Judicial Conduct Regulation Regimes in India and the United Kingdom: A Comparative Study

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Abstract

Judicial conduct regulation regimes have a vital role in upholding judicial independence, judicial conduct standards and public trust in the judiciary. However, there is no one right way to regulate judicial conduct. As this thesis underlines, the jurisdictions under study (i.e., England and Wales, Northern Ireland, Scotland, and India) have adopted different approaches to judicial regulation. In India, Scotland, and Northern Ireland, internal mechanisms are primarily responsible for judicial regulation, whereas mostly arm-length bodies carry out similar work in England and Wales. Notwithstanding the structural and functional differences these mechanisms bear, they must administer regulatory protocols fairly and consistently across the judicial hierarchies in the respective jurisdictions. Against this backdrop, the thesis attempts to answer the following question: Do regulatory mechanisms in India and the UK uphold judicial independence and effectively enforce the standards of judicial conduct? As regards India, the thesis draws on empirical data collected from 110 subject experts, whereas it engages in statistical and critical analysis in answering the question in relation to the UK. With respect to India, the study finds that the internal regulatory mechanisms for both higher and subordinate judiciaries do not adequately safeguard judicial independence and that the mechanisms are ineffective in enforcing the standards of judicial conduct. In contrast, the study finds that the regulatory mechanisms in the UK are effective in enforcing the standards of judicial conduct. However, the regulatory architecture in the UK offers inadequate safeguards to (individual and internal) judicial independence. The study concludes that there are notable flaws in the regulatory architecture of India and the UK, particularly in addressing abuses of disciplinary discretion by senior judges, violations of regulatory protocols by first-tier bodies, and the unfair and inconsistent application of regulatory processes by investigative authorities.

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Declaration

This thesis, or any of its parts, has not been previously submitted for examination at this or any other academic institution.

This thesis draws on material that has been published in the following forms:

> Shivaraj Huchhanavar, 'Conceptualising Judicial Independence and Accountability from a Regulatory Perspective' (2023) 9(2) *Oslo Law Review* 110-148.
>
> Shivaraj Huchhanavar, 'Is the system of self-regulation among India's judges fit for purpose? (2022) *U4 Anti-corruption Resource Centre* (27 June 2022) <https://www.u4.no/blog/self-regulation-indias-judges-fit-for-purpose>
>
> Shivaraj Huchhanavar, 'Judicial conduct regulation: do in-house mechanisms in India uphold judicial independence and effectively enforce judicial accountability?' (2022) 6:3 *Indian Law Review* 352-386.
>
> Shivaraj Huchhanavar, 'Disciplining judges for legal errors: a curious case of Justice Ganediwala' (2021) 3 P.L. 641-644.
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Dedication

This thesis is dedicated to the lower court judges of India and the United Kingdom for their unwavering commitment to upholding the rule of law, ensuring justice and protecting human rights.

Table of Abbreviations

CA	Civil Court of Appeal Civil Division
CA	Criminal Court of Appeal Criminal Division
CJEU	European Court of Justice
CJI	Chief Justice of India
CLJ	Cambridge Law Journal
CO	Complaints Officer
CPS	Crown Prosecution Service
CRA	Constitutional Reform Act 2005
CUP	Cambridge University Press
DPP	Director of Public Prosecutions
ECA	European Communities Act 1972
ECHR	European Convention of Human Rights 1950
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
Edin LR	Edinburgh Law Review
EHRLR	European Human Rights Law Review
HC	High Courts of India
HRA	Human Rights Act 1998
JAC	Judicial Appointments Commission
JACO	Judicial Appointments and Conduct Ombudsman
JCIO	Judicial Conduct Investigations Office
JCPC	Judicial Committee of the Privy Council
JCR	Judicial Conduct Reviewer
LC	Lord Chancellor
LCJ	Lord Chief Justice

LCJ(E&W)	Lord Chief Justice of England and Wales
LCJ(NI)	Lord Chief Justice of Northern Ireland
LP	Lord President of Scotland
LQR	Law Quarterly Review
LS	Legal Studies
MLR	Modern Law Review
NI	Northern Ireland
OJLS	Oxford Journal Legal Studies
OUP	Oxford University Press
PL	Public Law
PTA	Prevention of Terrorism Act 2005
PCA	Prevention of Corruption Act 1988
RTI	Right to Information
SC	Supreme Court of India
UK	United Kingdom
UKHL	Appellate Committee of the House of Lords
UKSC	Supreme Court of the United Kingdom

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Chapter 1: Introduction

I. Why should the judicial conduct regulation regimes in India and the UK be critically examined?

This thesis aims to critically evaluate the judicial conduct regulation regimes in India and the UK. The importance of such an assessment is manifold. The Constitutional Reform Act 2005 (CRA) in England and Wales and similar reforms in Scotland and Northern Ireland (NI) have radically redefined the landscape of judicial conduct regulation. Reforms have paved the way for specialised regimes that aim, *inter alia*, to secure judicial independence and effectively enforce judicial accountability.[1] However, in recent years, judicial regulation regimes have faced multiple complaints of serious, serial, and systemic failings.[2] In light of these complaints, it is imperative to examine whether the new regulatory protocols in the UK are being administered fairly, consistently, and efficiently.

It is also essential to audit the extent to which (if at all) the new regulatory regimes in the UK are effective in upholding judicial independence. A systematic and contextually grounded systems analysis would highlight the efficacy of regulatory regimes in judicial conduct regulation. Such an analysis would also help assess the implications of regulatory regimes on judicial independence and accountability. It would also identify the outstanding challenges facing these regimes. The dearth of academic inquiries assessing the efficacy and implications of, and diagnosing the gaps in, the regulatory architecture further accentuates the need for a comprehensive critical study.[3]

In India, judicial discipline is enforced exclusively by the judiciary through internal mechanisms, except for the constitutional removal procedure. Every High Court in India has an in-house vigilance cell that has remit over subordinate court judges and court personnel with respect to allegations of misconduct or corruption. For the higher judiciary (i.e., for the Supreme Court and High Court judges), there is an in-house mechanism to deal with

[1] See e.g., Ministry of Justice, *Judicial Discipline: Response to Consultation* (2022) <https://www.judiciary.uk/wp-content/uploads/2022/08/Judicial-Discipline-consultation-response-WEB.pdf> Unless otherwise stated, all URLs were last accessed on 02 January 2023.

[2] See e.g., Catherine Baksi, 'Judges owed a duty of care, the government concedes' *Law Gazette* (London, 23 July 2021); see also *Gilham v Ministry of Justice*, [2019] UKSC 44.

[3] Graham Gee, 'Judicial conduct, complaints and discipline in England and Wales: assessing the new approach' in R Devlin and Sheila Wildeman (eds), *Disciplining Judges Contemporary Challenges and Controversies* (Edward Elgar 2021) 131-132.

complaints of misconduct or corruption. However, despite these regulatory regimes, judicial conduct regulation has been a longstanding concern that has only grown worse in recent decades.

In 2010, a former Union law minister swore an affidavit stating that eight of the last 16 Chief Justices of India were corrupt.[4] Allegations of corruption and misconduct have increased since.[5] Four of the five latest Chief Justices—Justices Khehar, Misra, Gogoi, and Ramana—have faced serious allegations of corruption or misconduct.[6] In April 2019, a Supreme Court staffer alleged sexual harassment by Chief Justice Gogoi.[7] Chief Justice Ramana faced serious allegations of corruption and interference in the functioning of a High Court.[8] None of the allegations against the above-named Chief Justices was thoroughly investigated. Despite facing serious allegations, Justice Khehar did not face an inquiry.[9] Inquiries against Justice Gogoi and Justice Ramana were abruptly closed.[10] The removal proceedings against Justice Misra failed mainly for political reasons.[11] These high-profile controversies underline the significant accountability deficit in the higher judiciary.

Critics argue that in-house mechanisms are informal, *ad hoc*, opaque, and ineffective.[12] However, the judiciary continues to defend in-house mechanisms and the judicial primacy over conduct regulation as an imperative to judicial independence.[13] It is believed that 'self-regulation is dignified while outside imposition is demeaning.'[14] This ideological polarisation has forestalled Parliament-led reforms. For example, in 2015, the reform that proposed an arm's length body (National Judicial Appointments Commission) for judicial appointments and discipline was struck down as unconstitutional.[15] Through various pronouncements, the

[4] 'Eight of the Last Sixteen Chief Justices of India were definitely corrupt' *Outlook* (New Delhi, updated on 03 February 2022). Shubhankar Dam, 'Why is Judicial Corruption Invisible?' (2022) 33 *Public Law Review* 200-225.
[5] Shubhankar Dam, 'Active After Sunset: The Politics of Judicial Retirements in India' (2023) *Federal Law Review* 1-27.
[6] Shivaraj S. Huchhanavar, 'Regulatory mechanisms combating judicial corruption and misconduct in India: a critical analysis' (2020) 4:1 *Indian Law Review* 47-84.
[7] Id.
[8] Rekha Sharma, 'Andhra CM's allegations against a SC judge must not be swept under the carpet' *The Indian Express* (Noida, 26 October 2020).
[9] Rajeev Dhavan, 'Why JS Khehar was arguably one of the worst Chief Justices of India' *DailyO* (Noida, 21 August 2017).
[10] Siddharth Varadarajan, 'From the Supreme Court, a Reminder that Justice Was Sacrificed to Save a Judge' *The Wire* (New Delhi, 23 January 2020).
[11] Ashok K Singh, 'The politics behind move to impeach chief justice of India Dipak Misra' *DailyO* (Noida, 21 April 2018).
[12] See e.g., G Mohan Gopal, 'Corruption and the judicial system' <https://www.indiaseminar.com/2011/625/625_g_mohan_gopal.htm>.
[13] See e.g., *C.K. Ravichandran Iyer v A.M. Bhattacharjee*, 1995 (5) SCC 457.
[14] Justice J S Verma, 'Judicial Independence: Is It Threatened?' (First S Govind Swaminadhan Memorial Lecture at the Madras High Court Bar, Chennai, 29 January 2010).
[15] *Supreme Court Advocates-on-Record Association v Union of India,* (2016) 4 SCC 1.

Supreme Court of India (SC) has also established the primacy of the High Courts in matters such as appointment, transfer, removal, and conduct regulation concerning subordinate court judges.[16] As a consequence, the regulatory regimes in India, both for the higher and subordinate judiciary, are entirely under the control of the judiciary. Therefore, a critical assessment of the efficacy of judicial conduct regulation regimes in India is essential to understand the fault lines of in-house regimes.

Although there are some notable differences in the regulatory architecture of India and the UK, there are some key similarities that further accentuate the critical and comparative assessment of regulatory regimes. For instance, in all three jurisdictions of the UK, the heads of the judiciaries have gained a key role in matters of judicial discipline, as a result of judicial reforms since 2005.[17] However, there are no formal accountability mechanisms to review the *correctness* of the disciplinary decisions made by the heads of the judiciary and their deputies.[18] In England and Wales, even the Judicial Appointments and Conduct Ombudsman (JACO) can only intervene if there is procedural non-compliance or maladministration by the first-tier bodies.[19] Similarly in India, the in-house mechanisms are exclusively administered by senior judges; the mechanisms lack institutional autonomy.[20] Against this backdrop, it is crucial to examine whether the regulatory regimes that are administered mostly by senior judges uphold the judicial independence of judicial officeholders facing the disciplinary process.

Judicial conduct regulation regimes, particularly those administered solely by judges, must safeguard judicial independence against potential threats that may originate from within. It is 'recognised that judicial independence depends not only on freedom from undue external influence but also freedom from the undue influence which might in some situations come from the attitude of other judges.'[21] When senior judges have determinative roles in the regulation of judicial conduct, their judicial leadership roles, administrative responsibilities, general superintendence, and supervisory roles will be perceived differently by subordinate court judges. How senior judges administer disciplinary protocols will shape the perception

[16] See Chapter 4.
[17] See Chapter 3.
[18] See Chapters 5 and 7.
[19] JACO Annual Report 2020-21, 8.
[20] Huchhanavar (n 6).
[21] Consultative Council of European Judges, 'Independence, Efficiency and Role of Judges' [CCJE (2001) OP N°1], [16].

of subordinate judges about disciplinary protocols and regulatory regimes. It is also likely that the supervisory or disciplinary roles of senior judges impact the performance of junior judges on both the judicial and administrative sides. Therefore, unchecked disciplinary power conferred on senior judges might in practice undermine individual judicial independence. Against this backdrop, it is necessary to audit the functioning of regulatory mechanisms in India and the UK to determine, *inter alia*, the extent to which the regulatory mechanisms uphold judicial independence and effectively enforce the standards of judicial conduct. It is also necessary to examine whether the regulatory mechanisms undermine individual and internal judicial independence.

II. Research Question, Aims, and Objectives

For the reasons briefly outlined in the preceding paragraphs, the thesis attempts to answer the following research question: do regulatory mechanisms in India and the UK uphold judicial independence and effectively enforce the standards of judicial conduct? As the research lays special emphasis on individual and internal independence, the following sub-questions attempt to further contextualise the research question:

(1) Do regulatory mechanisms in India and the UK uphold the internal and individual judicial independence of judges?

(2) Do regulatory mechanisms in India and the UK adequately emphasise judicial accountability?

Aim:

The research project aims to assess the efficacy of judicial conduct regulation regimes in upholding judicial independence and enforcing judicial accountability in India and the UK. It also seeks to evaluate the implications of the regulatory regimes on individual and internal judicial independence in both jurisdictions.

The objectives of the thesis are:

(1) To advance readings of judicial independence and accountability from a regulatory perspective, underlining all three essential aspects (individual, internal and institutional) of the concepts. To emphasise that the judicial conduct regulation should serve other values such as transparency, openness and efficiency, and not just independence and accountability.

(2) To critically examine the relevant constitutional reforms and the underlying theoretical paradigms that shaped judicial conduct regulation regimes in India and the UK.
(3) To assess the efficacy of in-house judicial conduct regulation regimes in India and their implications for individual and internal judicial independence.
(4) To assess the efficacy of judicial conduct regulation regimes in the UK and their implications for individual and internal judicial independence.
(5) To examine the relevance of recent constitutional reforms and regulatory developments in the UK to India in revising its regulatory architecture.

III. Theoretical framework: the regulatory approach

Judicial regulation is a dynamic and complex exercise carried out through formal or informal mechanisms with an aim to alter, amend, abet, and sanction behaviours or competencies of judicial personnel that are inconsistent with institutional or professional standards or legitimate public expectations. It also aims to promote, augment, and incentivise behaviours or competencies of judicial personnel that are consistent with institutional or professional standards, producing defined or desired outcomes. In this sense, judicial regulation is a dynamic, complex, extensive, and outcome-orientated exercise.[22] To be effective, judicial regulation should evolve in response to context-specific challenges and dilemmas;[23] therefore, it must be dynamic. Regulation involves institutions, standards, mechanisms, procedures, processes, and practices, making it a complex endeavour.[24] The remit of judicial regulation is extensive – it starts with judicial appointments and continues to bind judicial personnel even after they retire from the judicial service. Likewise, judicial regulation aims to serve multiple values, namely impartiality, independence, representativeness, accountability, transparency, efficiency, and public trust; therefore, it is outcome orientated.[25]

Although contemporary paradigms of judicial administration are shaped by the principles of good governance (e.g., efficiency, accountability, and transparency), most academic enquiries into the need for robust judicial regulation mainly emphasise two key variables: judicial

[22] Richard Devlin and Adam Dodek, *Regulating Judges Beyond Independence and Accountability* (Edward Elgar Publishing 2016) 3-11.
[23] ibid 3-5.
[24] Id.
[25] ibid 6, 9.

independence and judicial accountability. This dyadic paradigm has highlighted the inherent tensions between these values and emphasised the need for reconciliation of the two. This approach has produced, as Dalvin and Dodek note, 'a very rich conceptual and empirical literature'[26] on the role of the judiciary in general and the need for judicial regulation in particular. However, the dyadic paradigm has some notable weaknesses. First, it implies that the other normative values are subordinate values, which is not the case.[27] Second, it can lead to ideological polarisation where judicial reforms are proposed or opposed on an ideological basis, without understanding the need or the context.[28]

Third, the dyadic approach does not adequately address the complexity of regulatory regimes. Judicial regulation involves multiple institutions/actors, and complex procedures, processes, and practices. To be effective, judicial regulation should also aim to serve multiple values while striving to produce predefined outcomes, without comprising the impartiality and efficacy of the regulatory process. Therefore, judicial regulation requires a careful calibration of diverse norms, values, and outcomes tailored to the constitutional, legal, social, political, and cultural context of a jurisdiction. The conventional dyadic approach, since it predominantly emphasises judicial independence and accountability, does not adequately emphasise the regulatory complexity.

As Dalvin et al. rightly argue, the 'renovation and modernisation' of the dyadic approach with an adequate emphasis on the 'normativity, complexity, contextualism, hybridity, and flux'[29] of judicial regulation is essential to explore regulatory mechanisms, protocols, conventions, and procedures as an essential part of public law.[30] The new analytical framework proposed by Dalvin et al. could be termed the *regulatory approach*. The novelty of the *regulatory approach* lies in its emphasis on the goals, outcomes, and implications of judicial regulation. The constitutional and legal framework and the theoretical and conceptual underpinnings are important, but so are the regulatory mechanisms, procedures, processes, and practices. The regulatory approach places *regulatory practices* at the heart of the analysis, avoiding undue emphasis on the *theory* that underpins the regulatory architecture. In this sense, the

[26] Devlin and Dodek (n 22) 2.
[27] ibid.
[28] Id.
[29] Ibid 5.
[30] Devlin and Wildeman (2021) 2.

regulatory approach is *outcome-driven*, not exclusively driven by ideology or values, as ideology or values are not the ends in themselves. This theoretical dynamism helps explore and assess how the regulatory norms are formulated and deployed across the regulatory landscape, starting with recruitment, training, deployment, discipline, retirement, and removal of judicial personnel. The *regulatory approach* may also be deployed to explore and evaluate inter and intra-branch interactions that have a bearing on regulatory *outcomes*. The interactions of judges and judiciaries with other stakeholders, media, litigants, civil society, and the public also fall within the scope of the *regulatory approach*. Additionally, the implications of the regulatory architecture on courts and judges are integral to the *regulatory approach*. This approach also enables a critical assessment of the implications of regulatory regimes, *inter alia*, on judicial independence, accountability, and competence.

The regulatory approach, which requires a careful calibration of diverse norms, values, and tools, exhibits a close interconnection with contemporary scholarship on regulation in public administration. In recent decades, the practice of regulation has increasingly moved towards more flexible understandings. The limits of 'command and control' theory have been widely shared[31] and new regulatory approaches (such as 'responsive regulation'[32] and 'really responsive regulation'[33]) have been put into practice.

The emphasis on multiple values and the rejection of a one-size-fits-all approach to judicial regulation finds its roots in 'better regulation' (aka high-quality regulation), which continues to have a significant impact on public administration discourse. 'High-quality regulation', similar to the proposed regulatory approach, recognises the need for flexible and adaptable approaches to regulation in light of the different regulatory contexts, stakeholders and circumstances.[34] 'High-quality regulation' acknowledges the importance of considering multiple values and diverse perspectives in the regulatory process, aiming to achieve better outcomes that align with the specific needs and interests of various stakeholders.[35] The

[31] See, for example, I. Ayres and J. Braithwaite, *Responsive Regulation* (OUP, 1992); Baldwin, Robert and Black, Julia, 'Really responsive regulation' (2008) *Modern Law Review* 71 (1), 59-94.

[32] John Braithwaite, 'Responsive Regulation' <http://johnbraithwaite.com/responsive-regulation/> accessed 01 June 2023.

[33] Baldwin and Black, *supra* note 31.

[34] Department for Business, Energy and Industrial Strategy, *Reforming the Framework for Better Regulation 2021* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005119/reforming-the-framework-for-better-regulation.pdf>

[35] See, for example, Martin Lodge & Kai Wegrich, 'High-quality regulation: its popularity, its tools and its future' (2009) 29:3 *Public Money & Management* 145-152.

proposed *regulatory approach* and contemporary regulatory theories in public administration advocate incremental and layered growth of regulatory infrastructure.[36] Likewise, both perspectives recommend audits, regulatory impact assessments, empirical testing of regulatory protocols, post-implementation reviews and prompt interventions to mitigate ineffective regulation.[37] The convergence of contemporary regulatory theory in public administration and judicial regulation could provide novel perspectives on the formulation, execution, and assessment of regulatory interventions within the judiciary. The convergence would also help test the efficacy of exogenous regulation theories in addressing the demands for efficient, fairer and participatory systems of governance for the judiciary.

It is against this backdrop that this study embraces the *regulatory approach* to – (1) critically assess the formal and informal judicial conduct regulation regimes, practices and processes in India and the UK; (2) explore the constitutional and legal underpinnings of regulatory regimes in both jurisdictions; (3) examine whether organisational arrangements and functional modalities of regulatory mechanisms uphold individual and internal judicial independence; and (4) audit whether the regulatory mechanisms conform to accountability, transparency and efficiency demands. Lastly, in recent decades, the formation and proliferation of international norms on judicial regulation have made transnational and trans-systemic analyses of regulatory best practices possible. Therefore, the study applies the *regulatory approach* to assess the regulatory architecture in India and the UK, against the backdrop of international standards and best practices.

IV. Methodology

In furtherance of the research objectives set out above, this thesis employs a mix of research methods, whilst the comparative approach remains the principal method. This subsection aims to establish, explain, justify, and underline the limitations of the main methods used in this study.

A. Doctrinal Research Method

Doctrinal Legal Research (DLR) is a predominant method employed by legal researchers.[38] DLR is an effective means to synthesise facts, theories, legal principles, and judicial doctrines.

[36] Glicksman, Robert L. and Shapiro, Sidney A., 'Improving Regulation Through Incremental Adjustment' (2005) 52 *GW Law Faculty Publications & Other Works* <https://core.ac.uk/reader/232645070>

[37] See generally, Martin Lodge & Kai Wegrich, *supra* (n 35).

[38] Bhat P. Ishwara, *Idea and Methods of Legal Research* (OUP, 2020) 144.

Abstraction, consolidation, and evaluation of facts, theories, and principles are the key strengths of this method.[39] The doctrinal method, through various approaches, attempts to synthesise, evaluate, and shape the law and society;[40] through legal reasoning or rational deduction, DLR expounds on legal principles. It also examines the functional aspect of the law and the administration of justice.

The doctrinal analysis draws heavily on primary sources – facts, legislation, delegated legislation and case law – where the analysis or argumentation is mostly an interpretative process.[41] It also extensively engages with secondary sources – books, articles, and analysis/interpretation of data – to understand and evaluate the development of law or its practical application. In this way, DLR addresses the *is* and *ought* aspects of the law. By employing both inductive and deductive reasoning, DLR integrates facts and theory. It aims to bring 'internal coherence and conceptual clarity required for a better understanding of the law and the legal system.'[42] The DLR could be pragmatic, progressive, evolutionary, and exploratory as the context demands. Therefore, it also supports research in areas where there is a dearth of literature or where the prevailing view/theory is outdated.

Therefore, the thesis employs DLR mainly to:

(a) challenge the outdated conceptions of judicial independence and accountability;

(b) offer alternative conceptions of judicial independence and accountability from a regulatory perspective; and

(c) critically evaluate the legal infrastructure, especially the recent reforms in the UK and judicial decisions in India that have enabled the dominant, in some cases, the determinative role of senior judges in matters of judicial conduct regulation.

The DLR or the 'black-letter law' method has some notable weaknesses. For instance, whilst it is aspirational and reformative, at the same time, it can be subjective, devoid of adequate inputs on how the law or regulatory systems work in reality. In the context of judicial conduct regulation, DLR could be particularly less effective where the information ecosystem is exclusively controlled by the judiciary.[43] For instance, in India, the disciplinary protocols are

[39] Id.

[40] Lynn Mather, 'Law and Society' in Robert E. Goodin (eds) *The Oxford Handbook of Political Science* (OUP, 2013) 290-300.

[41] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (eds), *Methodologies of Legal Research* (Hart, 2011) 1–18, 4–7.

[42] Bhat (n 38) 148.

[43] Subhankar Dam, 'Why is judicial corruption invisible?' (2022) 33 *Public Law Review* 202, 218.

administered mostly by the judiciary (senior judges), which means that the senior judiciary possesses the ability to exert systemic control over the disciplinary processes, thereby impeding the publicity of misconduct or corruption allegations against judges.[44] The lack of adequate data on India's regulatory regimes, to some extent, points to the active concealment of information relating to judicial misconduct.[45] The insufficiency of information concerning the regulation of judicial conduct undermines the effectiveness of DLR. Furthermore, from a methodological standpoint, DLR lacks systematic organization, thereby giving rise to haphazardness in its implementation.[46] In order to address these limitations associated with DLR, complementary research methods are used to facilitate in-depth critical analysis of regulatory regimes.

B. Comparative Legal Method

The Comparative Legal Method (CLM) has a long history.[47] The challenges and opportunities emerging from rapid globalisation, industrialisation and technological progress and the consequent proliferation of international principles into various fields of domestic law have made the CLM more relevant and prevalent. The CLM includes the comparison of different legal systems, areas of the law or specific topics within an area of law. The *comparison* 'is a logical and inductive method of reasoning that enables an objective identification of the merits and demerits of any norm, practice, system, procedure, or institution compared to those of others.'[48] The CLM operates at three levels: macrolevel (comparison of the legal system of one country to that of another), meso-level (comparison of different areas of law within a jurisdiction) and micro-level (comparison of specific topics within an area of law).[49]

The CLM progresses through different stages. As Siems presents, the first step involves deciding on the research question and the choice of legal systems. This is followed by a descriptive account of the laws specific to the research question of chosen jurisdictions. The third step is to compare and contrast the laws of different jurisdictions under consideration for identifying similarities and differences and exploring the reasons for such similarities and

[44] ibid, 207, 222-224; see also Anthony D'Amato, 'Self-regulation of judicial misconduct could be mis-regulation' (1990) 89 Mich. L. Rev. 609-623, 609.
[45] Id.
[46] Bhat (n 38) 168.
[47] Siems, M. *Comparative Law*, 2nd eds (CUP, 2018) 13.
[48] Bhat (n 38) 267.
[49] Siems (2018) 52.

differences. The final step involves the critical evaluation of the findings to make recommendations.[50] These research stages are, within the context of this research project, briefly outlined below.

Step 1: the research question and the choice of comparative components

The research question

The thesis attempts to answer a problem-based research question. A problem-based research question is particularly suited to the CLM,[51] as it facilitates a deep-level analysis of diverse legal norms.[52] Judicial administration and regulation, in India and the UK, are embedded in a plural legal foundation: they are governed by legislation, case law, and judicial conduct codes and influenced by international instruments and developments. By employing a problem-driven question, the thesis aims to facilitate a comprehensive analysis of this intricate legal pluralism. Through an exhaustive comparative analysis of legal systems, it becomes possible to scrutinize the confluence of normative legal principles with customary, cultural, and informal norms that govern judicial conduct regulation.

The CLM helps compare solutions produced within the context of the jurisdictions under study and examine why they were produced and what successes/failures they had.[53] Within the CLM, the *functional approach* 'has become the mantra of comparative law'.[54] It is one of the 'best-known working tools in comparative legal studies.'[55] It effectively facilitates the descriptive, analytical, and evaluative assessment of comparators.[56] The functional approach allows for a contextual evaluation of the subject under study. In other words, social, political, cultural, and economic contexts that shape or influence the comparator became an inescapable part of the comparison. This lends a multi-dimensional approach to a comparative study. However, arguably, the approach is not without faults – 'to its opponents,

[50] ibid 16-29.
[51] Markesinis, Basil and Fedtke, Jörg, *Engaging with foreign law* (Hart Publishing 2009) 35.
[52] Siems, M. *Comparative Law*, 3 eds (CUP, 2022) 145-146.
[53] ibid 37.
[54] Michaels, Ralf, ' The Functional Method of Comparative Law', in Mathias Reimann, and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (2006; online edn, Oxford Academic, 18 Sept. 2012), https://doi.org/10.1093/oxfordhb/9780199296064.013.0011, accessed 29 May 2023.
[55] Michele Graziadei, in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 100.
[56] Id.

it represents everything bad about mainstream comparative law.'[57] The functional approach is also criticised by modern comparatists for limiting the scope of CLM.[58] However, before we consider the notable weaknesses of the functional approach, it is necessary to reflect on what constitutes a 'functional approach', albeit briefly.

Zweigert postulates that '[T]he basic methodological principle of all comparative law is that of functionality.'[59] However, what is the functionality, or functional approach? Answers vary, but functional comparatists broadly agree on its three features. First, the functional approach is factual. It focuses not only on rules but also on their implications on objects of comparison. It means, in the context of this research, that the approach would require adequate emphasis on the implications of regulatory theory, for instance, on regulatory mechanisms, processes and regulatees. Second, the functional approach also combines its factual approach with theory. Functionalism 'evokes the idea that law responds to society's needs.'[60] It means comparison should have a functional relation to the challenges facing society. This feature of the functional approach complements the objectives of this research quite well, as it attempts to explore the implications of and challenges facing the regulatory mechanisms in India and the UK. The third key feature of the functional approach is that legal systems, institutions, mechanisms, processes or practices are comparable if they 'fulfil similar functions'[61] in jurisdictions under comparison. This feature of the functional approach, within the context of this research, is briefly discussed in this chapter.

Whilst the functional approach holds a significant position in comparative law, it has remained under-theorised. As the functional approach draws from various traditions, it has an undefined disciplinary position.[62] Moreover, even a spurious overview of comparative law theory reveals that functionalism is just one among several approaches to comparative law.[63] Other approaches that coexist alongside functionalism include comparative legal history, the

[57] Michaels, *supra* (n 54).
[58] See e.g., Markesinis et al. (n 51) 37-42.
[59] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans, Tony Weir, 3rd edn, 1998), 32–47.
[60] Michele Graziadei, in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 100.
[61] Michaels, *supra* (n 54), 343.
[62] Michaels, *supra* (n 54), 343.
[63] Ibid, 341.

study of legal transplants, and the comparative study of legal cultures.[64] Moreover, there is no one functional method, but many;[65] it means 'different things in different disciplines'.[66]

Notwithstanding its notable weaknesses, the functional approach is an effective comparative tool for two key reasons. First, it presupposes a (three-step) method for comparison.[67] The method not only guides the comparative analysis but also burnishes the reliability and validity of the comparative study. Second, the functional approach is more targeted and solution-oriented; it more easily leads to policy implications than other approaches to comparative studies.[68] The functional approach adequately focuses on the yield (solution/outcome) and design of the comparative research. Therefore, for problem-driven and solution-oriented research, such as this study, the functional approach is the best fit.

The Choice of Comparative Components

A critical assessment of judicial conduct regulation regimes in India and the UK is highly desirable and, especially in India, long overdue. However, the *comparability* (common or distinguishing grounds for comparability and analytical generalisation: *tertium comparationis*) of the chosen units (India and the UK) needs an explanation. The *comparability* is particularly important as the UK in recent decades, through a series of reforms, has established arguably robust judicial conduct regulation regimes. In contrast, India's regulatory regimes remain ineffective, informal, and opaque. Therefore, a traditional comparatist would hesitate to compare legal systems that are considerably different, as this would lead to comparisons between 'apples and oranges'.[69] However, this traditional notion of comparability, for good reasons, has been overlooked.[70] The prevailing view is that 'in order for any two entities to be comparable, they must be distinct yet also interconnected.'[71] In other words, 'so long as

[64] Id.
[65] Michaels, *supra* (n 54), 342.
[66] Ibid, 344.
[67] The three steps of a comparative study are (1) a statement of the problem in purely functional terms; (2) an objective description of the ways in which different legal systems address the legal problem; (3) a comparison and evaluation of the preceding analysis from a purely functional perspective. Anita Frohlich, 'Functionalism in Comparative Law' <https://comparelex.org/2014/03/20/functionalism-in-comparative-law/>
[68] Mahy P., 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12 *International Journal of Law in Context* 420, 432.
[69] Valcke C., *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* (CUP, 2018) 61.
[70] See e.g., Vivian Grosswald Curran, 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (1998) 46 *American Journal of Comparative Law* 657.
[71] Valcke (n 69) 60.

the entities are interconnected in some way, they are comparable.'[72] An effective comparative study requires distinctness and connectedness among the comparators. For this purpose, it is necessary to foreground how India and the UK, as comparators, are distinct and interconnected. Their interconnectedness is briefly outlined below.

India and the UK share a common legal heritage: common law. Although some aspects of civil, equity, customary and religious law[73] have been embraced by India, the common law, as in the UK, remains the cornerstone of the judicial system. This means notwithstanding a written constitution, judicial decisions remain a key source of the law. The judges, courts, lawyers and other stakeholders in the judicial administration have similar roles and responsibilities in both countries. The judicial personnel, judges, court staff, and lawyers, are, in terms of their performance and conduct, held to similar standards. In other words, the theory and rationale that underpin judicial regulation in both countries are similar, if not the same. Consequently, key values such as judicial independence, impartiality, immunity, and accountability are construed and applied in a similar vein.

India, being a colony under the British Empire for nearly 200 years, has retained several of the UK's constitutional features, such as the Westminster model of a parliamentary executive, the rule of law and bicameralism.[74] These common characteristics have similar implications for the judicial administration in both jurisdictions. Although there is a fusion of powers between the legislature and the executive, the judiciary is institutionally and functionally independent from the other two branches.

The foundation of Indian courts and the legal system was laid during the British Raj. King George I established Mayor's Courts in 1726 in Presidency Towns, namely Madras, Bombay, and Calcutta,[75] marking the beginning of the Crown Courts in India.[76] The Regulating Act of 1773 has had a lasting impact on constitutional developments in India.[77] By 1882, the British Raj had established a hierarchical court system; the key procedural laws, namely the

[72] Id.
[73] Ashish Bhan and Mohit Rohatgi, 'Legal systems in India: overview' (2021) *Practical Law* 6.
[74] ibid 1.
[75] The Charters of 1726 and 1753.
[76] Mamta Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (PIOOM Foundation, Leiden University, 1998) 6.
[77] The Act led to the establishment of a central executive authority [the Governor General of India] and the highest judicial institution [Supreme Court of Judicature at Calcutta].

Limitation Act of 1859, the Evidence Act of 1872, the Criminal Procedure Code of 1882, and important substantive laws, for example, the Contracts Act of 1872 and the Indian Panel Code of 1861 were enacted.[78]

Like in England at the time, judicial administration was dominated by the executive branch. For instance, under the Government of India 1914 and 1919 Act, the power of appointment of judges was vested in His Majesty; however, the appointments were, in reality, made by the Secretary of the State for India in Council. Unlike in England, judges held the office at the pleasure of the Crown (i.e., the Secretary of State for India). The power to fix salaries, allowances, furloughs, and retiring pensions of a judge was also conferred on the Secretary.[79] Executive dominance over judicial administration continued until the adoption of the Constitution of India in 1950.

In England, although the Act of Settlement 1701 established that judges hold their positions *quamdiu se bene gesserint* [during good behaviour] and will only be removed upon the address of both Houses of Parliament,[80] it did not prevent Royal interference with the working judges.[81] Like in colonial India, the merger of the judiciary and crown servants continued until the 1860s.[82] The judicial administration and regulation were almost exclusively carried out by the Lord Chancellor (LC), a prominent member of the executive branch. For instance, the judicial policy on appointments, conditions of service, salary, deployment, discipline, and removal was heavily centralised around the LC until the passage of the Constitutional Reform Act 2005.[83] Therefore, since the mid-18th century, one can observe notable similarities in judicial administration and judicial regulation in India and the UK, and unsurprisingly, despite significant reforms in both jurisdictions, some of the similarities have survived.[84]

The interconnectedness is evident not just in shared legal history and heritage, but the trajectory of recent judicial reforms in both jurisdictions has brought these jurisdictions even closer, enhancing their comparability. All three jurisdictions in the UK have, by adopting new

[78] Mamta Kachwaha, *supra* (n 76), 7-8.
[79] ibid 21-22.
[80] The Act of Settlement 1701, Article 3(7).
[81] Robert Stevens, *The English judges: their role in the changing constitution* (Hart Publishing, 2002) 11.
[82] ibid 12.
[83] Graham Gee (n 3) 130.
[84] For example, notable characteristics, such as the continued emphasis on judicial independence, near absolute judicial immunity and strong laws against judges' criticism, are common in both jurisdictions.

approaches to judicial appointments, management and regulation of judges, moved away from the executive-dominated models of judicial administration. Judges, especially senior ones, have gained significant roles and responsibilities in court administration in general and regulation of judges in particular. For example, in Scotland, the judiciary, under the Judiciary and Courts (Scotland) Act 2008, has gained a determinative role in judicial appointments, court administration, and judicial discipline, whereas the executive has the role of junior partner in judicial administration. Even the judiciaries in England and Wales and Northern Ireland are rapidly moving towards judicial self-regulation.

The held view in both jurisdictions is that 'the executive should not be the principal decision-maker.'[85] This paradigm shift in India could be traced back to judicial rulings in the 1990s;[86] however, in the UK, this shift is a consequence of radical reengineering of judicial governance through devolution and the Constitutional Reform Act 2005.[87] It is also pertinent to note that these significant reforms were driven by similar objectives. Whilst the Supreme Court of India curtailed the role of the executive branch in the judicial appointment and regulation to secure judicial independence, Parliament in the UK hoped to bolster institutional judicial independence by severing links between the judicial, legislative and executive branches. For this purpose, Parliament through the CRA transferred and shared some of the notable powers of the LC to the Lord Chief Justice and established arm's length bodies to facilitate judicial administration and regulation. In India, the establishment of Collegiums consisting of senior judges, both at the Supreme Court and 25 High Courts, for regulating judges of the higher judiciary, was accomplished through the judicial rulings of the Supreme Court.[88]

India and the UK both sought to attain similar goals, albeit through different means. The policymakers, namely the Parliament in the UK and the Supreme Court in India, recognised that promoting institutional autonomy of the judiciary would enhance judicial independence. Empowering the judiciary through the delegation of administrative and supervisory responsibilities to senior judges was deemed an effective measure to minimise institutional

[85] J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (British Institute of International and Comparative Law, 2015) 89; *Supreme Court Advocates-on-Record Association v Union of India* (2016) 4 SCC 1.

[86] *Subhash Sharma v Union of India*, MANU/SC/0643/1990; *Supreme Court Advocates on Records Association v Union of India*, 1993(4) SCC 441.

[87] Graham Gee (2021) 130-154.

[88] *Supreme Court Advocates on Records Association v Union of India*, 1993(4) SCC 441; *In re Special Reference No. 1 of 1998*, (1998) 7 SCC 739.

and functional overlaps between the judiciary and other branches of government. As a result, senior courts have become significant policy players not only in the wider constitutional framework but also in matters related to court administration and regulation of judges. This is how the judiciary in both India and the UK has attained a dominant, and in some instances, determinative role in matters of judicial regulation. Therefore, the shared legal history, theory, and practice of India and the UK, in relation to judicial regulation, facilitates a meaningful comparison in this context.

It is pertinent to note that both India and the UK have been subjected to comparative analysis on the topics of judicial appointments and judicial conduct regulation, albeit cursorily.[89] However, these studies fail to adequately emphasise the peculiarities of both jurisdictions (see Chapter 4). India and the UK bear some significant differences. For example, India has a codified Constitution, whereas the constitution of the UK remains uncodified. In India, the Constitution is supreme, whereas, in the UK, Parliament is supreme.[90] Likewise, as the Constitution of India confers extensive original, appellate, review, and advisory jurisdiction on the SC, the scope of judicial review in India, compared to the UK, is extensive.[91] One of the implications of parliamentary supremacy is that the judiciary cannot overturn and expressly amend Acts of Parliament. In other words, the validity of the Acts of Parliament could not be challenged in law courts;[92] in India, the higher courts – the High Courts and the Supreme Court – can review the legislative enactments, including the constitutional amendments.[93]

The judicial structures of these jurisdictions bear some notable differences. Although the courts and tribunals, like in India, are arranged hierarchically on the judicial side, on the administrative side, the judiciary in the UK is much more fragmented and complex. For historical reasons, all three constituent parts of the UK – England and Wales, Scotland and

[89] See, for example, A P Shah, 'A Manifesto for Judicial Accountability in India' *The Wire* (29 July 2019); Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (British Institute of International and Comparative Law, 2015) 89; *Supreme Court Advocates-on-Record Association v Union of India* (2016) 4 SCC 1. Jan van Zyl Smit, ''Opening up' Commonwealth judicial appointments to diversity? The growing role of commissions in judicial selection' in Gee and Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Taylor & Francis, 2017) 60-82; Law Commission of India, *The Judges Inquiry (Bill) 2005* (Law Com No 195, 2011) 46, 141-146, 161-168.

[90] Masterman and Murray, *Constitutional and Administrative Law* (CUP 2022) 145-173.

[91] Constitution of India 1950, Ch 4, Pt V.

[92] UK Parliament: Parliament's Authority <ttps://www.parliament.uk/about/how/role/sovereignty/#:~:text=Generally%2C%20the%20courts%20cannot%20overrule,part%20of%20the%20UK%20constitution>

[93] See e.g., *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

Northern Ireland – have distinct court systems. The Supreme Court of the United Kingdom (UKSC) is the final court of appeal, except for criminal matters from Scotland.[94] Each of the constituent parts has its own judiciary led by the Courts of Appeal in England and Wales and Northern Ireland and by the Court of Justiciary and Court of Sessions in Scotland. While the lower courts are organised identically in England and Wales and Northern Ireland,[95] Scotland has Sheriff Court and Sheriff Appeal Court at the meso-level. The Magistrates' Court, County Court, Family Court and First-Tier Tribunals are placed at the bottom of the judicial hierarchy in England and Wales and Northern Ireland;[96] whereas, Scotland has the Justice of Peace Court and Tribunals as courts of the first instance.[97] The intricate arrangement of tribunal judiciary (first-tier and appellate tribunals) in all three jurisdictions further adds to the complexity of the court system. Some tribunals have pan-UK jurisdiction.[98]

In contrast, the Constitution of India has established a hierarchical but unified judiciary. The judiciary is arranged into three tiers, namely the Union Judiciary (the Supreme Court), the State Judiciary (High Courts), and Subordinate Courts.[99] However, on the administrative side, the High Courts (HCs) are not subordinate to the SC. Furthermore, the HCs, within their respective territorial jurisdiction, have administrative and supervisory control over the subordinate courts.[100] The administrative autonomy has allowed the HCs to establish internal mechanisms to deal with judicial conduct regulation. This means that there are some significant differences among the High Court vigilance cells. This is because the High Courts, based on their local necessities and administrative convenience, have designed and deployed vigilance mechanisms.

The interconnectedness and distinctness briefly discussed in the preceding paragraphs demonstrate that the judicial systems of India and the UK are neither too similar nor radically different. On the contrary, the legal systems enjoy varying degrees of sophistication and

[94] The High Court of Justiciary <https://www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/about-the-high-court>.
[95] The Supreme Court and the United Kingdom's legal system <https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf>.
[96] The Judicial Office, 'The Judicial System of England and Wales: A visitor's guide' (2016) 6.
[97] The Supreme Court and the United Kingdom's legal system <https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf>.
[98] See e.g., Employment Tribunals (aka the Industrial Tribunals and Fair Employment Tribunal in Northern Ireland) operate across the UK dealing with employment claims.
[99] The Constitution of India 1950, Pt VI, Ch 4 and 5.
[100] Huchhanavar (n 6).

richness in differing contexts that are conducive to comparative legal research. Although at the macro level, India and the UK are two distinct legal systems, at the meso-level, each has accommodated significant structural and functional divergences. This means that within the UK, there are three different approaches at work, serving the purposes of judicial conduct regulation. Furthermore, the UKSC, magistrate courts, and the tribunal judiciary have different regulatory arrangements. Such notable differences persist even in India (see Chapter 5). This plural regulatory landscape, coupled with a distinct legal and constitutional history, facilitates a fruitful comparative study.

Step 2: Descriptive account of the legal frameworks that establish and govern regulatory regimes in India and the UK

As noted already, all three jurisdictions in the UK have detailed legal frameworks that establish and regulate judicial conduct regimes. In India, although there is a dearth of positive law guiding the in-house mechanisms, the judicial rulings that have developed in-house regulatory mechanisms deal with some aspects of conduct regulation. In this regard, this comparative study will –

(a) comprehensively describe disciplinary standards, practices, processes, and procedures in both jurisdictions;
(b) critically examine the theories and conceptions of the regulatory architecture in both jurisdictions; and
(c) foreground constitutional, legal, and political contexts that shaped the regulatory mechanisms in India and the UK.

Step 3: Comparative analysis

To facilitate a critical and empirical analysis of regulatory mechanisms in India and the UK, the thesis comprehensively examines –

(a) the structure, powers and functions of the first-tier regulatory regimes in India and the UK;
(b) the review mechanisms; and
(c) the role and efficacy of regulatory mechanisms in addressing judicial misconduct and corruption issues, using international standards as the basis.

Step 4: Critical evaluation of findings to make recommendations

There is limited literature on vigilance mechanisms and some aspects of the in-house procedure for the higher judiciary in India. A lack of adequate literature would hinder in-depth analysis of regulatory mechanisms. Additionally, an assessment of the implications of the regulatory mechanisms on judicial independence and accountability could not be performed without sufficient data on the working of the regulatory mechanisms. Therefore, empirical data on the functioning of India's in-house regulatory mechanisms were collected. With regard to regulatory mechanisms in the UK, there are adequate statistical data and academic literature that facilitate in-depth analysis. By building on the comprehensive descriptive and comparative analysis of the regulatory regimes of both countries, the thesis engages in a critical evaluation of regulatory policy, institutional frameworks, disciplinary protocols, and their implications on judicial independence and accountability. Based on critical and empirical analysis, the thesis answers the research question and recommends reforms in the regulatory architectures of both jurisdictions.

Comparative Legal Method: A Key Limitation

Although in-depth comparative analysis is essential for the critical analysis of the comparators,[101] it also presents a challenge: the challenge of perspective. That is, whether the researcher should view the comparator as an outsider or adopt an interior point of view. The outsider's viewpoint may not be in-depth and, more importantly, contextual. However, developing an interior point of view on foreign law or legal systems requires 'immersion' and an in-depth understanding of the legal culture of the jurisdiction under comparison and of the researcher himself.[102] Some comparators rightly argue that total immersion is impossible since one's own legal culture will inevitably influence the interpretation or understanding of the foreign law or legal system.[103] However, this is not an insurmountable challenge, as many comparatists note, a comparatist, as an outsider, should aim to understand the insider's view.[104] This requires imagination and 'the leap into a foreign mentality' [105] to understand the foreign legal culture.

[101] Siems, M. *Comparative Law*, 3 eds (CUP, 2022) 143.
[102] See Curran in Siems, ibid.
[103] ibid 143-145.
[104] Id.
[105] ibid 144.

The researcher assumes an intermediate position,[106] referred to as an 'in-betweener,'[107] in order to undertake a critical evaluation of the judicial regulation regimes in both India and the UK. This intermediate position allows for an objective comprehension and assessment of the judicial regulation regimes in both jurisdictions. Furthermore, it enables the researcher to appreciate diverse perspectives on pertinent legal reforms. By adopting an intermediary stance, the researcher is able to bridge the gap between the two contexts and draw upon relevant academic literature and empirical evidence to inform the analysis. This approach facilitates a comprehensive and nuanced understanding of judicial regulation regimes, taking into account the complexities and intricacies of each jurisdiction. This frame of reference provides a broader perspective and facilitates meaningful evaluation of various insiders' and outsiders' views on relevant legal reforms in India and the UK.

In order to further mitigate the issue of perspective, the researcher adopts a functional approach. That is, the researcher attempts to understand, analyse, and critique the judicial regulation regimes in their own context. India's regulatory regimes are critically assessed within its socio-legal, political, and constitutional context. Similarly, the UK's regulatory landscape is assessed within its context. In other words, the researcher attempts to become the voice of the UK legal system, albeit with a 'non-native accent'.[108] Whereas, he also attempts to view India's regulatory regimes from an outsider's point of view. Further, to achieve value neutrality, the research assesses the regulatory regimes against international standards.

C. Empirical Method[109]

Empirical data on the functioning of in-house regulatory regimes in India is gathered through online surveys and email correspondence. The over-arching objective of the surveys was to gather responses – information, opinions, and perception – from judges, advocates and academics on in-house mechanisms and their implications for judicial independence and

[106] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats" (1998) 46(4) *The American Journal of Comparative Law* 701-707.

[107] Chhabra, Gagan, 'Insider, Outsider or an In-Betweener? Epistemological Reflections of a Legally Blind Researcher on Conducting Cross-National Disability Research' (2020) 22(1) *Scandinavian Journal of Disability Research* 307–317.

[108] Bell in Siems (2022) 144.

[109] Chapter 6 further outlines the empirical method.

accountability. The target groups for the surveys were serving and retired judges, advocates, and academics having an adequate understanding of in-house mechanisms.[110]

Selection of subject experts

The pilot study revealed that even advocates, most legal academics, and junior judges lack adequate understanding of the working of in-house mechanisms. Therefore, advocates and legal academics who have adequate experience and expertise in relation to judicial conduct regulation were invited.

Views of legal academics are relevant to gauge informed views on issues concerning judicial administration. On contested issues such as judicial independence, accountability, and conduct enforcement, academic views gain considerable importance as they, to some extent, inform public perception. Against this backdrop, the project aimed to elicit academic views to test the hypotheses.

In total 110 participants responded to online surveys. The relevant demographic information of the participants is below:

The number of participant judges: 19 (10 District Judges, 8 other subordinate court judges and a High Court judge).
The number of participant advocates: 53.
The number of legal academics: 36.
The number of former vigilance officers: 2.

Statistical analysis scales

The 10-point Likert rating scale (that is, on a scale of 1-10[111]) is used to assess the confidence of respondents in the vigilance mechanisms' efficacy in upholding judicial independence. For example, a 4-point Likert scale ('strongly agree', 'somewhat agree', 'somewhat disagree' and 'strongly disagree') is used to examine the potential misuse of vigilance mechanisms.

[110] The research project received ethics approval from Durham University on 13 September 2019: Reference No - LAW-2019-08-28T11:22:03-qwgw68. However, COVID-19 forced changes in the research methodology; the amendments to the research methodology received ethics approval on 09 December 2020: Reference No - LAW-2019-04-10T21_41_53-qwgw68.

[111] Where '1' meant the mechanism 'does not protect at all' and '10' meant 'protects to a great extent'.

Likewise, to assess the efficacy of the mechanisms, for example, in combating judicial corruption or misconduct, close-ended questions are used.

The empirical method: limitations

Though the research conclusions are informed by the responses of a good number of subordinate court judges and other stakeholders, the sample size (n=110), especially for quantitative analysis, is considerably small. Another limitation of the study is that it mainly focuses on examining the implications of in-house regulatory mechanisms on judicial independence and accountability; the reforms that aim to strengthen judicial independence and address judicial accountability deficits in India should look beyond judicial conduct regulation regimes. As already noted in the method section, the COVID-19 pandemic forced some changes in the methodology, as a result, the redesigned questionnaires had fewer questions than previously planned.

The empirical method is not applied in the UK. The collection of empirical data from various jurisdictions in the UK was not undertaken for two reasons. Firstly, there exists a sufficient amount of publicly available data on the functionality of regulatory regimes, with the exception of the UK Supreme Court (UKSC), which enables critical analyses of these regimes. Secondly, although the insights and initial experiences of stakeholders involved in judicial conduct regulation would have greatly facilitated in-depth analysis of the regimes, simultaneously collecting adequate empirical data from India and all three jurisdictions of the UK was impracticable. Soliciting the perspectives of judges and judicial leadership on matters of judicial conduct regulation necessitates obtaining necessary approvals,[112] which in turn pose logistical and time constraints on the researcher. For these reasons, empirical data from the UK could not be captured.

V. Outline of the thesis

The next Chapter will conceptualise 'judicial independence' and 'judicial accountability' from a regulatory perspective. It will argue that judicial independence and accountability have three essential components: individual, internal, and institutional. Therefore, the legal

[112] See, for example, Courts and Tribunal Judiciary, 'Judicial participation in research projects' (16 October 2020) <https://www.judiciary.uk/guidance-and-resources/judicial-participation-in-research-projects/>

frameworks that set up and support regulatory regimes must adequately emphasise all three components of judicial independence and accountability. However, as this Chapter will underline, the legal frameworks in India and the UK mostly focus on institutional independence. Individual independence, from a regulatory standpoint, has been underemphasised, while internal judicial independence has been a vanishing point of jurisprudence in both jurisdictions. Likewise, the Chapter will argue that as the relevant reforms are primarily aimed at securing institutional independence, senior judges structurally and functionally dominate the regulatory regimes. However, the regulatory frameworks do not provide adequate checks to discourage the potential abuse of disciplinary power (or the perception of it) by senior judges. Therefore, this Chapter will argue that there are notable gaps in the accountability frameworks of both countries and that the accountability gaps have the potential to undermine individual and internal judicial independence.

To further substantiate the arguments made in Chapter 2, Chapter 3 will critically analyse the key constitutional reforms since 1997 in England and Wales (E&W), Northern Ireland (NI) and Scotland *vis-à-vis* judicial conduct regulation. There are some notable divergences in the regulatory regimes within the UK. Devolution and subsequent constitutional reforms have added more complexity to judicial regulation. Therefore, to situate analyses in a wider constitutional context, the recent reforms in judicial administration, appointments, and regulation across the UK will be audited, albeit briefly. The Chapter will argue that the constitutional reforms since 1997 have had a significant impact on the separation of powers and judicial independence in the UK. However, the three jurisdictions have adopted different models of separation of powers with varying degrees of divergence on key issues such as judicial appointments and conduct regulation. For instance, England and Wales have adopted a partnership model, which aims to foster judicial administration based on dialogue and consensus between the judiciary, tribunal judiciary, arm's-length bodies, and the executive. However, the power-sharing arrangements in NI and Scotland maintain the discernible dominance of the judiciary in general. Conversely, as this Chapter will foreground, on some matters, the executive branch still holds a determinative role. Therefore, with respect to NI and Scotland, this Chapter will conclude that the regulatory architecture established by recent reforms is uneven, inconsistent, and, in some cases, unchecked.

Chapter 4 will critically evaluate the implications of constitutionalising judicial primacy on judicial conduct regulation in India. It will place special emphasis on the implications of in-house mechanisms on individual and internal independence. The Chapter will explain that judicial primacy in matters of judicial regulation has strengthened the institutional independence of the judiciary in India. However, as it has also led to the concentration of unchecked powers in the higher echelons of the judiciary, it is undermining individual and internal judicial independence. This counteractive consequence, as the Chapter will demonstrate, is in part due to the judiciary's antagonism to Parliament-led reforms that aimed to establish specialised institutions to deal with appointments, transfers and conduct regulation. The final part of the Chapter will explain that the glaring absence of robust regulatory regimes is one of the key reasons why there is an accountability deficit at the higher echelons of the judiciary. In contrast, the Chapter will draw on the empirical evidence to conclude that the subordinate judiciary has been subjected to multi-layer accountability regimes that have resulted in accountability overload.

To comprehensively analyse the structure, powers, functions, procedures, practices, and processes of the regulatory regimes in India and the UK, Chapter 5 will be presented in two sections. Section I of this Chapter examines the regulatory regimes for both the subordinate and the higher courts in India. Section II will critically evaluate the regulatory regimes in the UK. To adequately contextualise the empirical and critical analyses (that follow in Chapters 6 and 7), both sections of Chapter 5 will foreground the organisational structure, operation, and strengths and limitations of the regulatory arrangements of both countries in detail. Section I will conclude that India's regulatory regimes for subordinate courts are bereft of functional autonomy. The procedures concerning judicial complaints, inquiries, and disciplinary actions are *ad hoc*. In light of recent allegations against the Chief Justices of India, this section will argue that the 'in-house procedure' for the higher judiciary is also inadequate, opaque, informal, and judge centric. The study will conclude that the 'removal procedure' is rigid and ineffective in addressing misconduct that falls short of misbehaviour that warrants removal.

Section II of Chapter 5 will elucidate that the judicial complaint procedures, practices, and processes in the three jurisdictions of the UK, in comparison to India, are relatively comprehensive. The legal framework comprising a detailed complaint procedure and

elaborate conduct guidance could be seen in all three jurisdictions. It is also evident that the UK have institutionalized and pluralized judicial conduct regulation. Another striking feature that this section will emphasise is that the regulatory frameworks in the UK are largely embedded in openness and transparency. Likewise, the legal frameworks ensure that the regulatory mechanisms are also held accountable. In contrast, the following key features, as this section will elucidate, are largely absent in India's regulatory landscape:

(a) comprehensive legal framework,

(b) institutionalised and pluralised regulatory regimes,

(c) participatory regulation,

(d) transparency, accountability and openness in judicial conduct regulation, and

(e) accountability of the account-holders.

In India, the judiciary exclusively regulates judicial conduct through in-house mechanisms, except for the constitutional removal procedure. The founding justification for in-house mechanisms is that they are indispensable to upholding judicial independence. In this context, Chapter 6 will attempt to answer the following research question: Do regulatory mechanisms in India uphold judicial independence and effectively enforce the standards of judicial conduct? The study, by analysing quantitative and qualitative data, will offer an initial assessment of the implications of in-house mechanisms on judicial independence and judicial conduct regulation in India. The study will place special emphasis on the efficacy of in-house mechanisms in upholding 'individual' and 'internal' judicial independence. The research will also assess the effectiveness of in-house mechanisms in enforcing judicial conduct. Based on the empirical and critical analyses, the Chapter will conclude that in-house mechanisms for both the higher and subordinate judiciary undermine individual and internal judicial independence and that the mechanisms are ineffective in enforcing the standards of judicial conduct.

As noted already, the Constitutional Reform Act 2005 in England and Wales and similar reforms in devolved nations, namely Scotland and Northern Ireland, have redefined the landscape of judicial conduct regulation in the UK. Reforms have paved the way for specialised regimes that aim, among others, to secure judicial independence and effectively enforce judicial accountability. Against this backdrop, Chapter 7 will attempt to answer the research question: Do regulatory mechanisms in the UK uphold judicial independence and effectively

enforce the standards of judicial conduct? The Chapter, by analysing the recent allegations of misconduct, bullying, and discrimination by or against judges in the UK, critically evaluates the implications of the judicial conduct regulation regimes on judicial independence and accountability. The Chapter will specifically focus on the implications of new regulatory regimes on individual and internal independence. Likewise, with the help of statistical analyses, the Chapter will critically audit the effectiveness of regulatory regimes in enforcing judicial conduct. The Chapter will conclude that the new regulatory regimes have strengthened the institutional independence of the judiciary and facilitated the effective enforcement of judicial conduct. However, as the critical analysis will highlight, the regulatory regimes are less effective in upholding individual and internal judicial independence; some aspects of the regulatory architecture potentially undermine individual and internal judicial independence. In addition, there are some significant lapses in the accountability and transparency frameworks of regulatory regimes.

Chapter 8 will conclude the study by summarising key research findings in relation to the research aims and questions. It reiterates that the regulatory regimes in India, both for the higher and subordinate judiciaries, do not adequately safeguard internal and individual judicial independence. The regimes are also not effective in enforcing standards of judicial conduct. On the contrary, as this thesis demonstrates, the informality, opaqueness, and *ad hocism* of the regulatory process have led to accountability overload for the subordinate court judges. With respect to regulatory regimes in the UK, the study concludes that the regimes are effective in enforcing the standards of judicial conduct. However, the regulatory architecture in all jurisdictions of the UK does not adequately safeguard internal and individual judicial independence. The study concludes that the judiciary in the UK has failed to develop robust internal mechanisms that could address issues such as abuse of disciplinary powers by senior judges, violation of regulatory protocols by first-tier bodies, and unfair and inconsistent application of regulatory processes by the investigative authorities. These regulatory lapses endanger internal and individual judicial independence.

This Chapter also synthesises the key findings of comparative analyses by drawing on the salient features of regulatory regimes in India and the UK. Unlike the previous Chapters, this Chapter engages in a macro-analysis of the regulatory regimes. The macro-analysis informs the key recommendations for regulatory reforms in India and the UK, presented in the

following section of the Chapter. In the concluding sections, the Chapter will briefly emphasise the contribution of the study, review its limitations, and propose opportunities for future research.

Chapter 2

Revisiting judicial independence and accountability from a regulatory perspective♠

I. Introduction

This Chapter revisits two particularly dominant values that inform judicial regulation theory – independence and accountability – from a regulatory perspective. More specifically, this Chapter examines whether the legal frameworks that establish regulatory regimes in India and the UK adequately emphasise all key aspects of judicial independence and accountability. This inquiry is pertinent since the conventional account of judicial independence and accountability, which, *inter alia*, foregrounds the conflicting dimensions of the values, is less effective for regulatory purposes.[1] Therefore, it is crucial to investigate whether the regulatory theory that has shaped the regulatory architecture in both jurisdictions is embodied in a comprehensive understanding of judicial independence and accountability.

For this purpose, Section II provides a brief conceptual analysis of judicial independence. This section outlines all three core aspects of judicial independence. Section III examines whether India and the UK have adequate measures in place to safeguard all three aspects of judicial independence, as this thesis attempts to audit the implications of judicial conduct regulation on judicial independence, this inquiry is critical. This section illustrates that the legal frameworks in both jurisdictions mostly focus on securing institutional independence; they do not adequately emphasise individual and internal judicial independence. This conceptual asymmetry is affecting (a) the decisional and administrative autonomy of judges and (b) the career of judges.

Judicial accountability is a contested, imprecise, and under-theorised concept. Therefore, Section IV revisits judicial accountability by briefly delineating its evolution from 'accountability' as understood in the sphere of public administration. This section argues that legal frameworks providing for judicial regulation should comprehensively and precisely define the content of judicial accountability. Against this backdrop that Section IV (3)

♠ This chapter has been published as a research article in the *Oslo Law Review* see Shivaraj Huchhanavar, 'Conceptualising Judicial Independence and Accountability from a Regulatory Perspective' (2023) 9(2) *Oslo Law Review* 110-148.

[1] Devlin and Dodek (2016) 2-3.

conceptualises judicial accountability from a regulatory perspective. Section V briefly underlines the congruence and potential areas of conflict between judicial independence and accountability, thereby drawing attention to the intricate relationship between the key aspects of these two values. Section VI emphasises some of the key challenges that the proposed regulatory approach would encounter. Section VII concludes.

II. Understanding judicial independence from a regulatory perspective

Judiciaries, especially in countries like India, often draw unprecedented attention for their alleged 'misconduct,'[2] 'corruption,'[3] 'arrogance,'[4] 'getting involved in politics',[5] and administrative incompetence and delays in disposal.[6] In recent years, the Indian judiciary has faced intense scrutiny broadly on two grounds: (i) that for some reason there is a diminution of judicial independence or competence, and (ii) that the judiciary is alleged to be less transparent and accountable.[7] Even in the UK, judges have been exceptionally described as the 'enemies of the people'.[8] There are accusations, though rare, of gross misconduct[9] or corruption.[10] Judges in the UK are more routinely accused of trespassing into the realm of politics through activist decisions and excessive judicial review.[11] Regulatory regimes cannot effectively address all these accusations and accountability demands; however, they can play a vital role in fulfilling some of the accountability needs, if the regulatory architecture is established and administered with due regard to its implications on judicial independence and accountability. As already stated, the legal framework must emphasise all the core aspects of judicial independence and accountability. The conceptual foundations of

[2] Jeffrey Gettleman, 'India's Chief Justice Is Accused of Sexual Harassment' *The New York Times* (New York, 20 April 2019).
[3] 'Notice of Motion for presenting an address to the President of India for the removal of Mr Justice Dipak Misra, Chief Justice of India, under Article 217 read with 124 (4) of the Constitution of India' (2018) 14, para [11].
[4] Alok Kumar, 'Kalikho Pul Suicide: Clumsy Handling Hurts Supreme Court's Image' *The Quint* (Delhi, 24 February 2017).
[5] In Unprecedented Move, 'Modi Government Sends Former CJI Ranjan Gogoi to Rajya Sabha' *The Wire* (New Delhi, 16 March 2020).
[6] K Shankar, 'Why Justice is delayed' *The Hindu* (Chennai, 02 February 2020).
[7] Shubhankar Dam (2022) 200-225.
[8] James Slack, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *Daily Mail* (London, 4 November 2016).
[9] Sebastian Murphy-Bates, 'High Court judge who complained about his lost luggage during £3billion British Airways case retires a week' *Daily Mail*, (London, 28 October 2017).
[10] Mary Dejevsky, 'Serious corruption has happened in our justice system - and the penalties could stand to be harsher' *Independent* (London, 14 October 2015).
[11] See e.g., John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (2019) (Policy Exchange: A Judicial Power Project) 5-6, 9.

regulatory regimes are causally important for their efficacy; conceptual foundations also set functional and procedural limitations on regulatory regimes.

II (1) Judicial independence: meaning and scope

Judicial independence is the ability of judicial personnel and the judiciary to perform their respective duties in accordance with the law and free from all forms of inappropriate influences.[12] Therefore, the concept requires the State to provide adequate measures, mechanisms, and resources to enable judicial personnel and the judiciary to avoid inappropriate influences that may undermine (or threaten to undermine) judicial independence. As noted above, there are three essential aspects of judicial independence: institutional, individual, and internal. However, traditionally, only two aspects – institutional and individual – are adequately emphasised. This is true for international law and domestic law.[13]

There are three key reasons why internal judicial independence has received inadequate attention: first, judicial independence has been almost exclusively viewed from a separation of powers perspective (see Chapter 3).[14] Separation of the judiciary from the other two branches of government has been considered quintessential for the independence and impartiality of the judiciary. Therefore, judicial reforms have focused more on the institutional and functional separation of judicial institutions from the other two branches.[15] This is also true for India (see Chapter 4). The second reason is that the idea of judicial self-governance – seeking greater control of the judiciary in judicial administration – was less prevalent until the late twentieth century. As a result, judicial administration, especially in the UK, was almost exclusively run by the executive branch. The higher echelons within the judiciary have had limited administrative and supervisory roles. Consequently, internal

[12] See generally Mia Swart, 'Independence of the Judiciary' *Max Planck Encyclopaedia of Comparative Constitutional Law* (1 March 2019).

[13] See e.g., Lord Hodge, 'Preserving judicial independence in an age of populism' (Speech at the North Strathclyde Sheriffdom Conference, Paisley, 23 November 2018). There is only a brief reference to internal judicial independence in international instruments on judicial independence, see, e.g., Bangalore Principles of Judicial Conduct 2002, Universal Charter of the Judge 1999 and Mount Scopus International Standards of Judicial Independence 2008, article 9.

[14] Burbank, 'The Architecture of Judicial Independence' (1999) *Southern California Law Review* vol 72: 315, 325-26.

[15] Lord Judge, 'Constitutional Change: Unfinished Business' (Lecture to UCL Constitution Unit, 4 December 2013) paras 16-18.

arrangements within the judiciary did not matter much from a judicial independence perspective.

The third reason IJI needs are not addressed by the legislature and judiciary is that it is a difficult topic. Since it relates to the internal dynamics of the judiciary, politicians generally are hesitant to openly engage in public conversations.[16] The topic is too close for senior judges to openly confront internal challenges to judicial independence. Commenting on the post-CRA reforms in the UK, Beatson rightly pointed out that the reform initiatives (i.e., the CRA) either overlooked or underestimated some of the difficult topics. He pointed out that the Labour government at the time (2002-03) had argued that reforming the office of the Lord Chancellor would strengthen judicial independence, but 'there was no public debate and little internal debate on the other aspect of judicial independence; that is, the independence of a judge from, in particular, more senior judges.'[17]

Similarly, in India, the Supreme Court (SC) has shown considerable resistance to reforms that aimed to strengthen internal judicial independence; the SC has also thwarted any attempt of Parliament to repeal judicial primacy.[18] Although there is a growing emphasis on securing internal judicial independence elsewhere,[19] the topic has not been addressed at the policy levels both in India and in the UK. The lack of adequate measures to maintain and defend internal judicial independence has implications for the overall paradigm of judicial independence and accountability. Greater institutional autonomy is not sufficient in itself to achieve adequate decisional and administrative autonomy for individual judges. In this context, the Chapter provides a brief conceptual analysis of judicial independence with a special emphasis on internal judicial independence.

II(1)(a) Institutional judicial independence

Institutional judicial independence aims to protect the judiciary from all forms of inappropriate influences arising from non-judicial actors that undermine or threaten to

[16] However, in recent years, the political executives in India have been openly courting issues that have bearing on the internal dynamics of the judiciary. See e.g., "'Sane view', says Union law minister Kiren Rijiju of high court ex-judge's collegium criticism" *Times of India* (New Delhi, 23 January 2023).

[17] Jack Beatson, 'Reforming an unwritten constitution' (2010) *Law Quarterly Review* 48-67, 64.

[18] See e.g., *Supreme Court Advocates-on-Record Association v Union of India*, (2016) 4 SCC 1.

[19] Kosař D, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice' (2017) 13 *European Constitutional Law Review* 123.

undermine the judiciary's ability to perform its role according to the Constitution, law, or fundamental principles of the legal system within which it operates. In other words, institutional judicial independence provides safeguards against real or perceived external interferences from non-judicial actors. Non-judicial actors include the executive branch, Parliament, media, civil society or parties to a dispute which the court has to adjudicate. Inappropriate influences, among others, include any inducements, pressures, threats or interferences, direct or indirect that constrain or induce the judiciary to act contrary to its role envisaged in the Constitution, law or the fundamental principles of its legal system. The State, within its politico-legal and socio-cultural context, should have adequate measures to insulate the judiciary from extraneous influences. Cox aptly summarises some such measures as follows:

> 'To my mind the idea of judicial independence implies: (1) that judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal; (2) that the courts' decisions shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions except as changed by constitutional amendment; and (3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.'[20]

Furthermore, to protect its institutional independence, the judiciary should have the power to punish for contempt of court and should have financial security and meaningful participation in the judicial administration. Likewise, there should be independent oversight mechanisms to deal with judicial discipline.[21]

II(1)(b) Individual judicial independence

Individual judicial independence aims to insulate judicial personnel from all forms of inappropriate influences arising from their conduct or from outside that undermine or threaten to undermine their abilities to perform their duties in accordance with the oath of office, terms and conditions of service, and the law.[22] Individual judicial independence requires judges to possess certain qualities to exhibit independence and impartiality in the

[20] Cox A, 'The Independence of the Judiciary: History and Purposes' (1996) (21)(3) *University of Dayton Law Review* 566.
[21] See e.g., Mount Scopus International Standards of Judicial Independence 2018.
[22] Individual independence is not limited to judges, it applies to the jury, court officials, prosecutors and advocates in relation to the nature of their duties and the extent of independence required of them.

discharge of their duties.[23] The Bangalore Principles of Judicial Conduct list some of the values expected of a judge, including the ability of a judge to uphold and exemplify independence, impartiality, integrity, propriety, equality, competence and diligence. However, these qualities are not monolithic. The degree to which and the rigour with which a judge should uphold and exemplify these values are conditioned on the nature of the judicial office he or she holds. The role of a judge in an adversarial system is different from that of a civil law system. Likewise, when a judge is called upon to act as a conciliator in a family matter, the judge is expected to conduct herself and the case differently than in a criminal trial. In the same manner, a part-time, fee-paid judge would be held to different standards of conduct than a full-time salaried judge. Precisely for these reasons, the oath of office, the current assignment, and terms and conditions of service should be considered in outlining the expected standards of judicial conduct or in assessing the conduct of a judge when called in question.[24]

Some of the key measures to secure, uphold and defend individual judicial independence, include (i) tenure security, (ii) adequate salary and pension, (iii) judicial immunity, (iv) fair, reasonable, and flexible conditions of service, (v) autonomy and effective control over immediate administrative penumbra, (vi) adequate measures for training, support and welfare, and (vii) independent, impartial, and competent bodies to deal with judicial selection and appointments, deployment, promotion, discipline, and removal.[25]

II(1)(c) Internal judicial independence

Internal judicial independence aims to insulate judicial personnel from all forms of inappropriate influences arising from within the judiciary that undermine or threaten to undermine their decisional autonomy or legal status. Internal judicial independence emphasizes the internal dynamics within judicial hierarchies. The improper pressure could arise from senior judges, colleagues, or other judicial personnel.[26] Therefore, internal judicial independence aims to insulate the ability of a judge to perform his or her duties without

[23] Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Peerenboom R (eds), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP, 2009) 71.

[24] Individual judicial independence is also called behavioural or positive or decisional independence. See Hilbink Lisa, 'The Origins of Positive Judicial Independence' [2012] vol 64(4) *World Politics* 587–621.

[25] See generally, Report of the Special Rapporteur on the independence of judges and lawyers (2017) UNGA Doc A/HRC/35/31, para 35.

[26] Shetreet, 'The Significance of the Independence of the Judiciary Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure' In *The Culture of Judicial Independence* (Brill, 2012) 44.

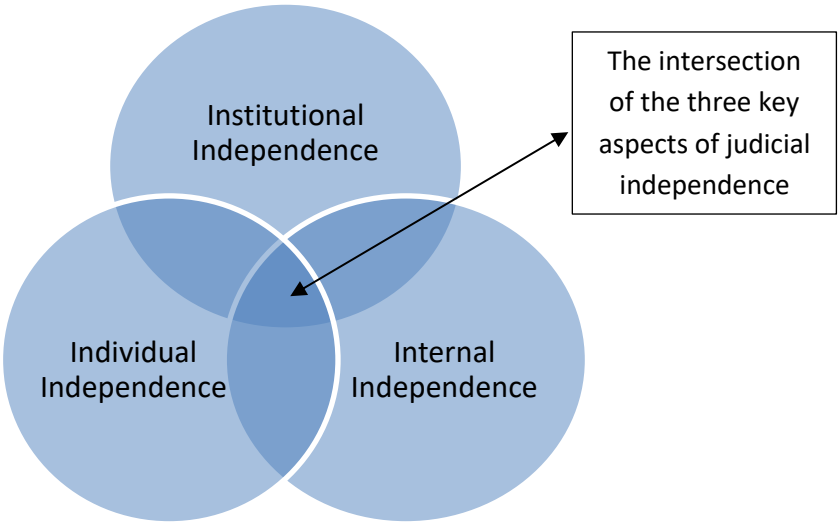
regard to administrative hierarchies within the judiciary and, in particular, without interference from senior judges.[27]

Internal judicial independence also implies that the judiciary should treat a judge fairly. Issues like transfer, promotion, disciplinary inquiries and removal must be carried out in accordance with pre-existing rules and fair procedures. No judge should be discriminated against or put in a disadvantaged position based on what she does on the judicial side (unless that judge wilfully contravenes the law) in terms of her perks and privileges as a judge. Internal independence also covers administrative issues like fair and equitable distribution of judicial and administrative work, infrastructure, and other facilities. It is also essential that 'judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process'[28] to circumvent potential impediments to the administration of justice. The bureaucratic apparatus in charge of courts' administration, in the absence of adequate checks and balances, undermine internal judicial independence.[29]

Internal judicial independence is intricately linked to individual judicial independence.[30] It aims to address inappropriate influences within the judiciary to safeguard the decisional autonomy of a judge, which is the very essence of individual judicial independence.[31] Unsurprisingly, we can also see considerable overlap between the institutional and internal dimensions. Whist institutional independence addresses, not exclusively but mostly, macro-level needs of the judiciary and the judges to safeguard judicial independence, internal judicial independence does the same to safeguard the decisional autonomy of a judge at the meso-level. Institutional independence is also necessary to secure individual and internal independence; without institutional independence, the decisional autonomy of judges and internal arrangements of the judiciary would gradually wither.[32] The Venn diagram below depicts the overlap between the three key aspects of judicial independence.

[27] European Commission for Democracy through Law, 'Report on the Independence of the Judicial System' (2010) Pt I, paras 68-72.
[28] Lord Mackay in T. Bingham (eds), *The Business of Judging: Selected Essays and Speeches*, *1985–1999* (2011) 55.
[29] Guy Lurie, 'Agencification and the administration of courts in Israel' (2020) 14 *Regulation and Governance* 719.
[30] See generally, Kosař (n 19).
[31] United Nations Office on Drugs and Crime, 'The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11' (2015), para 13, 4.
[32] Lord Judge, 'Constitutional Change: Unfinished Business', (Speech at University College London Constitution Unit, 4 December 2013) para 7.

Judicial Independence: Venn diagram



The inappropriate internal influences that challenge the IJI could be broadly categorised into two types: (i) inappropriate influences that undermine or threaten to undermine the judicial or administrative autonomy of a judge, and (ii) inappropriate influences that undermine or threaten to undermine the legal status of a judge.[33] In *Parlov-Tkalčić v Croatia*, highlighting the importance of IJI for judicial impartiality, the European Court of Human Rights has aptly ruled as follows:

> '…judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.'[34]

The actual exertion of inappropriate influence by senior colleagues or court officials is not always necessary to prevent a potential breach of this element of judicial independence. It is sufficient if the potential threat to decisional autonomy is capable of generating latent pressures resulting in judges' subservience to their judicial superiors or, at least, making individual judges reluctant to contradict their senior's wishes, that is to say, of having 'chilling' effects on the internal independence of judges.[35] Where senior judges play a dominant role

[33] Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' (2019) *European Constitutional Law Review* 113.
[34] ECtHR 22 December 2009, para 86; see also Jost Sillen, ibid 109.
[35] *Parlov-Tkalčić v Croatia,* ECtHR 22 December 2009, para 91.

in matters of judicial appointments, deployment, promotion, training, performance assessment, discipline and removal, they invariably possess the ability to affect the legal status of judges in relation to whom they exercise such a role.[36] In such a scenario, judicial independence measures that mainly stem from the separation of powers theory would be inadequate to safeguard judicial independence. Furthermore, because inappropriate interferences occur within the judiciary, especially where there are no robust mechanisms to address such interferences, individual judges cannot defend themselves.[37] See Section V for a brief discussion on the congruence and conflicting dimensions of judicial independence and accountability.

III. Do India and the UK have adequate measures of institutional, individual and internal judicial independence?

This section briefly examines judicial independence paradigms in India and England and Wales focusing exclusively on the subordinate judiciary (the courts below the High Courts). The special emphasis on the subordinate judiciary is crucial for three reasons. Firstly, academic inquiries mostly focus on the higher judiciary in their assessment of judicial independence. The academic inquiries tend to feed more into popular debates and not very often look beyond constitutional or public law perspectives on judicial independence, separation of powers, the rule of law, checks and balances, and judicial appointments. Topics, namely, judicial ethics, administrative arrangements within the judiciary and judicial conduct regulation regimes have not been comprehensively studied from a regulatory perspective.[38] It is needless to say that these topics have implications for judicial independence and accountability at all levels of the judiciary.[39] Secondly, though the role of apex judicial institutions is no less significant, for the majority of litigants, the lower courts are the real face of the judiciary.[40] Finally, subordinate court judges are the ones who are subjected to the oversight of the regulatory regimes. Therefore, the regulatory arrangements and their

[36] See, for example, *Case of Bilgen v Turkey*, ECHR 09 March 2021; *Eminağaoğlu v Turkey*, ECHR 079 (2021); *Case of Grzeda v Poland*, ECHR 43572/18 (2022).

[37] Consultative Council of European Judges, 'Preventing corruption among judges' (2018), CCJE Opinion No. 21, para 16, 4.

[38] Graham Gee (2021) 131-32.

[39] Andrew Le Sueur, 'The Foundations of Justice' in Sir Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (OUP, 2019) 211.

[40] For example, out of 2.9 million cases handled by courts in England and Wales, magistrates' courts alone received 1.13 million cases. Even most of the civil and family matters are dealt with by lower courts, see Georgina Sturge, 'Court statistics for England and Wales' (2021) House of Commons Library <https://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf>

implications on judicial independence should be viewed from the perspective of subordinate court judges. Notwithstanding the special emphasis on subordinate courts in this Chapter, subsequent Chapters (3, 4, and 5) comprehensively analyse the topic with reference to India and all the jurisdictions within the UK.

III(1) England and Wales

Individual independence of the judges in the UK is supplemented by statutes, common law and constitutional conventions.[41] As per the Act of Settlement 1701, judges hold judicial office during good behaviour. It means judges have the security of tenure, they cannot be removed on a whim by the executive branch or by their judicial superiors; senior judges, as discussed in the succeeding Chapters, can only be removed from office upon the address of both houses of Parliament.[42] The Act of Settlement further provides that judges' salaries be ascertained and established. Judicial immunity from civil and criminal liability is also guaranteed.[43] A constitutional convention insulates judges from direct and personal criticism by the members of the executive branch;[44] even members of Parliament should not attack judges or openly comment on the conduct or character of judges unless the discussion is based upon a substantive motion, drawn in proper terms.[45]

In addition to individual independence measures noted above, the Constitutional Reform Act 2005 (CRA) bolsters institutional independence by severing institutional links between the judicial, legislative and executive branches. Before the CRA, judicial administration was heavily centralised around the Lord Chancellor (LC). This meant, as the head of the judiciary, the LC was responsible for judicial appointments, training, deployment, discipline and removal. The LC was also the head of the Appellate Committee of the House of Lords and s/he was, at the same time, the Speaker of the House of Lords and a member of the Prime Minister's cabinet as a departmental minister.[46] The office of Lord Chancellor served as an

[41] Masterman and Murray, *Constitutional and Administrative Law* (CUP, 2022) 273-275, 413-429.
[42] See e.g., Senior Courts Act 1981, s. 11(3).
[43] *Anderson v Gorrie* [1895] 1 QB 668
[44] Anthony Bradley, 'Judicial Independence Under Attack' [2003] P.L. 397; House of Lords Select Committee on the Constitution [6th Report 2006-07] 17, para 42.
[45] UK parliament: Incidental criticism of the conduct of certain persons not permitted <https://erskinemay.parliament.uk/section/4873/incidental-criticism-of-conduct-of-certain-persons-not-permitted/#footnote-item-4>.
[46] Woodhouse, 'The office of Lord Chancellor: Time to abandon the judicial role – the rest will follow' (2002) 22(1) *Legal Studies* 128-145.

archetypal example of the lack of strict separation of powers in the UK.[47] However, the CRA has significantly redrawn the scheme of separation of powers. The Act diminished the role of the LC by shelving his headship of England and Wales judiciary, the Appellate Committee of the House of Lords and the House of Lords. The Act also formally obliged the LC to uphold and defend judicial independence.[48]

Under the CRA, now the Lord Chief Justice (LCJ) is the head of the England and Wales judiciary.[49] The LCJ is solely responsible for the welfare, training deployment, allocation of work and guidance of the judiciary.[50] Now the LCJ has a key role in judicial appointments.[51] Judicial discipline is now a joint responsibility of the LCJ and the LC.[52] The court services are now run as a partnership between the executive and the judiciary.[53] As the CRA transferred some of the significant powers to the LCJ, the judicial leadership has been diversified. The Judicial Executive Board [JEB][54] and the Judges' Council,[55] headed by the LCJ assist the LCJ in managing his responsibilities.[56] To assist the LCJ and the LC in matters of judicial discipline, the LCJ has established the Judicial Conduct Investigations Office (JCIO). The CRA has also provided for a Judicial Appointments and Conduct Ombudsman, which acts as a review body for complaints relating to judicial appointments and discipline. In addition, the CRA established the Supreme Court of the United Kingdom.[57]

The reforms introduced by the CRA have had notable implications for judicial independence. By delineating the judiciary from the other two branches – institutionally and functionally – the CRA, to a considerable extent, has strengthened institutional judicial independence. The

[47] Walter Bagehot termed the office of the Lord Chancellor as 'a heap of anomalies', see: Walter Bagehot, *The English Constitution* (1867) 167.

[48] CRA, s. 3.

[49] CRA, s. 7.

[50] ibid*;* see also Crime and Courts Act 2013, ss. 20, 21 and Sch 13 and 14; Courts Act 1971, part III; Senior Courts Act 1981, ss 6A, 6C, 91 and 102; County Court Act 1984, s. 8; Courts Act 2003, ss 10 and 24.

[51] The Lord Chief Justice has the final say on the appointments of all judges below the High Court, see e.g., Courts and Crime Act 2013, Sch 13, Part 4.

[52] Judicial Conduct, The Court and Tribunal Judiciary England and Wales <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-conduct/>.

[53] HM Courts & Tribunals Service Framework Document (2014), para 2.4.

[54] Lord Justice Thomas, 'The Position of the Judiciaries of the United Kingdom in the Constitutional Changes Address to the Scottish Sheriffs' Association Peebles' (2008) 3-5.

[55] The Judges' Council represents both court and tribunal judiciaries in England and Wales, currently, it consists of 32 members <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judges-council/>.

[56] The Lord Chief Justice <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/lord-chief-justice/>.

[57] CRA, s. 23.

establishment of arm's length bodies, for example, the Judicial Appointments Commission (JAC), JCIO and JACO has further burnished institutional judicial independence. Likewise, the participation of the judiciary (senior judges) in judicial administration has been significantly expanded. Now the input or the concurrence of the judiciary on some issues is determinative (for instance, in matters of judicial discipline). Arguably, this has also strengthened institutional judicial independence. However, there are areas of concern, for example, the judiciaries across the UK continue to operate in challenging funding and administrative environment (see Chapter 3 for further discussion).[58]

III(1)(a) Challenges to individual and internal judicial independence in England and Wales

(i) Allegations of discrimination, racism and bullying against senior judges: *Gilham* case (2019)

In *Gilham v Ministry of Justice,*[59] a district judge complained to the local judicial leadership and senior managers in Her Majesty's Courts and Tribunals Service about a lack of personal safety, inadequate administrative support and a heavy workload.[60] The judge asserted that these complaints amounted to 'qualifying disclosure' under section 43(B) of the Employment Rights Act 1996 and that she was entitled to whistle-blower protection.[61] However, the judge claimed that as a result of these complaints/disclosures, she was bullied, ignored and undermined by her fellow judges and court staff. The district judge claimed that inadequate support and bullying degraded her health, resulting in psychiatric injury and disability. However, she was informed that her workload concerns were because of her 'working style choice'.[62]

The district judge had also raised her concerns with the judicial complaints body, but the investigating judge noted that the judicial complaints procedure is not suitable to deal with alleged systemic failures.[63] Meaning there were no intra-institutional mechanisms to address the issues. The district judge made a two-part claim in the Employment Tribunal. One part of

[58] See e.g., Lizzie Dearden, 'Lord Chief Justice warns government over 'value of the rule of law' in courts funding plea' *The Independent* (London, 05 November 2021); 'Justice to lose most in Northern Ireland's draft budget' *Irish Legal News* (Dundee, 21 January 2022); 'Legal aid spending drop highlights funding crisis in the sector' *Law Society of Scotland* (Edinburgh, 20 December 2021); 'Supreme Court independence 'threatened' by funding' BBC (9 February 2011).

[59] [2019] UKSC 44.

[60] Catherine Baski, 'Judge Claire Gilham 'bullied to the brink of suicide' after she raised fears over cuts' *The Times* (London, 11 March 2021).

[61] Employment Rights Act 1996, s. 47B (1).

[62] *Gilham v Ministry of Justice* [2019] UKSC 44 [7].

[63] ibid [43].

her claim was for disability discrimination under the Equality Act 2010, because of the judiciary's failure to make reasonable adjustments to cater for her disability.[64] The other claim was that being a 'worker' she is protected by 'whistleblowing' provisions in Part IVA of the Employment Rights Act 1996. Both of her claims depended upon her being a 'worker' under the 1996 Act. The Employment Tribunal rejected her both claims. The Court of Appeal allowed her to raise the argument that denying her whistle-blowing protection is discrimination against the enjoyment of her right to freedom of expression [Art 14, ECHR]. However, her claim for whistleblowing protection was also ultimately rejected.

On Appeal, the UKSC noted that the judges 'are not so well protected against the kind of detriments that are complained about in this case, bullying, victimisation and failure to take seriously the complaints she was making.'[65] The court agreed that the issues raised by the judge were concerned with the violation of articles 10 and 14 of the European Convention on Human Rights. It ruled that judges are entitled to the protection of qualifying disclosures and whistle-blowing protection. Lady Hale concluded that such protection to judges would enhance 'their independence by reducing the risk that they might be tempted to go public with their concerns, because of the fear that *there was no other avenue available to them*, and thus unwillingly be drawn into what might be seen as a political debate.'[66]

In April 2021, similar allegations were made by eight anonymous serving judges who alleged that their colleagues have been 'undermined, belittled or accused of being mentally unstable' for raising concerns about a lack of diversity within the judiciary.[67] In response to the growing pressure, the judiciary has introduced a whistleblowing policy for judges. Reportedly, 14 judicial officeholders have been nominated as 'confidential and impartial points of contact and information.'[68] This is a welcome change. The qualifying disclosures and whistle-blower protection enhance judicial accountability and strengthen judicial independence. However, there is also a need for robust intra-institutional mechanisms to deal with issues such as bullying, discrimination and racism.

[64] ibid para 8.
[65] ibid para 26.
[66] (Emphasis added) ibid para 36.
[67] Monidipa Fouzder, ''Undermined, belittled, ostracised': judges to get whistleblowing policy' *The Law Society* Gazette (London, 27 April 2021).
[68] Monidipa Fouzder, 'Have confidence to speak up': whistleblowing policy for judges unveiled' *The Law Society Gazette* (London, 25 June 2021).

(ii) Promotion and performance appraisal

Promotion and performance appraisal are longstanding issues of judicial reforms in the UK. Judicial appointees like circuit judges, recorders, district judges or tribunal judges lack proper career options, there is limited movement of judicial personnel between the different divisions of the judiciary, and there is little prospect of promotion from the lower to the more senior branches.[69] However, it is not that there is no scope for promotions, but hitherto no serious attempts were made to streamline the complex judicial superstructure to accommodate the progression of competent judicial personnel. Judicial officeholders are not particularly satisfied with the judicial promotion process. Of 596 judges from England and Wales, around 101 either agreed or strongly agreed that judges are promoted *other than* on the basis of ability and experience. Likewise, 28 judges (out of 87) from Scotland and two of seven judges from Northern Ireland felt the same.[70] This is a significant anomaly since the UK ranks high on other parameters concerning judicial independence.[71] There is a need for a robust policy for promotion, based on the objective appraisal of judges' performance, expertise, experience and skills needed for the job. Providing a clear career structure to judges is essential to secure judicial independence.[72]

The latest Judicial Attitude Survey shows that almost two-thirds of judges (61%) in England and Wales viewed career progression opportunities as important.[73] A significant portion of judges (43%) felt that career progression opportunities are either 'poor' (31%) or 'non-existent' (12%).[74] A significant minority across judicial hierarchies viewed that there are no opportunities for career progression in the judiciary.[75] The barriers to career progression should, as a minimum, be removed and judges should be given a clear career structure at the time of recruitment.[76] Lack of career growth would demotivate judicial personnel and could also affect their performance.

[69] House of Lords Constitution Committee, *Judicial Appointments* (HL, 2012) Ch 7, para 174.
[70] European Network of Council for the Judiciary [ENCJ], 'Project on Independence and Accountability 2014-2015' 138.
[71] ibid 32.
[72] Committee of Ministers to the Member States on the Independence, Efficiency and Role of Judges, 'Recommendation no. R (2010) 12' 12-13.
[73] Cheryl Thomas, 'Judicial Attitude Survey 2020: England and Wales' (2021) *UCL Judicial Institute* 46.
[74] ibid.
[75] ibid 49.
[76] Council of Europe Committee of Ministers, 'Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges (1994)', Principle III, 4.

Judges' experience and skills could be harnessed by promoting deserving candidates to higher levels. This could also enhance the performance of appellate courts and tribunals. Career progression opportunities could serve as avenues for streamlining the *ad hoc* arrangements and communication channels across the judicial hierarchies. In other words, a promoted appellate judge would be better placed to understand the issues and challenges of the lower courts. Hence the lateral movement of judicial personnel would strengthen internal judicial independence. Further, the UK could use 'judicial promotion' as an instrument to build a unified judiciary; for example, judicial promotion could help build 'One Judiciary' that England and Wales are pursuing.[77] However, as the Advisory Panel on Judicial Diversity recommended, there is a need for a paradigm shift from '…individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary.'[78]

No doubt career progression within the judiciary needs to be encouraged and any artificial barriers should be removed, but this must be done prudently. The promotion of judges should be based on objective factors that include merit, competence, integrity, experience, and institutional need.[79] The hope of promotion or the fear of non-promotion could affect judicial decision-making.[80] Now that the LC has no effective control over judicial appointments and promotions, the potential intrusion of the executive branch into judicial promotions is largely addressed.[81] However, equally important, as the judicial leadership now plays a dominant role in judicial appointments,[82] the scheme of promotion should avoid inappropriate influences from within the judiciary as well.

Another longstanding area of judicial reform in the UK is judicial performance evaluation. Performance evaluation is interwoven with judicial accountability, independence, conduct and competence. When carried out objectively and effectively, performance evaluation has

[77] Pursuing 'One Judiciary' by the Lord Chancellor, the Lord Chief Justice of England and Wales and the Senior President of Tribunals (8 July 2022) <https://www.judiciary.uk/pursuing-one-judiciary-by-the-lord-chancellor-the-lord-chief-justice-of-england-and-wales-and-the-senior-president-of-tribunals/>

[78] The Report of the Advisory Panel on Judicial Diversity 2010, Recommendation 1, 18.

[79] The Basic Principles on the Independence of the Judiciary 1985, para 13.

[80] A. Allot, 'Independence of the Judiciary in Commonwealth Countries: Problems and Provisions' (1994) *The Commonwealth Law Bulletin* 1435.

[81] House of Lords Select Committee, *Relations between the executive, the judiciary and Parliament* (HL 2006-07, Oral Evidence, Lord Phillips, 3 May 2006, answer to Q 72) 127-128.

[82] Courts and Crime Act 2013, Part IV, Schedule 13.

the potential to enhance judicial integrity, accountability, and independence.[83] Also, it can be used as a medium of intervention that could lead to appropriate pastoral or judicial training support for judges in need.[84] Appraisals improve the quality of the judiciary by assessing any weaknesses in performance and offering adequate support for judges to develop the required skills.[85] But the UK judiciary has no formal judicial performance assessment mechanism. Interestingly, judicial officers favour appraisals.[86] It is not ideal for accountability-seeking institutions like the judiciary to be accountability complacent, especially when the performance appraisals are common in other sectors – 'without an effective appraisals system, the public cannot be assured that the judiciary is of the highest possible quality.'[87] The LCJ's annual reports since 2017 emphasize the significance of appraisals for career development and recruitment, however, the appraisal schemes have not been applied across jurisdictions.[88]

Besides promotion and performance issues discussed here, on various issues concerning lower court judges, there are no effective internal mechanisms to facilitate constructive interaction with senior judges and judicial bureaucracy in England and Wales. The latest Judicial Attitude Survey (2020) reveals that only a third of judges feel valued by the senior judiciary;[89] likewise, a quarter of judges opined that lack of support from the senior judiciary is one of the reasons that would discourage people from applying to the salaried judiciary.[90] A significant minority of judges (16%) felt that a rigid hierarchical work environment deters people from taking up judgeships.[91] Inflexible working conditions are another reason for dissatisfaction among judges.[92] For example, 61% of judges in England and Wales think that the availability of flexible working hours is 'poor' (16%) or 'non-existent' (45%).[93] Even the part-time fee-paid judges in the UK feel that there is no easy access to flexible working

[83] Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' (2002) 29 *Fordham Urban Law Journal* 1053.
[84] See generally, Stephen Colbran, 'The Limits of Judicial Accountability: The Role of Judicial Performance Evaluation' (2003) 6 *Legal Ethics* 55.
[85] ibid [182].
[86] Ibid.
[87] ibid [186].
[88] See Lord Chief Justices' Annual Reports of 2017 to 2021.
[89] Cheryl Thomas, 'Judicial Attitude Survey 2020: England and Wales' (2021) *UCL Judicial Institute* 46.
[90] ibid 77.
[91] Id.
[92] Sophie Turenne and John Bell, 'The attractiveness of judicial appointments in the United Kingdom: Report to the Senior Salaries Review Body' (2018), 14-19.
[93] Cheryl Thomas (n 89).

arrangements.[94] The general impression is that the judiciary does not recognise the specific circumstances. The absence of mechanisms to diagnose and resolve the concerns of judicial personnel would at best make the judiciary a *victim* of its inaction, and at worst, it would invite hostile forces to intrude on institutional autonomy, which would do more harm than good.[95] Therefore, the judiciary in the UK must revisit and review its internal processes that could impinge on the individual autonomy of its personnel.

III(2) India

The administration of subordinate courts in India is under the supervision and control of the High Courts.[96] Judicial appointment, promotion, transfer, removal and other judicial service matters are, almost exclusively, dealt with by the High Courts.[97] The supervision of High Courts, including in matters of judicial discipline, is considered indispensable to securing the judicial independence of subordinate court judges.[98] Moreover, the SC has held that the High Courts have complete administrative control over the subordinate courts (see Chapter 4). The 'control' extends to all functionaries appended to the subordinate courts. The court observed that administrative control is necessary for the harmonious, efficient, and effective working of the subordinate courts.[99] 'This control is exclusive in nature, comprehensive in extent, and effective in operation'.[100] These overwhelming administrative and disciplinary powers of the High Courts make them custodians of the lower judiciary, which means that the High Courts of India have both 'stick' and 'carrot' at their disposal.

The Constitution also confers extensive rule-making power on the High Courts, as a result, High Courts are free to design regulatory mechanisms as they see appropriate.[101] Nonetheless, almost all the High Courts have designated committees, comprising High Court judges as members, to deal with diverse issues pertaining to subordinate court judges.[102]

[94] House of Lords Constitution Committee, *Judicial Appointments* (HL, 2012) Ch 3.
[95] Gabriela Knaul, 'Report of the Special Rapporteur on the independence of judges and lawyers' (2014) UNGA Doc A/HRC/26/32, 5, para 22.
[96] Constitution of India 1950, Art 235.
[97] Constitution of India 1950, Pt VI, Ch VI.
[98] See e.g., Law Commission of India, *Method of Appointments to Subordinate Courts* (Law Comm No 118, 1986) 11. See also Law Commission of India, *Formation of an All-India Judicial Service* (Law Comm No 116, 1986) 26; *State of West Bengal v Nripendra Bagchi* [1966] AIR 447 (SC).
[99] *Renu v District and Sessions Judge*, *Tis Hazari*, AIR 2014 SC 2175.
[100] ibid.
[101] Constitution of India 1950, articles 227, 229(2).
[102] E.g., Allahabad High Court Rules 1952, Ch III, 7-9.

Decisions of these committees attain finality in some matters, but they are mostly recommendatory in nature and the final decision will have to be made by the Chief Justice or the full court.[103]

The High Court committees are internal mechanisms dealing with administrative issues of the High Court and subordinate court judiciary. There is no lay participation and there is no scope for participation of the executive branch.[104] On some matters, the state government may make rules, but there is no participation of the executive branch in the internal matters of the judiciary.[105] Against the decisions of these committees or the full court, there are no formal appeal mechanisms. The aggrieved party has to invoke writ jurisdiction of the same High Court on the judicial side, challenging the administrative decisions of some of the senior judges of that court. There are no robust internal review mechanisms.[106] As a result, subordinate court judges often perceive administrative decisions as unfair. One of the judges who participated as a subject expert in this study lamented that '[the] High Court is not at all objective in dealing with district judiciary. They [district judges] are being punished for *bona fide* judicial orders. District judiciary works in [an] environment of fear of [the] Bar and High Court, unwholesome for the system.'[107] Another District judge alleged that the High Judges 'look [at] the judicial officer on caste basis.'[108]

Unlike in England and Wales, the High Courts in India carry out performance appraisals annually. The performance appraisal of the District Judges is mostly carried out by a designated High Court judge or a committee of High Court judges. The appraisal of the other subordinate court judges is carried out by senior district judges. However, the judges who participated in this study expressed their concerns about the system of judicial performance evaluation and recording of Annual Confidential Reports (ACRs). One civil judge wrote that '…ACRs are at the discretion of district judges, and more often than not, instead of the work that a judicial officer performs, factors like how much submissive a judicial officer is to the district judges and whether the officer is attending irrelevant judicial get-togethers is what

[103] ibid, Ch III, 7-8.
[104] See Chapter 3 for a detailed discussion on this topic.
[105] Constitution of India 1950, Pt VI, Ch VI.
[106] See generally, Tony George Puthucherril,' 'Belling the cat': judicial discipline in India' in Richard Devlin and Sheila Wildeman, *Disciplining Judges Contemporary Challenges and Controversies* (eds) (Edward Elgar Publishing, 2021).
[107] Respondent's ID: 164560839.
[108] ID: 163365860.

counts' (sic).[109] The empirical evidence presented in Chapters 4 and 6 further corroborates that informal, *ad hoc* and subjective approaches with which the High Courts exercise their supervisory powers inhibit individual and internal judicial independence.

IV. Understanding judicial accountability from a regulatory perspective

'Accountability' is not new to the judicial branch; it is an age-old value that is deeply embodied in judicial processes. The requirements like the court proceedings should be open and accessible to the public,[110] the principle of *audi alteram partem*, reasoned decisions and the appeal procedure were, until fairly recently, considered to be adequate measures of judicial accountability.[111] Besides, judges are traditionally held accountable to the constitution and law, the oath of office, judicial precedent and judicial ethics.[112] However, the growing demand for efficiency, economic rationality, responsiveness and accountability in the public sector and the growing autonomy of the judiciary as a self-governing branch in the latter half of the 20th century, have had implications for these traditional notions of judicial accountability.[113]

The emergence of 'managerialism' and 'new public management' has had a considerable influence on the conceptual core of public accountability, especially in the UK. A managerial approach to public services meant contraction in public spending, decentralisation and devolution of key functions; it also led to objective-driven administration and performance management.[114] The New Right Conservative governments under Margaret Thatcher and John Major (1979-1997) saw fit to address the challenges faced by public services by drawing upon the expertise of private businesses. This approach became popular as 'the New Public Management.'[115] 'New' Labour government (1997-2007) envisioned 'democratic socialism and liberalism' that involved administrative reforms that transcended cost-benefit (economic) analysis and proposed a 'holistic' approach that involved optimal use of resources,

[109] ID: 166110773.

[110] J. Spigclman, 'Seen to be done: The principle of open justice Part 1' (2000) 74 *Australian Law Journal* 290.

[111] See generally, Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1) *Legal Studies* 73.

[112] Penny J. White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' (2002) 29 *Fordham Urban Law Journal* 1053, 1061-62.

[113] See generally, Kaufman, I., Chilling Judicial Independence (1979) 88(4) *The Yale Law Journal* 681-716.

[114] See generally, Horton S., Farnham D., 'The Politics of Public Sector Change' in Horton S., Farnham D. (eds) *Public Management in Britain* (Palgrave, 1999) 3-25.

[115] Aucoin, Peter and Heintzmann, Ralph 'The Dialectics of Accountability for Performance in Public Management Reform' (2000) 66 *International Review of Administrative Sciences* 45-55.

a collaboration between departments, and streamlining public services. These market-minded and customer-oriented reforms have had notable implications on budget and resource allocation; bureaucracies were downsized; and greater emphasis on human resource management and accountability to the customer (citizens) have emerged as a legitimate concern of public services. These reforms did affect the judiciary but not as much as sectors like health, education, social services and policing.[116]

Consequently, 'judicial accountability', though a progeny of 'public accountability' has remained mostly unmoulded by reforms in the latter half of the twentieth century. Further, though *managerialism* and *new public management* reached developing countries like India, they failed to have a considerable impact on judicial accountability. Therefore, although the scope of judicial accountability has significantly widened in some jurisdictions in recent decades, judicial accountability as a concept and as a mechanism is still largely jurisdiction-specific and is at different stages of its conceptual evolution and practical application.[117] In India, the concept is widely used but under-theorised; accountability mechanisms in India are conspicuous usually by their absence and mostly by their inefficiency. Thus, the conceptual analysis below begins with a rudimentary understanding of 'accountability' before it briefly traverses through the conceptual nuances of 'judicial accountability'.

IV(1) Accountability: a conceptual overview

'Accountability' in common parlance lacks precise meaning, however, as a dynamic concept,[118] it is prone to overuse.[119] The ever-expanding nature of 'accountability' is its strength also a notable weakness.[120] Accountability in a wider sense is an essentially contested and contestable concept—there is no consensus on the standards of accountable behaviour, and they differ from role to role, time to time, place to place, and from speaker to

[116] Reg Butterfield and Christine Edwards, 'The New Public Management and the UK Police Service' (2004) 6(3) *Public Management Review* 395–415; Arnott, M.A, 'Restructuring the Governance of Schools: The impact of managerialism on schools in Scotland and England, in Arnott, M.A., Raab, C.D. (eds) *The Governance of Schooling: Comparative studies of devolved management* (Routledge 2000).

[117] For instance, in the United States where the judges are elected, they are also accountable to their constituents. Likewise, the practice of televised confirmation hearings in the USA and Canada is another jurisdiction-specific means of accountability that is not favoured in the UK and India.

[118] Melvin J. Dubnick, 'Seeking Salvation for Accountability' (Speech at the Annual Meeting of the American Political Science Association, Boston, August 29-September 1, 2002) <https://mjdubnick.dubnick.net/papersrw/2002/salv2002.pdf>

[119] Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33:5 *West European Politics* 946-967.

[120] Richard Mulgan, ''Accountability': An ever-expanding concept?' (2000) 78 (3) *Public Administration* 555-573.

speaker.[121] Broadly, it connotes the quality of being accountable; liability to give an account of, and answer for, discharge of duties or conduct; responsibility, and amenableness (to a person, for a thing).[122]

In public administration discourse, accountability is seen as a concept (virtue) and as a mechanism. In the former case, accountability is used primarily as a normative concept: a set of standards for the evaluation of the behaviour of public actors. As a mechanism, accountability is seen as an institutional relation or arrangement in which an actor can be held to account by a forum. Here, the locus of accountability studies is not on the behaviour of public agents, but on how these institutional arrangements operate.[123] Accountability as a virtue provides legitimacy to public officials and public organisations. As a mechanism, it is instrumental in enforcing those virtues through regulatory mechanisms. The combination of accountability as a virtue and as a mechanism embodies the foundation of accountability institutions, namely, courts, tribunals and ombudsman. Conversely, the accountability deficit manifests as 'inappropriate behaviour, or bad governance – unresponsive, opaque, irresponsible, ineffective, or even deviant.'[124]

IV(2) Judicial accountability: a conceptual overview

The nature and forms of accountability depend on the nature of the constitutional and legal framework, functions and responsibilities of public servants or institutions – they are also contingent on the political and institutional culture in a jurisdiction. This is where, judicial accountability in a jurisdiction, though it may emanate from the same theoretical background, differs from other types of accountabilities (namely, political, administrative, professional and social). For instance, in public administration discourse, accountability is understood as 'the combination of methods, procedures and forces determining which values are to be reflected in administrative decisions.'[125] This conception of accountability may be unproblematic in public administration, and, arguably, it is relevant to judicial administration to a great extent, but it is not entirely suitable for judicial administration. Whilst the judiciary interprets pre-

[121] Mark Bovens, 'New Forms of Accountability and EU-Governance' (2007) 5 *Comparative European Politics* 104–120.
[122] Oxford English Dictionary (OED 1989).
[123] Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33:5 *West European Politics* 946-967.
[124] Id.
[125] H.A. Simon et al., *Public Administration* (Routledge, 1991) 513.

existing constitutional principles and laws, it has the discretion to apply those principles and procedures based on the factual matrix presented – in other words, the authority to choose the 'value' that should be reflected in a judicial decision is inherent in the judicial authority; any prescription on that authority, other than the pre-existing principles of law, would be an infringement. In countries like India, where the doctrine of *ultra vires* enables judicial review of the laws made by Parliament,[126] the accountability framework cannot prescribe the 'values' – except those overarching values enshrined in the Constitution – to be reflected in judicial decisions.

However, this does not mean that accountability, as understood in public administration, is entirely irrelevant. Whilst adjudication is the primary function of the judiciary, like any other public institution, it has an administrative set-up, which provides ancillary services to the court users. In this perspective, apart from the purely adjudicatory functions of a judge (examination of witnesses, appreciation of evidence, application and interpretation of the law and making formal judgment), the rest of the functions of judges or court personnel could be categorised as 'administrative'. For instance, in India, judicial officers act as a manager of the court – they have the responsibility of maintaining judicial records and articles in their judicial custody.[127] Likewise, a principal judge in a court complex has various administrative functions ranging from maintaining court infrastructure and overseeing ancillary services to court users.[128] Thus, it could be argued that accountability as a concept and as a mechanism applicable to other departments of the government is equally relevant to the judiciary. Therefore, whilst the conceptualisation should underscore the salient features of judicial administration, it cannot entirely be oblivious to public accountability discourse.

IV(3) Conceptualising judicial accountability from a regulatory perspective

This Chapter argues that conceptualising judicial accountability into individual, internal and institutional would facilitate the identification of core components of judicial accountability more effectively than other approaches. This approach will be particularly helpful in designing a robust regulatory architecture to enforce judicial accountability.

[126] See e.g., *Mrs. Maneka Gandhi v Union of India*, AIR 1978 SC 597.

[127] There are court managers, but still the Principal Judges have numerous administrative functions.

[128] Justice P. Sathasivam, 'Effective District Administration and Court Management' (2013) <http://www.tnsja.tn.gov.in/article/Effectuve%20Dist%20Admn-PSJ.pdf>.

IV(3)(a) Individual judicial accountability

Judicial accountability at the individual level is a responsibility to comply with voluntary, conventional, professional, or legal obligations that are required or expected of judicial personnel. Judicial personnel may self-impose certain accountability practices to strengthen public confidence in the judicial office. For instance, if a chief judge adopts a policy to publish annual reports outlining the performance of his or her court, s/he is expected to carry out that voluntary obligation. Similarly, judicial personnel may encounter some conventional accountability measures. For example, they must practice a higher degree of social isolation compared to other public servants, to maintain the perception of impartiality. However, this conventional obligation does not proscribe a list of dos and don'ts to maintain adequate social isolation. It is intentionally left open to new interpretations because prescribing a specific set of behaviours to comply with this obligation is difficult, if not impossible. Therefore, the conduct of judicial personnel will be questioned if she or he takes part in any activity that could compromise the dignity or efficacy of their office or affect public confidence in the judicial system.[129] These conventional accountability demands complement professional (conduct codes) and legal obligations that are required of judicial personnel.

Individual judicial accountability measures encompass various aspects of judicial accountability. They include decisional, behavioural, and managerial accountability measures. These measures can also accommodate probity, process, content and performance accountability demands as long they are directed at individual judicial personnel.[130] It extends to extra-judicial conduct or the private lives of judicial personnel.[131] Unlike any other classification, from a regulatory perspective, individual judicial accountability offers a discernible accountability rationale. Some of such rationales that may underpin individual judicial accountability measures would be immunities, privileges, and a greater degree of decisional autonomy that should be strictly used by judicial personnel to serve the ends of justice.[132] This understanding establishes a direct correlation between individual judicial independence measures and individual accountability demands: individual judicial

[129] Consultative Council of European Judges, 'Opinion no. 3 of the Consultative Council of European Judges' (CCJE (2002) Op. N° 3) 7, para 39.
[130] Le Sueur A, "Developing Mechanisms for Judicial Accountability in the UK" (2004) 24 *Legal Studies* 73
[131] Gabriela Knaul, 'Report of the Special Rapporteur on the independence of judges and lawyers' (2014) UNGA Doc A/HRC/26/32, 10, para 58.
[132] *Hinds v The Queen*, [1977] AC 195, paras 210, 221-G.

independence is justified only to the extent that it reinforces impartiality, integrity, competence, efficiency, and public trust in judicial personnel. It evades an over-emphasis on judicial independence and diverts much-needed attention on other equally important values, for example, competence and efficiency.

Individual judicial accountability, if understood and applied correctly, helps design context-specific accountability frameworks: the nature of the judicial office, the work expected of a judge, and peculiar circumstances that call for accountability would be adequately weighed at the design stage. Moreover, since the emphasis is on the 'individual', there will be an adequate emphasis on rights and minimum safeguards (i.e., individual judicial independence measures) that the account-giver should have. Consequently, adequate emphasis on the individual 'account giver' (e.g., lower court judge) lead to limitations on the 'account holder' (e.g., disciplinary judges).

IV(3)(b) Internal judicial accountability

The judiciary as an administrative set-up is a cobweb of complex interactions of individuals, procedures, processes and practices. The outcome – i.e., dispute resolution through judgements – does not just happen;[133] it involves a wide range of infrastructure and resources. The institutional landscape of the judiciary is by design hierarchical, however, there are countless horizontal interactions among various duty-holders of the judicial system. This interaction exists in the form of cooperation and/or competition among the duty-holders who may have shared or competing interests. In the same manner, within the judiciary, there are vertical relationships. The vertical relationship exists at the micro-level (e.g., within a judge's administrative setup), meso-level (e.g., among judges working at the same level) and macro-level (e.g., across the judicial and administrative hierarchies).

From the regulatory standpoint, these micro, meso, and macro-level interactions are the most significant since they help admit, assess, process and decide conflicting interests of litigating parties. If a judicial system is to be compared to a factory, these interactions resemble an assembly line or a production unit of that factory. Thus, internal arrangements, practices, procedures, processes, and interactions are the key subject matter of judicial regulation.

[133] Andrew Le Sueur (2019) 209.

Therefore, internal judicial accountability – as a concept and as a mechanism – is the foci of judicial regulation. Precisely for this reason, internal judicial accountability must be treated as an independent aspect of judicial accountability, not merely as one of the aspects of institutional accountability. Prevailing jurisprudence, domestic and international, fail to see internal judicial accountability as a distinct area needing equal treatment compared to individual and institutional judicial accountability. Arguably, this underemphasis is one of the reasons why well-developed legal systems like the UK have inadequate measures of internal judicial independence and accountability.

Since the internal judicial arrangements have a bearing on the judicial process, and ultimately, on the final outcome of a *lis*, the operation of the internal arrangements should be consistent with overarching values namely, independence, impartiality, efficiency, competence and diligence. Thus, internal judicial accountability – as a concept and as a mechanism – aims to ensure that internal arrangements of the judiciary operate consistently with the overarching values of its judicial system: independence, impartiality, efficiency, competence and diligence. A robust internal judicial accountability framework provides for the accountability of key actors in the judiciary, be it senior judges or senior court officials. It offers robust complaints' redressal mechanisms on various aspects of judicial personnel – ranging from racism to lack of adequate staff; it provides for minimum safeguards, procedural and substantive, to every actor within the judiciary to rightfully defend oneself or present one's case.

The emergence of judicial self-regulation has strengthened the judiciary's competence to reengineer its internal arrangements. For instance, post-CRA, the LCJ (E&W), as head of the judiciary, can rearrange leadership roles; he can create new internal regulatory regimes, delegate some of his powers to other judges, and redefine rules concerning deployment, training and welfare. These reinvigorated competencies of the LCJ also mean the principal responsibility of judicial administration now lies with the judiciary itself. This means it is the principal duty of the judiciary, especially where it has the competencies to do so, to establish robust internal accountability mechanisms to enforce overarching judicial values in its day-to-day operation. However, as briefly analysed elsewhere in this Chapter, on several aspects of judicial administration, the judiciary in England and Wales has failed to put in place robust internal judicial accountability mechanisms. Whereas in India, there are not enough internal judicial accountability mechanisms, and the ones that exist are too weak to be effective.

Adequate emphasis on internal judicial accountability would not only help define the accountability rationale but would also help design regulatory mechanisms, processes, procedures and practices in line with the internal dynamics within the judiciary. A robust accountability architecture should take into the potential implications of internal judicial interactions on judicial personnel at the micro or meso level. For instance, in India, invariably High Court judges carry out performance appraisals of District judges; such High Court judges, by virtue of being a Guardian Judge or an Administrative Judge would have a critical role in judicial conduct regulation, transfer and promotion of such District judges. Similarly, the Guardian Judge has administrative oversight and superintendence over assigned District Courts. The implications of these internal regulatory or oversight arrangements on the administrative or judicial autonomy of a District Judge would be adequately weighed. Such an emphasis is only possible if we consider internal judicial interactions as part of the judicial independence and accountability paradigm. Categorising judicial accountability into three aspects, help adequately emphasize the need for securing individual and internal judicial independence and also appreciate internal judicial accountability demands.

IV(3)(c) Institutional judicial accountability

Institutional judicial accountability is a responsibility to comply with voluntary, conventional, professional, or legal obligations that are required or expected of the judiciary as a public institution. The judiciary, as an institution, must be open to external scrutiny, for example, by media,[134] civil society, academia, Parliament, and the bar. For this purpose, it should make available relevant information about the courts, judges, and the judiciary through its websites, periodical reports and account statements. Parliament (and provincial legislatures) should have access to relevant information concerning budget utilisation, annual expenditure statements, judicial workload, and funding allocation; in essence, the legislative body as an account holder should have access to all the information to satisfy itself whether the executive branch has made adequate resource allocation; and, to assess whether the judiciary has made optimal utilisation of the resources allocated to it. Though the principal responsibility of judicial administration lies with the judiciary and the executive branch, the legislative branch should be able to assess the performance of the other two branches in this

[134] Patrick O'Brien, '"Enemies of the People": Judges, the media, and the mythic Lord Chancellor' [2017] P.L. 135.

regard.[135] Likewise, as a public institution, the judiciary should ultimately be responsible to the public it serves, through public hearings, publication of decisions, and annual reports.[136]

Institutional accountability of the judiciary is a distinct and critical component of judicial accountability. The scope of institutional accountability is contingent on – the degree of administrative autonomy; the extent of infrastructural dependence of the judiciary on the government; and the judiciary's control over its institutional structure and arrangements (vertical, horizontal and internal).[137] The judiciary, especially the apex courts, is also subject to ideological accountability: it is a qualitative assessment of the judiciary's deference to constitutional values and legislative intent. The functional efficiency of the judiciary in terms of filing, pendency, backlog and disposal of cases; the use of public infrastructure, resources and funding are also the subject matters of institutional accountability. A clear understanding of judicial administration is essential to devise robust mechanisms to enforce judicial accountability.

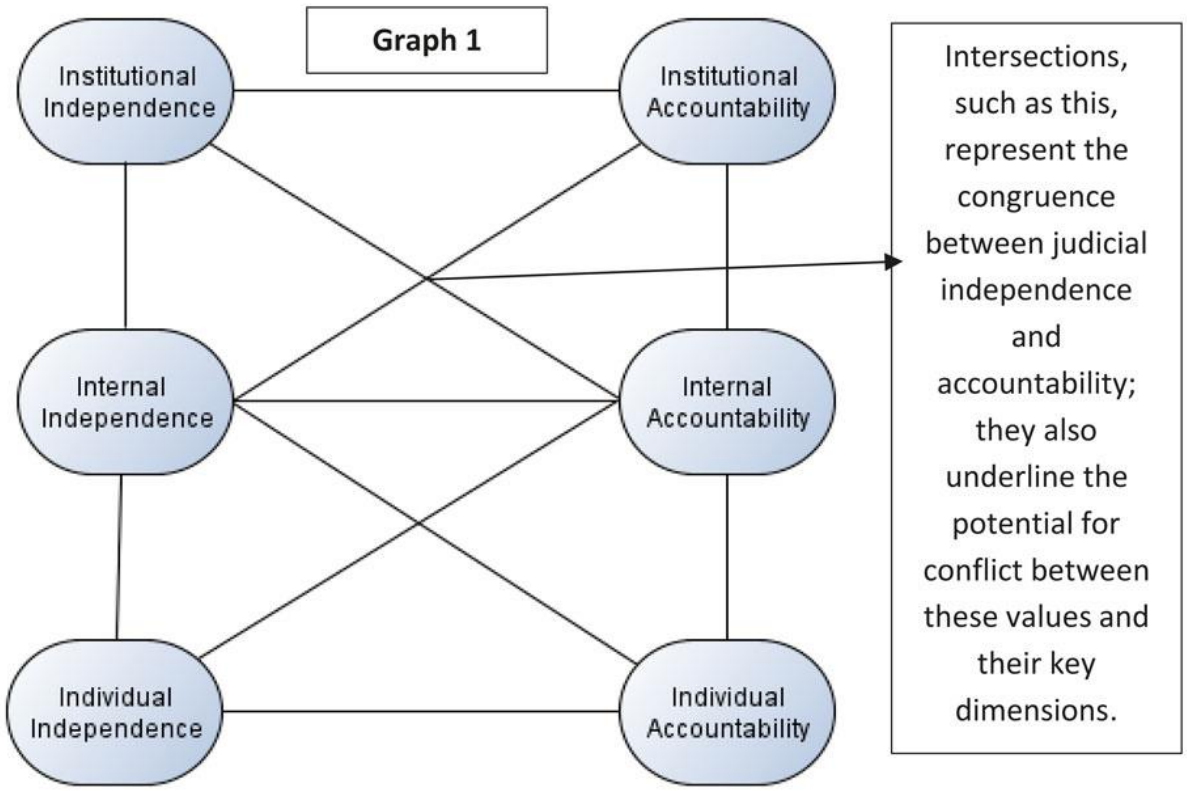
V. The congruence and potential conflicting dimensions of judicial independence and accountability

Judicial independence and accountability are contextually nuanced concepts. These concepts have changed and will continue to change over time. The interplay of these concepts is influenced by constitutional traditions, reforms, and evolving standards, which in turn are shaped by diverse circumstances and conditions. As this chapter briefly outlines, three key aspects of judicial independence and accountability vary from one another in a matter of degrees; they are not mutually exclusive binaries. These three aspects synchronously interact with each other, mirroring the functioning of a judge, court or judiciary, respectively. The bipartite graph (see Graph 1) attempts to depict bidirectional interactions between the two values and their key aspects. For this purpose, the key aspects of judicial independence and accountability are divided into three nodes [⬭] connected by lines (—), representing bidirectional interactions.

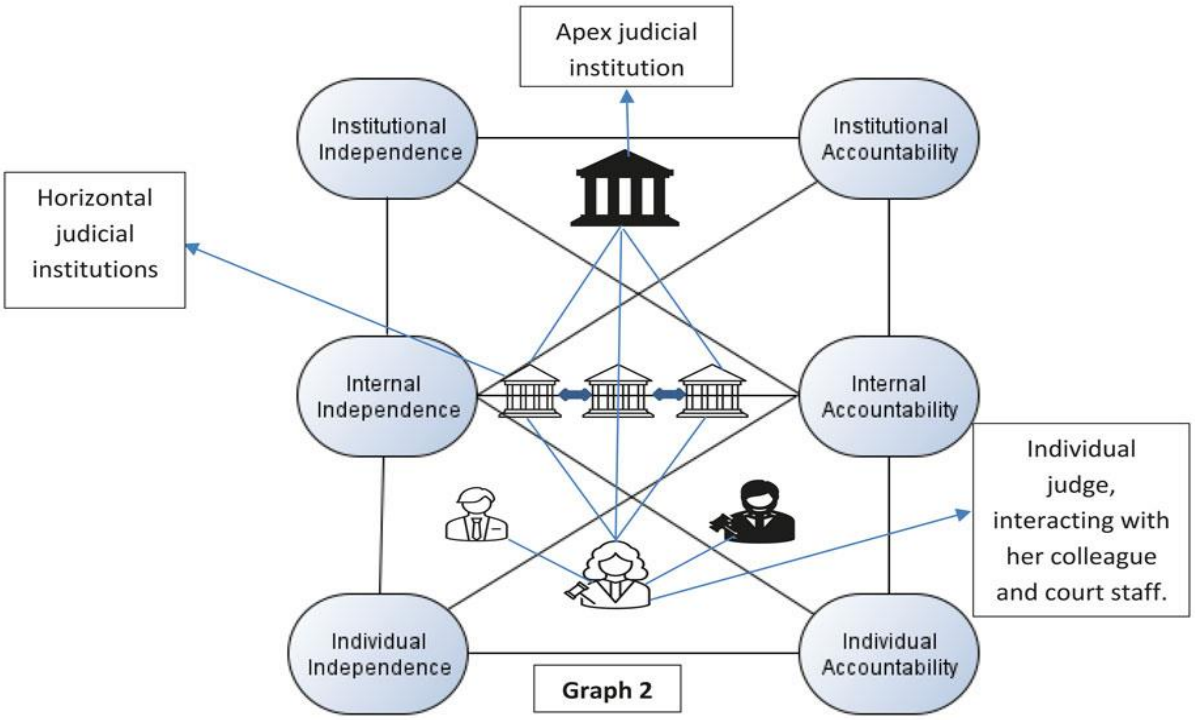
[135] Burbank, 'Judicial Independence, Judicial Accountability and Inter-branch Relations' (2007) *Faculty Scholarship at Penn Law* 909, 913.

[136] Gabriela Knaul, 'Report of the Special Rapporteur on the independence of judges and lawyers' (2014) UNGA Doc A/HRC/26/32, 10, para 55.

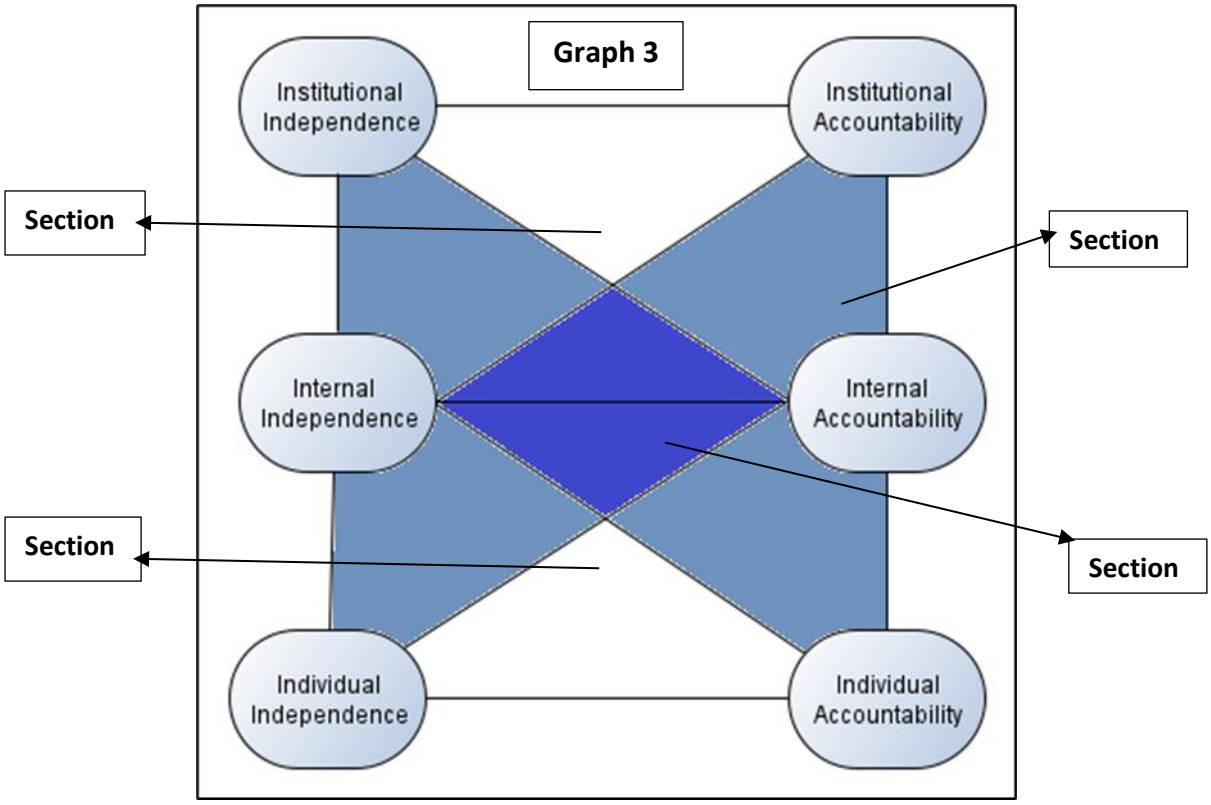
[137] For example, if the judiciary plays a dominant role in judicial appointments, there should be mechanisms to hold the judiciary accountability for any maladministration or irregularities.



Myriad vertical and horizontal interactions between individual judges, court staff and judicial institutions significantly widen the extent of congruence and the potential for conflict. These intra-judicial interactions are contingent on various aspects. For example, the hierarchy of courts and judges, types of jurisdictions and subject matter of judicial interactions will have a bearing on the overlap between the different aspects of judicial independence and accountability. Graph 2 below attempts to illustrate the complex interplay of judicial interactions vertically and horizontally among judicial personnel.



Compared to intra-branch interactions, the judiciary and judges' interactions with non-judicial actors are much more complex and dynamic. Therefore, the judicial independence measures and judicial accountability demands that regulate these interactions should sufficiently emphasise the potential areas of conflict. In a similar vein, there should be an adequate emphasis on rationalising the intersections between the key facets of independence and accountability with respect to interactions within the judiciary. Graph 3 illustrates the realm of judicial interactions related to internal independence and accountability. The pale-blue area [Section A] of the graph represents a broader horizon of internal judicial independence and accountability, while the dark-blue area [Section B] signifies the core of internal independence and accountability. Sections A and B together represent the breadth of judicial interactions that have a bearing on independence and accountability in relation to other dimensions. Sections C and D represent judicial interactions that exclusively concern institutional and individual independence and accountability measures.



As shown in Graph 3, substantial overlap exists among the three dimensions of judicial independence, and the same holds true for judicial accountability. Therefore, challenges that may arise in relation to judicial independence (or accountability) may concern more than one aspect of the respective value. For instance, a judicial misconduct complaint raises individual independence and accountability questions. However, if this complaint is not appropriately addressed by an investigation judge, it might translate into an issue of internal independence and accountability. Similarly, failures in enforcing standards of judicial conduct by regulatory regimes due to deficiencies in regulatory protocols give rise to concerns about institutional independence and accountability. Furthermore, matters such as judicial appointments, transfers, and the assignment of judicial work may raise questions that intersect various aspects of judicial independence and accountability. It is worth noting that such challenges may also encompass multiple values, including efficiency, accountability, independence, and transparency.

VI. The regulatory approach to judicial regulation: key challenges

(a) Autonomy and accountability

The proposed regulatory approach recommends holistic and flexible regulatory regimes to be administered, preferably by autonomous bodies. Effective judicial regulation would require the delegation of adequate autonomy and powers. Delegation of important policymaking and implementation powers to unelected (or non-representative) regulatory institutions would raise problems of accountability, de-politicization and legitimacy.[138] This challenge can be addressed by a rationalised delegation of autonomy and powers and by employing robust accountability structures,[139] proportional to the varying degrees of autonomy such regulatory regimes are conferred with.

(b) Cost of agency and agencification

Regulation through a specialised autonomous body entails additional costs.[140] It also involves the realignment of powers, modes of operation and institutional structure of not just the new regulatory agency but also of the judiciary and executive agencies hitherto responsible for judicial regulation.[141] A clear reallocation of remits and competencies is as important as the creation of an autonomous regulatory regime. If not designed and implemented properly, the regulatory framework would be counterproductive: it could create administrative burdens, impede judicial autonomy, and abet maladministration and corruption.[142]

Agencification – the delegation of regulatory responsibilities to specialised agencies – might also occur through the transformation of existing internal arrangements into regulatory agencies for specific regulatory purposes. For instance, the Registrar Vigilance (a senior district judge working as an administrative officer in the high court) facilitates judicial conduct regulation. Judicial complaints handling is one of the key responsibilities of the Registrar Vigilance, but it is not the only function that s/he does. Likewise, select district and high court

[138] Flinders, M., 'Distributed Public Governance in Britain' (2004) 82 *Public Administration* 883-909; Wittreck F, "German Judicial Self-Government — Institutions and Constraints" (2018) 19 *German Law Journal* 1931.

[139] Giandomenico Majone, 'The regulatory state and its legitimacy problems' (1999) 22(1) *West European Politics* 13-17; Marver Bernstein, Regulating Business by Independent Commissions (Princeton, 1955).

[140] Ibid, 6-9.

[141] Lurie, G., Reichman, A. and Sagy, Y., 'Agencification and the administration of courts in Israel' (2020) 14 *Regulation & Governance* 718-740.

[142] See generally, Kosař D, "Judicial Accountability and Judicial Councils," Perils of Judicial Self-Government in Transitional Societies (CUP 2016).

judges and chief justices of the high court play a critical role in judicial conduct regulation (see Chapter 5, Section I), along with their regular adjudicative and administrative duties. These in-house regulatory arrangements pose challenges of various kinds. Their informal, fragmented, *adhoc* and opaque functioning undermines elementary values (e.g., transparency, accountability and independence) that the regulatory approach seeks to uphold. However, these mechanisms are administered by the senior judges themselves. Therefore, the proposals to radically reengineer the regulatory landscape would meet staunch opposition from the judges themselves. The introduction of regulatory reforms should be predicated upon a comprehensive impact assessment underscoring the feasibility, stakeholder acceptance, need for capacity building, and the intensity of resistance and urgency of the proposed reform. Besides, the implementation process may still require negotiations, cooperation and steering.

(c) The dangers of regulatory capture

A critical challenge for the regulatory framework proposing the regulatory approach is to override the inappropriate influence of key stakeholders on the regulatory regimes. However, the judicial conduct regulation protocols of arm's length regimes (e.g., England and Wales, see Chapter 5, Section II) and of self-regulating bodies (e.g., India, see Chapter 5, Section I) are administered mostly by judges themselves. This functional dependency of regulatory regimes on the judiciary (senior judges) presents the potential for judicial capture of regulatory regimes. In other words, the threats of regulatory capture may arise also from within the judiciary,[143] a narrow group of judicial leaders who have key roles in judicial regulation may exert inappropriate influences, notwithstanding that the regulatory regimes are autonomous on paper. By stipulating checks against the capture of arm's length bodies structurally or functionally, the legal framework should guard the autonomy of the regulatory regimes.

(d) Regulatory discretion

As the *regulatory approach* presupposes, regulation must be flexible and contextual. Flexibility entails that the regulator will have a range of regulatory intervention tools to

[143] Kosar, *supra* (n 142), 130.

employ in addressing deviance or ensuring compliance.[144] The legal frameworks that establish regulatory regimes typically delegate norm-setting and enforcement power to the regimes.[145] This delegation of power gives regulatory bodies the discretion to select appropriate regulatory interventions (aka the enforcement pyramid[146]). However, this discretion must be exercised fairly and consistently.[147] Regulatory complexity or a layered approach to regulation must not lead to the indiscriminate use of regulatory tools. Regulatory choices should always be justified by clear and intelligible criteria, ensuring transparency and accountability.

(e) Potential for an overemphasis on judicial conduct regulation

The regulation of judicial conduct, particularly concerning the higher judiciary, has received considerable attention and sparked extensive debate.[148] However, there remains a noticeable dearth of emphasis on other critical aspects of judicial regulation, such as deployment, transfer, promotion, judicial training, case allocation, and retirement, when viewed from a regulatory standpoint. These issues are commonly perceived as internal to the judiciary and are often left to internal mechanisms for regulation.[149] These facets bear significance for internal judicial independence,[150] akin to judicial conduct regulation. Consequently, regulatory theory should endeavour to provide adequate attention to these less-debated dimensions of judicial regulation while avoiding an excessive focus on the significance of judicial conduct regulation. In other words, emphasis on judicial conduct regulation should not overshadow the significance of other dimensions of judicial regulation.

VII. Conclusion

The foundation of judicial regulation is embodied in the legal frameworks that establish and govern regulatory regimes. The legal frameworks should, as argued in this Chapter,

[144] See, for example, "Neil Cunningham, Enforcement and Compliance Strategies" in Robert Baldwin et al. (eds) *The Oxford Handbook of Regulation* (OUP 2010) 121-122.

[145] See generally, Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (OUP 1992) 159-161.

[146] Ayres and Braithwaite (OUP 1992) 158, 161-162.

[147] Graham Gee, 'Judicial conduct, complaints and discipline in England and Wales: assessing the new approach' in R Devlin and Sheila Wildeman (eds), *Disciplining Judges Contemporary Challenges and Controversies* (Edward Elgar 2021) 131-132.

[148] See, for example, Shubhankar Dam, 'Why is judicial corruption invisible?' (2022) 33(3) *Public Law Review* 200-225; 'Over 1,600 complaints against judiciary: Rijiju' *the Hindu* (02 April 2022); V. Venkatesan, 'The Nine Former Judges Who Spoke of Corruption in the Higher Judiciary', *Bar and Bench* (22 August 2020).

[149] See, for example, Montreal Declaration on the Independence of Justice 1983, para 2.16.

[150] Santiago Basabe-Serrano, 'Some determinants of internal judicial independence: A comparative study of the courts in Chile, Peru and Ecuador' (2014) 42 *Internal Journal of Law, Crime and Justice* 130-145.

adequately emphasise the key aspects of values that are central to judicial administration. The asymmetrical conceptual arrangement would inhibit the efficacy of the regulatory regimes. As seen in this Chapter, the neglect of internal judicial independence has negative implications for the functional autonomy of judicial personnel in India and the UK. Further, it is a prerequisite that the regulatory mechanisms are themselves independent and accountable.[151] However, there are no robust internal mechanisms in both jurisdictions to abate the abuse of oversight powers by senior judges; this is a significant accountability deficit that has serious implications for both individual and internal judicial independence.

[151] Bangalore Principles of Judicial Conduct 2002.

Chapter 3

Judicial conduct regulation: key constitutional and legal reforms in the United Kingdom: a critical review

I. Introduction

This Chapter aims to further substantiate the arguments that in the UK (a) there is an inadequate emphasis on individual and internal judicial independence, and (b) there are notable gaps in judicial accountability frameworks.[1] For this purpose, the Chapter critically analyses the key constitutional reforms since 1997 concerning judicial conduct regulation. To situate analyses in a wider constitutional context, the recent reforms in judicial administration, appointments, and regulation across the UK have been audited, albeit briefly.

The emphasis of the Chapter is on relevant constitutional reforms since 1997 in the UK for three key reasons. First, reforms have revisited the separation of powers, leading to increased autonomy of the judicial institutions. Second, the reforms also aimed to strengthen judicial independence, by transferring the administrative responsibilities of the Lord Chancellor (and/or ministers in some cases) to the judicial leadership or arm's-length bodies. As a result, the reforms have redrawn the institutional landscape of judicial institutions and the relevant executive departments/offices; the reforms have also created autonomous bodies to facilitate judicial regulation. Third, reforms (especially devolution) have widened the legislative competencies of devolved legislatures, thereby facilitating plural regulatory perspectives and institutional dynamics to emerge. These reforms have implications for the administration of courts, interbranch relationships, and intra-branch judicial regulation; therefore, to assess the efficacy of these reforms, their implications on the core aspects of judicial independence and accountability must be evaluated.

Against this backdrop, Part II of the Chapter summarises key constitutional reforms since 1997 applicable across the UK; reforms operating in the devolved territories are discussed separately. Part III critically assesses the implications of reforms in England and Wales. This

[1] The Chapter covers all three jurisdictions of the UK, whereas Chapter 2 had to selectively deal with some aspects of judicial independence and accountability for the sake of brevity. Chapters 5 and 7 further analyse some of the issues addressed in this Chapter.

part highlights the Lord Chief Justice's (and, through him, the senior judges') expanded administrative and disciplinary powers as well as the Lord Chancellor's constrained but crucial role (LC) in judicial regulation. The adequacy of judicial accountability measures as prescribed in the CRA, along with the voluntary accountability measures developed by the judiciary, is also critically presented in this part. Part IV briefly discusses reforms concerning the Supreme Court of the United Kingdom (UKSC). Part V focuses on devolved territories of the UK, namely Scotland and Northern Ireland (NI). With respect to NI and Scotland, the judicial appointment systems are examined to highlight the dominant role of the judiciary;[2] this part concludes that the dominant role of the judiciary in judicial appointments and discipline would undermine public trust in the judiciary. This part also sheds light on the lack of effective participation of the NI judiciary in the administration of courts and the exclusive control of the Scottish judiciary on the court administration. Part VI concludes the Chapter.

II. Constitutional Reforms since 1997 in the UK: a summary

The decade between 1997 and 2007 saw major constitutional reforms in the UK. Vernon Bogdanor rightly characterised the years since 1997 as a veritable era of constitutional reform.[3] The reforms were truly substantial in scale – they, *inter alia*, redrew the relationship between the judiciary, government, and Parliament;[4] provided for referendums on and subsequently delivered devolution to Scotland, Northern Ireland, and Wales. Reforms instituted the Human Rights Act 1998; (partially) reformed the House of Lords; led to the enactment of the Freedom of Information Act 2000; abridged Lord Chancellor's powers to strengthen judicial independence and separation of powers.[5] The scope of this project does not allow for a full-scale evaluation of all these reforms. Instead, this Chapter examines the reforms that redefined the separation of powers, impacted judicial independence and judicial accountability, and provided for judicial conduct regimes. Therefore, the following section summarises some of the significant and relevant reforms since 1997. In the subsequent sections, the reforms concerning each jurisdiction of the UK are critically examined.

[2] The judicial appointments system of England and Wales is compared and contrasted with India's in Chapter 4.
[3] Vernon Bogdanor, 'Our new constitution' (2004) 120(Apr) *Law Quarterly Review* 243.
[4] S. Prince, 'Law and politics: upsetting the judicial apple-cart' (2004) 57 *Parliamentary Affairs* 288, 293.
[5] *Supra* (n 3) 242.

The First Stage: 1997-2003

Some of the notable reforms of this period include the enactment of the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights into UK domestic law. HRA gave domestic effects to the Convention rights and transformed the relationship between the government, parliament, and the judiciary. The HRA obliged the courts *to take into account* the jurisprudence emanating from relevant ECHR institutions.[6] The Act by requiring the courts to read and give effect to primary and secondary legislation so far as possible in a way that is compatible with the Convention rights extended the role of the judiciary.[7] The power of courts to make a declaration of incompatibility of primary legislation,[8] coupled with the overarching duty of public authorities to act in a way that is compatible with a Convention right,[9] further expanded the judicial review in the UK. Furthermore, article 6 of the ECHR guarantees the right to a fair and public hearing by an independent and impartial tribunal. The interpretation of EtCHR of article 6 emphasised the need for judges not only to be independent but also to be seen as such.[10] Therefore, the institutional overlap between the judiciary and the House of Lords was considered incompatible with Article 6; for the same reason, the Office of Lord Chancellor, which was already argued to be 'the living refutation of the doctrine of separation of powers in England',[11] had to be revisited. Thus, the HRA exerted considerable pressure to redraw the relationship between the judiciary and the other branches; this was later realised through the CRA 2005.[12]

The Second Stage: 2003-2007

In June 2003, the government unexpectedly[13] announced that the office of Lord Chancellor would be abolished and a new arm's length body – the Judicial Appointments Commission,

[6] HRA, s. 2.
[7] HRA, s. 3.
[8] HRA, s. 4.
[9] HRA, s. 6.
[10] See e.g., *Procola v Luxembourg*, Application no. 14570/89, 1995, para 45. *McGonnell v United Kingdom*, Application no. 28488/95, 2000, paras 46 and 47; *Findlay v The United Kingdom*, 110/1995/616/706, para 76; *Pullar v United Kingdom*, 20/1995/526/612, paras 30-34.
[11] TC Hartley and JAG Griffith, *Government and Law* (2nd eds) (Weidenfeld & Nicolson, 1981) 179.
[12] Masterman, & Murray, *Constitutional and Administrative Law* (3rd eds) (CUP, 2022) 418-422.
[13] In the words of Lord Hailsham, this abrupt change was akin to 'acquiring [our] institutions by chance [in this case over some 1,000 years] and shedding them in a fit of absentmindedness', see Jack Beatson, 'Reforming an unwritten constitution' (2010) *Law Quarterly Review* 55.

would be established. The reform also proposed the establishment of a new Supreme Court.[14] In January 2004, the Government announced the outcome of negotiations (the Concordat)[15] between the Lord Chancellor and the Lord Chief Justice of England and Wales. Although the Concordat was negotiated and drafted on the assumption that the Minister responsible for judiciary-related matters would be a Secretary of State (who would be a non-lawyer and a Member of the House of Commons), its principles are equally applicable to the continued existence of the office of Lord Chancellor, albeit in a modified form.[16] The Concordat aimed to settle some of the issues that were not addressed in the government's consultation papers.[17] Many of the principles set out in the Concordat are reflected in the CRA.

Through another significant constitutional reform, Tony Blair's government replaced the Department for Constitutional Affairs (DCA) with the Ministry of Justice (MoJ) in May 2007.[18] The rearrangement limited the Home Office's responsibilities to counterterrorism, police, asylum, and immigration.[19] The MoJ now has the responsibility, *inter alia*, for constitutional matters, civil and administrative justice, the courts, legal aid, and criminal justice policy.

The reforms briefly noted above aimed to 'put the relationship between the executive, legislature and judiciary on a modern footing, respecting the separation of powers between the three'.[20] They also intended to increase accountability, transparency, and public confidence in the constitutional organs/institutions of the UK. However, as Masterman rightly points out, the key motivation for reform proposals was to enhance judicial independence.[21] Therefore, reforms had to reset the separation of powers to improve the structural and visual aspects of judicial independence. As a result, the Lord Chancellor (LC) has to give away some of his/her powers and share some critical roles with the Lord Chief Justice (LCJ). It was also essential to detach the Appellate Committee of the House of Lords from the House of Lords.

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[14] Masterman R., *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2010) 219.

[15] The Concordat, in essence, is a set of principles for allocating responsibilities between the Lord Chief Justice and the Lord Chancellor with respect to wide-ranging judiciary-related matters.

[16] The Lord Chancellor's Judiciary-Related Functions: Proposals 2004 (the Concordat). <http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/lcoffice/judiciary.htm>.

[17] Department of Constitutional Affairs (DCA), *A New Way of Appointing Judges* (CP 10/03, July 2003); DCA, A Supreme Court for the United Kingdom (CP 11/03, July 2003); DCA, *Reforming the Office of Lord Chancellor* (CP 13/03, September 2003).

[18] Since 2007, various reforms concerning judicial conduct regimes have come up, these reforms will form part of the analyses in the succeeding Chapters.

[19] Constitutional Affairs Committee, *The Creation of the Ministry of Justice* (HC 466, 2006-07) 3.

[20] The Lord Chancellor's Judiciary-Related Functions: Proposals (the Concordat) 2004.

[21] *Supra* (n 14).

In light of the summary of reforms presented in the preceding paragraphs, some of the notable implications of the scheme of separation of powers and judicial independence in England and Wales are briefly discussed below.

III. England and Wales

1. Change in leadership: the new role of the Lord Chief Justice

The CRA severed the LC's role as the head of the judiciary in England and Wales. The LCJ has assumed the title of 'President of the Courts of England and Wales'.[22] The welfare, training, and guidance of judicial officeholders are now the responsibility of the LCJ.[23] The key powers with respect to the deployment of judicial personnel and resources have been transferred to the LCJ.[24] The LCJ also appoints the Heads and the Deputy Heads of Criminal and Family Justice Divisions.[25] The Senior President of Tribunals and the LCJ now confirm the appointment of around 95% of judges in England and Wales.[26] The CRA also empowers the LCJ to make representations on important matters concerning the judiciary to Parliament and to Ministers where necessary.[27] The authority to make a representation was termed a 'nuclear option',[28] which was meant to be used when the challenges facing the judiciary become unsustainable.[29] In summary, the LCJ has the necessary powers to create internal governance structures and leadership roles to lay out and implement policies for the effective administration of courts and the regulation of judicial personnel.[30] With the help of the Judicial Executive Board, the Judges' Council, and numerous judges with leadership roles, the LCJ carries out his/her statutory responsibilities.[31] The plenary obligations and powers of the LCJ make him/her a locus around which the administrative structures and the regulatory

[22] CRA, s. 7(1).
[23] CRA, s. 7(2).
[24] CRA, s. 7.
[25] CRA, ss. 8, 9, 85, 86 and 87.
[26] Graham Gee, 'Rethinking the Lord Chanecllor's role in judicial appointments' (2017) 20(1) *Legal Ethics* 9; The Crime and Courts Act 2013, Pt 4, Sch 13.
[27] CRA, s. 5.
[28] Now, it is a routine accountability exercise as the LCJs periodically submit reports to Parliament under Section 5 of the CRA. See Gee et. al., *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 100-101.
[29] House of Lords Select Committee Report on the Constitution, *Relations between the executive, the judiciary and Parliament* (HL, 2006–07) 25.
[30] Graham Gee et al., (CUP, 2015) 130.
[31] Justice Thomas, 'Judicial independence in a changing constitutional landscape' (Speech at the Commonwealth Magistrates' and Judges' Association, 15 September 2015) 5.

regimes have been built.[32] Therefore, the reforms further strengthen the role of the Lord Chief Justice of England and Wales; the same could be said more emphatically about the Lord President of Scotland and the Lord Chief Justice of Northern Ireland.

The role of the LCJ in the regulation of judicial conduct is of particular importance to this project. The LCJ can regulate judicial conduct by making appropriate regulations and rules that provide procedures with respect to '(a) investigation and determination of allegations of any person of misconduct by holders of judicial office holders; (b) reviews and investigations (including the filing of applications or references).'[33] The LCJ, by making rules, can regulate when, how, and by whom a judicial complaint should be investigated. The procedures and practices of the Judicial Conduct Investigations Office are also described by the LCJ.[34] With the agreement of the Lord Chancellor, the LCJ can 'give a judicial officeholder formal advice, or a formal warning or reprimand, for disciplinary purposes.'[35] There are no restrictions on what 'he may do informally or for other purposes' or where any advice or warning is not addressed to a particular officeholder.'[36]

Though the LCJ has to exercise most of his/her powers with the agreement of the Lord Chancellor, in light of the LCJ's numerous responsibilities, he/she would delegate some or all of the delegable disciplinary responsibilities to various senior judges.[37] In relation to magistrates and tribunal members, the LCJ and the Lord Chancellor may delegate the functions of suspending, reprimanding, warning, or advising to a nominated judge or the Tribunal President as appropriate.[38] This means that various senior judges now exercise disciplinary powers on behalf of the LCJ. Therefore, as argued in Chapter 2, the implications of plenary disciplinary powers of the LCJ (or on his behalf, by other judges) on individual and internal judicial independence must be critically examined. Chapters 5 and 7 critically analyse various aspects of judicial conduct regulation. Here in this Chapter, to highlight that disciplinary powers in England and Wales are not sufficiently circumscribed, the power of suspension of the LCJ and the LC is critically analysed below.

[32] Graham Gee et al., (2015) 138-147.
[33] CRA, ss. 115, 116 and 117.
[34] CRA, ss. 115, 116, 117, 120 and 121; see also Judicial Discipline (Prescribed Procedures) Regulations 2014.
[35] CRA, s. 108 (3).
[36] ibid.
[37] The LCJ's powers/responsibilities under ss. 108(3) to (7), 111(2), 112 and 116(3)(b) may be delegated to other judicial officeholders, see CRA, s. 119.
[38] The Concordat, para 77.

The Power of Suspension

Under sections 108 (4) to (7), the LCJ may (with the concurrence of the Lord Chancellor), suspend a judicial officeholder, including a senior judge, for *any period* broadly on any of the following grounds:

(a) If that judicial officeholder is convicted of an offence or misconduct.
(b) If that judicial officeholder is facing a criminal or disciplinary investigation.
(c) If the judicial officeholder has been convicted of a criminal offence and it has been determined under prescribed procedures that the judicial officeholder should not be removed from office, but it appears to the LCJ with the agreement of the LC that the suspension is necessary for maintaining confidence in the judiciary, the LCJ may suspend that judicial officeholder.
(d) The LCJ may suspend a senior judge for any period during which the judge is subject to proceedings for an Address.
(e) The LCJ may also suspend a judicial officeholder who is subject to prescribed [disciplinary] procedures.

The judicial officeholders facing suspension have formal and procedural safeguards. The LCJ must notify the officeholder of his decision of suspension and the reasons for it.[39] The LCJ should also notify the officer when the suspension would end and what factors will be taken into account to revoke the suspension.[40] The LCJ should invite the officer to make representations.[41] Furthermore, according to Regulation 17 (1), if a person or body conducting the investigation considers that the judicial officeholder in question should be suspended, that person or body should submit a report to that effect to the LCJ and the LC. These formal and procedural safeguards are available only when a judicial officeholder is facing a criminal or disciplinary proceeding, or if a senior judge is subject to proceedings for an Address.[42] However, in the case of category (c) above, that is, in relation to a judicial officer convicted of an offence, even when a decision has been made not to remove the judicial officeholder in question if the LCJ and the LC think 'the suspension is necessary for

[39] The Judicial Discipline (Prescribed Procedures) Regulations 2014, Regulation 17(2)(a).
[40] ibid Regulation 17(2)(b).
[41] ibid Regulation 17(2)(c).
[42] ibid Regulation 17(1) and (2).

maintaining confidence in the judiciary,' [43] they can suspend the judge without complying with the safeguards prescribed in Regulation 17. The exception also applies to senior judges since, for disciplinary purposes, the 'judicial office' means (a) office as a senior judge, or (b) an office listed on Schedule 14.[44] In other words, the LCJ and the LC can suspend a senior judge, even when the disciplinary authority has determined that the judge should not be removed.[45] This means that the LCJ (with the concurrence of the LC) can use suspension as a punitive or disciplinary measure, including against the senior judges. The LCJ can employ suspension as a holding operation [i.e., precautionary suspension] or as a punitive measure.[46]

The Review Panel (2022) has proposed that the suspension should be used as a punitive measure.[47] If the recommendations of the Panel are given effect, the LCJ and LC can employ suspension as a sanction for misconduct that would effectively sit between reprimand (the second most serious sanction currently available) and the ultimate sanction of removal from office.[48] Although the proposal attempts to circumscribe the suspension power by prescribing that it should be used 'only in the most serious cases which fall just short of warranting removal from office',[49] in effect, it confers almost unfettered discretion on the LCJ (or the relevant senior judge) and the LC to suspend a judicial officeholder when in their assessment the complaint is sufficiently serious. Furthermore, the duration of suspension is also left to the discretion of the LCJ and LC. In addition, as per the latest proposal, a judicial officeholder (including a fee-paid judge) would not receive payment during his/her suspension.[50] Although the judicial officeholders may, post facto, make representation to the LCJ and LC with reference to the duration of the suspension and the financial hardship that it may cause, there are no adequate mitigating measures that could prevent the abuse of suspension power.

Arguably, there is nothing wrong with employing suspension as a punitive measure when it is specifically authorised by law.[51] However, with respect to the High Court and the Court of Appeal judges ('senior judges'), it raises a pertinent question. To secure and protect the

[43] CRA, s. 108(4) and (5).
[44] CRA, s. 109(4).
[45] CRA, s. 108(5)(b).
[46] *Lewis v Heffer*, [1978] 3 All E.R. 354; *Rees v Crane,* Privy Council (Trinidad and Tobago), [1994] 2 W.L.R. 476
[47] Judicial Discipline: Response to Consultation (2022) 39, 41.
[48] ibid 41.
[49] Judicial Discipline: Response to Consultation (2022) 41.
[50] ibid 42.
[51] Id.

independence of the higher judiciary, the Act of Settlement 1701 provides a special procedure for the removal of senior judges.[52] Therefore, would it be appropriate if the LCJ and the LCJ could suspend 'senior judges'[53] as a punitive measure without any input from a disciplinary tribunal or Parliament? The power of suspension is not adequately circumscribed even with respect to senior judges. The CRA does not maintain a distinction between senior judges and the other judges; this arguably goes against long-standing constitutional protection for judicial independence.[54] Furthermore, although the CRA, by sharing the power of suspension between the LCJ and the LC, attempts to limit the role of the executive in judicial conduct regulation, it has failed to provide an accountability framework to address the misuse (or the perception of it) of the power of suspension by the LCJ (or by nominated judges) and the LC. In other words, the Act has delegated unfettered discretionary power to the LCJ and the LC; for example, there is no adequate guidance on when it would be appropriate for the LCJ to determine that 'the suspension is necessary for maintaining confidence in the judiciary', except for the two preconditions prescribed by Section 108(5).

The power of suspension is not sufficiently circumscribed. The infamous episode of Justice Peter Smith and the mishandling of the complaint against Judge Herbert Peter[55] (further discussed in Chapter 7) demonstrate that the broad discretion power of the LCJ, coupled with the mechanical delegation of disciplinary powers in favour of senior judges, is leading to inconsistent and unfair application of suspension as a disciplinary measure. The House of Lords Committee on the Constitutional Reform Bill had rightly cautioned that 'in one view [the suspension power] undermines the protection conferred by the Act of Settlement… [Lord Woolf also noted that] the powers of suspension should be more limited than those contained in the bill as introduced.'[56] However, contrary to the recommendation of the Committee, the latest proposal for the suspension power of the Review Panel expands the LCJ and the LC without contemplating adequate safeguards to mitigate the abuse of the suspension power.

[52] Under the Act of Settlement 1701, judges of the superior courts—which today are the High Court and Court of Appeal—may be removed from office only following an address of both Houses of Parliament to Her Majesty the Queen.
[53] For definition of a 'senior judge' see, CRA, s. 109(5).
[54] Senior Courts Act 1981, s. 11(3).
[55] In 2017, a relevant senior judge, acting on behalf of the LCJ, had wrongfully suspended Judge Peter Herbert. Subsequently, the JCIO had to apologies for unfairly suspending the judge, see Chapter 7 for further discussion.
[56] Disciplinary Panel in the case Judge Peter Herbert OBE: Recommendations to the Lord Chief Justice, 92-93.

2. The Office of Lord Chancellor

As Robert Stevens argued, the Lord Chancellor's Office was 'perhaps the most fascinating of all departments'[57] in the English legal system.[58] Before the CRA, the LC was a key member of the legislature, the executive, and the judiciary.[59] This meant that the LC's roles in politics, law-making, and adjudication were not delineated from a separation of powers point of view.[60] Traditionally, this fusion of powers was not particularly problematic, as the UK had a 'mixed government' model where political experience and institutional pragmatism were preferred over strict separation of powers.[61] As already noted in this Chapter, the CRA shelved some of the notable powers[62] of the Lord Chancellor to establish a partnership between the LCJ and the LC. This proposed change, as Masterman[63] and others note, was due to external pressures emanating from the ECHR, in particular, Article 6(1).[64] However, as Robert Stevens explains, there were more tenuous political reasons to weaken (more appropriately, to get rid of the then LC, Lord Irvine).[65]

As informed commentators note, Lord Irvine was opposed to judicial reforms mulled by the PM, Tony Blair, since 2001.[66] Irvine was also opposed to the creation of the UKSC, JAC, the abolition of the Office of Lord Chancellor and criminal justice reform.[67] Lord Irvine, as the LC, was unwilling to 'act as the advocate of change' and there was 'no co-operation from him' on the proposed reform.[68] However, Tony Blair remained committed to bringing 'some modernity into the very old-fashioned way the criminal justice system worked';[69] although, for the PM, it meant losing Lord Irvine, who was his 'idol and mentor'.[70] Tony Blair ultimately

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[57] Robert Stevens, 'The Independence of the Judiciary: The View from the Lord Chancellor's Office' (1988) 8(2) *Oxford Journal of Legal Studies* 223.

[58] Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart, 2005) 167.

[59] Robert Stevens, *supra* (n 55) 222-248.

[60] D. Woodhouse, *The Office of Lord Chancellor* (Hart, 2001) 12.

[61] Masterman, R.M.W. and Murkens, J.K. 'Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court' [2013] (4) P.L. 800-820.

[62] Stevens (n 58) 165-168.

[63] Masterman (n 14) 212-15.

[64] *McGonnell v U.K.*, [2000] European Court of Human Rights 28488/95.

[65] Stevens (n 58) 154-157.

[66] Graham Gee et. al., The Politics of Judicial Independence in the UK's Changing Constitution (CUP 2015) 37; See also HL Constitution Committee, 'Memorandum by Lord Irvine of Lairg' (HL 30 2009) <https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/30/09070105.htm>

[67] Gee, *ibid*; Robert Stevens, 'Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World' (2006) 24(1) *Legal Studies* 22.

[68] HL Constitution Committee, 'Memorandum by Lord Irvine of Lairg' (HL 30 2009) <https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/30/09070105.htm>

[69] Tony Blair, *A Journey: My Political Life* (KNOPF 2010) 578.

[70] Id.

carried through a rather 'bumpy and chaotic' constitutional reform to improve the criminal justice system for the benefit of 'normal folk'.[71] The constitutional reforms in relation to the Office of Lord Chancellor were indeed driven by a multitude of political and legal rationales. These reforms have significantly transformed the landscape of judicial governance and justice administration in various ways. However, the ensuing discussion, constrained by the scope of the thesis, primarily centres on judicial regulation, albeit briefly.

2.1 The Lord Chancellor and Secretary of State for Justice: the new *avatar*

Notwithstanding the considerable reallocation of responsibilities and transfer of powers, the LC has some significant responsibilities with respect to judicial administration and judicial independence.[72] The LC remains a conduit for conveying the concerns and demands of the judiciary.[73] The LC remain a key channel of judicial accountability and a key guardian of judicial independence. At the general level, Section 3 CRA requires the LC and other Ministers of the Crown to uphold the continued independence of the judiciary.[74] The Act does not define or outline judicial independence, nor does it define what constitutes a threat to judicial independence,[75] except to state that the LC and ministers should not seek to influence particular judicial decisions through any special access to the judiciary.[76] Section 3(6) CRA does indicate that the LC has particular obligations in relation to judicial independence:

> The LC must have regard to -
> '(a) the need to defend that independence;
> (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
> (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.'

Under clause (3) of the section, the LC and others (including ministers) are required to *uphold* judicial independence; whereas clause (6) requires the Lord Chancellor to *have regard* for the

[71] Id.
[72] Graham Gee, 'What are Lord Chancellors for? [2014] P.L. 11-27.
[73] House of Lords Constitution Committee, *On the of the Lord Chancellor* (HL, 2014) para 30.
[74] CRA, s 3(1).
[75] Diana Woodhouse (n 60); see also, Robert Stevens (n 58) 166-167.
[76] CRA, s 3(5).

need to *defend* judicial independence. Essentially, the provision is declaratory, but it reiterates what was seen prior to the CRA to be a cardinal (customary) obligation of the LC. However, the lack of an enforcement framework significantly undercuts the normativity of these provisions. The statutory duty is further strengthened by the language of the oath under Section 17 of the CRA. The LC must swear that '...in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary, and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible'.

The CRA places the duty to defend judicial independence on a statutory footing, but the scope of this duty is unclear. There are two opposing views on the scope of the LC's duty. As Gee notes, there is a narrow 'departmental' perspective, which suggests that the duty to defend judicial independence is coterminous with the LC departmental responsibilities.[77] By fulfilling these departmental responsibilities, such as allocating adequate resources to the judiciary, arm's length bodies, and Her Majesty's Courts and Tribunals Service (HMCTS), and by exercising effective oversight over bodies like the Judicial Conduct Investigations Office (JCIO), Judicial Appointments Commission (JAC), and Legal Services Board (LSB), the LC can fulfil his/her statutory duty of defending judicial independence.[78]

There is a broad (cross-governmental[79]) view that understands the LC's duty to extend beyond his departmental responsibilities. This view sees the LC's duty to defend judicial independence as plenary: the LC is expected to intervene where the government's policy or action could potentially undermine judicial independence. Potential threats to independence may relate to the exclusion of judicial review, judicial appointments, damaging accountability demands, personal attacks against judges, inflexible working conditions, and salary and pension cuts. The LC is also expected to defend the judiciary when members of the executive branch seek to gain political advantage by inaccurately presenting judicial decisions to the public. This broader perspective envisions the LC as an intervenor with the responsibility to provide guidance, clarification, warning, and condemnation when necessary. The LC's role

[77] Oral evidence taken by the HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023) (March 2022) <https://committees.parliament.uk/writtenevidence/106902/pdf/> (Professor Graham Gee)
[78] Id.
[79] *Supra* (n 77).

encompasses addressing actions and policies of colleagues, the media, and other non-judicial actors that undermine the rule of law and, more specifically, judicial independence.

The narrow view is buttressed well by 'the general thrust of the reforms' since 2005.[80] Clearly, the CRA intended to downgrade the LC's office into a conventional ministerial office.[81] As emphasised by Gee, developments since 2005 underscore that the LC's office is an ordinary ministerial position. Even in practice, the office has been treated as any other ministerial position. The tenure of the LC's since 2003 has shrunk significantly, averaging 649 days (21 months). For the LCs who served after 2012, the tenure has been 1.4 years;[82] whereas the LC's between 1945 and 2003 had 5 ¼ years of tenure.[83] Further, the office holder is no longer required to be a peer and a lawyer, a junior politician (MP) 'qualified by experience'[84] could be the LC now; such a mid-level politician, hoping to rise through the ranks, has to manoeuvre through partisan politics in the House of Commons. The changes in law and practice show that post-CRA, the office has been perceived differently by politicians, judges and scholars alike.[85] Some argue that these changes explain why, in recent years, the Lord Chancellors have been reluctant defenders of judicial independence.[86] In this milieu, the narrow view is, in many ways a good reflection of the status quo.

However, this thesis favours a broad perspective for five reasons.[87] First, adopting a narrow perspective would lead to a regulatory void.[88] Even if we acknowledge that the office of the LC now has a conventional ministerial portfolio and it is unrealistic to expect LCs to be as effective as their predecessors, it does not negate the necessity of defending judicial independence. When judicial independence is threatened by a non-judicial actor, it becomes crucial that someone who is not from the judicial branch voice caution. Such intervention is

[80] Oral evidence taken by the HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023) (March 2022) <https://committees.parliament.uk/writtenevidence/106902/pdf/> (Professor Graham Gee)

[81] Id.

[82] Oral evidence taken by the HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023) (18 March 2022) <https://committees.parliament.uk/writtenevidence/107291/pdf/> (Dr Patrick O'Brien)

[83] *Supra* notes 80 and 82.

[84] CRA, s 2.

[85] HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023) 45-58.

[86] *Supra* (n 82).

[87] HL Constitution Committee also endorses a broader, cross-departmental role for the LC. See HL Constitution Committee (2023), 74.

[88] While defending judicial independence, the LC mostly engages in soft regulation, seeking voluntary compliance with a constitutional convention (now a statutory responsibility, although the content of that responsibility is not defined). Soft regulation is often associated with the principle of 'comply or explain.' See Seidel, D., Sanderson, P., & Roberts, J., 'Applying the "comply-or-explain" principle: discursive legitimacy tactics with regard to codes of corporate governance (2013) 17(3) *Journal of Management and Governance* 791–826.

necessary to keep the judiciary away from partisan politics.[89] For example, if an incumbent Prime Minister undermines judicial independence through politically motivated attacks on judges or the judiciary, as per the narrow view, the LC will have no obligation to intervene unless such a transgression concerns his/her departmental responsibilities. Therefore, there is a need for someone from the executive branch to defend judicial independence when such a situation arises.

Second, under the current constitutional scheme, the LC engages with the judiciary and judges in various capacities. The LC assumes roles as a provider, partner, facilitator, account-receiver, and account-giver.[90] The LC's engagement with the judiciary is deep, continuous and formal. Therefore, among all the ministers of the Crown, the LC is best placed to defend judicial independence, when circumstances necessitate such action.

Third, the partnership between the judiciary and the Lord Chancellor, as envisioned by the Concordat,[91] CRA and Framework Document,[92] would lack robustness if the Lord Chancellor fails to defend judicial independence. The effectiveness of the partnership between the Lord Chancellor and the judiciary depends not only on structural and formal arrangements but also on the prevailing legal and political culture. The constitutional reforms since 2005 have not extensively altered these formal and cultural arrangements to the extent that they disrupt the close cooperation that exists between these entities. The enduring collaboration between the judiciary and the LC remains deeply entrenched, notwithstanding intermittent tensions resulting from political upheavals such as Brexit. This symbiotic relationship between the two entities is exemplified by their continued engagement in judicial governance and regulation. Further, the concerns raised against the *broader view*, such as the lack of 'legal background' of the incumbent, the LC's short tenures, and the LC being an MP rather than a peer, could be remedied by the Prime Minister. In other words, the CRA does not prohibit the appointment of an eminent lawyer at the twilight of her career to be the LC, if that is what is missing in the current constitutional scheme.[93]

[89] Oral evidence taken before the Constitution Committee, Annual evidence session with the Lord Chief Justice, 22 March 2017 (Session 2016–17), Q 4 (Lord Thomas of Cwmgiedd).

[90] See, for example, the Constitutional Reform Act 2005, the Crime and Courts Act 2013, and HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023).

[91] The Lord Chancellor's Judiciary-Related Functions: Proposals (the Concordat) 2004

[92] Her Majesty's Courts Service Framework Document 2008 (updated 2011)

[93] HL Constitution Committee, *Role of the Lord Chancellor and the Law Officers* (HL 118, 2023) 45-58.

Fourth, critics argue for the enhancement of the role of the LC in judicial appointments.[94] This thesis also recommends the active participation of the LC in judicial regulation. Further empowerment of the LC is necessary to counter the unhealthy dominance of the judiciary (senior judges) in the regulatory process, including in the judicial appointments process. In a similar vein, as an equal partner, the LC should carry out his/her constitutional duty of defending judicial independence. This does not mean that the LC is the sole guardian of judicial independence; the CRA has diversified this responsibility.[95] Under the current constitutional scheme, the judiciary is expected to be the master of its fate. The empowered judiciaries have the primary responsibility to defend judicial independence.[96] Only where judicial intervention would further politicise the issue or where the judiciary's intervention would breach the constitutional convention of not commenting on purely political or policy issues, would the LC's intervention be helpful.[97] It is important to note that the effectiveness of LC's intervention cannot be guaranteed in every instance, nor can it entirely abate unjustified attacks on the judiciary in the future. Nonetheless, the constitutional responsibility of the LC to defend judicial independence reflects a profound commitment to the principles of the rule of law, democratic accountability, and respect for judicial independence. Prompt and proportionate intervention by the LC would also imply that the judges' and judiciary's vulnerabilities and needs are understood and valued within the government.[98]

Lastly, the legal infrastructure and institutional history of the Office of Lord Chancellor support the cross-departmental view.[99] While the general thrust of the CRA was to minimize the remit of the LC, it has not narrowed the LC's constitutional obligation to defend judicial independence. On the contrary, the CRA has elevated this constitutional convention into a statutory responsibility. The LC has an 'uncontested' role in defending judicial independence in the UK.[100] The current LCJ, Lord Burnett, encapsulates the role of LC well:

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[94] Graham Gee, 'Rethinking the Lord Chancellor's role in judicial appointments' (2017) 20(10) *Legal Ethics* 4-20; Richard Ekins and Graham Gee, Reforming the Lord Chancellor's Role in Senior Judicial Appointments (Policy Exchange Judicial Power Project, February 2021)

[95] See, for example, section 3.

[96] The CRA enables the Lord Chief Justices to raise concerns directly to the Lord Chancellor and Parliament.

[97] 'The judiciary is unable to defend itself against unfair, personal or threatening abuse', HL Constitution Committee (2023), 4.

[98] Currently, only 8% of the judges in England and Wales feel valued by the government. See Cheryl Thomas, '2022 UK Judicial Attitude Survey: England and Wales' (2023) *UCL Judicial Institute* 16.

[99] See, for example, CRA, ss 1, 3 and 17; HL Constitution Committee (2023) 74.

[100] HL Constitution Committee, The Office of Lord Chancellor (HL 2014) <https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/75/7505.htm>

> "[t]he Lord Chancellor remains the constitutional lynchpin between executive and judiciary. It is the Lord Chancellor who is charged particularly with defending the independence of the judiciary and who solemnly undertakes to do so in the oath of office. That entails a duty to engage publicly on behalf of the judiciary in the rare circumstances when public attacks are launched upon the judiciary as a whole or upon individual judges. It calls for Lord Chancellors to bring to the cabinet table not only their political experience and judgment as Secretary of State for Justice but also, as Lord Chancellor, their enhanced duty with respect to the rule of law and judicial independence."[101]

Therefore, a narrow view would be a retrograde step, although, as briefly discussed below, the performance of the LC since the CRA has largely been unsatisfactory.[102]

Following the High Court's decision in *R (Miller) v Secretary of State for Exiting the European Union,*[103] a series of press reports accused the court of being antidemocratic in rather bitter terms, but the LC's unwillingness (or inability) to defend the independence from unwarranted attacks was apparent.[104] Judges were described as 'enemies of the people'; they were accused of declaring war on democracy' by 'defying 17.4 million voters'.[105] *The Telegraph* called it 'a plot to stop it (Brexit)'.[106] *The Daily Mail* condescendingly wrote about the Bench of three judges that ruled on the matter that '[T]he judges who blocked Brexit: One who founded a EUROPEAN law group, another charged the taxpayer millions for advice, and the third is an openly gay ex-Olympic fencer.'[107]

Even a senior conservative MP called it 'an attempt to frustrate the will of the British people, and […] unacceptable.'[108] However, the response of the then LC [Elizabeth Truss] to these comments was docile. After a few days, amid mounting criticism for her silence, she said: '[T]he independence of the judiciary is the foundation upon which our rule of law is built and

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[101] Lord Burnett, 'The Lord High Chancellor of Great Britain' (Swearing-in Ceremony, 24 May 2023) 4 <https://www.judiciary.uk/wp-content/uploads/2023/05/Lord-Chief-Justices-speech.pdf>

[102] Diana Woodhouse, 'The Constitutional Reform Act 2005 – defending judicial independence the English way' (2007) 5 *International Journal of Constitutional Law* 159-160.

[103] [2016] EWHC 2768.

[104] Patrick O'Brien, '"Enemies of the People": Judges, the media, and the mythic Lord Chancellor' [2017] P.L. 135.

[105] *The Daily Mail* (London, 4 November 2016) <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

[106] 'Delaying Brexit is 'a plot to stop it' as May caves in to Remainers' *The Telegraph* (London, 26 February 2016)

[107] 'The Daily Mail was furious because an "openly gay" judge delivered a ruling on Brexit today' *PinkNews* (London, 3 November 2016).

[108] 'This was an attempt to frustrate the will of the British people and it is unacceptable' see: Sajid Javid MP, speaking on Question Time, *BBC 1* (3 November 2016).

our judiciary is rightly respected the world over for its independence and impartiality.'[109] She refused to go further in condemning the attacks reportedly to avoid interfering with '...a free press…' and she further added that '[I]t is not the job of the government or the lord chancellor to police headlines, and it would be a dark day for democracy if that changed.'[110]

The minister's justifications for not defending the judiciary were not consistent with the legal duty of her office.[111] The CRA obligates the LC to *uphold*, *defend,* and *support* judges and courts in the discharge of their functions. Lord Thomas, one of the three High Court judges who decided the Brexit case, rightly criticised the LC for not understanding her role and the difference between abuse and criticism.[112] Perhaps the minister would have done well if she had recognised the principal statutory obligation of defending judicial independence, rather than choosing to cheer the impudent press. However, as Woodhouse envisaged, 'the elected politician will no longer have... a particular loyalty to and empathy with the judiciary.'[113] It may also be that elected politicians in pursuance of their political ambitions have to weigh the immediate and long-term consequences of openly voicing concerns against powerful sections of society or their political constituency.[114] In any case, it would be difficult for an elected minister to match the stature and status of an erstwhile Lord Chancellor who generally had vast legal experience commanding the respect of members of the Government, parliamentarians, and the judiciary alike.[115] Post-reform, Lord Chancellors '…lack the cultural background, constitutional authority, and political incentive to defend judicial independence...'[116]

The performance of the LC, since 2005,[117] has not been very encouraging. Unfounded attacks on lawyers[118] and judges could reoccur despite the intervention of LC, but a robust

[109] 'Liz Truss defends judiciary after Brexit ruling criticism' *The Guardian* (London, 5 November 2016).
[110] ibid.
[111] Oral evidence taken the HL Constitution Committee, *The Role of Lord Chancellor and Law Officers* (HL 2023) 35 (Lord Judge).
[112] Owen Bowcott, 'Lord chief justice attacks Liz Truss for failing to back article 50 judges' *The Guardian* (London, 22 March 2017).
[113] Diana Woodhouse (n 60) 159-60.
[114] The House of Lord Select Committee on the Constitution recommends that the Lord Chancellors should have a legal qualification and they '…must be willing and able, where necessary, to stand up to Cabinet colleagues and the Prime Minister.' House of Lords Select Committee on the Constitution, *the Roles of the Lord Chancellor and Law Officers* (HL, 2022) 48, paras 167-168.
[115] House of Lords Select Committee on the Constitution, *the Office of Lord Chancellor* (HL, 2014, the Bar Council — Written evidence OLC0026) 36.
[116] Patrick O'Brien, *supra* (n 104) 135.
[117] House of Lords Select Committee on the Constitution (n 80) 35-37.
[118] 'Immigration Minister Accuses Lawyers of "Playing Politics"' *Lawyer Monthly* (Staffordshire, 23 November 2020).

intervention would vindicate lawyers and judges facing such attacks and improve public trust in courts and the rule of law.[119] Despite these continued challenges to judicial independence, as O'Brien concludes, the LC's office has 'withered, politically and functionally...' [A]s a special guardian of judicial independence, the Lord Chancellor is a myth.'[120] There are good reasons for pessimism about the LC's efficacy in upholding and defending judicial independence, but since the CRA expects the LC to be an effective guardian of judicial independence, the expectations will remain high.

2.2 The establishment of MoJ and the Lord Chancellor's general duty

One of the primary responsibilities of the LC is to ensure that the government provides adequate infrastructure and human resources to courts. For example, the Courts Act 2003 requires the LC to ensure that there is an efficient and effective system to support courts of all levels.[121]Before the CRA, the LC carried out this responsibility through Her Majesty's Court Service (HMCS), an executive agency. HMCS was directly accountable to the LC. Immediately after the CRA, the problem arose as the LCJ replaced the LC as the head of the judiciary. Now, the LCJ and the LC were instead required to act as partners. However, as then the LCJ, Lord Phillips, pointed out, the Department continued to act as if it had retained primary responsibility for the administration of justice and continued to decide what resources should be allocated and how they should be deployed, without the participation of the LCJ.[122] There were clear differences between the senior judges and the LC with respect to budget allocation. The HMCS was forced to cut its expenses.[123]

The formation of the MoJ in 2007 further complicated the relationship between the executive and the judiciary. As noted above, this reform has brought together responsibility for criminal justice, prisons, penal policy,[124] court services, and legal aid.[125] The judiciary was anxious as it now has to compete for funds with the other departments of the MoJ.[126] The judicial

[119] House of Lords Select Committee (n 110) 37.
[120] Patrick O'Brien, *supra* (n 104) 135-149.
[121] Courts Act 2003, s 1.
[122] Lord Phillips, 'Judicial independence' (Speech at Commonwealth Law Conference, Nairobi, 2007) 8.
[123] The Tribunals and Courts Services were merged to form Her Majesty's Courts and Tribunals Service (HMCTS) in 2011.
[124] Previously, prisons and penal policy were the responsibility of the Home Secretary; Graham Gee, 'What are Lord Chancellors for? [2014] P.L. 11-27.
[125] House of Lords Select Committee on the Constitution, *Relations Between the Executive, the Judiciary and Parliament* (HL, 2006-2007) 11.
[126] *Supra* (n 122) 8.

leadership wanted to negotiate for necessary safeguards [presumably concerning funding and resources]; however, the government was not willing.[127] Two months after establishing the MoJ, a working group was formed to negotiate outstanding differences, which led to an agreement between the government and the judiciary. An agency called the Courts Service[128] was created; the Courts Service was made accountable to the LCJ, the LC, and the Senior President of Tribunals. A Board (now the HMCTS Board) headed by the Chief Executive was created to oversee the work of HMCTS. Now, the Chief Executive manages the day-to-day activities, whereas the Board, along with its oversight functions, is mainly responsible for operational policy and guidance in respect of the courts.[129] Does the new framework, which aims to foster a partnership between the judiciary and the executive, work effectively? Do courts, tribunals, and judges receive adequate support? These questions are briefly addressed below.

Budget allocation for the MoJ and the court has not been adequate since the inception of the MoJ;[130] it has been under-resourced for far too long.[131] The government was forced to make funding cuts in the wake of the 2008 financial crisis. The slow economic recovery also forced a comprehensive spending review in 2010, leading to an expenditure reduction of more than £2 billion a year during the four-year period (2011-15). The MoJ was also required to find a further 10% savings in 2015-16. Overall, in less than a decade, government funding has fallen by 21%[132]—this has affected judicial pensions, taxation, and filling up vacancies.[133] The Review Body on Senior Judges' Salaries noted that the reduction in pay[134] and pension, along with other contributing factors [namely inadequate administrative and IT support, a significant increase in workload, inflexible working patterns, inadequate rewards for judges taking on leadership roles, and a large-scale breakdown in trust in the government] have a

[127] *Supra* (n 125) 24.
[128] It is now a part of HMCTS.
[129] HMCTS: Our Governance <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/our-governance>.
[130] See e.g., Lord Neuberger, 'Justice in an Age of Austerity' (Tom Sargant Memorial Lecture 2013) <https://www.supremecourt.uk/docs/speech-131015.pdf>.
[131] Ruth Green, 'Access denied: Britain's broken justice system' *International Bar Association* (London, 13 February 2020).
[132] House of Lords Select Committee on the Constitution, *COVID-19 and the Courts* (HL, 2019-21) 9.
[133] Senior Salaries Review Body, *Thirty-sixth Annual Report 2014* (Report No.84, Cm 8822) para.5.6.
[134] Senior Salaries Review Body, *Major Review of the Judicial Salary Structure 2018* (Report No. 90, Cm 9761) 3.

deleterious impact on judges' morale.[135] The Covid-19 pandemic has further worsened the state of judicial administration and the working conditions of judicial personnel in the UK.[136]

In the last Judicial Attitude Survey (JAS), only 9% of judges in England and Wales felt valued by the government,[137] which is a notable improvement since 2016 as in that year only 2% of them felt the same.[138] In 2020, while a majority of judges (56%) noted that working conditions were worse than they were two years ago, this is substantially lower than in 2016 (76%). More concerning finding was that a large portion of the judges say they might consider leaving the judiciary early; surprisingly, the largest proportions of judges intending to leave early in the next 5 years are amongst Upper Tribunal Judges (55%), Court of Appeal Judges (44%) and Circuit Judges (40%).[139] Even with respect to judicial independence judges seem less satisfied, with 70% of the respondents somewhat or extremely concerned about the loss of judicial independence.[140] However, the survey discussed here does not tell the whole story with respect to judicial officeholders in England and Wales, since only the salaried judges and tribunal members (1909 in total) took part in this survey. As one can imagine, part-time, fee-paid judges and tribunal members would be worse off than comparatively well-paid and tenured judges. [141]

The constitutional reforms since 2003 have realigned the judiciary structurally; they enabled the judiciary to self-regulate its internal affairs; and the autonomous regulatory bodies now play a crucial role in judicial administration and regulation. Overall, these reforms have strengthened the institutional independence of the judiciary. However, as analysed in previous paragraphs, individual judges have seen little to no affirmative changes in their work environment. Limited resources, crumbling court infrastructure, the dwindling number of judicial personnel, and an inflexible work environment continue to affect their ability to administer justice. In other words, in England and Wales, challenges to individual and internal judicial independence remain largely unaddressed despite these significant constitutional reforms.

[135] ibid.
[136] *Supra* (n 132).
[137] Cheryl Thomas, '2020 UK Judicial Attitude Survey: England and Wales' iii.
[138] Cheryl Thomas, '2016 UK Judicial Attitude Survey: England and Wales' 3.
[139] *Supra* (n 137) iii.
[140] *Supra* (n 134) 6.
[141] House of Commons Justice Committee, *The role of the magistracy* (HC165, 2016–17) 8.

2.3 The Constitutional Reform Act 2005: judicial accountability in England and Wales

The CRA proposes some additional accountability mechanisms, namely the Judicial Appointments and Conduct Ombudsman; and it further reinforces the practice of parliamentary hearings through specialist committees. Furthermore, the judiciary and arm's length bodies have also developed *suo motu* accountability initiatives to convey adequate information to the public.

2.3.(i) Judicial Appointments and Conduct Ombudsman

The CRA provides for the Judicial Appointments and Conduct Ombudsman (JACO), to review the exercise of a disciplinary function by *any person*, on the grounds that there has been (a) a failure to comply with prescribed procedures or (b) some other maladministration.[142] The provision makes it clear that the JACO can also review the LCJ and the LC's disciplinary decisions.[143] However, the JACO's review is limited to any violation of 'prescribed procedures' or an instance of 'maladministration'. In other words, *the Ombudsman may not review the merits of a decision made by any person*.[144] Clearly, the Act intends to restrict the remit of the JACO to procedural or administrative failures in handling judicial complaints by investigative bodies/authorities.[145] The JACO is not an appellate or a fully-pledged review body.

If the ground for review has been established in a case, the JACO may make recommendations to the LCJ and the LC (i) for the payment of compensation, and/or (ii) the JACO may set aside the determination.[146] However, these review powers are subject to Section 112 of the CRA, which requires the JACO–

> '(2) Before determining his response to an application the Ombudsman must prepare a draft of a report of the review carried out on the application.
>
> (3) The draft report must state the Ombudsman's proposed response.
>
> (4) The Ombudsman must submit the draft report to the Lord Chancellor and the Lord Chief Justice.

[142] CRA, s. 110 (1).
[143] CRA, s. 110(8).
[144] CRA, s. 110(6) and 110(7)
[145] What constitutes 'maladministration' has not been defined.
[146] CRA, s. 111.

(5) If the Lord Chancellor or the Lord Chief Justice makes a proposal that the Ombudsman's response to the application should be changed, the Ombudsman must consider whether or not to change it to give effect to that proposal.'

The procedure prescribed under Section 112 severely undermines the review powers of the Ombudsman.[147] Why should an independent reviewer share a draft of the findings with an authority whose decisions are within the remit of the reviewer? Why should the JACO consider whether to give effect to the proposal of the LCJ and the LC? Experience suggests that the JACO has intervened where he or she has found maladministration or non-compliance with the prescribed procedure (Chapter 5); however, it is clear it has severe procedural constraints that emerge from the potential influences of the LCJ and the LC. This is not to suggest that the LCJ or the LC seek to influence the determination of the JACO; however, the perception of such intervention severely undermines the decisional autonomy of the JACO (Chapters 5 and 7).

2.3.(ii) Judicial accountability through Select Committees

The House of Lords Constitution Committee and the House of Commons Justice Committee can play a key role in enforcing judicial (institutional) accountability by questioning judicial leadership in public.[148] Committees can invite the LCJ and other senior judges to provide evidence on topics related to judicial administration.[149] Parliamentary committees can also consult judges at any level if it is necessary to review the implications of government policy or to assess the state of affairs of courts and judicial administration.[150] The procedure of requesting the appearance of a judge is governed by a protocol issued by the Lord Chief Justice.[151] It is extremely unusual and very unlikely that a parliamentary committee will order

[147] Similar procedure exists with respect to reference from the LCJ or the LC, see, CRA, ss. 113 and 114.

[148] For a detailed critical analysis of the topic, see Gee et. al., *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 101-118.

[149] The Judicial Executive Board [JEB], *Guidance to Judges on Appearances before Select Committees 2012*, 6. Lord Phillips, *The Lord Chief Justice's Review of the Administration of Justice in the Courts* (HC 448, 2008) 4-15.

[150] House of Commons Justice Committee, *The role of the magistracy* (HC 1654, 2017–19) <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1654/165402.htm>.

[151] ibid.

a judge to attend.[152] The request for appearance has to go through the Private Office of the Lord Chief Justice.[153]

Judges will not be questioned on the merits of individual cases, proposed bills, and government policies.[154] Judges should also avoid passing remarks on serving judges, politicians, and other public figures.[155] However, with respect to the LCJ and other senior judges, who, by virtue of their particular functions, leadership responsibilities, and representative roles, may have cause to comment on policy issues and Bills that concern judicial administration or judicial independence.[156]

The practice of calling judges with leadership responsibility facilitates meaningful interaction between the legislature and the judiciary; it can also facilitate the evaluation of the government's policies with respect to the administration of courts and judicial regulation.[157] Considering the institutional separation of the judiciary (the House of Lords) from Parliament and the weakening of the LC Office, the participation of judges in select committees is particularly important. However, the conventions and practicalities that guide the conversation significantly limit the scope of the inquiry. As noted already, there are obvious limits on the questioner and the respondent; moreover, the response of judges would be well guided and informed by institutional position on the topic of inquiry;[158] there is very limited scope for the viewpoint of an individual judge unless specifically asked for. Therefore, it is difficult to envisage that the issues related to judicial misconduct (of lower court judges), or the concerns of individual judges will be discussed or brought before Parliamentary committees by respondent judges. In addition, the CRA has created a host of arm-length bodies, namely, the JCIO, the JAC, the JACO, and the HMCTS, whether and to what extent Parliamentary Select Committees can exercise effective oversight over these bodies is debatable.

[152] *Supra* JEB (n 148) 4, paras 12 and 13.
[153] ibid 6, para 22.
[154] *Supra* (n 125) 41.
[155] *Supra* Guidance (n 149) 4, paras 15 and 16.
[156] ibid, paras 9 and 13.
[157] Graham Gee et al., *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP, 2015) 134.
[158] *Supra* Guidance (n 149) 6-7.

2.3.(iii) Voluntary accountability initiatives

The CRA prescribes accountability measures for relevant judicial, non-judicial actors, and arm's length bodies. For example, the LC is required to report to Parliament annually.[159] Likewise, the JAC must submit annual reports to the LC (through the LC to Parliament).[160] It should also submit annual accounts and audit reports to the Comptroller and Auditor General (through the Auditor General to Parliament).[161] In the same manner, the Ombudsman [JCAO] is required to report to the LC (through the LC to Parliament) annually.[162]

However, the judicial leadership across all three jurisdictions in the UK, including the UKSC, has no statutory duty to report to Parliament. In other words, the Act does not require the judicial leadership to file annual reports to any authority, including Parliament, with respect to their responsibilities. On the contrary, as noted elsewhere in this Chapter, the judicial leadership (for example, the LCJ(NI)[163]) may make written representations on 'matters of importance relating to the judiciary, or otherwise to the administration of justice'[164] to Parliament. According to Section 5(1) of CRA, the judicial leadership, for example, the LCJ(E&W), presents annual reports to Parliament.[165] Publication of annual reports under Sections 5 and 6 of CRA is a voluntary accountability measure undertaken by the LCJ office. The reports reflect on the state of judicial administration, strengthening public understanding of the role of judges, courts, and other stakeholders in the administration of justice.[166] This best practice could be seen in courts at all levels. For example, the criminal and civil divisions of the Court of Appeal, Commercial Court and Admiralty Court, Technology and Construction Court, Crown Courts, County Courts, Family Courts and Magistrates' Courts publish annual reports and statistics separately.[167] HMCTS and the Senior Tribunal Presidents also publish reports annually.[168] In the same manner, the regulatory regimes, for example, the JCIO, which

[159] CRA, s 10(2).
[160] ibid Sch 12, para 31.
[161] Id.
[162] CRA, Sch 13, para 15; see also, CRA, s 54, which obliges the Chief Executive Officer of the UKSC to submit annual reports to Parliament.
[163] CRA, s 6, see also, s 5.
[164] CRA, s 5(1), (2), (3) and s 6(1).
[165] See e.g., the Chief Justice's Annual Report 2020-21.
[166] Lord Phillips, *The Lord Chief Justice's Review of the Administration of Justice in the Courts* (HC 448, 2008) 5.
[167] See e.g., the Court of Appeal (Criminal Division) Report 2019-2020.
[168] See e.g., HM Courts & Tribunals Service Annual Report and Accounts 2020-21; Technology and Construction Court: Annual Report 2019-2020; The Commercial Court Annual Report 2018-19; Family Court Statistics Quarterly 2020; Civil Justice statistics quarterly 2021.

owes no statutory reporting obligations other than to the LCJ and LC, continue to publish annual reports and disciplinary and press statements as voluntary accountability measures.[169]

The voluntary accountability measures meet the legitimate demands of courts, the media, Parliament, and the government. For example, Lord Phillips presented to Parliament in accordance with Section 5(1) of the CRA, *the Review of the Administration of Justice in the Courts of the Lord Chief Justice [Judiciary of England and Wales].*[170] It was a comprehensive review of the status of judicial governance post-CRA. The report highlighted various challenges facing the judiciary in England and Wales, namely the increased administrative burden on senior judges, the inadequacy of resources, challenges with judicial appointments, and outdated IT infrastructure.[171]

However, to what extent are these voluntary accountability initiatives effective? The judiciary is an enormous public body employing thousands of judicial and nonjudicial personnel; it is a complex set-up with many divisions and subdivisions, facing numerous challenges. The annual report and periodic statistical reports would, in the best case, highlight some of the key achievements and challenges facing the judiciary. It is highly unlikely that judicial leadership prefer to use the annual report to outline the key concerns of the judiciary, as was done by Lord Phillips. In fact, since 2008, there has been hardly any comprehensive critical discussion of the challenges faced by the judiciary in annual reports, except for the 2020 report, which inevitably talks about COVID-related challenges. Therefore, how far these annual reports set out a true and fair view of the business of the courts would be debatable. It is also understandable that a public institution like the judiciary would use its voluntary accountability means to promote its public image. As Lord Phillips noted in the 2007 Review, in the backdrop of significant constitutional reforms, a comprehensive audit of the judiciary was warranted and that future reviews will be concise.[172] Moreover, the content, format, and frequency of voluntary accountability initiatives are purely in the hands of the account-giver. Therefore, whilst annual reports or reviews are useful accountability tools, they tend to have limited efficacy.

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[169] Judicial Conduct Investigations Office, 'Publications' <https://www.complaints.judicialconduct.gov.uk/reportsandpublications/>.

[170] Judiciary of England and Wales, 'The Lord Chief Justice's Review of the Administration of Justice in the Courts' (2008) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/report_lordchiefjustice_review_2008.pdf>.

[171] ibid 11-62.

[172] *Supra* (n 166) 2.

IV. The Supreme Court of the United Kingdom [UKSC]

The creation of a new free-standing Supreme Court was a long-standing demand.[173] As noted elsewhere, the considerable growth of judicial review and the increasing pressures of the ECHR with respect to judicial independence and impartiality had made the position of the House of Lords unsustainable.[174] Thus, the government came to believe that 'the establishment of a separate Supreme Court will be an important part of a package of measures which will redraw the relationship between the Judiciary, the Government, and Parliament to preserve and increase our judges' independence.'[175] Arguably, devolution also necessitated an independent and separate adjudicatory body, not the one drawn from the HL to adjudicate issues between different parts/institutions of the UK. Therefore, the apex court had to be institutionally distanced from the rest of the Westminster architecture, to maintain the public perception of judicial independence and transparency.[176] It is against this backdrop that the UKSC was carved out of the House of Lords (HL), where it had been formally recognised since the Appellate Jurisdiction Act of 1876. The 12 full-time Law Lords (aka Lords of Appeal in Ordinary) became initial members of the UKSC, marking the continuity and severance at the same time.[177] The new members ceased to be members of HL.[178]

The administrative and financial autonomy of the UKSC

The UKSC is a small, closely managed, and autonomous judicial institution. It stands administratively apart from the broader judicial infrastructure; the Court is not part of Her Majesty's Court Service, the Northern Ireland Court Service, or the Scottish Court Service. It is part of the MoJ.[179] The court has a dedicated staff that manages administrative work for the UKSC and the Judicial Committee of the Privy Council.[180] It has a separate budget.[181] The

[173] See e.g., Le Sueur, A., The Conception of the UK's New Supreme Court in *Building the UK's New Supreme Court: National and Comparative Perspectives* (OUP, 2012).
[174] Department for Constitutional Affairs Constitutional Reform: A Supreme Court for the United Kingdom (DCA London 2003) 11.
[175] ibid 13.
[176] ibid 19.
[177] CRA, s. 23(6).
[178] CRA, s. 137.
[179] Jenny Rowe, 'The Chief Executive UKSC' (Speech at Legal Week Litigation Forum, 17 September 2009) 5.
[180] Usually, Justices of the UKSC sit as members of the Judicial Committee of the Privy Council: see Judicial Committee <https://www.jcpc.uk/about/judicial-committe.html>.
[181] *Supra* (n 179) 5.

administrative responsibility of the UKSC rests on a leadership trinity: the President, the Deputy President, and the Chief Executive.[182]

The Chief Executive (CE) plays a key role in the day-to-day running of the court.[183] She is responsible for the court finances and optimal use of resources.[184] The CE has to report to Parliament, the LC and the executive heads of the devolved administrations.[185] The CE rigorously engages with HM Treasury with respect to accounts.[186] The President also delegates nonjudicial responsibilities to the CE;[187] the CE acts within the directions given by the President.[188] The CE also leads the Management Board, which oversees the execution of administrative directions of the UKSC.

Although the UKSC has a robust administrative infrastructure of its own, it depends on the MoJ for budget and 'the full range of administrative support and services, including human resources, property management, and IT'.[189] This contrasts, for instance, with the Supreme Court and High Courts in India, which have constitutionally guaranteed administrative autonomy,[190] whilst being reliant on the government for the budget. The UKSC's judicial complaint mechanism of the UKSC is critically evaluated in Chapters 5 and 7.

V. The UK's devolution arrangements and judicial regulation

In 1998, the UK Parliament established legislatures in Scotland, Northern Ireland, and Wales, devolving a varying degree of legislative competencies and executive autonomy.[191] England remains the only non-devolved territory in the UK. The devolution process, as Masterman and Murray highlight, was carried out to serve different purposes. The devolution for Scotland was a necessary step to assuage Scottish dissatisfaction over the concentration of powers in the UK parliament. In Northern Ireland, devolution was seen as a means of ending decades of

[182] R. Cornes, 'Gains (and Dangers of Losses) in Translation: The Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects' [2011] P.L. 509, 517.
[183] The UKSC has a team of approximately 50 staff and contractors supporting the work of judges: see Executive Team <https://www.supremecourt.uk/about/executive-team.html>.
[184] CRA, s. 51.
[185] ibid; the Chief Executive is also a custodian of the UKSC records (CRA, s 56).
[186] Statement of Accounting Officer's Responsibilities, The Supreme Court Annual Report and Accounts 2019–2020, 99.
[187] CRA, s. 48(3).
[188] CRA, s. 48(4).
[189] Diana Woodhouse, 'United Kingdom: The Constitutional Reform Act 2005—defending judicial independence the English way,' (2007) 5:1 *International Journal of Constitutional Law* 157.
[190] See e.g., Constitution of India 1950, arts 145, 146 and 229.
[191] Masterman, & Murray, *Constitutional and Administrative Law* (3rd eds) (CUP, 2022) 435-473.

conflict and thus uniting divided communities. In Wales, devolution emerged as an afterthought.[192] Notwithstanding different political and constitutional contexts and differing intentions, in 1998, the UK Parliament transferred, and continues to transfer, a wide range of powers to Scotland, Wales, and Northern Ireland. Devolution as a process continues to unravel, mostly in response to political developments such as Brexit.

1. The legislative competence of devolved parts: an overview

The scope of this project precludes a detailed analysis of the legislative, executive, and judicial competencies of the devolved territories; however, to contextualise the constitutional scheme within which the devolved institutions operate, the legislative competence of devolved nations is briefly discussed here.[193]

1(i) Northern Ireland

The Northern Ireland Act 1998, which was passed to implement the Belfast Agreement,[194] distinguishes *excepted*, *reserved,* and *transferred* matters. The *excepted* matters (e.g., international relations and treaties) will never be devolved to the Northern Ireland Assembly [the Assembly].[195] Some subjects were *reserved*[196] at the time of devolution (e.g., defence, finance, and foreign affairs), but could be transferred to the Assembly in future. Some of the *reserved* powers are gradually being transferred to the Assembly (e.g., criminal law, prosecutions, public order, and the police). With respect to reserved matters, the Assembly can legislate with the Secretary of State for Northern Ireland. Some matters are *entrenched* (e.g., the HRA Act of 1998), and on these matters, the Assembly cannot legislate. Everything else is within the scope of the Assembly.

1(ii) Scotland

The Scottish Parliament enjoys extensive legislative power. Only on *reserved matters,*[197] the Scottish Parliament lacks competence (e.g., foreign affairs, defence, financial, and macro-

[192] ibid 437.
[193] ibid 435-473.
[194] ibid 462.
[195] Northern Ireland Act 1998, Sch 2.
[196] ibid Sch 3.
[197] Scotland Act 1998, Sch 7; see also *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61.

level economic matters). Moreover, reserved matters have been gradually transferred to the Scottish Parliament.[198] However, unlike Northern Ireland, the Scottish Parliament cannot legislate on reserved matters.[199]

1(iii) Wales

The Government of Wales Act 2006, Section 29, empowers the Senedd Cymru[200] to legislate on matters stipulated in part 1 of Schedule 5 of the Act. Schedule 7A reserves some issues with Westminster Parliament. Some subjects were *reserved*[201] at the time of devolution (e.g., defence, finance, and foreign affairs), but could be transferred to the Senedd in future. Some of the reserved powers have gradually been transferred to the Senedd (e.g., criminal law, prosecutions, public order, and the police). Schedule 7B has added additional restrictions with respect to some matters (e.g., private law, criminal law, and the European Communities Act 1972) that cannot be modified by the Senedd.

Devolution does not affect the power of the Parliament of the United Kingdom to make laws on any matter devolved.[202] However, the United Kingdom's Parliament is expected to 'not normally legislate with respect to devolved matters without the consent of the devolved legislature' [also known as the Sewel Convention].[203] It is pertinent to note that the UKSC rulings on the legislation of a devolved body apply only to that 'part' of the UK.[204]

2. Judicial administration in devolved territories

2.1. Northern Ireland

The Court of Judicature of Northern Ireland, headed by the Lord Chief Justice, consists of the Court of Appeal, the High Court, and the Crown Court. The Supreme Court of the United Kingdom has appellate jurisdiction over the Court of Judicature of Northern Ireland. The Court of Appeal consists of the Lord Chief Justice as President and three other judges as Lord Justices

[198] See Scotland Acts of 1998, 2012 and 2016.
[199] Lady Hale, 'Devolution and The Supreme Court – 20 Years On' (Scottish Public Law Group: Edinburgh, 2018) <https://www.supremecourt.uk/docs/speech-180614.pdf>
[200] Government of Wales Act 2006, s 1.
[201] ibid Sch 7A.
[202] See e.g., Scotland Act 1998, s 28(7).
[203] See e.g., the Government of Wales Act 2006, s 107(6) and Scotland Act 1998, s 27(8); however, these provisions are not justiciable, see *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5.
[204] *In re Northern Ireland Human Rights Commission's application for judicial review* [2018] UKSC 27.

of Appeal.[205] The Court of Appeal hears criminal appeals from the Crown Court and civil appeals from the High Court. It also hears appeals on points of law from the County Courts, Magistrates' Courts, and certain tribunals. The High Court consists of the Lord Chief Justice and not more than six puisne judges of the High Court.

2.1.(i) The Senior Judiciary: appointments and removal

In Northern Ireland, ministers, including the First Minister, *must uphold* the 'continued independence of the judiciary';[206] the ministers must not seek to influence judicial decisions through special access to the judiciary.[207] The Justice (Northern Ireland) Act 2002 provides for the Northern Ireland Judicial Appointments Commission to assist in the appointment to both 'senior' and 'listed' judicial offices. The Lord Chief Justice of Northern Ireland [LCJ(NI)] is the chair of the commission,[208] unlike in E&W where a layperson is the chairperson of the Judicial Appointments Commission.

The Queen, on the recommendation of the Prime Minister, appoints the Lord Chief Justice and Lord Justices of Appeal of Northern Ireland. Before making a recommendation, the Prime Minister must consult the Lord Chief Justice of Northern Ireland (in the case of other judges) and the Northern Ireland Judicial Appointments Commission.[209] The Lord Chief Justice, Lord Justices of Appeal, and judges of the High Court hold office during 'good behaviour' and they may be removed by Her Majesty on the address presented to her by both houses of Parliament.[210] A motion for parliamentary address can be made — (a) in the House of Commons, only by the Prime Minister; (b) in the House of Lords, only by the Lord Chancellor (or by another minister, if the Lord Chancellor is not a member of the House of Lords).[211] Before filing such a motion, a tribunal should be convened to determine the allegation.[212] The procedure of judicial appointments and removal demonstrates that the judicial leadership is in firm control of the appointments,[213] while the removal of senior judges has a precondition

[205] Masterman and Murray, *Constitutional and Administrative Law* (2nd eds) (Pearson 2018) 394.
[206] Justice (Northern Ireland) Act 2002, s. 1.
[207] ibid s. 1(3).
[208] ibid s. 3; the commission has 12 members, five of which will be from the judiciary.
[209] Northern Ireland Act 2009 (c. 3) Schedule 2; Judicature (Northern Ireland) Act 1978, ss. 12 to 12C.
[210] Senior Courts Act 1981, s. 11(2); Tribunals, Courts and Enforcement Act 2007, Sch 1, para 6; CRA, s. 33; Northern Ireland Act 2009 (c. 3) Sch 2; Judicature (Northern Ireland) Act 1978, s. 12B.
[211] ibid.
[212] Judicature (Northern Ireland) Act 1978 s. 12B (9).
[213] Committee for Justice, *Summary of the Committee for Justice Consideration of the Judicial Appointments Process in Northern Ireland* (2016) 2, 8.

in the form of an investigation by a tribunal, and the composition of the tribunal is again dominated by judicial members.[214] It is also clear that the Lord Chancellor has a limited (consultative) role in the case of appointments and removal.

The 2010 amendments to the Northern Ireland Act 2002 have further strengthened the position of the LCJ(NI). The amendments limit the powers of the First and Deputy First Minister as regards judicial conduct regulation and removal of judges;[215] from the separation-of-powers perspective, this is a welcome development. However, the new scheme does not provide any checks on the determinative role of the LCJ(NI). Judges holding 'listed judicial offices' may be removed or suspended by the LCJ(NI), on the ground of misbehavior and inability.[216] The precondition for such removal (or suspension) is that a tribunal must be convened to investigate alleged misconduct or inability.[217] However, the LCJ(NI) can disagree with the tribunal's recommendation on removal or suspension.[218] The scope of powers conferred on the LCJ(NI), especially as regards listed judicial offices, is very wide compared with the powers of the LCJ(E&W). The removal or suspension of listed judicial office holders has become primarily the responsibility of the LCJ(NI); it is a joint responsibility of the Lord Chancellor and the Lord Chief Justice of England and Wales.

2.1.(ii) Administration of Courts and Tribunals

The Northern Ireland Courts and Tribunals Service (NICTS) provides administrative support to courts and tribunals. While in E&W, the HMCTS is accountable to the LCJ and LC collectively; the NICTS is a government department under the full control of the executive. Before the CRA, the LC oversaw the NICTS. The CRA made the LCJ-NI head of the judiciary, and the devolution in 2010 led to the creation of the NICTS, which was established as an agency of the new Department of Justice of the Northern Ireland Executive.[219] 'Day-to-day governance is the responsibility of the NICTS board, chaired by the Chief Executive of the organisation... although judges are not in control, this [consultative] arrangement allows them to exercise

[214] Judicature (Northern Ireland) Act 1978, s. 12B (9).
[215] Justice (Northern Ireland) Act 2002, s. 7.
[216] The 'listed judicial offices' includes the High Court judges; see, ibid, s. 7 (7) and (8).
[217] Justice (Northern Ireland) Act 2002, s. 7(3) & (4).
[218] ibid s. 7(6A).
[219] Graham Gee et al., (2015) 235.

considerable influence over areas such as court provision and resources and allows them to be consulted on key decisions, such as court closures.'[220]

Of the 12 members of the NICTS, 4 are from the judiciary, nominated by the LCJ(NI) to observe the functioning of NICTS[221] and liaise between the board and the LCJ(NI).[222] LCJ (NI) plays a key consultative role in court policy, budget, and staffing.[223] There are practical reasons why the judiciary in NI has a limited role in running the court service. There is not an adequate number of senior judges to bear the administrative responsibilities.[224] Three Justices of Appeal and 11 High Court Judges would be overly burdened if the NI judiciary undertakes the responsibility of the administration of courts. However, the adoption of the partnership model of E&W, with the strategic participation of judges in the administration of courts and judicial regulation, would enhance efficiency and strengthen judicial independence in NI.

What do judges think about the administration of courts in Northern Ireland?

The Judicial Attitude Survey (Northern Ireland) 2020 reveals that a majority (56%) of judges feel that they have experienced a deterioration in their working conditions since the last survey (2016).[225] The survey highlighted an overwhelming dissatisfaction among judges with respect to pay and pension (71%).[226] Two-thirds of judges thought that opportunities for career progression are either poor or non-existent.[227] The changes that concern the judges in NI the most are - the loss of respect for the judiciary by the government (96%), personal safety for judges (84%), increase in litigants in practice (88%), loss of judicial independence (85%), stressful working conditions (85%), fiscal constraints (97%), low judicial morale (85%), loss of experienced judges (55%) and the inability to attract the best people into the judiciary (52%).[228] Likewise, most of the judges thought opportunities to work part-time (76%), flexible working hours (55%) and to sit in other jurisdictions (79%) are either poor or non-existent.[229]

[220] ibid 236.
[221] The NICTS Agency Board <https://www.justice-ni.gov.uk/articles/nicts-agency-board-0>.
[222] Gee et al., (2015) 236.
[223] Id.
[224] ibid 235.
[225] Cheryl Thomas, 'UK Judicial Attitude Survey 2020: Report of findings covering salaried judges in Northern Ireland' *UCL Judicial Institute* (2021) 7.
[226] ibid 18.
[227] ibid.
[228] The reported percentages represent responses that were 'somewhat & extremely concerned' on the respective criteria. See *supra* (n 225) 27.
[229] Thomas (n 225) 20.

These challenges underline the institutional, individual, and internal dimensions of judicial independence that the government and the judicial leadership must address.

Since the judiciary has gained firm control over judicial appointments, deployment, and discipline in NI, it should bear proportionate responsibility in addressing systemic challenges or policy needs that strengthen the independence and enhance the operational competencies of judicial personnel. Proportionate responsibility would include adequate accountability measures; it also means that, where the relationship between the judiciary and the other two branches is uneven, they must be realigned to accommodate accountability needs. For instance, how far is the determinative role of judges in judicial appointment justified? The current arrangement is comparable to the judges appointing judges system that is prevalent in India. As the NI Assembly Committee on Judicial Appointments has rightly noted, the composition of the appointments commission should be changed to allow greater representation of other stakeholders to alleviate the perception of the judiciary's dominance in appointments.[230]

2.1(iii) Judicial accountability measures

Devolution and consequent rearrangement of responsibilities between the executive and judiciary have significantly strengthened the separation of powers and institutional judicial independence in NI. However, the reforms have failed to provide adequate checks and balances, especially against the determinative role of the judiciary with respect to appointments and conduct regulation.[231] However, the reforms have introduced some measures of accountability. For instance, the LC-NI and the executive branch (NI) now have reporting obligations under the CRA and other legislations.[232] Following the practice of England and Wales, the judiciary of NI also publishes reports, newsletters, and press releases regularly.[233] These voluntary accountability initiatives may fulfil some of the accountability needs; however, for the reasons stated elsewhere in this Chapter, these measures are not adequate.

[230] Committee of Justice, *Summary of the Committee for Justice Consideration of the Judicial Appointments Process in Northern Ireland* (2016) 2, 8.
[231] Gee et al. (2015) 250.
[232] See e.g., CRA, s 11.
[233] Judiciary NI: Publications <https://www.judiciaryni.uk/publications>

A visible accountability gap in Northern Ireland is that it lacks a review body. Like England and Wales, Northern Ireland has the Judicial Appointments Ombudsman (NICO). However, unlike England and Wales, only complaints relating to appointments are within the remit of the Ombudsman.[234] It is desirable to extend the remit of NICO to include the LCJ(NI)'s decisions with respect to judicial complaints and conduct enforcement. In NI, the complainant and the judicial officer, at all stages of the disciplinary proceedings, can request a review. However, compared to a dedicated review body, the review provision that exists at each stage of the disciplinary proceedings is less effective, except that a dedicated review body needs more resources. Furthermore, once a review request is made, it is up to the LCJ(NI) to refer the matter to an independent judge. A robust review mechanism involves the intervention of an independent person – the discretion of the LCJ(NI) on such a critical issue makes the mechanism LCJ(NI) centric (Chapters 5 and 7).

2.2. Scotland

The Court of Session, headed by the Lord President, is Scotland's highest civil court. It is divided into the Outer House and the Inner House. The Outer House hears cases at first instance, and the Inner House is primarily an appellate court, hearing civil appeals from both the Outer House and Sheriff Courts. Appeals from the Inner House may go to the UKSC. The High Court of Justiciary (HCJ) is Scotland's supreme criminal court. Unlike the Court of Session, its decisions are final. After the Courts Reform (Scotland) Act 2014, the same judges of the Court of Session sit at the HCJ. Below the Court of Session and the HCJ is the Sheriff Appeal Court (established in 2015), followed by Sheriff Courts and Justice of Peace Courts. In addition, there are the Court of Lord Lyon, Scottish Land Courts, and other tribunals.

2.2(i) Judicial appointments and removal

Under the Judiciary and Courts (Scotland) Act 2008, 'continued judicial independence' is guaranteed, and the responsibility of upholding judicial independence is placed on the First Minister and others.[235] Like in England and Wales and Northern Ireland, there is an

[234] Functioning from 1 April 2016; the Office operates under section 58 and Schedule 6 of the Northern Ireland Public Services Ombudsman Act 2016.

[235] Judiciary and Courts (Scotland) Act 2008, s. 1.

autonomous Judicial Appointments Board for Scotland.[236] The Board is a recommendatory body having remit over judicial appointments to the office of judge of the Court of Session, the European Court of Human Rights, the Scottish Land Courts, the Sheriff Courts, Tribunals, and the part-time and temporary judicial offices.[237] The board consists of judicial members appointed by the Lord President, and legal and lay members appointed by the Scottish Ministers.[238] The judicial members are drawn each from the Court of Session (other than the Lord President and the Lord Justice Clerk), the office of sheriff principal, the office of sheriff, President or Vice-President within the Scottish Tribunals.[239] A practicing advocate and one practicing solicitor are selected as legal members. The number of lay members is to be equal to the total number of judicial and legal members, and none of them should be a solicitor or an advocate.[240] Unlike the LCJ(NI), the Lord President is not a part of the Board, nor the board is dominated by judicial members numerically. However, the Lord President [LP] plays a central role in appointing judicial members; the LP can also issue guidance for the Board to follow.[241]

There will be a separate panel for the appointment of the Lord President and the Lord Justice Clerk.[242] The Lord President, as the Head of the Scottish Judiciary and Chair of the Scottish Courts and Tribunal Service, bears many responsibilities.[243] As head of the Scottish judiciary, the LP is responsible for making appropriate arrangements for '(i) the investigation and determination of any matter concerning the conduct of judicial officeholders, and (ii) the review of such determinations.'[244] The term 'judicial office holders' includes the judges of the Court of Session, the Chairman of the Scottish Land Court, the Sheriff's Principal and the Justice of the Peace.[245] However, unlike LCJ (E&W) and LCJ(NI), there is no procedure for the removal of LP.[246]

[236] Gee et al., (2015) 225.
[237] Judiciary and Courts (Scotland) Act 2008, s 10.
[238] ibid Sch 1.
[239] ibid.
[240] ibid Para 4, Sch 1.
[241] Judiciary and Courts (Scotland) Act 2008, s. 9.
[242] Judiciary and Courts (Scotland) Act 2008, sch 2 provides for a panel that comprises judicial members in the majority.
[243] ibid s. 2.
[244] ibid s. 2(2)(e).
[245] Judiciary and Courts (Scotland) Act 2008, s. 43.
[246] J. Harrison, 'Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland' [2009] *Edinburgh Law Review* 427, 433; Gee et al., (2015) 238.

As noted above, the LP shares crucial responsibilities with respect to judicial discipline. In Scotland, if a judicial complaint is against a senior judge[247] and raises an issue involving fitness for the judicial office 'by reason of inability, neglect of duty, or misbehaviour',[248] the First Minister (if requested by the LP or *suo motu*) appoints the tribunal.[249] If a complaint relating to a senior judge does not raise an issue involving fitness for the judicial office (i.e., if the allegation is less serious) or complaints relate to subordinate court judges, the disciplinary process is carried out as per the Complaints about the Judiciary (Scotland) Rules 2017. These rules are made by the LP in the exercise of his/her power under the Judiciary and Courts (Scotland) Act 2008 and Tribunals (Scotland) Act 2014. The disciplinary protocols will be discussed in detail in Chapter 5.

The power of suspension

With respect to senior judges to whom Section 35 of the Judiciary and Courts (Scotland) Act 2008 applies, both the LP and the First Minister may suspend those judges in different scenarios: (a) Where the LP has requested the First Minister to constitute a tribunal under Section 35, the LP may, at any time before the tribunal reports to the First Minister, suspend the judicial officeholder who is or will be facing the investigation;[250] and (b) the First Minister may, after receiving a recommendation for suspension from the investigating tribunal, suspend the judicial office holder in question.[251] This means that the LP need not wait for the First Minister to constitute a tribunal, nor does he need to consider the tribunal's report before passing the suspension order. Whereas the First Minister can only suspend the judicial officeholder if the investigating tribunal recommends her to do so.

The LP's suspension power is unfettered. This is true with regard to senior judges to whom Section 35 applies or any other judicial office holder in Scotland. Section 34 makes it abundantly clear that '[I]f the Lord President considers that it is necessary for the purpose of maintaining public confidence in the judiciary...',[252] the LP can suspend a judicial officeholder.

[247] That is if the complaint relates to —(i) Lord President (ii) Lord Justice Clerk, (iii) Judge of Court of Session, (iv) Chairman of the Scottish Land Court and the temporary judge, the procedure outlined in s. 35 of the Judiciary and Courts Act 2008 apply.
[248] The Judiciary and Courts Act 2008, s. 35(1).
[249] ibid s. 35.
[250] The Judiciary and Courts Act 2008, s. 36 (1).
[251] ibid s. 36 (3).
[252] The Judiciary and Courts Act 2008.

Unlike England and Wales (CRA, s. 108), section 34 authorises the LP to de-roster a judge without formally suspending such a judge. Furthermore, Section 34 does not limit the LP's suspension power to disciplinary purposes: the LP may also suspend or withdraw work from a judicial office holder for administrative reasons. Unlike E&W, in Scotland, even the delegated legislation (Rules) made by the LP does not circumscribe the suspension provision with necessary procedural safeguards. In the absence of formal safeguards, one can only hope that the LP suspends the judges relying on the thorough initial assessment of the allegation by the JOS and the recommendation of the disciplinary judge. Even if the LP exercises the suspension power responsibly and fairly, the lack of formal safeguards may spawn negative perceptions, eventually engendering internal and individual independence of judicial officeholders facing the disciplinary process.

2.2.(ii) Administration of courts and tribunals

With respect to the administration of courts, Scotland follows a different separation of powers template, compared with NI and E&W. The Scottish Courts and Tribunals Service (SCTS) is an independent body established under the Judiciary and Courts (Scotland) Act 2008.[253] The powers previously exercised by the relevant minister with respect to the administration of courts have been transferred to the SCTS.[254] It now has Lord President as its chair,[255] joined by another six members from the judiciary, even the nonjudicial members are appointed by the LP.[256] Undoubtedly, the Scottish model comes closest to being regarded as a self-regulating judicial administration model in the UK. Therefore, it can safely be concluded that recent reforms have conferred a greater degree of institutional autonomy on the Scottish judiciary compared with E&W and NI in the UK, except for the UKSC. Additionally, unlike the judiciaries in England and Wales, the SCTS and the judiciary in Scotland have not encountered notable challenges in negotiating the budget with the government.[257]

[253] Judiciary and Courts (Scotland) Act 2008, Pt 4, see also Schedule 3.
[254] ibid s. 63(1).
[255] Formerly known as the Chairman of the Scottish Courts and Tribunals Service Board.
[256] In all, it has 14 members (including the chairperson); out of thirteen members: seven are judicial members, two lawyers, three laypeople and the Chief Executive. The non-judicial members are drawn from Tribunal Services, Solicitors, Academics, Advocates, and Civil Service.
[257] Gee et al., (2015) 233.

What do judges think about the administration of courts in Scotland?

Unlike judges in NI, judges in Scotland saw improvements in working conditions since the last judicial attitude survey (2016); the most improved working conditions (rated Good or Excellent) are the physical quality of the workspace, the amount and quality of administrative support, and space to meet and interact with other judges.[258] With respect to salary and pensions, judges had a favourable view,[259] compared to judges in E&W. However, like their colleagues in E&W and NI, only a small minority of judges feel valued by the media (18%) or government (17%),[260] but the percentage points are better than both E&W and NI. On the contrary, Scottish judges (50%) were more concerned for their safety while in court, which is higher than E&W (37%).[261]

The concerns of Scottish judges over fiscal constraints (85%), the loss of experienced judges (78%), and the loss of judicial independence (76%) have increased substantially since 2016.[262] A significant percentage of judges noted that the standard of IT resources and support (48%), support for dealing with stressful working conditions (46%), opportunities for career progression (48%), opportunities to work part-time (54%), opportunities for flexible working hours (62%), and opportunities for flexible working hours (60%) were poor or non-existent.[263] A large proportion (43%) of the Scottish judiciary say they might consider leaving the judiciary early, which is higher than E&W (33%). The reduction in pension benefits is the most crucial factor that would make salaried judges in Scotland more likely to leave the judiciary early (83%).[264]

The survey highlights some positive changes; however, the Scottish judiciary, like the judiciary in E&W and NI, faces severe constraints and challenges as regards conditions of service, pension benefits, physical security at the workplace, and constant policy changes. These concerns should be addressed by governments and the judiciary to safeguard and strengthen institutional, individual, and internal judicial independence.

[258] Cheryl Thomas, 'UK Judicial Attitude Survey 2020: Report of findings covering salaried judges in Scotland (2021) *UCL Judicial Institute* 8-10.
[259] ibid iv.
[260] ibid iii.
[261] ibid.
[262] Cheryl Thomas, 'UK Judicial Attitude Survey 2020: Report of findings covering salaried judges in Scotland (2021) *UCL Judicial Institute,* v.
[263] ibid 14 & 25.
[264] ibid v.

2.2.(iii) Judicial accountability measures

Like in England and Wales and NI, in Scotland as well, recent judicial reforms have introduced new accountability measures. For example, the Chief Executive of the SCTS is required to send a copy of the annual report to ministers and lay a copy before the Scottish Parliament.[265] Under the Public Finance and Accountability (Scotland) Act 2000 the SCTS must, through the relevant minister, lay a copy of accounts together with the auditor's report.[266] The Chief Executive could also be called to appear before Parliamentary committees.[267] The Judicial Appointment Board must present its annual report to the Minister and Parliament.[268] The LP may also make representation to the Scottish and UK Parliaments, as the LCJ may do under Section 5 of the CRA. The delegated legislation made by the LP can also be scrutinised by the Scottish Parliament. The Scottish Judiciary and the arm's length bodies that work with the judiciary also publish annual reports, public notices, and relevant official information mostly as voluntary accountability initiatives.[269] The Scottish Parliament may also require senior judges with administrative responsibilities to appear before parliamentary committees.[270]

Although Scotland adopts a unique template of separation of powers that may have contributed to greater institutional independence, from a judicial accountability perspective, the power allocation appears much more uneven and inconsistent. As noted elsewhere, the investigation procedure is prone to political interference, there is little encouragement for consultation, and there is no oversight over disciplinary powers conferred on the LP either (Chapters 5 and 7). Even the review mechanism [the Judicial Complaints Reviewer] is not robust. Section 30 of the Judiciary and Courts Act (Scotland) 2008 provides for the Judicial Complaints Reviewer (JCR) to review, upon the request of the complainant or the judicial office holder or *suo motu*, the handling of the investigation to determine whether the investigation has been carried out in accordance with the rules.[271] However, unlike JACO (England and Wales), the Reviewer in Scotland has no powers to set aside the inquiry held or

[265] Judiciary and Courts (Scotland) Act 2008, s 67.
[266] Judiciary and Courts Act 2008, s 22(4) and (5).
[267] Gee et al., (2015) 234.
[268] The Judiciary and Courts Act 2008, s 18.
[269] Scottish Courts and Tribunals: Reports and Data <https://www.scotcourts.gov.uk/about-the-scottish-court-service/reports-data>.
[270] However, in 2013, the then LP refused to appear before the Scottish Parliament's Public Petitions Committee, see Gee et al., (2015) 234.
[271] Harrison, J., 'Judging the Judges: The New Scheme for Judicial Conduct and Discipline in Scotland' (2009) 13(3) *Edinburgh Law Review* 427-44.

to modify the recommendations made. He simply reports back to the Lord President, who may make appropriate decisions on such referrals.[272] Section 33(2)(d) coupled with Section 30(2)(b) of the Act reduces the Reviewer merely to a recommendatory body. Overall, the judicial conduct enforcement scheme of Scotland heavily relies on the discretion of the Lord President, or where complaints relate to senior judges, the First Minister bears some of the key responsibilities, which makes the mechanism overly centralised and the power distribution uneven.

VI. Conclusion

The partnership model of E&W is more desirable for judicial regulation for several reasons. It enables the effective participation of the executive and the judiciary; facilitates reciprocal oversight by the LC and the LCJ (E&W). Compared with the other two models, in E&W, the regulatory frameworks arguably have greater autonomy from both the judiciary and the executive. Yet, there are notable concerns with respect to the partnership model of E&W. Under the new regulatory framework, most of the disciplinary powers are exercised by designated senior judges; however, the CRA fails to provide effective checks and balances to avert the potential misuse (or the perception of misuse) of disciplinary powers by senior judges. This accountability deficit will be further exacerbated if the PM appoints an inexperienced, career politician as the LC. The success of the partnership model, as many commentators have pointed out, among others, rests on effective oversight by the LC.

The Scottish model ensures greater institutional independence for the judiciary. This judicial self-governance has arguably strengthened judicial administration; the credit is partly due to politicians who have enabled the smooth transfer of powers from the executive to the judiciary and supported the judiciary thereafter with adequate funding. As Gee and others note, the Scottish model also facilitated the unification of a rather scattered judiciary.[273] However, as argued in this Chapter, the separation of power arrangement is not balanced in Scotland; with respect to judicial complaints investigation and suspension relating to senior judges, the First Minister and the LP have overriding powers – these plenary disciplinary powers should be sufficiently circumscribed. The LP also has unchecked administrative and

[272] Judiciary and Courts Act 2008, s. 33(2)(d).
[273] Gee et al., (2015) 237.

supervisory powers over subordinate court judges. Additionally, as Harrison points out, there is a reluctance to put in place the procedure to investigate complaints against the LP (see Chapter 7).[274]

In Northern Ireland, there is no formal involvement of the judiciary in court administration. However, there remains considerable dominance of the judiciary in judicial appointments, which is arguably an area of concern. Going forward, diversification of the Northern Ireland Judicial Appointments Commission would be necessary to have a positive public perception of the judiciary. Similarly, the determinative role of the LCJ(NI) in matters of judicial conduct, without any checks, is problematic from an internal judicial independence perspective.

Although the recent judicial reforms in the UK have achieved greater institutional separation of the judiciary and strengthened the administrative and, to a certain extent, financial autonomy, they have not adequately improved the autonomy and working conditions of individual judges (especially of the lower court judges). This is in part because reform initiatives have overly focused on the transfer of powers from the executive to the judiciary, without any emphasis on how the transferred powers would be further diversified and shared at the lower rungs of the judiciary. Further reforms, emphasising the needs of lower courts and addressing the concerns of lower court judges, are necessary – which is only possible when the reform initiative prioritises the needs and concerns of individual judges of all levels and focuses more on the internal processes of the judiciary than lobbying for cosmetic changes that improve the outward appearance of judicial institutions.

[274] *Supra* Harrison (n 246) 427-44.

Chapter 4

Tracing the fault lines of judicial primacy and its implications on judicial conduct regulation in India

I. Introduction

Although India has derived some of its founding constitutional principles from the United Kingdom – parliamentary government, the rule of law, bicameralism, partial separation of powers and the common law – it has adopted a different approach to safeguarding judicial independence. The Constitution provides comprehensive measures for securing judicial independence (see Section II) and presupposes a consultative process for judicial appointments and transfers for both higher and lower judiciaries. However, in the early 1990s, the Supreme Court of India (SC) ruled that executive primacy in matters of judicial appointments and transfers is inconsistent with judicial independence. Through the *Judges' Case II,*[1] the SC institutionalised judicial primacy by establishing the Collegium of senior judges at the SC and the High Courts (HCs).

Whether the means adopted (i.e., judicial primacy) to regulate the judiciary has intended consequences is a question that needs a critical inquiry. Therefore, this Chapter examines the implications of judicial primacy on individual and internal judicial independence and accountability. A special emphasis on two key aspects of judicial independence – individual and internal – is crucial to determine whether the means adopted promote a sustainable congruity among different key aspects of judicial independence. Similarly, it is imperative to examine whether there are robust checks and balances to discourage abuse of judicial primacy. It is also necessary to audit the implications of judicial primacy on accountability mechanisms, for example, on judicial conduct regulation regimes.

Against this backdrop, the chapter briefly outlines the constitutional safeguards to secure institutional independence of both union and state judiciaries [Section III(i)]. The chapter emphasises that, contrary to judicial rulings in the 1990s, the Constitution did not envisage primacy of any one organ; instead, it empowered the executive branch to appoint senior

[1] *Supreme Court Advocates on Records Association v Union of India*, Writ Petition (civil) 1303 of 1987, 1993(4) SCC 441.

judges (the SC and HC judges) after consulting the Chief Justice of India (CJI) and other senior judges. Therefore, Section II (iv-v) argues that judicial primacy, as established in *Judges Case II,*[2] has no textual basis in the Constitution, nor is it consistent with constitutional history.

Section II (vi) contends that the SC in *the NJAC case*[3] erred in holding judicial primacy as an indispensable aspect of judicial independence; the majority held that judicial primacy is the basic structure of the Constitution;[4] however, this conclusion does not reflect the correct understanding of judicial independence. Section III critically analyses the High Courts' power of control and supervision over the lower courts. The constitutional scheme of separation of powers has ensured adequate autonomy for the state judiciary. However, the judiciary-led reforms – that established the High Court's determinative role in the matters of appointment, deployment, and discipline – have undermined the right to appeal of judicial officers in matters of their conditions of service that are interwoven with individual and internal judicial independence. It is also evident that subordinate court judges are subjected to multilayer accountability regimes. This section, with the help of empirical evidence gathered from 18 subordinate court judges, argues that the extensive hierarchical superintendence and multilayer accountability scheme undermines the individual and internal independence of subordinate court judges; it has also resulted in accountability overload.

II. Judicial Independence and Judicial Primacy: the Higher Judiciary

(i) Constitutional Measures for the Higher Judiciary: an Overview

The Constitution envisaged a consultative process in which both the executive and the judiciary unanimously appoint suitable persons to the High Courts or the Supreme Court.[5] A similar consultative process was also designed to deal with the transfer of High Court judges.[6] The SC judges are allowed to hold the office up to the age of 65 years and the High Court judges up to 62 years.[7] The SC and HC judges do not hold their tenure at the pleasure of the President.[8] A High Court judge is initially appointed for two years as an Additional Judge;[9] on

[2] Id.
[3] *Supreme Court Advocates-on-Record Association v Union of India* (2016) 4 SCC 1.
[4] By 3:2 majority, see discussion on the NJAC judgment below.
[5] Constitution of India 1950, arts. 124 and 217.
[5] *Union of India v Sankalchand Seth,* 1977 AIR 2328.
[6] Constitution of India 1950, art. 222.
[7] ibid arts. 124 and 217.
[8] ibid.
[9] Constitution of India 1950, art. 224.

completion of two years, such a judge would be appointed as the Permanent Judge of the High Court.[10] The removal of the High Court and the Supreme Court judges is possible only after following an elaborate procedure;[11] their salaries, allowances, and pension are charged on the consolidated funds of the concerned state or of the Union,[12] and the compensation paid to the judges cannot be varied to their disadvantage after appointment.[13]

Even the administrative expense of the SC and the HCs is charged on the consolidated fund of the respective governments.[14] Other measures of judicial independence include that there is no discussion to take place in the legislatures on the conduct of judges in the discharge of their duties, except on a motion for their removal.[15] Both the SC and the HCs have the power to punish for contempt of court.[16] Judges are also immune from criminal and civil liability for acts done in a judicial capacity, which is intended to ensure that judges remain undeterred from external pressures in the discharge of their constitutional duties.[17] No criminal action or investigation can be initiated against the SC and HC judges without the permission of the Chief Justice of India (CJI).[18]

Articles 146 and 229 reinforce the administrative autonomy of both the SC and the HC. The articles empower the CJI and the Chief Justice of the High Court to appoint officers and servants, save after consultation with the concerned Public Service Commission, to avoid indirect interferences in judicial administration. In addition, the CJI and the Chief Justice of the High Court can make rules governing conditions of service, salaries, allowances, leave, or pensions. In other words, the CJI and the Chief Justice of the High Court have complete control over court staff and officers.

[10] Department of Justice, *Memorandum of procedure of appointment of High Court Judges* <https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-high-court-judges>.
[11] Constitution of India 1950, art. 124.
[12] ibid arts. 146 and 229.
[13] ibid arts. 125 and 221.
[14] ibid arts. 146 and 229.
[15] ibid art. 211.
[16] ibid arts. 129 and 215.
[17] Judges (Protection) Act 1985, s. 3.
[18] *K. Veeraswami v Union of India,* (1991) 3 SCC 650.

(ii) Judicial Appointments and Transfer Procedure: Politico-Legal Developments Preceding the Judges' Case I

In the late 1960s, the apex court and PM Indra Gandhi[19] battled for supremacy on who would have the final say in interpreting the Constitution.[20] In *Golaknath v State of Punjab,*[21] the SC proclaimed that Parliament cannot take away fundamental rights and even constitutional amendments are subject to judicial review under Article 13.[22] In response, in an attempt to reinstate the supremacy of Parliament, the party in power amended various provisions of the Constitution, including Article 368 which provided for the procedure to amend the Constitution. Some of the constitutional amendments were challenged in *Kesavananda Bharati v State of Kerala.*[23] In this case, the SC ruled that Parliament has the power to amend the Constitution; however, it cannot abrogate the 'basic structure' of the Constitution. Although this judgment was a severe setback for the ruling party, unfortunately, it further emboldened Prime Minister Gandhi to suppress judicial resistance. In retribution, immediately after *Kesavanada Bharati*, three senior judges, Justices Shelat, Grover, and Hegde, were superseded, and Justice A. N. Ray was appointed as the Chief Justice of India, leading to widespread criticism and public outcry.[24] However, the government did not heed the public pressure. Instead, one of the ministers floated the 'committed judiciary' theory; the theory insisted that the government should also consider the 'philosophy and outlook' of judges when making appointments.[25] This was a clear indication that judicial appointments would be made 'keeping an eye on the judicial attitudes of the appointees.'[26] The appointment of Justice A N Ray as the CJI was an attempt to pack the judiciary with judges committed to the political philosophy of the executive branch.[27]

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[19] This is not to suggest that judicial appointments before the PM Indira Gandhi era were flawless; however, compared to what followed next, these early years were definitely less eventful and controversial. Law Commission of India, *Reform of Judicial Administration* (Law Com No 14, 1958) 34.

[20] Andhyarujina, T., 'A Committed Judiciary: Indira Gandhi and Judicial Appointments' (2018) In *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (OUP, 2019) 19.

[21] 1967 AIR 1643; other notable setbacks for the government came in the form of *R. C. Cooper v Union of India*, (1970) 1 SCC 248 and *Madhav Rao Scindia v Union of India*, (1971) 1 SCC 85.

[22] Chandrasekhara Rao, R., 'Mrs. Indira Gandhi and India's Constitutional Structures: An Era of Erosion' (1987) 22(3-4) *Journal of Asian and African Studies* 159.

[23] (1973) 4 SCC 225.

[24] Reddy, O. Chinnappa, 'Democracy Denuded: The Aftermath of Kesavananda, Emergency, and Supersession of Judges' in *the Court and the Constitution of India: Summit and Shallows* (OUP, 2010) 65-72.

[25] Mohan Kumaramangalam, *Judicial Appointments: An Analysis of the Recent Controversy over the Appointment of the Chief Justice of India* (Oxford & IBH Pub. Co., 1973) 83.

[26] See generally, *supra* (n 20).

[27] Noorani, A., 'The Judges' Case 1' In *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (OUP, 2006) 85-86.

In 1975, the relationship between the executive and the judiciary reached its nadir. The Allahabad High Court invalidated the election of Mrs Gandhi for electoral malpractices.[28] In the appeal, the SC granted an interim injunction,[29] allowing Mrs Gandhi to continue as the PM. However, nationwide agitations and political unrest proved consequential to the proclamation of the National Emergency.[30] During the Emergency, most fundamental rights were suspended, leading to arbitrary arrests, mass detentions, and press censorship. During the 21-month emergency, several constitutional amendments were implemented.[31] Agonizingly, even when the executive had sabotaged the Constitution and threatened to erode democracy, the SC abandoned its constitutional duty to protect and uphold the Constitution and fundamental rights.[32] A bench headed by pro-government CJI, A.N.Ray,[33] held that, in view of the abrogation of fundamental rights by the President, '... no person had any *locus standi* to move any writ petition under Article 226 before a High Court for habeas corpus... on the ground that the order…was illegal or was vitiated by *malafides*… or was based on extraneous considerations'.[34] The lone dissenting judge, Justice Khanna,[35] was later punished by promoting his immediate junior, Justice Beg, as the CJI. Notably, however, some High Courts stood up to the executive excesses,[36] but even the High Court judges had to suffer the executive retribution – a questionable policy of transfer was put in place, and 16 High Court judges were transferred as a result.[37]

One of the transferee judges, Justice S. H. Sheth challenged the transfer on the grounds, *inter alia,* that it was made without his consent and that the President did not have 'effective consultation' with the CJI before making the transfer order.[38] The central issue, in this case, was about the meaning and nature of 'consultation' with respect to appointments and transfers of the High Court judges, which was *res integra* at the time. Article 222 empowered the President, after consulting the CJI, to transfer a judge from one High Court to another.

[28] *State of Uttar Pradesh v Raj Narain*, 1975 AIR 865.
[29] *Indira Nehru Gandhi (Smt.) v Raj Narain*, 1975 AIR 1590.
[30] The country was already under the National Emergency on account of 'external aggression' as a result of Indo-Pak War of 1971.
[31] See, for instance, the 38th, 39th and 42nd Amendments to the Constitution of India.
[32] See generally, Noorani, A. G. 'The Judiciary and the Bar in India during the Emergency' (1978) 11(4) *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 403–410.
[33] Justice Ray had ruled in favour of the government also in *Kesavanada*, *R.C. Cooper* and *Madhav Rao Scindia*.
[34] *ADM Jabalpur v Shivakant Shukla*, AIR 1976 SC 1207.
[35] Justice Khanna held that High Courts could issue writs in the nature of *habeas corpus* even during the Emergency.
[36] E.g., N. *P. Nathwani v The Commissioner of Police*, 78 (1975) Bom LR 1.
[37] H.M. Seervai, *Constitutional Law of India* (2008) 3(4) 2802.
[38] *Union of India v Sankalchand Seth*, 1977 AIR 2328.

The plain meaning of Article 222 did not require the consent of the transferee, nor did it make the recommendation of the CJI binding on the President. Therefore, the SC had to determine whether (i) the consent of the transferee is a precondition for transfer, and (iii) whether the views/recommendations of the CJI are binding on the President.[39]

However, by the time the case ended, PM Indira Gandhi had suffered a heavy defeat in the 1977 general election. The new government and the petitioner had amicably settled the matter by which the transfer orders of all 16 High Court judges were revoked. In this unconstrained and sanguine setting, the SC ruled that full and effective consultation with the CJI is mandatory, but it is open to the President to arrive at a proper decision on the question of whether a judge should be transferred to another High Court. In other words, consultation was not construed to mean 'concurrence' or 'consent'. The Court also reiterated that the transfer should only be made in the public interest and should not be used as a punitive measure.[40] However, Justice Chandrachud and Untwalia differed on the requirement of consent: they viewed the consent of the judge as a precondition for transfer. Although in this case, the SC examined the contours of judicial independence at length in relation to transfers, its interpretation remained broadly close to the text of the Constitution.

(iii) Judicial Appointments and Transfer: The Judges' Case I[41]

In 1980, Mrs Indira Gandhi was elected for the third term as the Prime Minister. In the following year, the Union Law Minister came up with a plan for 'further national integration [of the judiciary] and to combat narrow parochial tendencies bred by caste, kinship, and other local links and affiliations' by appointing one-third of the judges of the High Court outside the state in which the High Court is located. For this purpose, he directed the states to obtain the consent of the Additional High Court Judges [AHCJ] and persons who are or will be proposed for the appointment as the AHCJ. To this effect, the Minister issued a circular letter to all State Governments and High Court Chief Justices, which was challenged as a 'direct attack on the independence of the judiciary, which is a basic feature of the Constitution'.[42]

[39] In this case, the Gujarat High Court invalidated the transfer on the grounds of lack of effective consultation with the CJI.
[40] Justices Chandrachud, P.N. Bhagwati and N. L. Untwalia.
[41] *S. P. Gupta v Union of India*, AIR 1982 SC 149.
[42] ibid para 2.

Speaking on behalf of the 7-judge Bench, Justice Bhagawati ruled that consultation with the CJI in matters of appointment and transfer is mandatory, but the views or recommendations of the CJI are not binding on the President.[43] In the same manner, the consent of a judge is not a precondition for his or her transfer from one High Court to another.[44] The judicial appointment and transfer policy introduced by the government cannot be ruled unconstitutional, as the matter clearly falls within the domain of the executive.[45]

On the issue of the disclosure of correspondence between the Law Minister, the CJI, and the Chief Justices of the High Court, the court delivered a landmark ruling. The court observed that –

> 'an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers…The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government, and the Chief Justice of India... The mystique of this process is kept secret and confidential between just a few individuals… We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should be protected against disclosure at all events and in all circumstances.'[46]

Despite this ruling, even when the judiciary regained primacy in the matters of judicial appointments through the *Judges' Case-II* and *Judges' Case-III*, the correspondence between important functionaries (i.e., the Union Law Minister, State Governments, the CJI and judges of the SC, the Chief Justice High Court and High Court judges) remained shrouded in secrecy.

(iv) Judicial Appointments and Transfers: The Judges Case II

The year 1989 marked the beginning of a long streak of coalition governments at the center.[47] Between 1989-1999, there were five general elections, marking unstable governments in India. The 1990s also ushered in judicial activism in the areas of judicial appointments,

[43] See e.g., *S.P. Gupta v Union of India*, AIR 1982 SC 149, para 1233.
[44] ibid para 1080.
[45] ibid paras 1222 and 1229.
[46] ibid para 84.
[47] Between 1989-2014, India had coalition governments at the center.

transfers, and confirmations, leading to the establishment of the Collegium system both at the SC and the HCs.[48] A paradigm shift in the judicial approach to judicial appointments has its beginning in *Subhash Sharma v Union of India*.[49] In this case, through public-interest litigation, the petitioners prayed for a writ of mandamus compelling the central government to fill up the vacancies in the SC and HCs. The SC doubted the correctness of the interpretation of 'consultation' adopted in *the Judges' Case I* (*S.P. Gupta v Union of India*). Ultimately, the court asked the larger bench of the SC to reconsider *S. P. Gupta*.[50]

It is against this backdrop that the *Judges' Case-II*[51] was taken up by a 9-judge bench. The referral was limited to two issues, namely (1) the position of the CJI with reference to primacy and (2) the justiciability of the executive policy determining the number of judges and courts and filling the outstanding vacancies.[52] Although the issues were very specific, the court went beyond the referral to effectively rewrite the relevant provisions of the Constitution. Justice V. S. Verma, known as the face of judicial activism in India,[53] delivered the lead opinion on behalf of himself and four other judges.[54] Two judges dissented,[55] and the other two delivered separate speeches[56] supporting the views of the majority. Speaking through Justice Verma, the majority laid down 14 conclusions; the most significant of which are summarised below.

(1) The court reiterated that all constitutional functionaries must perform their duties collectively in order to reach an agreed decision so that no occasions for primacy arise. However, in the event of conflicting views, the view of the CJI shall hold primacy.

(2) Initiation of proposals for appointments to the SC shall be made by the CJI, and in the case of HCs, the proposal should be initiated by the Chief Justice of that High Court, not the executive branch. No appointment to the SC and HCs can be made unless it conforms with the opinion of the CJI. In exceptional circumstances, 'for stated strong cogent reasons,' the

[48] The term 'collegium' was first used by Justice Bhagwati in *S.P. Gupta v Union of India*, AIR 1982 SC 149, para 29.
[49] MANU/SC/0643/1990.
[50] ibid para 49.
[51] *Supreme Court Advocates on Records Association v Union of India*, Writ Petition (civil) 1303 of 1987, 1993(4) SCC 441.
[52] ibid para 2.
[53] 'Justice Verma, the face of judicial activism, dies of multiple organ failure' *Indian Express* (23 April 2013).
[54] Justice Yogeshwar Dayal, G.N. Ray, Dr. A.S. Anand & S.P. Bharucha.
[55] Justice A. M. Ahmadi and M.M. Punchhi.
[56] Justice S. Ratnavel Pandian and Kuldip Singh.

appointment recommended by the CJI may not be made, however, on reiteration of the recommendation by the CJI, the appointment should be made as a healthy convention.

(3) Consent of the transferee judge is not necessary. In transfer matters, the opinion of the CJI 'has not mere primacy but is determinative.' Notably, in *S. P. Gupta*, the court has held that transfers should not be punitive. However, in this case, the court ruled that transfers made according to the CJI recommendation should not be deemed punitive, and such a transfer is not justiciable on any grounds.

(4) The court also limited the scope of judicial review in matters of appointments and transfers. It also ruled that 'the relevant provisions of the Constitution, including the constitutional scheme, must now be *construed*, *understood,* and *implemented* in the manner indicated herein by us.'[57]

From the judgment, it is clear that the majority thought that the above-mentioned amendments to the procedure of judicial appointments and transfers were essential to secure the independence of the judiciary and the rule of law.[58] Justice Verma also opined that the CJI is best equipped to assess the suitability and qualifications of candidates for judicial appointments,[59] and for this purpose, the CJI should consult at least two senior judges of the SC.[60] Assuming that the CJI is better equipped to assess the candidates,[61] to what extent is the erosion of the constitutional authority of the executive tolerable in a democratic country on the grounds that judges can do some jobs better than the executive branch? *Efficiency* is not the only objective that the doctrine of separation of powers seeks to achieve; *inter alia*, it also aims to provide for the division of labour and checks and balances.[62] Even the partial separation of powers theory that the Constitution has adopted entails that each organ of the government should be able to check the exercise of the powers by the other. Additionally, it is interpretatively impossible to construe 'consultation' to mean an affirmation of the CJI as a precondition for appointments to the HCs and SC. As if the primacy was not enough, in the

[57] *Supreme Court Advocates on Records Association v Union of India,* Writ Petition (civil) 1303 of 1987, para 80.
[58] ibid para 8.
[59] ibid para 40.
[60] ibid 482 and 720.
[61] Sengupta A, 'Pre-Tenure Questions: Appointments to the Higher Judiciary, Independence and Accountability of the Higher Indian Judiciary (CUP, 2019) 37-46.
[62] Kavanagh, A. 'The Constitutional Separation of Powers' in Philosophical Foundations of Constitutional Law (OUP, 2016), 234.

case of transfers, Justice Verma decreed that the views of the CJI are 'determinative'; this radical reading of the Constitution is the product of his judicial activism in defiance of established canons of construction, and neither the context nor the text of the Constitution sustains this interpretation.

Justice Kuldip Singh maintained that as a constitutional convention, the executive has been complying with the views of the CJI. Therefore, the judiciary can recognise a longstanding constitutional convention as the law once it is established to the satisfaction of the court. Justice Singh found that there is no distinction between constitutional law and an established constitutional convention.[63] He consulted wide-ranging primary and secondary sources from the UK and Canada to conclude that, keeping in view the expanding horizon of the judicial review, various facets of judicial independence have also evolved.[64] The judge applied Sir Ivor Jennings' three tests[65] on constitutional conventions and concluded that the convention in question indeed satisfies all three tests; therefore, he held that the recommendations of the CJI are binding on the government.[66] The deduction of Justice Singh is erroneous on two counts: (i) the English common law does not permit constitutional conventions to override express provisions of the legislation, let alone the Constitution;[67] (ii) although India has inherited a constitutional architecture that was substantially shaped during the British Raj, it has been redefined by the Constitution; therefore, even though the Constitution has widened the scope of judicial review, it has not permitted the rewriting of a constitutional provision by the courts. Justice Singh uses the expansion of judicial review as a justification for additional measures of judicial independence measures; however, he did not consider the expansion of judicial review as a reason for additional measures of judicial accountability. Justice Singh and the majority failed to address the need for additional judicial accountability measures.

The SC's reasoning in the *Judges' Case II* was not consistent with the Constitution, nor was it supported by context; it also did not have a sound factual basis. Justice Ahmadi, one of the dissenting judges, referring to one of the Counsel's affidavits, noted that between 1983-1993,

[63] ibid para 451.
[64] ibid para 431-449.
[65] Jennings, *The Law and the Constitution* (5th ed., London 1959) 136. Jennings three tests (questions) are as follows: What are the precedents? Secondly, did the actors in the precedents believe that they were bound by a rule? Thirdly, whether there is a good reason for the rule? See also Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *The Cambridge Law Journal* 149.
[66] ibid para 474.
[67] N. W. Barber, 'Laws and Constitutional Conventions' (2009) *Law Quarterly Review* 294.

547 appointments to the higher judiciary were made of which only seven were contrary to the views of the CJI.[68] It is pertinent to note that all 547 appointments were made after *the Judges Case I,* i.e., during this period when the executive allegedly carried the primacy in matters of appointments.[69] Although the court tried to justify its rationale with embellishing rhetoric of judicial independence designed to create a pretence that it was merely interpreted the constitutional provisions to uphold the intent of the framers, it became clear that the majority intended to embody judicial primacy in the Constitution substituting the executive primacy that was embedded in the Constitution. Dr Ambedkar argued that 'to allow the Chief Justice [i.e., the CJI) practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that is also a dangerous proposition.'[70] Thus, the ruling suffers from a 'suspect reading of constitutional history, logical deficiencies, and implausible interpretations.'[71] Justice Ahmadi, one of the dissenting judges, rightly concluded that it is impermissible to break, replace, or re-write the constitutional provision in the guise of interpretation unless the Constitution is amended.[72] Besides glaring jurisprudential vacuity, the ruling also lacked clarity, which paved the way for the *Judges' Case III.*

(v) Judicial Appointments and Transfer: The Judges' Case III

In 1998, the executive and the then CJI, Justice Punchhi, clashed over judicial appointments. The government opposed several of Punchhi's recommendations for judicial appointments, alleging that he had not consulted two of his colleagues before making the recommendations per the *Judges' Case II*.[73] While denying the allegations, Justice Punchhi retorted that the Union Law Minister could not inquire into consultation processes among the members of the Collegium.[74] Against this backdrop, the President of India referred the matter to the SC to clarify the *Judges' Case II*.

[68] *Supreme Court Advocates on Records Association v Union of India*, 1993(4) SCC 441, paras 370, 373 and 394.
[69] This clearly demonstrates that the executive acted with restraint and in deference to the views of the CJI.
[70] B R Ambedkar, Constituent Assembly Debates, vol VIII (Draft Article 103, 24 May 1947, para 8.90.157) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-24#8.90.157>.
[71] *Supra* (n 61) 31.
[72] *Supreme Court Advocates on Records Association v Union of India,* 1993(4) SCC 441, paras 404 and 413.
[73] Manoj Mate, 'The rise of judicial governance in the Supreme Court of India' *Boston University International Law Journal* (2015) 189.
[74] ibid.

In response to the nine queries that the President had raised in *In re Special Reference No. 1 of 1998*,[75] the nine-judge bench clarified that:

(i) 'Consultation' with the CJI means consultation with a plurality of judges; the individual opinion alone does not constitute 'consultation'.

(ii) The recommendation on the transfer of High Court judges and chief justices should be made by the CJI only after consulting the four seniormost judges of the SC and the chief justices of relevant High Courts, that is, the chief justices of the High Court from which and the High Court to which the concerned judge is being transferred. The transfer order can only be challenged on the ground that it has been made without appropriate consultation.

(iii) For the appointment of SC judges, the CJI shall consult four senior judges of the SC. And in the case of the appointment of HC judges, the CJI shall consult two seniormost judges of the SC, along with the SC judges who are conversant with the affairs of the concerned High Court.

(iv) The CJI is not entitled to act solely. The views of other consultee judges must also be communicated to the government in writing. The recommendations of the CJI that do not adhere to these guidelines are not binding on the government.

On the question of the justiciability of transfers of High Court judges, the court reiterated that the transfers are not justiciable on any ground, except on the ground that there was no consultation as prescribed in the *Judges' Case-II*. The court observed that the opinion of the CJI, formed in consultation with other senior judges of the SC and the Chief Justice of the relevant High Courts, is a sufficient safeguard against any arbitrariness or bias, as well as the erosion of judicial independence.[76]

The *Judges' Case II* travelled far beyond the initial reference made by a three-judge bench; therefore, it was rightly criticised as 'null and void'.[77] In this case, the court had an opportunity to rectify this substantive error,[78] by comprehensively reviewing the *Judges' Case II*. Considering the wider scope of the reference made by a President, the substantive review of

[75] (1998) 7 SCC 739.

[76] The court took note of *Ashok Reddy v Government of India*, [1994] 1 SCR 662, and observed that the Peer Committee's recommendations and consultation with other judges as prescribed by the *Judges' Case-II* are sufficient safeguards, so there is no need for judicial review.

[77] HM Seervai, *Constitutional Law of India* [4th eds., (1996), vol. 3] 2936.

[78] Law Commission of India, *Proposal for Reconsideration of Judges Cases I, II and III* (Law Com No 214, 2008), 17.

the *Judges' Case II* was necessary. However, the court preferred to clarify *Judges' Case II* without providing reasoned justification for its own conclusions. The court accepted the premises of the *Judges' Case II*; it viewed the primacy of the CJI as a well-established constitutional position.

The reference by the President was a significant opportunity for the SC to reflect on the plausible consequences of the Collegium system, as it had the benefit of hindsight. By this time, the weaknesses of the Collegium were quite discernible, and there was growing discontent within and outside the judiciary.[79] The Collegium had failed to emerge as an institution capable of conducting numerous inquiries about the competence, character, and integrity of the proposed appointees. Lacking an institutional setup, the Collegium had resorted to informal and *ad hoc* enquiries leading to unsuitable appointments that revealed judicial incompetence and instances of indiscipline all too often.[80] The secretive nature of its deliberations and decision-making process had already dented the credibility of the Collegium system;[81] There was a need to address accountability and transparency deficits in the Collegium system. However, in this case, Justice Bharucha denied some of the dire concerns raised about the working of the Collegium. Without any substantive inquiry, he concluded that '[We] do not share them [the apprehensions]. We take the optimistic view that successive Chief Justices of India shall *henceforth* act in accordance with the *Second Judges' case* and this opinion.'[82] This total refusal of self-reflection led to the institutionalisation of the Collegium system that had no textual or contextual basis; in short, the SC rewrote the Constitution; it did not operate under it.[83]

(vi) The NJAC Case[84]

The Constitution (One Hundred and Twenty-First Amendment) Bill was successfully passed in 2014. The amendment provided for the National Judicial Appointments Commission (NJAC) consisting of (i) the CJI, an ex officio Chairperson; (ii) two senior-most judges of the SC; (iii)

[79] *Supra* (n 77) 2936, para 25.
[80] Krishna Iyer, 'Judicial Accountability to the Community: A Democratic Necessity' (1991) 26(30) *Economic and Political Weekly* 1814.
[81] *Supra* (n 27) 85-89.
[82] *In re Special Reference No. 1 of 1998,* (1998) 7 SCC 739 para 38.
[83] Mehta, P., 'A Plague on Both Your Houses: NJAC and the Crisis of Trust', in *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (OUP 2018) 58.
[84] *Supreme Court Advocates-on-Record Association v Union of India*, (2016) 4 SCC 1.

the union minister in charge of Law and Justice; two eminent persons[85] to be nominated by a committee consisting of the PM, the CJI, the Leader of Opposition in the House of the People (members).[86] The NJAC's remit included the appointments to the SC and HCs and the transfer of HC judges and the Chief Justice of the High Courts.[87] The recommendation of a judicial appointment, to be valid, needed affirmative votes from five out of six members of the NJAC, this meant that the negative votes of any two members will nullify the proposal of appointment.[88]

The amendment did not provide comprehensive guidance on the criteria for judicial appointments, but stipulated that the person recommended should be of 'ability and integrity'.[89] The Amendment Act empowered Parliament to regulate the procedure for judicial appointments and empower the NJAC 'to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointments, and such other matters as may be considered necessary by it.'[90] As the amendment intended to replace the collegium system,[91] it restricted the role of the CJI only to make reference to the NJAC with respect to a vacancy; based on the NJAC recommendation, the President was to make the appointment. However, the SC struck down this amendment as unconstitutional. The majority found the amendment unconstitutional on the ground that the constitutional amendments and the NJAC Act undermine judicial primacy; the court viewed judicial primacy as an indispensable feature of judicial independence.[92] The majority also ruled that judicial independence is a basic structure of the Constitution, and as such, it is impervious to being curtailed by a constitutional amendment.[93] Like the *Judges' Cases II* and *III*, the *NJAC* case also suffers from doctrinal incoherence and unsound reasoning, some of which are briefly analysed below.

Two of the majority judges (Justice Khehar and Lokur) whilst emphasising the need for judicial primacy in matters of appointments, traversed notable reforms in the UK and several other

[85] Constitution of India 2014 (Amend), art. 124A.
[86] ibid.
[87] ibid art. 124B.
[88] National Judicial Appointments Commission Act 2014, ss. 5 and 6.
[89] Id.
[90] Constitution of India 2014 (Amend), art. 124C.
[91] The Constitution (One Hundred and Twenty-first Amendment) Bill 2014, 4.
[92] Justice Khehar, Goel and Joseph (3:2), Justice Chelameswar and Lokur did not consider judicial primacy as an essential feature of judicial independence.
[93] Justice Khehar, Goel, Lokur and Joseph (4:1), Justice Chelameswar dissented.

countries. Both judges inferred that the Constitutional Reform Act 2005 (CRA) has diminished the role of Lord Chancellor (LC), *inter alia*, in the matters of judicial appointments.[94] Justice Khehar claimed that there is an emerging trend signifying the diminishing role of the executive in judicial appointments.[95] 'In recognition of the above trend, there cannot be any greater and further participation of the executive, than that which existed hitherto before.'[96] On this basis, Justice Khehar concluded that the participation of the law minister as a member of the NJAC, and the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha in the selection of two eminent persons is a retrograde step and cannot be accepted.[97] Reading the CRA as a pretext to fortify judicial primacy or forbidding the participation of political executives and legislators in judicial appointments is erroneous, as it amounts to drawing false equivalence and reading the Constitution out of context.

The UK's CRA delineates the judiciary institutionally and functionally from the other two estates; it strengthens judicial independence and confers administrative autonomy to judiciaries in the UK. For this purpose, it weakens the office of the Lord Chancellor by transferring some of his notable functions to the Lord Chief Justice. However, it does not recognise the primacy of the judiciary or, for that matter, of the executive in matters of judicial appointments. Out of 15 members, the Judicial Appointments Commission (JAC) has five judicial members, two professional members, five lay members, one from the tribunal judiciary, and a lay justice member. A stark contrast in the composition of the collegiums in India and the JAC by itself highlights an apparent contradiction in the inference drawn by Justice Lokur and Khehar. Unlike the SC and HC collegiums, the hierarchy of courts in England and Wales is being represented, not just the senior-most judges in the country. Along with lay members, legal practitioners (solicitors and barristers) also have their representatives in the JAC, strengthening the diversity of the appointing body.[98] The judges failed to note that the other two jurisdictions in the UK (Northern Ireland and Scotland) have different judicial appointment commissions. This distinction is significant as it underscores that the JAC and the Indian Collegium system deal with different judicial hierarchies in their respective

[94] *Supreme Court Advocates-on-Record -Association v Union of India*, WP no 13/2015, 838-841.

[95] He based this claim on the comparative analysis of judicial appointments and discipline through judicial councils by Nuno Garoupa, Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57(1) *The American Journal of Comparative Law* 103–134.

[96] Justice Khehar, page 377-78, para 178.

[97] Id.

[98] CRA, Schs 12 and 14.

jurisdictions. The JAC does not deal with appointments to the senior judiciary in England and Wales – it recommends candidates for posts up to and including the High Court; whereas the Collegiums in India deal with appointments to the HCs (the UK equivalent is Court of Appeal) and the SC.

Justices Khehar and Lokur also failed to emphasise that the chairperson of the JAC shall be a lay member, not a sitting senior-most judicial officeholder in the country. Above all, the chairman and 14 other commissioners are appointed by the Queen on the recommendation of the Lord Chancellor (LC), a prominent member of the executive branch.[99] Therefore, whilst the functioning of the JAC may exhibit a considerable influence on the judiciary in the appointments to the lower judiciary,[100] the CRA did not intend to confer primacy on the judiciary; compared with the LC, the Lord Chief Justice holds no special position to be able to exert judicial primacy in matters of judicial appointments overriding the recommendations of the JAC. More importantly, the CRA through the JAC aims to reinforce the separation of powers and improve transparency, diversity, and public confidence in the judicial appointments process; unlike the collegium system, it does not intend to serve the singular purpose of securing and upholding (institutional) judicial independence. In other words, the CRA recognises that judicial regulation aims to serve multiple values, although judicial independence is one of the values, it is not the only value that the CRA seeks to reinforce.

However, as rightly noted by Justice Lokur, appointments to the UKSC are recommended by an *ad hoc* selection commission.[101] The commission should include (i) a senior UK judge, (ii) a judge of the SC [the President UKSC],[102] (iii) one member of the JAC, (iv) one member of the Judicial Appointments Board for Scotland, and (v) one member of the Northern Ireland Judicial Appointments Commission.[103] Clearly, the selection committee for the UKSC is more diverse compared with the collegium of the SC in India. Although Justice Lokur, citing Robert Hazell, concludes that 'judges appointing judges' is not unique to India, he overlooks the fact that the executive branch plays a key role in the appointment of UKSC judges—only the Prime

[99] CRA, Sch 12.
[100] Graham Gee, et. al., (2015) 180.
[101] Crime and Courts Act 2013, Sch 13; see also, CRA, s. 27; The Supreme Court (Judicial Appointments) Regulations 2013 [Part-3 and 4].
[102] In case of selection other than the President, the President acts as Chairperson of the Commission, see the Supreme Court (Judicial Appointments) Regulations 2013, Part 3.
[103] Id.

Minister of a UK can make the recommendation for the appointment of the UKSC judges, based on the recommendation of a selection commission which is convened by the Lord Chancellor.[104]

Additionally, the selection commission is also required to consult senior judges across the UK, the LC, the First Minister in Scotland, the First Minister for Wales, and the Northern Ireland Judicial Appointments Commission.[105] It is also worth noting that, as per the 2013 regulations, the Lord Chancellor may accept, reject, or require reconsideration of a selection.[106] Whereas in India, the executive can request for reconsideration of the recommendation; however, upon the reiteration of the recommendation by the SC Collegium, the executive is bound to confirm the appointment.[107] Therefore, although the judiciary has a greater role in selecting judges for the UKSC, it is not akin to the 'primacy' that the SC Collegium in India wields. The executive discretion in judicial appointments has been significantly narrowed in the UK, while in India, it is left to the whims of the senior-most judges. Moreover, it is not that the scheme of appointment for the UKSC is perfect or that it needs no improvement; it is vehemently criticised for (a) impeding judicial diversity: the slow progress on diversifying the senior judiciary in the UK has been attributed to the dominant role of the judiciary; (b) undermining the democratic legitimacy and accountability of senior appointments in the face of ascendant judicial power.[108]

In this case, the majority found that the proposed composition of the NJAC would inhibit judicial independence; therefore, they found the amendment unconstitutional.[109] In particular, the presence of the law minister as a member of the NJAC was considered detrimental to judicial independence; it was held that the government, being the largest litigant in matters involving issues of national importance, should not participate in judicial appointments.[110] Likewise, the danger that any two members of the NJAC, as per section 6(6) of the NJAC Act, could veto the recommendations was inferred to undermine judicial primacy

[104] CRA, s. 26.
[105] Supreme Court (Judicial Appointments) Regulations 2013, Part 3.
[106] ibid Regulations 20 and 21.
[107] *Judges' Case-II*, para 478.
[108] Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' (Policy Exchange, 2021) <https://policyexchange.org.uk/wp-content/uploads/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf>.
[109] See e.g., Justice Lokur, *Judges' Case-II*, page 892, para 568; Justice Goel, page 986, para 18.8.
[110] See e.g., Justice Khehar, page 366 & 367, para 166 & 167; Justice Lokur, page 861; Justice Goel, page 987, para 18.8.

in matters of appointment.[111] Consequently, the 99th constitutional amendment and the Act passed thereunder was held to be violative of judicial independence: the basic structure of the Constitution. Justice Lokur concluded that the amendment, by introducing radically different appointment procedures, seriously compromised the independence of the judiciary.[112]

If judicial pragmatism, as claimed by Justice Lokur and Goel,[113] facilitated radical reading of the constitutional text approving judicial primacy, the same pragmatic approach should have formed the basis of the NJAC ruling to reject the primacy of either branch and to uphold the symmetrical role of both the executive and the judiciary. While it is true that the executive, in the past, has undermined judicial independence and still exhibits such tendencies, the Collegium system is equally guilty of it.

Although the 99th Amendment and the NJAC Act were struck down, the SC in the *NJAC case* admitted that the collegium system needs improvements. The same bench heard the suggestions of Counsels on reforming the collegium and decided to collect suggestions from the public on the topics related to the collegium system, namely transparency, collegium secretariat, eligibility criteria for appointments, and complaints.[114] Suggestions totalling 11500 pages were received. The court asked the government to redraw the Memorandum of Procedure for appointments and transfers. The government prepared two memoranda of procedure for appointments one for the SC and another for the appointments and transfer of High Court judges.[115]

However, both the judiciary and the executive were again at loggerheads – the executive wanted to insert a clause in the memorandum allowing it to veto the recommendation on the grounds of national security, but the CJI disapproved the move.[116] The continuing battle for supremacy is hurting judicial appointments – the executive and the judiciary continue to

[111] See e.g., Justice Goel, page 1009, para 19.13; and at pages 1022-23, paras 22.4 and 23. Justice Lokur is hesitant use the term 'primacy', instead he preferred 'responsibility', see pages 784-85, paras 357 and 358. Justice Chelameswar a dissenting judge, did not accept judicial primacy as part of judicial independence.

[112] *Judges' Case-II*, 591, para 2.

[113] ibid 662, para 124; Justice Goel, page 983, para 18.7.

[114] *Supreme Court Advocates-on-Record Association v Union of India*, WP (Civil) No 13 of 2015.

[115] Department of Justice (DoJ), *Memorandum of procedure of appointment of Supreme Court Judges* <https://doj.gov.in/sites/default/files/memosc.pdf>; DoJ, *Memorandum of Procedure of appointment of High Court Judges* <https://doj.gov.in/sites/default/files/memohc_0.pdf>.

[116] Maneesh Chhibber, 'MoP on appointments: SC Puts Its Foot Down, Rejects Govt Plan to Veto Postings on National Security Grounds' *Indian Express* (Chennai, 24 March 2017).

blame each other for delayed appointments.[117] The Collegium is continuing to steer controversies through arbitrary transfers[118] and questionable appointments.[119] Worse still, the Collegium continues to work in shrouded secrecy. In October 2017, the SC Collegium resolved to publish its decisions on appointments along with the reasons on the SC website.[120] However, from October 2019, the Collegium has stopped providing 'reasons' for appointments. In case of transfer, as a matter of policy, no reasons are disclosed.[121] It is clear that in India, judicial accountability and transparency are the vanishing points of jurisprudence, and the law on judicial independence is still in its infancy.[122]

III. Judicial independence, accountability, and judicial primacy: the subordinate judiciary

(i) The Nature and Scope of the High Court's power under Article 235

The key factor determining the scope of the High Court's control under Article 235 depends on the nature of the responsibility and the type of judges it deals with. If the High Court deals with matters, namely, the *appointment*, *posting,* and *promotion*[123] of *district judges*, the Governor has a key role as the appointing authority, while the High Court's role is limited to making initial recommendations. The other issues of district judges, namely *transfer*, *confirmation*, *fixing of seniority*, *suspension*, *disciplinary actions,* and *retirement,* that are not explicitly enumerated in Article 233 are within the *exclusive* domain of the High Court.[124] On these aspects, the Governor must act in accordance with the recommendation of the High Court. This position has been clarified by the SC in the case of *State of West Bengal v Nripendranath Bagchi.*[125] The court ruled that articles 233-37 are intended to make the High

[117] Rupam Jain and Arpan Chaturvedi, 'Indian judges concerned as government seeks bigger role in judicial appointments' *Reuters* (Ahmedabad, 19 January 2023).

[118] Bhadra Sinha, SC raps Modi govt for delaying judges' transfers — 'indicates other factors coming into play' *The Print* (New Delhi, 06 January 2023).

[119] Justice SC Dharmadhikari, 'POCSO Case Judgment Questionable: Appoint Judges After Full Scrutiny so that Justice is Served' *The Leaflet* (Delhi, 17 March 2021).

[120] See the SC Collegium Resolution on Transparency in Collegium System (03 October 2017) <https://main.sci.gov.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf>.

[121] See the Collegium's Statement (12.09.2019) <https://main.sci.gov.in/pdf/Collegium/Statement_12092019.pdf>.

[122] Anashri Pillay, 'Protecting judicial independence through appointments processes: a review of the Indian and South African experiences' (2017) 1:3 *Indian Law Review* 291-296.

[123] *State of Assam v S.N. Sen*, 1972 (2) SCR 251.

[124] The High Court's power to transfer, promotion and confirmation, see e.g., *State of Assam v Ratiga Mohammed*, (1968) I LLJ 282 SC; for power of confirmation, see *Punjab & Haryana High Court v State of Haryana*, 1975 AIR 613; on retirement: *State of U.P. v Batuk Deo Pati Tripathi,* 1978 2 SCC 102.

[125] AIR 1966 SC 447.

Court the sole custodian of control over the judiciary *except* in so far as exclusive authority is conferred upon the Governor concerning the *appointment*, *posting,* and *promotion* of district judges.[126] In the case of the other subordinate court judges, the role of the Governor is limited only to *appointments;* in all other matters, the High Court is an appropriate authority.[127]

However, the distinctions noted in the last paragraph have largely faded away following various rulings that overlooked the constitutional divergence; the courts concluded that to separate the judiciary from the executive and to uphold judicial independence, the government should act according to the recommendation of the High Court. The Supreme Court has ruled that even in matters like appointments of district judges in which the Governor may make a decision, 'the decision cannot be taken save by consultation with the High Court. The consultation is mandatory, and the opinion of the High Court is binding on the State Government; the control, as contemplated by Article 235, would be rendered negated... The consultation here means meaningful, effective, and conscious consultation.'[128]

The power to control is plenary. It has many dimensions; however, as the scope of this project demands, the Chapter mainly focuses on disciplinary control over subordinate court judges. There is numerous case law on the subject, but, for the sake of brevity, the crux of the case law is presented here. The disciplinary control over subordinate court judges and staff includes conducting inquiries, disciplinary proceedings, and recommending the imposition of disciplinary measures, namely dismissal, removal, reduction in rank, or compulsory retirement.[129] It also includes the suspension of a judicial officer or court staff whilst a disciplinary inquiry is ongoing.[130] The power to investigate and hear cases against a judicial officer is an exclusive power of the High Court. No other authority can examine complaints of judicial misconduct against subordinate court judges.[131] Even *Lokpal* or *Lokayukta,* the ombudsman dealing with corruption allegations against public functionaries, have no jurisdiction over the judges.[132] Should any anti-corruption bureau intend to initiate an

[126] *Rajendra Singh Verma v Lt. Governor (NCT of Delhi),* (2011) 10 SCC 1.
[127] There is no need for High Court to consult the government on these matters.
[128] *Gauhati High Court v Kuladhar Phukan*, AIR 2002 SC 1589, para 14.
[129] Justice S Tamilvanan, 'Inspection of Courts – Civil & Criminal Court Registers Assessment of Works of Subordinate Officers' (2013) *Tamil Nadu State Judicial Academy* 14-37.
[130] See e.g., *High Court of Judicature for Rajasthan v Ramesh Chand Paliwal*, AIR 1998 SC 1079.
[131] See e.g., *Shamsher Singh v State of Punjab,* 1974 AIR 2192.
[132] *Lokpal* Act 2013, s. 14. See also, 'Let there be a Lokpal for judges: Prashant Bhushan' *The Hindu* (Chennai, 17 February 2018).

investigation against a judicial officer, it has to first inform the relevant District Judge or the High Court.[133] Furthermore, the SC has held that to maintain judicial independence, the police can only file a first information report against a judicial officer with the prior permission of the High Court Chief Justice.[134] The court also requires that judicial officers under arrest not be taken to the police station without notifying the district judge or the High Court; such judges should not be handcuffed unless there is a justifiable reason to do so.[135] The courts deem these measures to be fundamental in ensuring and preserving judicial independence. However, an argument can be made that certain measures, such as exempting judges from the jurisdiction of criminal law by implementing distinct procedures, may conflict with Article 14 (equality before the law or equal protection of the law) of the Constitution;[136] it is also inconsistent with the United Nations Convention Against Corruption 2003.[137]

In summary, disciplinary 'control' entails conferring necessary administrative and disciplinary powers on the High Court to oversee the functioning of lower judges and staff. The scope of 'control' extends to the management of human resources, court infrastructure, planning, budget and record keeping. These overwhelming administrative and disciplinary powers of the High Courts make them a custodian or guardians of the lower judiciary. The gamut of incidental powers that the judiciary has conferred onto itself through various rulings is arguably essential to secure and maintain judicial independence.[138] However, as noted in this Chapter, insulation from external interference is not always adequate to secure judicial independence, and often inappropriate influences from within the judiciary trample upon the independence of individual judges.[139] Therefore, it is necessary to examine whether there are adequate checks to prevent abuse of the power of the High Courts to control and exercise superintendence over the lower judiciary.

The Constitution makers qualified the High Courts' administrative power of the High Courts by the law and the rules made by the state legislature or the Governor.[140] The High Court has no inherent powers to make rules on the topics covered in Chapter VI. Therefore, the High

[133] *U.P Judicial Officers Association v Union of India*, 1994 SCC (4) 687.
[134] *Delhi Judicial Service Association v State of Gujarat,* AIR 1991 SC 2176.
[135] ibid.
[136] Ranjan, S., 'Accountability of Judges' in *Justice versus Judiciary: Justice Enthroned or Entangled in India?* (OUP, 2019) 133.
[137] See Chapter III of the convention. See also Bangalore Principles Implementation Measures (2010) para 9.1.
[138] *State of West Bengal v Nripendranath Bagchi,* [1966] 1 SCR 771.
[139] J.S. Verma, 'Constitutional Obligation of the Judiciary' (2004) *New Dimensions of Justice* (Universal Law) 18.
[140] Constitution of India 1950, art. 235.

Court cannot undermine the rights of judicial officers guaranteed under the laws/rules made by the state legislature/the Governor in the exercise of its control over such officers. Similarly, judicial officers, at least theoretically, have the right to appeal against the decision made by the High Court. However, these checks have not been very effective for two reasons – (i) the rules made by the state government confer wide discretion on the appropriate authority, i.e., the High Court. Even when the state government makes comprehensive rules regulating the service conditions of judicial officers,[141] the executive branch tends to defer to the views of the High Court.[142] (ii) There is no independent appellate authority to hear the appeals from the aggrieved judicial officer.[143] It is literally true that there are no departmental remedies against the administrative decisions of the High Court.[144]

There is no provision for an appeal against the government where the decision is made on the recommendation of the High Court. As a result, often the judicial officers approach the same High Court on the judicial side by challenging the administrative decisions of that High Court. The anomaly is that often major disciplinary measures are imposed by a resolution in a full-court meeting.[145] There is an unhealthy intersection of administrative and judicial powers of the High Court that brood a perception of bias. The aggrieved judicial officers can only file an appeal or a special leave petition before the SC; however, the matters take years to get through the High Court, and even in the SC, the cases would take at least a couple of years to reach a logical end.[146]

(ii) Empirical evidence substantiates the inherent flaws in the High Courts' supervision and control

Impassioned judicial assertions that the 'total and absolute administrative independence of the High Court' is essential to secure judicial independence are relentless.[147] However, the moot question is whether the institutional independence that is conferred on the High Courts

[141] See e.g., The Tamil Nadu Civil Services (Discipline and Appeal) Rules 1955.
[142] See e.g., *Yoginath Bagade v State of Maharashtra,* (1999) 7 SCC 739.
[143] *Registrar General, High Court, Calcutta v Smt. Ananya Bandyopadhyay,* W.P. No. 555 of 2014.
[144] Rameshwar Dayal, 'Remedies, Administrative and Judicial, Relating to Administrative Functions of High Courts' (1962) 4(4) *Journal of the Indian Law Institute* 549.
[145] However, as there no alternative forum to hear the judicial officeholders, the High Court judges who bear supervisory or administrative role in that High Court hear such judicial officeholder. See e.g., *Pyare Mohan Lal v State of Jharkhand*, (2010) 10 SCC 693.
[146] The HC or the SC cannot substitute the administrative decision of the High Courts - *Syed T.A. Naqshbandi v State of J&K* [(2003) 9 SCC 592].
[147] *H. C. Puttaswamy v Chief Justice of Karnataka High Court*, AIR 1991 SC 295.

by the Constitution and further aggrandised through judicial pronouncements effectively secures and protects the individual independence of the subordinate court judges. To find an answer to this question, 18 district judicial officers and the other subordinate courts from different parts of India were consulted. Chapter 6 provides a comprehensive critical analysis of the disciplinary and supervisory powers of the High Court. Here, a brief analysis of the responses of judicial officers to disciplinary inquiries, performance evaluation, and discriminatory treatment of judicial officers is presented.

One of the district judges highlighted the harsh realities that subordinate court judges face in India as follows.

> '[The] High Court is not at all objective in dealing with district judiciary. They [district judges] are being punished for *bona fide* judicial orders. District judiciary works in [an] environment of fear of [the] Bar and High Court, unwholesome for the system.'[148]

The participants disparaged the prejudicial treatment of judges facing inquiries. A Principal District Judge observed that the High Judges should not 'look the judicial officer on caste basis'[149] and proceed to conduct inquiries on such considerations. It is also evident that the High Courts are entertaining judicial complaints even when they are not supported by an affidavit,[150] and in some cases, acting against judicial officers based on such complaints.[151] Participant judges suggested that before requiring a judicial officer to respond to a complaint, the vigilance department should adequately investigate the substance of the complaint to determine its credibility. At the scrutiny stage, the complaint should undergo a thorough preliminary assessment.[152] There is also a trust deficit among judges with respect to inquiry officers. A Principal District Judge noted that 'personal equations or in-service rivalries' play a role during inquiries.[153] The participant judges recommend that there should be comprehensive rules on judicial complaints investigation, including the remit of the High Court vigilance cell. The judges also noted that the vigilance officer should be independent,

[148] Respondent's ID: 164560839.
[149] ID: 163365860.
[150] ID: 154575585; ID: 154434217.
[151] ID: 154575585.
[152] ID: 154611821; ID: Vig.Mech/DSJA/WB/Jan2020/05.
[153] ID: Vig.Mech/DSJA/WB/Jan2020/05.

competent, and honest.[154]One judge emphasised that the procedure for such inquiries should also be laid down to minimise subjectivity.[155]

The participant judges expressed their disquiet over the subjectivity in recording the ACRs. One civil judge wrote that '…ACRs are at the discretion of district judges, and more often than not, instead of the work that a judicial officer performs, factors like how much submissive a judicial officer is to the district judges and whether the officer is attending irrelevant judicial get-togethers is what counts.'[156] The judges suggested that there should be comprehensive criteria for performance assessment and recording of ACRs. The system should be transparent and judicial officers should be sufficiently informed about the process.[157] It is clear that the mechanism for judicial performance evaluation does not inspire confidence among the judges and, as has been noted in many judgments of the SC, the mechanism lacks objectivity and transparency.

Justice Krishna Iyer, denouncing the executive role in the judicial administration, decreed that there cannot be two masters for the lower judiciary.[158] However, on the contrary, now there are a handful of masters within the judiciary. From the perspective of a magistrate or a civil judge, a cobweb of supervision starts with his or her immediate senior in that court complex, generally the Chief Judicial Magistrate, the unit head.[159] Immediately superior to the unit head is the Principal District Judge (PDJ) who exercises numerous supervisory powers over all the judicial officers and staff in that district.[160] The lower court judges are required to respond and send information and records regularly to the High Court Registry.[161] The supervision of high echelons starts with administrative judges, aka the portfolio judges, who are responsible for the overall supervision of the courts in designated districts.[162] Above the administrative judge, as noted in this section, the High Court committees on specific matters operate, for

[154] ID: 154611821; ID: 155482171; ID: Vig.Mech/DSJA/WB/Jan2020/05.
[155] ID: 157362796; ID: Vig.Mech/DSJA/WB/Jan2020/05; ID: 163126401; ID: 164560839.
[156] ID: 166110773.
[157] ID: 154434217; ID: 154580906.
[158] *Shamsher Singh v State of Punjab*, AIR 1974 SC 2192, para 140.
[159] Occasionally, the senior-most sub-judge acts as the administrative head of the court complex - see 'Court Staff, Registers Legal Procedures: A Guide for the District Judiciary' (2013) *Judicial Academy Jharkhand* 22.
[160] Justice R. Banumathi, 'Effective District Administration' (2013) *Tamil Nadu State Judicial Academy* 1-13.
[161] Reports in the form of monthly statement, monthly review report, quarterly statement, half-yearly statement, and annual statement need to be filed to the High Court through the PDJ; likewise, judicial records, annual income and assets declarations, request or representation on disciplinary issues; reports on periodical meetings, legal services authorities, etc., to be submitted to the High Court.
[162] Justice S. Tamilvanan, 'Inspection of Courts – Civil & Criminal Court Registers Assessment of Works of Subordinate Officers' (2011) *Tamil Nadu State Judicial Academy* 14-37.

example, the Disciplinary Committee, the Rules Committee, the ACR Committee, the Infrastructure Committee, and the Inspection Committee.[163] These committees, subject to the High Court rules, rarely correspond with the lower court judges; however, for district judges and judges exercising administrative and supervisory functions, these committees are indispensable.[164]

In addition, the Chief Justice of the High Court also has some supervisory functions over the lower courts, although he or she generally delegates such powers to respective committees; some functions, for example, supervision over the vigilance cell, are nondelegable.[165] And finally, the full court of the High Court also has administrative supervision over the lower courts; Through its rules, regulations, circulars, and office orders, it constantly regulates the judicial officers and the court staff. This cobweb of supervision and control consumes considerable time and energy for every judicial officer in the country. There are administrative and ministerial officers to help perform these administrative duties; however, the judicial officer, being the head of his or her court, is accountable for its administrative failings as well. This accountability is sacrificial, that is, judges' administrative performances are recorded in the ACRs, which form the job history of their officers; therefore, judicial officers must spend considerable time managing their courts.

Subordinate court judges suffocate under a multilayer accountability regime. The top-down approach of the High Courts has exacerbated the working conditions of the lower court judges, in addition, hostile Bar, shortage of administrative staff, non-cooperative public officials, and local authorities have affected the independence, integrity, and competence of the lower judiciary. Underneath this hierarchical notion of independence and accountability lies a mix of 'arbitrary, feudal, and despotic elements in the treatment of lower judges by appellate ones'.[166] India's lower judiciary suffers from multiple accountabilities disorder and accountability overload, which inevitably undermines the internal and individual independence of judicial officers.

[163] The Allahabad High Court has 71 committees of judges and court officers. The list of committees is available at <http://www.allahabadhighcourt.in/event/event_7844_19-08-2020.pdf>

[164] The PDJs or the judges exercising administrative or supervisory functions should provide relevant information or inputs as asked by the relevant committee. The powers and functions of these committees are defined by the full court.

[165] Chief Justices' Conference 2009, Resolution 5.

[166] Upendra Baxi, *Courts, Craft and Contention: The Indian Supreme Court in the Eighties* (N.M. Tripathi Private Limited 1985) 25.

IV. Conclusion

The NJAC ruling demonstrates that the Indian judiciary views the executive branch with suspicion; it uses judicial independence mostly as a pretext to avoid perceived threats to its institutional autonomy. However, that was not the intent of the founding document; this misreading of constitutional intent has severely impaired the checks and balances the Framers had envisaged. The judiciary has also failed to develop robust accountability mechanisms using unfettered regulating powers that it had carved out for itself through various rulings. Instead, as analysed in this chapter, it further fortified the vigorously guarded fortress of judicial independence. This has allowed the collegiums to work with impunity. Nevertheless, the judiciary can still take full advantage of judicial primacy by formalising and institutionalising judicial accountability, by plugging the accountability gaps at the higher echelons of the judiciary.

However, future reforms should be mindful of the overly prescriptive and excessively hierarchical accountability frameworks that would result in various accountability hazards. The judiciary has also used judicial independence to hinder the meaningful participation of state governments; the lack of external oversight has led to impenetrable state judiciaries, undermining the judicial and administrative autonomy of subordinate court judges. The present arrangement gives the impression that judicial personnel are serving at the pleasure of the High Courts. Therefore, future reforms should aim to reconcile the judicial independence and accountability demands, having regard to the regulatory regimes' implications on individual and internal judicial independence.

Chapter 5: Section I

Judicial Conduct Regulation Regimes in India: A Critical Analysis♠

I. Introduction

Judicial corruption and misconduct are not uncommon in India. As a former Chief Justice of India observed 'it [judicial corruption] has become a way of life – an acceptable way of life.'[1] Justice Katju, a former judge of the Supreme Court of India, stated that 'there is rampant corruption, and [a] large number of judges at all levels have become corrupt. I guess 50% of judges are corrupt in India.'[2] The Transparency International survey revealed that 77% of the respondents perceived the judicial system as corrupt and one among three court users admitted that they paid bribes.[3] The Centre for Media Studies found that the lower courts are the second most corrupt public service, trailing the police.[4] Speaking on this issue, Justice Krishna Iyer opined that 'the judiciary now functions without check, even illegally and corruptly...'[5]

In 2010, a former law minister declared that eight of sixteen former Chief Justices of India (CJI) were corrupt, and in 2014 a former Supreme Court judge alleged that three former CJIs made 'improper compromises' to allow a corrupt High Court judge to continue in office.[6] As noted in Chapter 1, all four former Chief Justices of India since 2017 have faced serious allegations of corruption or misconduct. In April 2019, an allegation of sexual harassment was made against Justice Ranjan Gogoi, the then Chief Justice of India;[7] His successor, Chief Justice Ramana, also faced serious allegations of corruption and interference in the functioning of a

♠ A substantial part of this Chapter has been published as Shivaraj S. Huchhanavar, 'Regulatory mechanisms combating judicial corruption and misconduct in India: a critical analysis' (2020) 4:1 *Indian Law Review* 47-84.

[1] 'Is There Corruption In Supreme Court? Former CJI Ranjan Gogoi Answers' *Zee News* (Noida, 10 December 2021).

[2] *Government of India v Nirav Modi*, UKWMC (2021), 55-56, [124].

[3] Global Transparency International, *Global Corruption Report: Corruption in Judicial Systems* (CUP, 2007) <http://files.transparency.org/content/download/173/695/file/2007_GCR_EN.pdf.12>; not much has changed since 2007, World Justice Project Rule of Law Index [WJPRLI] ranked India at 85 among 128 countries, whereas the judicial branch is ranked at 78 positions, signifying a high-level corruption in the country and the justice sector. See WJPRLI 2020 <https://worldjusticeproject.org/rule-of-law-index/country/2020/India/Absence%20of%20Corruption/>

[4] In 2005, 79% of court users responded that there is corruption in the judiciary, see Centre for Media Studies and TI India, '*India Corruption Study to Improve Governance*' (2005) 104.

[5] Iyer Krishna VR., *The Majesty of the Judiciary* (Universal Law Publishing, 2007) 8.

[6] Shubhankar Dam (2022) 200-225.

[7] Jeffrey Gettleman, 'India's Chief Justice Is Accused of Sexual Harassment' *The New York Times* (20 April 2019).

High Court.[8] These recent episodes underscore the need for accountability within the judiciary and highlight the absence of robust regulatory mechanisms to deal with judicial corruption and misconduct.

Judicial complaints against the lower judiciary fall under the remit of vigilance mechanisms. The higher judiciary[9] has an in-house mechanism to investigate allegations of misconduct or corruption; the in-house mechanism is administered exclusively by the Chief Justice of India. Both vigilance and in-house mechanisms are internal accountability mechanisms that lack functional autonomy. The powers and functions of these mechanisms are not clearly prescribed, and the procedures concerning complaints, inquiries and disciplinary actions are *ad hoc*. Therefore, from the regulatory standpoint, it is essential to examine the implications of these mechanisms on judicial independence (especially individual and internal judicial independence) and judicial accountability. Against this backdrop, Subsection II critically examines the functioning of vigilance and in-house mechanisms. Subsection III briefly discusses some of the foundational issues that the Indian regulatory mechanisms face. Subsection IV concludes the analyses.

II. Regulatory Mechanisms in India

A. The regulatory mechanisms for subordinate courts

In the exercise of their supervising and controlling powers, the High Courts have established in-house mechanisms (formally known as 'vigilance cells') for facilitating the investigation of allegations of misconduct or corruption against the judicial personnel. The cell is normally based in the High Court precincts, headed by the Registrar (Vigilance), a senior district judge.[10] It works under the supervision of the High Court Chief Justice.[11] The cell is authorised to receive complaints against the district and subordinate court judges and also against the staff of both the High Court and subordinate courts.[12] However, it has no jurisdiction to entertain

[8] Rekha Sharma, 'Andhra CM's allegations against a SC judge must not be swept under the carpet' *India Today* (Noida, 26 October 2020).

[9] Here 'higher judiciary' refers to the Supreme Court and the High Courts of India.

[10] The composition of the vigilance cell varies significantly from one High Court to another. For instance, the Gujarat High Court has a Special Officer (Vigilance) as its head supported by Vigilance Officer-I and Vigilance Officer-II as his deputies (see Rule 5(a) and (b) of Gujarat High Court Vigilance Rules 1986). Whereas in Allahabad High Court, the Special Officer (Vigilance) is supported by Vigilance Officers working in the district judgeship (see Power and Duties of Allahabad High Court Officers, p.1). However, in most of the High Courts, Registrar (Vigilance) is overall in charge of the vigilance cell.

[11] See e.g., the Kerala High Court Office Manual 2015, 4.

[12] Kerala High Court Office Manual 2015, 4.

complaints against High Court judges, tribunal members, members of *Lok Adalats*, arbitrators, conciliators, and court-annexed mediators. Complaints received by the vigilance cell, according to the directions of the Chief Justice of the High Court, are invariably subjected to discreet inquiry[13] followed by fact-finding/preliminary inquiry[14] and, where appropriate, disciplinary proceedings are held.

In the following paragraphs, this section discusses the inquiry processes and procedures against judicial officers facing allegations of misconduct or corruption. Most High Courts conduct inquiries and investigations through vigilance cells according to the provisions of civil services rules formulated by the state government.[15] The civil services rules, as they apply to all civil servants of the state, are formulated in general terms; these rules outline general principles of substantive and procedural safeguards available to civil servants. Nevertheless, many of the High Courts, as they have not yet made special rules concerning judicial conduct regulation, follow the rules made by the state government.[16] In contrast, some High Courts[17] have made special rules for vigilance matters, but these rules are not comprehensive enough to govern the procedure for filing complaints, conducting inquiries, investigating and disciplinary proceedings, imposing disciplinary measures, and providing review and appeal. As a result, vigilance activities are guided by a combination of (a) state government rules,[18] (b) rules made by the High Court,[19] and (c) judicial decisions of the respective High Court and the Supreme Court of India. The judgments of the High Court and the Supreme Court examine issues of illegality, procedural impropriety, and the irrationality of disciplinary measures; the

[13] See e.g., *Registrar General High Court of Gujarat v Jayshree Chamanlal Buddhbhatti,* 2013(13) SCALE 230.

[14] See e.g., *Champaklal Chimanlal Shah v Union of India*, AIR 1964 SC 1854.

[15] The Vigilance Cell of the High Court of Madras follows the Tamil Nadu Civil Services (Discipline and Appeal) Rules 2013. See *infra* note 18 for the list of state rules followed by the High Courts that are referred for the purposes of this section.

[16] For instance, the Punjab and Haryana High Court follows the state government rules, concerning vigilance matters, it has no rules of its own. See also *infra* note 19.

[17] The Gujarat Vigilance Cell (Judicial Department) Rules 1986 and the High Court of Karnataka (Vigilance Cell) (Functions) Rules 1971.

[18] The state civil services rules consulted for this study are - the Punjab Civil Services Rules, vol I, 2016 (revised), the West Bengal Service Rules (Part I) 1971, the Gujarat Civil Services (Conduct) Rules, 1971, the Gujarat Civil Services (Discipline and Appeal) Rules, 1971 the Maharashtra Civil Services (Discipline and Appeal) Rules 1979, the Kerala Civil Services (Classification, Control & Appeal) Rules, 1960, Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, the Tamil Nadu Civil Services (Discipline and Appeal) Rules 2013, the Rajasthan Civil Services (Classification, Control and Appeals) Rules, 1958, Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991 and Central Civil Services (Conduct) Rules 1964.

[19] *Supra* (n 16).

courts also often review disciplinary proceedings to determine questions related to the compliance of principles of natural justice.[20]

This subsection attempts to construct the procedural framework within which the regulatory regimes for subordinate judiciary operate. The aim is to (a) outline procedural safeguards available to the subordinate court judges facing the disciplinary proceedings *vis-à-vis* the processes and procedures that the vigilance mechanisms follow; (b) highlight the procedural inadequacies in the inquiry and investigation processes; (c) underline the structural, organisational, and functional concerns of vigilance mechanisms.

The analysis has a couple of limitations, mainly concerning the High Court rules: (a) the explication of inquiry and investigation procedure is based on the High Court rules[21] compiled by the National Judicial Academy of India for judicial training programmes held in 2015 and 2016 – therefore, subsequent amendments, if any, to the High Court rules are not part of this analysis. (b) As previously stated, on procedural issues, for instance, the procedure on discreet and preliminary inquiry, formal rules of the High Court or the state government discussed are not exhaustive.[22] As a result, the overview is drawn with the help of landmark judicial pronouncements of the High Courts and the Supreme Court of India. Therefore, the explication of the processes and procedures is, at best, a general overview and not the exact portrayal of the Rules of any of the state governments or High Courts. A critical analysis of procedures and processes of vigilance cells is presented separately at the end of the general overview (see Subsection II.B), to sufficiently emphasize and put into context the structural, organisational, and functional concerns that otherwise may not readily emerge from the overview.

[20] The judicial pronouncements are particularly important as the civil service rules or the High Court rules (or both), do not comprehensively cover the complaints and scrutiny procedure.

[21] The High Court rules on power and functions of Registrar (Vigilance) referred for the purposes of this study are of the High Court of Allahabad, Gauhati, Himachal Pradesh, Jharkhand, Orissa, Punjab and Haryana, Madras, Kerala, Karnataka, Chhattisgarh and Tripura. Source – Reading Materials of National Conferences on Functions of Registrar (Vigilance) [P-946, P-949 and P-999].

[22] However, Gujarat High Court Rules (Rule 11 &12), in brief, deal with the discreet and preliminary inquiries.

The Vigilance Mechanisms: Remit, Complaint Procedure and Investigation Process

The Remit

A vigilance cell receives all types of complaints, including allegations of corruption.[23] In India, regulatory bodies do not maintain any distinction between allegations of judicial corruption and misconduct (see Subsection IV.A). A pertinent question at this juncture would be why criminal proceedings are not instituted for alleged acts of corruption. Some High Courts have formulated rules[24] on disciplinary actions that explicitly bar anti-corruption agencies from entertaining complaints of judicial corruption. For example, Rule 17 of the Vigilance Cell (Judicial Department) Rules 1986 adopted by the Gujarat High Court declares that 'no other anti-corruption agency in the state shall have any authority or jurisdiction to entertain any complaint against any official in the Judiciary Department of the State.'[25] However, it is highly contentious whether the High Court Rules prevail notwithstanding contrary provisions in the Prevention of Corruption Act (PCA) 1988.

The prevailing practice across the country is that no anticorruption agency takes cognizance of a complaint unless a such complaint is referred by the Chief Justice of the High Court,[26] or if the Chief Justice approves a request of the agency to investigate a complaint under the PCA. The permission of the High Court/the Chief Justice is also necessary to register an FIR against a judicial office holder.[27] In addition, some state governments,[28] as recommended by the respective High Courts, have declared the High Court Vigilance Cell a 'police station' for investigations under the Criminal Procedure Code of 1973. Such a declaration, coupled with a restriction on the power to arrest,[29] lay a trap[30] and collect intelligence inputs,[31] effectively

[23] For instance, Gujrat High Court Rules provide that '[A]ll matters relating to the allegations of corruptions against the Judicial Officers and staff members working in the Subordinate Courts in the State, dealt with by the Vigilance Cell of the High Court,' see *supra* (n 22). Karnataka High Court (Vigilance Cell) Functions Rules 1971, Rule 6.

[24] See Chapter 4.

[25] Constitutional Validity of Rule 17 is under challenge before the High Court of Gujarat. See *Mohammed Bilal Gulam Rasul Kagzi v Registrar, High Court of Gujarat* (2016).

[26] No judicial officer can be arrested for any offence without intimation to the High Court or the District Judge, see *Delhi Judicial Service Association v State of Gujarat* (1991) 4 SCC 406.

[27] See e.g., *Sharanappa v State of Karnataka* ILR 2015 KAR 6012.

[28] See e.g., *Jagat Jagdishchandra Patel v State of Gujarat* R/SCR.A/7338/2015; Gujarat High Vigilance Cell Rules 1986, Rule 16.

[29] *Delhi Judicial Service Association v State of Gujarat*, 1991 AIR 2176.

[30] Gujarat High Court Vigilance Rules, Rule 6(a).

[31] In Orissa, the state vigilance department is barred from collecting intelligence inputs regarding corrupt practices of any judicial officers and such information should be brought to the notice of the High Court, see Office of the Director and IG Police Cuttack, Orissa, standing order no.3/1972.

truncates the investigative powers of the anti-corruption bureaus under the PCA. Therefore, judicial corruption complaints are rarely investigated under the PCA. However, an absolute bar on anti-corruption agencies from taking cognisance of corruption cases is not a healthy practice and is inconsistent with the PCA.

The Complaints Procedure

A complaint against a judicial officer or court staff may be filed directly before the Registrar General of the concerned High Court.[32] The complaints so filed are placed before the Chief Justice or, in some High Courts, before the administrative committee in charge of vigilance matters.[33] Every complaint must be accompanied by an affidavit.[34] Whilst the requirement of an affidavit is intended to prevent false, pseudonymous, and anonymous complaints, its efficacy is questionable.[35] If the Chief Justice or the committee (hereafter the appropriate authority) considers a complaint to be genuine, they may direct the Registrar (Vigilance) to conduct a discreet inquiry. A discreet inquiry is made to determine the truthfulness of the complaint and to see whether there is credible information to proceed with the complaint.[36] The discreet inquiry, as the name suggests, is to be conducted covertly.[37]

If the discreet inquiry reveals any material supporting the allegation, the appropriate authority may direct the Registrar (Vigilance) to conduct a preliminary inquiry.[38] The preliminary inquiry is not always mandatory.[39] If there is conclusive evidence against a judicial officer, the appropriate authority may hold regular departmental proceedings. The object of a preliminary inquiry is to determine the veracity of the complaint and, where appropriate, to collect evidence to support the allegation.[40] The preliminary inquiry may form the basis for

[32] Guidelines on Grievances received in the Department of Justice, 5.

[33] For instance, in Allahabad High Court, a complaint against a judicial officer is initially placed before the administrative judge and inquiries, if any, will be held as per the directions of the administrative judge.

[34] See D.O.NoCJI/CC/Comp/2014/1405 date 03/10/2014.

[35] The vigilance cells receive a significant number of pseudonymous and anonymous complaints. See Huchhanavar, S.S. 'Learnings from the Conference on Functions of Registrar (Vigilance/Intelligence)' (2015) 04(1) *NJA Newsletter* 76-82.

[36] However, the procedure for discreet inquiry is not clear and often discreet inquiries fail to collect detailed and relevant information, see, *Barkha Gupta v High Court of Delhi through Registrar General and Lieutenant Governor of Delhi*: 136(2007) DLT119. Contrary to the law, occasionally, disciplinary measures are imposed on the basis of discreet inquiries see *K.B. Krishnamurthy v The State of Karnataka,* MANU/KA/2502/2011.

[37] ibid *K.B. Krishnamurthy*.

[38] *Rajendra Singh Verma (Dead) Through Lrs. v Lt. Governor of NCT of Delhi*, (2011)10 SCC 1.

[39] *Lalita Kumari v Govt. of U.P.,* AIR 2014 SC 187; The judicial decisions and the High Court practices on this issue are not unanimous, see *Champaklal Chimanlal Shah v Union of India*, AIR 1964 SC 1854, *Nirmala J. Jhala v State of Gujarat*, (2013) 4 SCC 301 and *G.S. Harnal v Union of India and Ors,* (1971) ILR 2 Delhi 129.

[40] *Nirmala J. Jhala,* see note 39.

the indictment/charges.[41] The main concern regarding preliminary inquiries is that High Courts are unable to conclude them expeditiously, and there is no established procedure to guide preliminary inquiries.[42]

Once the preliminary inquiry is concluded, the Registrar (Vigilance) submits a report to the appropriate authority which decides whether to conduct disciplinary proceedings or drop the inquiry process.[43] Once the decision is made in favour of holding a departmental inquiry, an inquiry officer is appointed.[44] A presenting officer is also appointed to represent the case of the disciplinary authority.[45] A charge sheet is prepared and a show-cause notice is served on the judicial officer. The charges should not be vague.[46] 'A show-cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.'[47]

The disciplinary inquiry is a quasi-judicial proceeding and must be held in accordance with the principles of natural justice.[48] The judicial officer may be suspended while disciplinary proceedings against the officer are contemplated or pending.[49] When dealing with a serious charge of corruption, an inquiry officer should consider whether the charge is proved beyond a reasonable doubt as it attracts both civil and criminal consequences.[50] Given that the charge is of a quasi-criminal nature, and a criminal charge cannot be proved merely on probabilities, the charge must be proved beyond any shadow of a doubt.[51] However, since disciplinary proceedings are conceptualised as civil, not criminal, why should a charge levelled against a judicial officer be proved beyond a reasonable doubt? Although the view is that the conduct of a judge should be evaluated on the basis of a preponderance of probabilities,[52] since the vigilance mechanisms in India also take cognisance of the criminal conduct of judicial officers,

[41] *G.S. Harnal,* see note 39.
[42] Chief Justices' Conference 2009, Resolution 5.
[43] *Champaklal,* see (n 39).
[44] The Tamil Nadu Civil Services (Discipline and Appeal) Rules 2013.
[45] The officer plays a role of a Prosecutor. He or she examines the witnesses of the department and cross-examines the witnesses in support of the judicial officer. The Karnataka Civil Services (Classification, Control and Appeal) Rules 1957, Rule 11.
[46] Maharashtra Civil Service (Discipline and Appeal) Rules 1979, Rule 8 – there must be 'definite and distinct' articles of charges.
[47] *Oryx Fisheries Pvt Ltd. v Union of India,* (2010) 13 SCC 427.
[48] E.g., *Anil Kumar v Presiding Officer* (1985) 3 SCC 378.
[49] The Kerala Civil Services (Classification, Control & Appeal) Rules 1960, Pt IV.
[50] Krishna Iyer, 'Judicial Accountability to the Community a Democratic Necessity' (1991) 26(30) *Economic and Political Weekly* 1814.
[51] *Union of India v Gyan Chand Chattar,* (2009) 12 SCC 78.
[52] *R.R. Parekh v High Court of Gujarat,* AIR 2016 SC 3356.

the criminal standard of proof is applied. However, conflicting judicial views on the issue of standard of proof have also complicated the procedure for disciplinary proceedings.[53]

The report of the inquiry officer is shared with the judicial officer in question and his/her comments are invited. The Chief Justice or the appropriate committee may disagree with the findings of the inquiry officer and direct a fresh inquiry.[54] According to the inquiry report, if the High Court decides to take action, the judicial officer has the right to be heard before any penalty is imposed.[55] The disciplinary proceeding may lead to minor or major disciplinary actions.[56] Minor disciplinary measures, such as reprimanding/suspending the judicial officer or withholding pay increments, are imposed by the Chief Justice.[57] Major disciplinary actions, including removal and compulsory retirement, are imposed by the full court.[58] Again, the practice of making major disciplinary decisions by the full court is not uniform. In some High Courts, the Administrative Committee recommends the imposition of a major penalty, which cannot be questioned on the ground that such a recommendation was not made by the High Court.[59] As far as the removal of judicial officers is concerned, the High Court makes the decision, and the government is bound to confirm it.[60] There is no appeal or review provision on the administrative side,[61] as discussed in Chapter 4, aggrieved persons must move the concerned High Court on the judicial side. In a number of cases, High Courts, due to procedural errors in the inquiry process, have reversed their own disciplinary determinations.[62]

The investigation and inquiry process and reports are kept confidential. Vigilance officers and staff are required to observe strict and absolute secrecy.[63] Although citizens have access to

[53] ibid.
[54] *Madhura Prasad v Union of India* (2007) 1 SCC 437; *R.R. Parekh,* (n 52).
[55] *Managing Director, ECIL v B. Karunakar*, (1993) 4 SCC 727; *R.R. Parekh*, (n 52).
[56] Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991, Pt IV, Rule 9.
[57] However, this practice is not consistent in all the High Courts. For instance, in Allahabad High Court the Administrative Committee dealing with vigilance matters makes these decisions. See High Court Allahabad Rules 1952, 9.
[58] Where all the High Court judges sit together and pass a resolution against/in favour of the motion and the matter is decided on the basis of a simple majority.
[59] *Yoginath D. Bagde v The State of Maharashtra*, (1999) 7 SCC 739.
[60] In *Samsher Singh v State of Punjab*, AIR 1974 SC 2192.
[61] Some State Civil Services Rules provide for a review process. For instance, Rule 29 of the Madhya Pradesh Civil Services Rules 1966 empowers the High Court to exercise review powers. Nonetheless, the process cannot be equated with a *bona fide* appeal or review, mainly because there is no involvement of an independent body to review the decision of the High Court.
[62] See e.g., *Registrar General High Court of Gujarat v Jayshree Chamanlal Buddhbhatti,* 2013(13) SCALE 230.
[63] Karnataka High Court (Vigilance Cell) Functions Rules 1971, Rule 4. See also Kerala High Court Office Manual 2015, 4.

inquiry reports against civil servants,[64] the judiciary in India has precluded itself from disclosing information about inquiries against judges under the Right to Information Act 2005 (RTI Act). In *The Registrar General v K. Elango,*[65] the petitioner sought information about the number of complaints filed against the judicial officers and their outcomes under the RTI Act 2005. The Madras High Court observed that disclosure of sensitive information requested by the petitioner would 'impede and hinder the regular, smooth and proper functioning' of the High Court as an independent authority. Similarly, the Supreme Court of India also relied on a pre-RTI Act judgment to deny the disclosure of inquiry reports.[66] Releasing information about the assets, affiliations and interests of judges, including inquiries conducted against judges should not be seen as impairing judicial independence.[67] The regulatory mechanisms must balance the public's right to information and the need for secrecy during an investigation; the disclosure of information should be seen as a step towards promoting a more democratically grounded independent judiciary.[68]

B. Structural, organisational, and functional concerns of vigilance mechanisms

There are other structural, organisational, and functional issues facing the vigilance mechanisms. The critical analysis briefly presented in the following paragraphs is based on the resource material compiled by the National Judicial Academy for the National Conferences on functions of the Registrar (Vigilance/Intelligence).

- Vigilance mechanisms lack clearly defined rules. There are no clear rules/guidelines on the nature of complaints to be accepted, further probed, referred for investigation, or rejected. [69]
- Vigilance mechanisms lack functional autonomy. Mechanisms are required to act as per the directions of the appropriate higher authorities. For example, Rule 3 of the Karnataka High Court (Vigilance Cell) Functions Rules 1971 mandates the Registrar (Vigilance) to work, in all respects, 'according to the directions and order which the

[64] *P.P.K. Rana v CPIO, Delhi Police*, CIC/AT/A/2006/00322.
[65] 2013 (5) MLJ 134.
[66] *Indira Jaising v Registrar General, Supreme Court of India*, Writ Petition (civil) 218 of 2003.
[67] 'RTI Disclosures May Affect Independence of Judiciary: AG Argues for SC in SC's Appeal Before CB Headed by CJI On The Question 'Whether CJI's Office A Public Authority' *Live Law* (Kochi, 3 April 2019).
[68] Supriya Routh, 'Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary' (2014) 13 *Washington University Global Studies Law Review* 321, 345.
[69] Huchhanavar, S.S., 'Learnings from the Conference on Functions of Registrar (Vigilance/Intelligence)' (2015) 04(1) *NJA Newsletter* 76-82.

Chief Justice may from time-to-time issue in consultation with Administrative Judge of the District concerned.' In the Allahabad High Court, the vigilance officer had to act according to 'orders/directives of the Administrative Judge'.[70] The total subordination of a key functionary like the Registrar (Vigilance) is antithetical to the institutional autonomy of the vigilance cell.

Furthermore, even if the Registrar (Vigilance) is accountable only to the Chief Justice (e.g., Kerala, Karnataka, Gujarat, and Madhya Pradesh), he is a district judge below the ranks of High Court judges, and, unless he is elevated to the High Court, after completion of his deputation as a vigilance officer, he will continue to serve as either a district judge or an officer in other departments of the High Court Registry, again, under the supervision of the High Court judges. This hierarchical subordination would prevent vigilance officers from acting firmly (especially against the wishes of High Court judges).

- There is a lack of uniformity in the practises, procedures, and processes among the High Courts on vigilance matters. High Courts must coordinate and cooperate to combat judicial corruption and misconduct at both regional and national levels. There is also a need to have a common policy framework within which the High Courts may considering local circumstances, adopt different approaches consistent with the common policy. For example, instead of having a police unit attached to the vigilance cell at every High Court,[71] a group of adjoining High Courts may have a joint police force assisting the vigilance cells of those High Courts as required. In addition, the High Courts need to work together to achieve some degree of uniformity on critical policy matters like adopting a code of judicial conduct for subordinate court judges and court staff[72] along with uniformity in complaints and scrutiny procedures. There is a scope for a national platform for information/intelligence sharing on matters of judicial corruption as well.

[70] Power and Duties of Allahabad High Court Officers, 1 <http://www.allahabadhighcourt.in/rti/powers_duties_03-05-12.pdf>.

[71] For want of sufficient work, the smaller High Courts may find it unnecessary or burdensome to have a police unit attached with the vigilance cell.

[72] There are no normative indicators or exhaustive guidelines on 'judicial misconduct' and 'judicial corruption'. In some states, for instance, the Madhya Pradesh Civil Services Rules 1965, (Rule 3 and 3A) attempt to outline the meaning of misconduct in general; however, these general guidelines do not adequately address the peculiarities of the judicial administration.

- There are no comprehensive rules relating to the investigation of judicial complaints.[73] The lack of a comprehensive procedural framework was discussed at the Chief Justices' Conference (2009). A resolution was passed partly to address this flaw. The resolution touched on two issues: (a) that the vigilance cell should fall under the supervision of the Chief Justice and (b) the decisions concerning minor disciplinary measures shall be made by the Administrative Committee appointed by the Chief Justice, while major penalties should only be imposed by the full court.[74] However, none of these measures proved effective in addressing the procedural void; in most of the High Courts, neither the Chief Justice nor the designated committee worked towards the formulation of a comprehensive disciplinary procedure.

- Many vigilance cells have inadequate infrastructure and staff. In High Courts like Madras and Madhya Pradesh, the vigilance cell receives more than 100 complaints per month, but the cells do not have enough staff to attend to such a volume of complaints. Of the 10 vigilance officers, 8 responded that the vigilance cell lacks adequate staff.[75] Disclosure under the Right to Information Act 2005 revealed that in the Gujarat High Court Vigilance Cell, in 2016, out of 19 vigilance officers and 13 support staff positions (of various levels), only 1 and 2 were appointed.[76]

- Information and technological needs of the vigilance cells remain largely unaddressed. In the internet era, corrupt dealings are often planned and materialised online. Therefore, electronic devices must be confiscated to apprehend the corrupt.[77] The vigilance registrars observed that the vigilance cells lack the adequate technical support and training required to confiscate electronic devices.[78]

- In many High Courts, the Registrar (Vigilance) is burdened with the responsibilities of other departments such as court inspection, protocol, High Court Rules, and the Right

[73] In some High Courts, complaints are routed through the 'administrative judge' to the Chief Justice; in few High Courts, the Registrar (Vigilance) directly consults the Chief Justice. The scrutiny process is also not similar in all the High Courts.
[74] Chief Justices' Conference 2009, Resolution 5.
[75] Huchhanavar, S.S., 'Learnings from the Conference on Functions of Registrar (Vigilance/Intelligence)' (2015) 04(1) *NJA Newsletter* 78.
[76] Advocate Mohammed Bilal Gulamrasul Kagzi, RTI application dated 03 August 2016 and reply dated 21 September 2016.
[77] See the observations of Justice Gokani on the sorry state of the vigilance cell in *Jagat Jagdishchandra Patel v State of Gujarat*, R/SCR.A/7338/2015.
[78] *Supra* (n 75).

to Information matters. The delegation of too many responsibilities on vigilance officers has led to inefficiency.[79]

- In large states (e.g., Rajasthan, Maharashtra, and Madhya Pradesh), a vigilance cell operating with limited resources from the High Court precincts cannot effectively keep vigil over the activities of judicial officers and court staff. A vigilance cell at the district level is the desiderata. In the Chief Justices' Conference (2009), it was decided to establish district vigilance cells, to date, not all the High Courts have vigilance cells at the district level.[80]
- The Chief Justices' Conference (2009) also recognised that the process adopted, and the methodology used by the vigilance cells do not produce quick and effective results. Cells have failed to earn the confidence of the litigating public. Inquiries conducted by these cells do not proceed in a timely manner and are not monitored regularly.[81]

C. The In-House Mechanism for High Court Judges

The Framers of the Constitution, with an intention to guard judicial independence, formulated a rigid and long-winded procedure for the removal of High Court[82] and Supreme Court judges (hereafter senior judges). The removal procedure was designed to cause as little damage as possible to the independence and public confidence in the efficacy of the judicial process and to maintain the authority of the courts for their effective operation.[83] Senior judges can be removed on the grounds of 'proved misbehaviour or incapacity'.[84] Article 124(4) of the Constitution, along with the Judges Inquiry Act 1968 regulates the procedure for removal. The removal process is set in motion by a 'removal motion' supported by '100 members of the Lok Sabha (lower house) or 50 members of the Rajya Sabha (upper house)'.[85] The removal motion must be accompanied by a signed complaint that is then investigated by a three-member committee composed of two judges and a jurist; if the charges of misbehaviour or incapacity are proved,[86] the matter will be debated in both Houses. Once the

[79] For instance, the Rules of the High Court of Himachal Pradesh list as many as 25 functions for the Registrar (Vigilance). See Reading Materials of National Conference on Functions of Registrar (Vigilance) [P-946, P-949 and P-999]. The National Judicial Academy India [2015-16 and 2016-17].
[80] Chief Justices' Conference 2009, Resolution 5.
[81] ibid; see also *Jagat Jagdishchandra Patel v State of Gujarat*, R/SCR.A/7338/2015.
[82] Constitution of India 1950, art 217.
[83] See generally, *K. Veeraswami v Union of India and Others,* (1991) 3 SCC 655.
[84] It implies that the impeachment process is not available for a misdemeanor of a judge.
[85] Judges Inquiry Act 1968, s. 3 (a) and (b).
[86] The Constitution of India 1950, art 124.

House in which the removal motion was introduced passes it with a 2/3rd (special) majority, the motion moves to the second House, where it must also pass with a special majority. The entire procedure must be completed within a single session; otherwise, the whole process must begin afresh in the subsequent session. After the motion is passed by both Houses, it will be placed before the President of India, by whose order the impugned judge will be removed.

In addition to the removal procedure (also known as the reference procedure), there is an 'in-house procedure' to deal with complaints against senior judges. The foundation of the in-house procedure was laid by the SC in *C. Ravichandran Iyer v Justice A.M. Bhattacharjee*[87] where the court observed that the 'yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating judge/Chief Justice of a High Court could be disciplined by self-regulation through the in-house procedure.'[88] This judgment led to the appointment of a committee.[89] The committee proposed an 'in-house procedure' to investigate complaints and suggest remedial action against senior judges. The report of the committee was adopted by the Supreme Court in 1997.[90] Recently, in *Additional District and Sessions Judge 'X' v Registrar General, High Court of Madhya Pradesh and others,*[91] the court elaborated on the in-house procedure.

The in-house procedure empowers the Chief Justices of the High Courts and the Chief Justice of India (CJI) to handle complaints against High Court and Supreme Court judges, respectively.[92] If the CJI, based on the initial assessment of the case, considers a further investigation necessary, he may constitute a three-member committee for that purpose. If the complaint relates to a High Court judge, the committee comprises two Chief Justices of High Courts and a High Court judge; if the complaint pertains to a High Court Chief Justice or a Supreme Court judge, the composition of the committee varies, but it will exclusively consist of judges.[93] Based on the recommendations of the committee, the CJI may, *inter alia*, dismiss the complaint or ask the judge in question to resign.[94]

[87] 1995 SCALE (5)142.
[88] ibid para 42.
[89] The committee consisted of three Supreme Court judges and two senior-most Chief Justices of High Courts.
[90] The report was adopted by the Supreme Court on 15 December 1999.
[91] AIR 2015 SC 645.
[92] Huchhanavar (2020) *Indian Law Review*, 59-70.
[93] Id.
[94] ibid.

The in-house procedure requires that the complaints received by the President, or the Law Minister have to be forwarded to either the Chief Justice of the relevant High Court or to the Chief Justice of India. Recent revelations show that a considerable number of complaints received by the executive branch are forwarded to the judicial leadership. For instance, in 2021, the Law Minister disclosed that, in the last five years, the Ministry had received 1,622 complaints that were forwarded to the CJI or concerned Chief Justices according to the established in-house procedure.[95]

D. Inquiry against High Court judges: withdrawal of work and punitive transfers: a critical review

In the exercise of his disciplinary power, the CJI can impose minor correctional or punitive measures on a senior judge facing disciplinary proceedings. Generally, when serious allegations of corruption or misconduct are made against High Court judges, the CJI resorts to punitive transfers[96] or withdrawal of judicial and administrative work.[97] However, in the following paragraphs, this subsection examines the efficacy of minor punitive measures exclusively against High Court judges.

During the emergency (1975), punitive transfers, especially against High Court judges, were used as a means to punish judges who stood up to the executive.[98] Unfortunately, the issue of abuse of transfer powers persists even today.[99] However, in this subsection, the discussion is limited only to evaluating the utility of minor punitive measures, like transfers, from a regulatory perspective. For this purpose, the corruption allegations against Justice P. D. Dinakaran and contempt of court proceedings against Justice C. S. Karnan are discussed as recent examples.[100] The subsection argues that transfer and withdrawal of work as a disciplinary measure will fail to have the desired impact if they are untimely; the judiciary often fails to use transfer and withdrawal of work effectively.

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[95] 'More than 1,600 complaints received against judiciary in last 5 years: Centre' NDTV (New Delhi, 02 December 2021) <https://www.ndtv.com/india-news/more-than-1-600-complaints-received-against-judiciary-in-last-5-years-centre-2634274>.

[96] Arghya Sengupta, *Independence and Accountability of the Indian Judiciary* (CUP, 2019) 63-82.

[97] 'SC Collegium recommends transfer of Patna High Court CJ and Justice Rakesh Kumar' *The Hindu* (Chennai, 17 October 2019).

[98] *Sankalchand Himatlal Sheth v Union of India*, (1976) 17 GLR 1017 and *S.P. Gupta v President of India*, AIR 1982 SC 149.

[99] 'Government not approving transfer of judges obstructs the administration of justice: Supreme Court' *The Leaflet* (6 January 2023).

[100] *Supra* (n 96) 63-82.

Justice P. D. Dinakaran, former Chief Justice of the Karnataka High Court, faced serious allegations of corruption. In all, he faced 16 charges; one of which was that he had acquired more than 300 acres of land in three villages in Tamil Nadu in his and his family members' name and four companies.[101] When the allegations emerged, Justice Dinakaran was the Chief Justice of Karnataka, consequently, his judicial work was withdrawn by the CJI. He approached the Supreme Court to challenge the withdrawal of his judicial work,[102] but the court rejected his petition. He was also advised by the CJI to go on leave until the conclusion of the inquiry by the in-house committee, but he refused. He defied the advice of the CJI and continued to handle the administration of the Karnataka High Court for several months. As an interim punitive measure, he was transferred to the Sikkim High Court as Chief Justice. That again proved to be ineffective and created a new problem when the High Court's Bar refused to appear before Justice P. D. Dinakaran in protest against the transfer of a corrupt judge to Sikkim. He finally resigned while facing in-house committee proceedings and an impeachment motion.[103] However, Justice Dinakaran did question the integrity of the members of the in-house committee on the ground that the committee had framed additional charges and was independently conducting investigations against him, which, according to the judge, was not permissible under law.[104] The entire episode dragged on for more than 2 years, and it not only tarnished the image of the judiciary but also underlined the ineffectiveness of ill-timed disciplinary measures like transfers and withdrawal of work.

A more recent example that highlights systemic inadequacies and inefficiency of disciplinary measures is the controversy surrounding Justice K. Karnan. In a series of letters between 2015 and 2017,[105] Justice Karnan made allegations of corruption, incompetence, and caste discrimination against fellow judges of the Madras High Court.[106] He also alleged that the High

[101] Bhusan, P. 'The Dinakaran Imbroglio: Appointments and Complaints against Judges' (2009) 44(41/42) *Economic and Political Weekly* 10-12.

[102] *Justice P.D. Dinakaran v Hon'ble Judges Inquiry Committee* WP Civil No 217/2011.

[103] Later, he unsuccessfully tried to withdraw his resignation, see Maneesh Chhibber, 'Dinakaran's Offer to withdraw resignation finds no takers in Govt' *The Indian Express* (New Delhi, 11 August 2011).

[104] 'Justice Dinakaran resigns as Chief Justice of Sikkim' *NDTV* (New Delhi, 29 July 2011).

[105] However, this was not the first time Justice Karanan's conduct stirred a controversy. In 2011, he complained to the National Schedule Caste Commission that he was subjected to caste-based harassment by other Madras High Court judges. The complaint was escalated up to the CJI, but no inquiries were made. In 2014, again Justice Karnan involved in a controversy when he allegedly barged into the courtroom interrupting an ongoing hearing of a matter relating to judicial appointments and claimed that selections were unfair.

[106] He also accused the Chief Justice of Madras High Court of caste discrimination for not having included him in any of the committees of the High Court (letter dated 21 August 2015); however, none of the allegations of Justice Karnan was investigated.

Court Chief Justice, while making recommendations for appointments to the High Court, ignored the underprivileged castes and tribes, as well as other minorities. Considering the seriousness of the allegations, the Chief Justice of India should have constituted an in-house committee. But Justice Karnan's allegations were not investigated. However, in response to Justice Karnan's allegation, the then Chief Justice of the Madras High Court, Justice Agarwal wrote to the CJI urging him to transfer Justice Karnan to a different High Court.[107]

Later, a 7-judge bench of the Supreme Court was constituted to hear the matter and the notice for contempt of court was issued against Justice Karnan.[108] His judicial and administrative work was withdrawn. Justice Karnan was asked to appear in person before the court, but he refused. He claimed that a *suo motu* petition is not maintainable against a sitting High Court judge and the Supreme Court has no power to punish him. Ultimately, the court found Justice Karnan guilty of contempt of court. He was sentenced to six months.

This case showcased the lack of intent of the judiciary to act swiftly and effectively, especially when serious allegations were made by and against Justice Karnan in 2011 and 2014. The apex court's response was casual, to say the least, and its intervention in the matter was belated rendering the disciplinary measures of withdrawal of judicial and administrative work and transfer ineffective.[109] Ultimately, the transfer orders did not solve the problem. The apex court adopted an escapist approach, hoping that the controversy would die a natural death with the retirement of Justice Karnan. However, the episode ended badly for both Justice Karnan and the judiciary.[110]

E. In-house procedure for complaints against judges of the Supreme Court

If a complaint is received against a judge of the Supreme Court by the CJI or if a complaint is forwarded to him by the President of India, the CJI shall first examine it. If the CJI finds it frivolous or does not involve any serious complaint of misconduct or impropriety, or directly related to the merits of a substantive decision in a judicial matter, he shall dismiss the complaint without any further action. If he is satisfied that the complaint is of a serious nature involving misconduct or impropriety, he will ask for the response of the judge concerned. On

[107] D. Suresh Kumar, 'Justice Karnan's Judicial Journey' *The Hindu* (Chennai, 16 February 2016).
[108] This was an unprecedented exercise of contempt power against a High Court judge.
[109] This is mainly because the judicial leadership did not act in time.
[110] Smita Chakraburtty, 'The Curious Case of Justice Karnan' (2017) 52(18) *Economic and Political Weekly* < https://www.epw.in/journal/2017/18/web-exclusives/curious-case-justice-karnan.html>.

a consideration of the allegations in the light of the response of the concerned judge, if the CJI is satisfied that no further action is necessary, he shall close the investigation. However, if the CJI is of the opinion that the matter needs a deeper probe, he shall constitute a Committee consisting of three judges of the Supreme Court. The said committee shall conduct an inquiry in the same manner as the committee formed to examine the complaint against a High Court judge, and further action on the same lines in light of the findings of the committee shall be taken by the CJI.[111]

F. In-house procedure for complaints against the Chief Justice of India

There are no guidelines that clearly set out the procedure to follow when a complaint is made against the Chief Justice of India.[112] In recent years, although serious allegations were made against the CJI, the constitution of in-house committees to look into these complaints did not follow any norms.[113] Although the in-house committee report does not provide for the procedure to deal with complaints against the CJI, the CJI should let the second senior-most judge of the Supreme Court deal with complaints against the CJI as a matter of judicial propriety (that no one should be a judge in his own cause). If the senior-most judge finds substance in the complaint, he shall ask for the response of the CJI. In case the complaint needs a deeper investigation, he would constitute a committee consisting of three judges of the Supreme Court.

Allegations against the CJI: a critique of the in-house procedure

The office of CJI is vital not just for the judicial administration in India but central to constitutional governance. When accusations of corruption or misconduct are made against the incumbent CJI, it strains the foundation of public administration and shakes public trust in the constitutional machinery. In recent years, the office of CJI has been embroiled in controversies. The controversy surrounding the current CJI, Justice Ramana, is briefly discussed in Chapter 2. Two of the recent controversies are discussed below as they highlight regulatory concerns. However, for the sake of brevity, only the key issues (allegations) are discussed.

[111] The procedure summarised in this paragraph is outlined in the Report of the Committee on In-house procedure, 8.

[112] The Report of the Committee on In-house procedure is silent on the procedures in cases where allegations are made against the CJI.

[113] For example, in 2019, when the sexual harassment allegations were made against the CJI, the bench headed by the CJI heard the matter and then constituted an in-house committee.

(i) Justice Dipak Misra

Justice Misra faced many allegations; this subsection briefly covers only two of them.

(a) The Chief Justice of India, Justice Misra, presided over every bench that heard the matter of Prasad Medical College. The main charge was that Justice Misra was involved in an alleged corruption scandal pertaining to the medical college. The Central Bureau of Investigation registered an FIR, *inter alia,* against a retired High Court judge Shri I. M. Quddusi. The FIR contained an allegation of criminal conspiracy and gratification by corrupt means to influence the outcome of a case pending before a bench headed by Justice Misra.[114]

Two petitions, one by the Campaign for Judicial Accountability and Reforms (CJAR), and the other by Ms Kamini Jaiswal (advocate) were filed in the Supreme Court. Both petitions prayed for an independent investigation into the FIR registered by the CBI. The petitioners also asked the CJI to recuse himself from the case. The petition of Kamini Jaiswal was initially heard by a bench headed by the second senior judge, Justice Chalmeswar. The bench, considering the importance and sensitivity of the case, ordered the constitution of a larger bench (of 5 senior judges). Subsequently, both petitions assigned to two different benches of the court were tagged (clubbed together) and listed before a 5-judges bench headed by CJI Dipak Misra himself.[115] The 5-judge bench nullified the order passed by the bench headed by Justice Chalmeswar.

These events clearly suggest that the CJI dealt with petitions both on the administrative and judicial sides, whilst being one of the suspects of bribery. The acts of Justice Dipak Misra including hearing this case himself, asserting his authority by assigning benches to adjudicate this case, preventing a constitution bench of five senior-most judges from deliberating on this case, and arranging for the case to be heard before the Bench of junior judges, constituted a gross violation of natural justice, abuse of judicial authority, and gross misconduct.[116]

(b) The second charge against Chief Justice Misra was that he acquired land, while he was an advocate, by filing a false affidavit that neither he nor his family had owned any agricultural land. However, in an earlier lease application for the same land, he stated that his family-

[114] Notice of Motion for presenting an address to the President of India for the removal of Mr Justice Dipak Misra, Chief Justice of India, under Article 217 read with 124(4) of the Constitution of India, 14, para 11.
[115] ibid.
[116] ibid 24.

owned 10 acres of land.[117] This matter was investigated by an Additional District Magistrate who cancelled the allotment in 1985. Despite the cancellation order, Justice Misra did not surrender the land until 2012. This serious non-compliance raised concerns about judicial misconduct which ought to have been investigated.

Apart from the two grounds briefly narrated above, the opposition party moved a motion for the removal of Justice Misra in the upper house of Parliament on 20 April 2018, raising 5 serious charges against Justice Misra.[118] However, the Vice-President of India, former chair of the upper house of Parliament, dismissed the motion on the ground that '...the allegations are within a judicial domain and concern internal judicial processes or there are unsubstantiated surmises and conjectures which hardly merit or necessitate further investigation…'[119] Despite these allegations and the motion for his removal, Justice Misra retired as CJI on 02.10.2018. Nevertheless, he earned disrepute for being the first Chief Justice of India to face a removal motion.

Among all this, in January 2018, four senior-most judges[120] of the Supreme Court convened a historic press conference. Referring to the difference of opinion on some matters,[121] the judges remarked that '[m]any things that are less than desirable have happened in the last few months…Unless this institution [Supreme Court] is preserved and it maintains its equanimity, democracy will not survive in this country… Therefore, we are left with no choice except to communicate to the nation that 'please take care of the institution and take care of the nation'.[122] This press conference marked a deep division within the judicial leadership of the country.

(ii) Justice Ranjan Gogoi

On 20 April 2019, a 35-year-old junior court assistant of the Supreme Court alleged that Justice Gogoi sexually harassed and abused her.[123] An emergency hearing was convened by

[117] ibid 26.
[118] Id.
[119] The Vice-President's Order dated 23 April 2018 <https://rajyasabha.nic.in/rsnew/HC_orders_mothion.pdf>.
[120] Justice Chelameswar, Justice Rajan Gogoi, Justice Madan B Lokur and Justice Kurian Joseph.
[121] Ostensibly, they referred to an undated letter written by them to the Chief Justice over allocation of cases by the Chief Justice and other issues like the death of Justice Loya, see *Scroll.in* (12 January 2018).
[122] ''Democracy is in danger': Watch the historic press conference held by four Supreme Court judges,' *Scroll.in* (13 January 2018).
[123] 'Chief Justice of India sexually harassed me, says former SC staffer in the affidavit to 22 judges' *Scroll.in* (20 April 2019).

the Supreme Court to hear the matter. Justice Gogoi categorically denied the allegations.[124] He was reported to imply in his response that 'the allegations were part of a broader conspiracy, and the judiciary of this country is under very, very serious threat.'[125] Later, an in-house committee, headed by the second senior judge of the Supreme Court, Justice S.A. Bobade was constituted.[126]

The complainant appeared twice before the in-house committee, but on 1 May 2019, she withdrew from the in-house proceedings citing the lack of sensitivity on the part of the committee. She alleged that access to a lawyer was denied to her. She was not informed of the procedure to be followed during the inquiry.[127] However, the committee proceeded *ex parte* and concluded that there was 'no substance' to the accusations, adding that its report would not be made public.[128]

The manner in which the allegations against two Chief Justices of India were handled demonstrates that there is no robust mechanism to deal with judicial misconduct at the highest level. The accusations against Chief Justice Misra were serious. But the accountability mechanism failed again. The removal process proved to be ineffective. Though under section 3 of the Judges Inquiry Act 1968, the Chairman of the Rajya Sabha has the power to refuse the removal motion, as a matter of convention, this power has never been exercised in the past by the Chairman.[129] The removal motion in Parliament was always followed by the constitution of an inquiry committee, but not in the case of Justice Misra. Considering the reluctance of Justice Misra to disengage himself with the medical college case and with subsequent petitions requesting his recusal, the impeachment motion seemed the only recourse to investigate the allegations. While party politics has always played its role in the impeachment process in India, in this case, the Chairman chose a legal justification for defeating the motion for removal. However, the accountability mechanism again failed to investigate the serious allegations.

[124] 'Justice Gogoi refutes allegations, says 'bigger force' wants to deactivate CJI's office' *Hindustan Times* (New Delhi, 20 April 2019).

[125] Jeffery Gettleman, 'India's chief justice accused of sexual harassment: "He touched me all over my body"' *The Independent* (London, 22 April 2019).

[126] The committee had other two members: Justice Indu Malhotra and Justice Indira Banerjee, both were sitting judges of the Supreme Court at the time.

[127] 'Complainant Against CJI Withdraws from Inquiry Panel, Citing Lack of Sensitivity' *The Wire* (New Delhi, 01 May 2019).

[128] 'Ranjan Gogoi: India's chief justice cleared of sexual harassment' *BBC* (London, 6 May 2019).

[129] See, e.g., impeachment proceedings against Justice V. Ramaswmi and Justice Soumitra Sen.

The allegations against Justice Misra were handled in a manner contrary to the procedure prescribed in *Veerasawmi.*[130] The judgment held that, in order to ensure the independence of the judiciary, it is necessary to seek permission from the CJI to register an FIR against judges of the High Court and Supreme Court. The judgment also clarified that if allegations are made against the CJI, the government may consult any other judge or judges of the Supreme Court to seek permission to register the FIR. However, Justice Misra did not allow the second senior-most judge at the time, Justice Chelmeswar,[131] to deal with the case, let alone permit the filing of an FIR. Unfortunately, the government never seemed interested in investigating the allegations against Justice Misra. It was busy delegitimising the opposition's removal motion.[132]

The case involving sexual harassment allegations against Chief Justice Gogoi demonstrates that the in-house mechanism is deeply flawed.[133] There are no clear guidelines on the procedure to be followed by the in-house committee. Even if the committee is authorised to prescribe appropriate procedures,[134] both parties must be made aware of such procedures beforehand. Why should the lawyer's assistance be denied in a sexual harassment case? If there were justifiable reasons, the complainant should have been informed of them. Furthermore, the lack of transparency and the degree of opacity with which the judiciary dealt with the inquiry report is unacceptable and contrary to the law.[135]

Furthermore, the in-house mechanism, by design, is meant to be supervised and, where necessary, enforced by the Chief Justice. The mechanism is set in motion by the Chief Justice - if the allegations are against the Chief Justice himself - the in-house procedure remains uninvoked for want of authority of the next senior judges of the Supreme Court to execute the procedure. For example, as discussed already, Justice Misra did not bother to appoint an in-house committee, and the next senior judge could not invoke the in-house procedure. Furthermore, both Justice Misra and Justice Gogoi violated the foundational principle of natural justice by being a judge in his own cause and thereby undermined public trust in the

[130] *K. Veeraswami v Union of India and Others***,** (1991) 3 SCC 655.
[131] Tenure of CJI Dipak Misra: 400 days of tumult for the 'Master of Roster,' *Business Standard* (New Delhi, 3 October 2018).
[132] 'CJI Misra impeachment: Rijiju says Congress doesn't trust army, CJI, SC, EC' Business *Standard* (New Delhi, 21 April 2018).
[133] Rajeev Dhavan, 'Gogoi Case a Reminder that India Lacks System of Judicial Accountability' *The Wire* (New Delhi, 09 May 2019).
[134] *X v High Court of M.P* (2015) 4 SCC 91.
[135] Under the Right to Information Act 2005, Indian citizens have the right to know about the disciplinary proceedings against public servants.

highest judicial institution. In both cases, the second senior-most judge of the Supreme Court should have handled the allegations.

The success of the regulatory regime lies in enforcing judicial conduct without ceding public trust in courts and accountability mechanisms. The present in-house mechanism has failed in both. A peer-review approach has failed to ensure judicial accountability, and it operates like a mechanism *of the judges, by the judges and for the judges*. In a democracy, it is difficult to make people accept a judge who is accountable only to his peers. The other two organs—the legislature and the executive—derive legitimacy through periodic elections. Likewise, people expect the judiciary to be accountable to them in some form. Therefore, the in-house mechanism should include a broad spectrum of the population, representing the executive, the legislature, the Bar, and civil society, and within this wider spectrum, the judiciary may have greater representation.

In addition, India needs a dedicated judicial accountability institution that deals with judicial misconduct. The in-house mechanism is not the solution, nor is it an alternative to the rigid impeachment process. A formal mechanism with a comprehensive complaint and inquiry procedure is the desiderata. However, the in-house mechanism should not be substituted by a mechanism that is (a) too informal (i.e., its composition, powers and functions must be clearly prescribed); and (b) judiciary or CJI-centric (it should represent a broad-spectrum population). Such a mechanism should have (a) comprehensive provisions to ensure accountability of the CJI; (b) sufficient provisions for transparency and openness. Furthermore, any attempt to formalize the in-house mechanism, in its present *avatar*, without addressing its institutional, compositional, and functional concerns is a recipe for failure.

III. Regulatory mechanisms in India: areas of concern

1. There is no comprehensive and binding code of judicial conduct

The Restatement of Values of Judicial Life 1997, which have no enforcement mechanism, is the only code of judicial conduct binding the senior judges.[136] Restatement, which was

[136] National Network of Lawyers for Rights and Justice, 'Restatement of Values of Judicial Life (1999) – Code of Judicial Ethics' (12 November 2009).

approved by the Chief Justices' Conference 1999, is abstract and inadequate. It briefly touches on (i) trade, business, investment, and gifts; (ii) family, fiduciary relationships, and professional conduct; (iii) and eschews political and associational activities that could lead to a conflict of interest.

The major weakness of the Restatement is that it sets out the principles of judicial conduct without sufficiently clarifying standards of behaviour for judges. One of the main purposes of the conduct code is to enable judicial officeholders to assess their conduct bearing in mind the abstract principles outlined in the code.[137] For this purpose, interactive and practice-oriented manuals and guides must be devised to supplement the code; adequate training should also be imparted to help judges cope effectively with real-life situations.[138] The principles cannot be expected to work in a vacuum. An institutional framework is needed to monitor and enforce these principles.[139] Although there are investigative mechanisms for both the higher and lower judiciary, there are no regulatory mechanisms to enforce the 'values of judicial life' and the Bangalore principles.[140] Furthermore, there is no corresponding statement of values for judges of the district and lower courts, and court officials.[141] These cursory principles regarding judicial values also need a comprehensive review in light of international instruments.[142]

The structural arrangement of the Indian judiciary is such that every High Court (on the administrative side) is an autonomous institution governed largely by self-made rules. Therefore, a conduct code, to be binding, must be approved by full court resolutions of each High Court. Judicial conduct codes, whether international or national, without the insignia of the relevant High Court, would remain irrelevant for judicial officers and regulatory authorities enforcing judicial conduct. Furthermore, informal judicial institutions such as *Lok Adalats*, court-annexed mediation, conciliation, and arbitration proceedings also need adequate attention from both the legislature and the judiciary with regard to judicial conduct regulation. For example, *Lok Adalats* are organized across India by Legal Services

[137] See generally, Global Judicial Integrity Network, Guide on How to Develop and Implement Codes of Judicial Conduct 2019.
[138] See generally, 'Judicial Conduct and Ethics: Trainers' Manual' (2018). See also Resource Guide on Strengthening Judicial Integrity and Capacity 2011.
[139] G. Mohan Gopal, 'Corruption and the Judicial System' <https://www.indiaseminar.com/2011/625/625_g_mohan_gopal.htm>.
[140] ibid.
[141] Commonwealth (Latimer House) Principles, *Plan of Action for Africa* (2005) para 2.3.2.
[142] See e.g., Principles of Judicial Ethics (2016) <https://www.unodc.org/documents/ji/discussion_guides/ENCJ_Supporting_Documents.pdf>.

Institutions[143]- in 2018 alone, 72,40,524 cases were amicably settled by these *Adalats*.[144] The National Legal Services Authority also reported that for 2018 the court-annexed mediation centres had settled 1,01,182 cases. Despite their pan-national presence and notable contribution to the administration of justice, these informal judicial institutions have no complaints mechanisms. There must be a code of conduct for individuals participating in these informal justice dispensation mechanisms as arbitrators, conciliators, mediators, and adjudicators. Similarly, there should be accountability mechanisms that enforce both individual and institutional accountability of individuals or institutions that participate in the informal justice administration.[145]

2. Threats to internal judicial independence are underemphasised

Regulatory mechanisms play a vital role in reconciling judicial accountability and independence. To this end, the mechanisms must be capable of safeguarding subordinate judges against the abuse of power by higher echelons of the judiciary.[146] Additionally, to secure internal judicial independence, it is necessary to ensure that the oversight mechanisms do not impede judicial independence through overregulation.[147] This is particularly relevant where judicial regulation is carried out by in-house mechanisms. Unlike arm's length regulatory bodies, in-house mechanisms lack autonomy and often act according to the direction of senior judges. The interaction between the higher judiciary and the in-house mechanism often resembles a 'principal-agent' relationship, where the latter lacks adequate functional autonomy.

Furthermore, the issue of internal judicial independence assumes greater complexity in the Indian context. As seen in Chapter 4, the higher judiciary plays a vital role in judicial appointments, transfer, promotion, suspension, retention, and removal of both judicial officeholders and court staff. Against this backdrop, what are the implications of the in-house vigilance mechanism on the internal independence of the judiciary? Little attention has been paid to this critical issue. It is the duty of the High Courts to ensure that accountability

[143] For the sake of brevity, this subsection avoids a detailed discussion on *Lok Adalats*.
[144] See NALSA Annual Report 2018, 7.
[145] See generally, Alok Prasanna Kumar et al., 'Strengthening Mediation in India: A Report on Court-Connected Mediations' (2016) *Vidhi Centre for Legal Policy* 1-40.
[146] Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995, art 6.
[147] See e.g., *R.C. Sood v High Court of Judicature at Rajasthan* AIR 1999 SC 707.

mechanisms do not override judicial independence. Judicial individualism is central to judicial impartiality. Therefore, a constant critical evaluation of these institutions and their interactions with each other and the overall impact of the relationship between the High Court and the vigilance cell on judicial conduct regulation is essential. An audit of the mechanisms and their implications on internal judicial independence should guide structural, compositional, and functional reforms in the existing regulatory framework.

Currently, the vigilance mechanism is too informal; none of the High Courts (except Gujarat[148]) formally recognises the vigilance cell as a separate department of the High Court. While the Registrar (Vigilance) is treated just as another officer of the High Court Registry, the vigilance cell has only powers and functions delegated to it by the Chief Justice or the relevant Administrative Committee. In its current form, neither the public nor the judicial officer can see the vigilance cell as an entity separate from the High Court. As a result, judicial officers may perceive the influence of the High Court or the Administrative Committee behind the actions of the vigilance cell. Simply put, the corporate veil of the vigilance cell is too thin to obfuscate the commanding authority (the High Court). Therefore, the present in-house arrangement must be audited with special emphasis on its implications for internal judicial independence.

3. Appropriate and adequate use of criminal law – One of the striking features of the Indian regulatory system is its reluctance to employ criminal law. There are instances where even allegations of corruption and misuse of public funds are treated as misconduct issues and are addressed through disciplinary actions.[149] Further, as noted elsewhere, no First Information Report (FIR) can be registered against a judicial office holder without appropriate permissions; anticorruption authorities do not exercise jurisdiction over judges without the sanction of the Chief Justice of the relevant High Court. In *C Ravichandran Iyer v A M Bhattacharjee,* the SC ruled that no forum or group or association – statutory or otherwise – can investigate or enquire into or discuss the conduct of a judge or the performance of his duties.[150] In summary, none of the regulatory bodies/authorities can investigate or discuss

[148] Gujarat High Court Vigilance Rules 1986, Rule 4(c).

[149] See allegations against Justice P. D. Dinakaran and against Chief Justice Rangan Gogoi (subsection II.E & F). It is not that the corruption or misappropriation of funds does not constitute 'misconduct'. However, if the criminal law offers more rigorous sanctions; judges, like any public servants, must be tried for serious charges first.

[150] (1995) 5 SCC 457, para 20.

judges' conduct. This overwhelmingly broad immunity from oversight and scrutiny provides a free pass to judges. The prevailing practice has been that the police are allowed to investigate the allegations only in rare cases.[151] As a result, the fear of prosecution, fines, forfeiture, and imprisonment has withered away. The practice of not using criminal law against corrupt judicial officeholders does not help the judiciary in its fight against corruption; instead, it would abet corruption and criminal behaviour (see Subsection IV(A) for further discussion).

4. Lack of transparency and accountability – Judicial conduct regulation in India is grounded in an opaque system that operates in-house and is 'inaccessible'. Virtually nothing is publicly known about the activities of the mechanism. No information about the number of complaints received, investigated, or dismissed is made public; the vigilance mechanism divulges no information on the number of judicial officers reprimanded, suspended, or removed. Not even the reasons for rejecting complaints are communicated to complainants. Across the country, a significant, but publicly unknown number of judicial officers are said to be expelled from judicial service for misbehaviour or conduct unbecoming of a judge or corruption. However, these actions remain shrouded in secrecy.[152] Shubhankar Dam rightly terms this as an economy of ignorance.[153]

IV. Conclusion

India's regulatory architecture is founded on conceptual asymmetry; it lacks a balance between judicial accountability and independence. The procedure for the removal of judges through impeachment proceedings is rigid, and the in-house procedure is too informal. Therefore, there is a need to find a suitable alternative.[154]Any regulatory mechanism that replaces the in-house procedure must be an arm's length institution, having adequate diversity in terms of its composition.[155] The mechanism should also not be judiciary or CJI-centric.[156] The procedure must be comprehensive, and value transparency and openness. To

[151] For instance, despite numerous allegations of corruption by the senior judges, currently, only three senior judges are facing criminal charges. See Shubhankar Dam (2022) 220.
[152] G. Mohan Gopal, *supra* (n 150).
[153] Dam (n 151) 222-224.
[154] See generally, P.N. Bhagwati, 'Judicial Independence vs Judicial Accountability: A Debate' *Centre for the Independence of Judges and Lawyers* (1999).
[155] SP Sathe, 'Appointment of Judges: The Issues' (1998) 33(32) *Economic and Political Weekly* 2155-2157.
[156] *S.P. Gupta v President of India*, AIR 1982 SC 149 para 29.

resist external influences, the procedure must have constitutional safeguards. Therefore, for this purpose, the Constitution may be amended.

As regards the lower judiciary, there are fewer procedural and legal constraints – there is no need for the judiciary to count on Parliament or the state legislature to usher judicial reforms – and the High Courts are constitutionally authorised to undertake necessary reforms, *inter alia,* relating to judicial conduct regulation. However, the judiciary must resist the temptation towards secrecy. Not being accountable is convenient, but that is not the value on which the Constitution and India's democracy are founded. Benjamin Franklin's adage that 'three may keep a secret if two of them are dead'[157] is apt; If the judiciary wishes to keep everything opaque, this will only come at the cost of public confidence, and this behaviour is an open invitation to external forces that often undermine the independence of the judiciary. Therefore, judicial secrecy can only survive at the cost of two kills: public trust and judicial independence.

Even for the lower judiciary, an arm-length institution is needed to regulate judicial misconduct. There is a lack of role clarity and autonomy. The vigilance mechanism merely processes information and facilitates inquiries and disciplinary proceedings. The mechanism must have recommendatory powers to be effective. For this purpose, vigilance cells should be institutionalised. There is an urgent need to strengthen these institutions in terms of infrastructure, personnel, and technical support. Considering the territorial jurisdiction of some of the High Courts, such as Allahabad, Madhya Pradesh, Rajasthan, Bombay, Calcutta, and Tamil Nadu, it is also necessary to establish district vigilance cells. Vigilance mechanisms in many High Courts, also lack comprehensive procedural rules. A comprehensive legal framework helps regulatory mechanisms comply with procedural requirements. In addition, it is also necessary to have an independent second-tier review mechanism. Such mechanisms can hold vigilance cells accountable and rectify procedural errors of first-tier complaints mechanisms.

[157] Benjamin Franklin, Poor Richard's Almanack (Founders Online, 1735) <https://founders.archives.gov/documents/Franklin/01-02-02-0001>

Chapter 5: Section II

Judicial conduct regulation regimes in the UK: a critical study of the complaint and investigation procedures and processes

I. Introduction

In England and Wales, the primary regulatory body is the Judicial Conduct Investigations Office (JCIO),[1] while in Northern Ireland, it is the Complaints Officer. The Judicial Office for Scotland has a similar role with respect to judicial officeholders in Scotland. In addition, unlike Northern Ireland,[2] England and Wales and Scotland have second-tier review bodies.[3] These regulatory regimes have a number of notable similarities and differences between them. This section aims to explicate these similarities and differences and their implications on judicial conduct regulation. For this purpose, the complaint procedures, screening processes, inquiry and investigation procedures, disciplinary actions, review and appeal procedures, and the role of the JACO and JCR are critically examined. However, since England and Wales and Northern Ireland (NI) share notable similarities, to avoid unnecessary repetition, only the differences concerning the regulatory mechanisms of NI are highlighted. Although the primary aim of this section is to compare regulatory mechanisms in three jurisdictions of the UK, where relevant, the section compares regulatory mechanisms of the UK and India, which is the overarching aim of this section.

The section is structured as follows: Subsections II to V critically analyse complaints mechanisms, investigation procedures, disciplinary measures, and other relevant disciplinary protocols in the respective jurisdictions, including the Supreme Court of the United Kingdom (UKSC). With a view to facilitating an in-depth critical analysis of the regulatory regimes in this section and Chapter 7, this section discusses disciplinary protocols at length. Subsection VI briefly outlines some of the notable features of the UK's regulatory regimes that have significantly improved judicial accountability, while adequately safeguarding the institutional independence of the judiciary in the UK. This subsection argues that these key characteristics,

[1] However, complaints concerning tribunal members and magistrates are dealt with separately by the respective tribunal President and the Local Advisory Committees in the case of magistrates, see Chapters 3 and 6 for further discussion.

[2] Judiciary and Courts (Scotland) Act 2008, s. 30; the Northern Ireland Public Services Ombudsman Act 2016, s. 58; Justice (Northern Ireland) Act 2002, s. 9A.

[3] JACO Business Plan 2019-20, 1.

namely (a) comprehensive legal frameworks; (b) inclusive accountability regimes; (c) institutionalised approach to judicial conduct regulation; (d) open and transparent conduct regulation regimes; and (e) accountability of regulatory regimes, are missing in India. As a result, India lacks robust judicial conduct regimes. These key features will be elaborated upon further and critically assessed in the following Chapters. This subsection also argues that although the UK's regulatory frameworks are comprehensive and the mechanisms are robust, there is scope for improvement. Subsection VII concludes.

II. England and Wales

Under the CRA, the Lord Chief Justice has the primary responsibility to ensure the 'good behaviour' of judicial officers, tribunal members, arbitrators, and commissioners, including coroners and court officials.[4] However, the Act attempts to counterbalance the role of the executive branch and the judiciary in judicial discipline by sharing the disciplinary authority between the Lord Chief Justice and the Lord Chancellor.[5] Procedural aspects relating to the appointment of a nominated judge, investigative judge and the disciplinary panel, the consultation between various disciplinary actors, the investigation and the decision-making process have been adequately outlined. In this regard, the LCJ is empowered to issue rules in consultation with the Lord Chancellor.[6]

The Judicial Complaints Investigations Office (JCIO): the Role

The Lord Chief Justice drew up the Judicial Discipline (Prescribed Procedures) Regulations 2014, which established the JCIO.[7] The JCIO 'supports the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline.'[8] It provides administrative assistance in the investigation of complaints against judicial office holders and acts as an intermediary between various authorities responsible for judicial conduct regulation. It receives complaints directly from the public[9] and facilitates the investigation of complaints with the help of a

[4] Concurrent obligation of maintaining higher judicial standards is also on Ombudsman and Lord Chancellor.
[5] See Chapters 2 and 3; see also Gee et al., (2015) 34.
[6] CRA, s. 115.
[7] As per Regulation 14, the Lord Chancellor had to 'designate officials' – that body of officials is known as the JCIO. See also CRA, ss. 115, 116 and 117.
[8] Judicial Conduct Investigations Office: About us <https://judicialconduct.judiciary.gov.uk/about-us/>.
[9] Judicial Conduct (Judicial and other officeholders) Rules 2014, Rule 5.

nominated judge. Based on the findings of the nominated judge, the JCIO advises the Lord Chancellor and the Lord Chief Justice on judicial conduct and disciplinary measures.[10]

The JCIO is not the only first-tier judicial complaint-handling mechanism in England and Wales. As regards magistrates and tribunal members, there are different complaint procedures. As against the magistrates, the complaint shall be made to the Advisory Committee for the local justice area or to its Secretary.[11] Likewise, in the case of tribunal members, a complaint is to be filed to the President of the relevant tribunal.[12] The complaints against magistrates and tribunal members are initially assessed by the Local Advisory Committee and the President of the relevant tribunal, respectively, and are dealt with as per the relevant Rules.[13]

The 2014 Rules, together with the 2014 Regulations,[14] prescribe a comprehensive procedure for investigations into allegations of judicial misconduct.[15] The Rules apply to a judicial office[16] – which is defined to include both 'senior judges', and as per Schedule 14 of the Act, all judicial officeholders below the High Court and administrative officers in charge of such courts; prosecution lawyers are also included within the meaning of 'judicial officeholder'. The judicial complaints procedure relating to the judges of the UKSC is prescribed separately.[17] Consequently, every judicial office holder – from the President of the UK Supreme Court to a corner – is accountable for his/her judicial conduct.

The complaints procedure, scrutiny, and the summary process

The JCIO has the power to receive, scrutinise, and, in some cases, deal with the complaints summarily.[18] In appropriate cases, the JCIO may extend the time limit to make a complaint.[19]

[10] Judicial Discipline (Prescribed Procedures) Regulations 2014, Regulation 4.

[11] Judicial Discipline: Response to Consultation (2022), 28.

[12] The working group (2022) proposed to transfer responsibility for dealing with complaints about tribunal members from chamber presidents to the JCIO: see Judicial Discipline: Response to Consultation (2022), 9-11.

[13] Judicial Conduct (Tribunals) Rules 2014 and the Judicial Conduct (Magistrates) Rules 2014.

[14] The Lord Chief Justice, in the exercise of powers conferred under ss. 115, 116, 117, 120 and 121 of the Constitutional Reform Act 2005 has laid down the Judicial Discipline (Prescribed Procedures) Regulations 2014.

[15] The Lord Chief of England and Wales, in the exercise of powers conferred upon him by the Constitutional Reform Act 2005 has promulgated the Judicial Conduct (judicial and other officeholders) Rules 2014. As regards the magistrates, the Judicial Conduct (Magistrates) Rules 2014 apply. The Supplementary Guidelines to the Judicial Conduct (Judicial and other office holders) Rules 2014 also set out the role of JCIO and the investigations against the relevant judicial officeholders.

[16] The rules apply to a judicial office, the offices of the senior coroner, area coroner or assistant coroner and to an office designated under section 118 of the CRA.

[17] Judicial Complaints Procedure: UK Supreme Court <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>.

[18] Judicial Conduct (Judicial and other office holders) Rules 2014, Rules 19, 20 and 29-31.

[19] ibid, Rule 14. As a general rule, a complaint must be made within three months of alleged misconduct (Rule 11).

It has the power to call for all documents within the control of the complainant substantiating the allegation.[20] These powers, *among others,* demonstrate that the JCIO does not merely act as a facilitator, but plays a crucial role in investigating judicial complaints. The power to dismiss complaints that fail to meet the criteria prescribed by the rules further testifies to the critical role that it plays.[21]

The role of a nominated judge, an investigating judge and the disciplinary panel

Whilst the receipt, scrutiny and initial processing of complaints are done by the JCIO independently, once the complaint is retained for further inquiry and if that complaint cannot be dealt with summarily, it shall be referred to a nominated judge.[22] The nominated judge must consider the complaint and determine whether the facts constitute misconduct. The nominated judge, in addition to submitting his findings, advises the Lord Chancellor and the Lord Chief Justice on whether disciplinary action should be taken.[23]

However, in appropriate cases, the Lord Chief Justice (or a nominated judge) and the Lord Chancellor or the Judicial Conduct Ombudsman under Section 111 of the CRA, may ask for a referral to an investigating judge.[24] In such an eventuality, the Lord Chief Justice may, as per Regulation 10, nominate an investigating judge.[25] The investigating judge has all the powers of a nominated judge; s/he can reconsider any evidence, determine the matter afresh and submit a report to Lord Chief Justice and Lord Chancellor. One of the striking distinctions between a nominated judge and an investigating judge is that the latter has greater control over the procedure to be followed during the investigation.[26] The investigating judge must submit his report with details of any changes that he recommends. The report should also be shared with the officeholder in question, including, as appropriate, with the third parties participating in the proceedings.[27]

[20] Judicial Conduct (Judicial and other office holders) Rules 2014, Rules 6-9.

[21] A complaint of judicial misconduct must be in writing, legible and contain allegations against an identifiable judicial officeholder; complaints about a judge's decision or the way a judge has managed a case will not be entertained by the JCIO as it has no remit on such complaints.

[22] A nominated judge is a senior judicial officeholder (mostly a High Court judge) appointed by the Lord Chief Justice to provide advice on complaints.

[23] Judicial Conduct (Judicial and other office holders) Rules 2014, Rule 38.

[24] ibid Rule 57.

[25] Judicial Discipline (Prescribed Procedures) Regulations 2014, Regulation 10. The current cadre of nominated judges consists of the High Court or Court of Appeal judges: Judicial Discipline: Response to Consultation (2022) 21.

[26] Judicial Conduct (Judicial and other office holders) Rules 2014, Rules 67 to 71; see also See Judicial Discipline: Response to Consultation (2022) 26-27.

[27] ibid Rule 72.

Regulation 11 provides for the formation of a disciplinary panel when requested by a judicial office holder, the Ombudsman, or the Lord Chancellor and the Lord Chief Justice.[28] The disciplinary panel comprises two judicial members and two publicly appointed lay members. The Lord Chief Justice appoints one sitting or retired judicial officeholder - who is of a higher rank - and another judicial officeholder who is of the same rank as the officeholder concerned.[29] The Lord Chancellor will appoint, with the agreement of the Lord Chief Justice, two other lay members, neither of whom has been a judicial officeholder or a lawyer.[30] The disciplinary panel may consider and review any findings of fact, recommendations, and proposed disciplinary action, on the balance of probabilities.[31] The primary responsibility of the panel is to advise the Lord Chancellor and the Lord Chief Justice whether an action recommended by a nominating judge is justified in recommending the removal or suspension of the judicial office holder.[32] Based on the report of the disciplinary panel, the Lord Chief Justice and the Lord Chancellor make the decision.[33]

Even though the JCIO is an arms-length institution having a distinct and demarcated role, when it comes to actual investigations of a complaint, it is primarily done by judicial personnel. For example, both the nominating and investigating judges are or have been part of the judiciary. Likewise, though ensuring judicial discipline is a joint responsibility of the Lord Chief Justice and the Lord Chancellor, it is clear that the Lord Chief Justice plays a dominant role as he gets to nominate both the nominating and investigating judges. However, as regards the disciplinary panel, both the Lord Chancellor and the Lord Chief Justice play an equal role by nominating the same number of panel members. Besides, the disciplinary panel consists of two non-judicial members, therefore, there is the participation of laypersons as well, which further enhances public confidence in the regulatory process.[34]

The Lord Chief Justice plays a decisive role in making a formal decision, based on the reports of the investigating authority or the disciplinary panel.[35] Formal decisions range from

[28] The Judicial Discipline (Prescribed Procedures) Regulations 2014.
[29] ibid Regulation 11 (a) & (b).
[30] ibid Regulation 11(c).
[31] Judicial Conduct (Judicial and other office holders) Rules 2014, Rules 75 & 76.
[32] ibid Rules 77 and 78.
[33] ibid Rule 15(2)(a).
[34] The composition of disciplinary panel might change in near future – comprising of two lay persons and a senior judge as the chair of the panel. See Judicial Discipline: Response to Consultation (2022) 24.
[35] Disciplinary powers are vested in the Lord Chancellor and the Lord Chief Justice, see Chapter 3 Part IV of the 2005 Act.

dismissal to a formal warning.[36] However, there is no restriction on what the Lord Chief Justice may do informally,[37] and these informal decisions can be made by the Lord Chief Justice without the agreement of the Lord Chancellor.[38] This power to decide how to deal with the judicial officeholders allows the Lord Chief Justice to recommend pastoral interventions that would enhance the professional competence of judicial officers.

The legal framework (CRA and the relevant delegated legislation) governing the enforcement of judicial conduct in England and Wales is also flexible and adaptable. Whilst the Lord Chancellor can extend the application of discipline provisions to other offices,[39] where necessary the Lord Chief Justice with the agreement of the Lord Chancellor has the authority to ask the relevant tribunal President or an advisory committee to investigate any complaint on his or her behalf. Similarly, the legal framework also enables the delegation of some of the powers and functions of the Lord Chief Justice.[40] In the same manner, with little procedural variance, the Judicial Conduct (Tribunals) Rules 2014, and the Judicial Conduct (Magistrates) Rules 2014 have detailed the processual, investigative, and recommendatory modalities to deal with complaints against different categories of judicial and quasi-judicial authorities. Supplementary guidelines are also issued, which, *inter alia,* clarify the roles and responsibilities of the tribunal presidents, the JCIO and the JACO.[41] Together, the CRA, rules, regulations, guidelines, and judicial conduct codes make the legal and regulatory framework of England and Wales comprehensive.

The Judicial Appointments and Conduct Ombudsman [JACO]

JACO investigates complaints about the handling of the judicial appointment process and the handling of complaints involving judicial conduct.[42] Though the primary function of the JACO is to investigate complaints concerning investigating (first-tier) authorities (namely, JCIO, a

[36] The review panel is recommending employing suspension as one of the disciplinary measures: Judicial Discipline: Response to Consultation (2022) 39-43.

[37] CRA, s. 108(3).

[38] Section 108(3) is not very clear on whether there is a need for the agreement of the Lord Chancellor for informal actions; Regulation 15 (see *supra* note 28) makes it clear that whilst they both need to agree on whether the matter to be dealt with informally, what the Lord Chief Justice may do informally is left alone to the Lord Chief Justice.

[39] CRA, s. 118.

[40] CRA, s. 119 and Regulations (2014), Regulation 20.

[41] The Judicial Conduct (Tribunals) Rules 2014: Supplementary Guidance <https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2015/12/Supplementar y_Guidance_Tribunals_Rules___2_.pdf>.

[42] Judicial Appointments and Conduct Ombudsman <https://www.gov.uk/government/organisations/judicial-appointments-and-conduct-ombudsman>.

Tribunal President or an Advisory Committee), it can also review the decisions of the Lord Chief Justice and the Lord Chancellor. The review power aims to hold disciplinary authorities accountable and improve the efficiency of the disciplinary protocol.[43] Furthermore, the JACO not only points out a violation of prescribed rules or instances of maladministration, but it also has the power to recommend improvements to avoid the recurrence of the same. JACO also has the power to propose compensation if a complainant has suffered because of maladministration or mismanagement.[44] Therefore, the JACO is not merely a review body, it acts as an adviser to first-tier bodies and an indemnifier to complainants whose interests are prejudicially affected by the judicial complaints mechanisms and disciplinary authorities. The correctional, compensating, and advisory powers of the JACO are unique to England and Wales, and they underline the key role of the JACO in enforcing judicial conduct, ensuring accountability, and securing judicial independence.

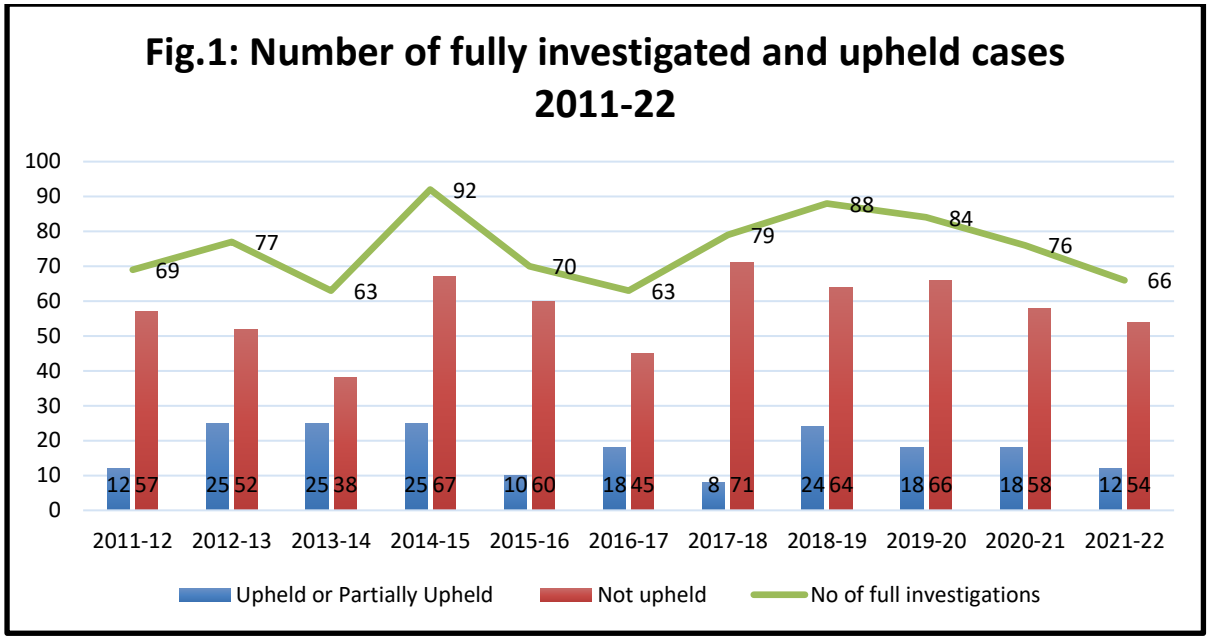
The review carried out by the JACO, unlike the Judicial Conduct Reviewer in Scotland, is not exclusively a paper-based exercise. The JACO follows a three-step process. Firstly, the JACO undertakes initial checks to determine whether the complaint is within its remit. Secondly, a complaint that is within the remit of the JACO is subjected to a preliminary investigation to determine whether it warrants a full investigation. Lastly, in deserving cases, the full investigation is carried out, which involves a thorough examination of documents and additional details from the complainant and concerned third parties. Following a preliminary investigation, if the JACO cannot be certain of what determination has to be made, it conducts a full investigation.[45] At this stage, JACO gives first-tier bodies the opportunity to comment on the process undertaken and the possible findings. The responses from the first-tier bodies will be considered 'critically' in light of the available evidence and relevant content from the responses will be included in the final reports provided to complainants.[46] During the investigations, the first-tier bodies may withdraw their determinations and look at aspects of complaints again in light of the issues raised.[47]

[43] CRA, s. 110(8).
[44] CRA, s. 111.
[45] Judicial Appointments & Conduct Ombudsman, *Annual Report 2020-21*, 13-26.
[46] ibid, 18-19.
[47] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 27.

As noted already, the regulatory oversight of JACO extends to a host of first-tier bodies. The stepwise investigation process briefly outlined above applies to complaints in relation to all the first-tier bodies. For example, in 2021-22, the JACO determined 66 cases following full investigations:[48] most of the matters were concerned with the JCIO (43); 12 were concerned with judicial complaints handled by the Tribunal Presidents; 8 cases were related to complaints handled by the Advisory Committees; and 3 were related to the Judicial Appointments Commission (JAC). Following the full investigations, the JACO upheld or partially upheld 12 cases. This amounts to 18% of the cases determined following a full investigation. Most of the cases upheld or partially upheld were against the JCIO (10), and the remaining two were concerned with advisory committees and the JCIO.[49] There were diverse grounds for upholding 12 complaints against the first-tier bodies: there was a failure to follow an investigation process consistent with the appropriate guidance (3 cases); failure to rectify process issues flagged by the JACO during the investigation of complaints (3 cases); the JACO also found mismanagement, poor communication and delay in another 3 cases; and in another 3 cases, the JCIO failed to follow an appropriate process as it did not verify the facts in relation to allegations that there had been a delayed judgment.[50]

The JACO findings speak to the depth of investigations that it undertakes, especially in cases that are subjected to full investigations. Besides upheld or partially upheld findings, there were 13 cases in which the JACO underlined *issues with correspondence* by the first-tier bodies, underlining the errors in correspondence, failing to provide clarification and poorly substantiating regulatory decisions.[51] In addition to the *issues with correspondence*, 20 *other concerns* were identified by the JACO, which included instances of delay or poor case management, insufficient engagement with the complainant and minor violations of the disciplinary procedure by the first-tier regulatory bodies (for the number of cases investigated and upheld since 2011, see Fig.1).[52]

[48] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 23.
[49] ibid, 28.
[50] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 28.
[51] These concerns did not amount to maladministration; see, Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 30.
[52] These concerns did not amount to maladministration; see, Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 30-32.



In upheld cases, the JACO proposes a measured intervention in setting aside or partially amending the determination of first-tier bodies. The JACO sets aside the determination of a first-tier body's determination only if such determination is 'unreliable'.[53] For instance, in 2021-22, out of 12 upheld cases, only in one case has the JACO set aside the JCIO's determination. In two cases, the JACO did not consider the first-tier bodies' decision 'unreliable', as the violations were minor.[54] However, the intervention of the JACO is not free from interference. As per section 112(4) of the CRA, the JACO must submit the draft of the report (the proposed intervention) to the LC and the LCJ. The LC or the LCJ may propose changes in the proposed intervention or the JACO's report in general. The JACO's final report must set out his/her response to such a proposal from the LC or the LCJ. Although the implications of this intervention are not adequately reflected in any of the annual reports of the JACO, instances of intervention by the LCJ or the LC have, at least occasionally, 'caused the JACO to reach a different view as to whether the Investigating Body's decision should be set aside.'[55] The extent and implications of intervention by the LC or the LCJ remain unclear; however, as noted in Chapter 3, the provision for such interference with determinations of an independent oversight body remains a significant regulatory lapse in England and Wales.

[53] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 34.
[54] ibid.
[55] Judicial Appointments & Conduct Ombudsman, *Annual Report 2020-21*, 19; Judicial Appointments & Conduct Ombudsman, *Annual Report 2019-20*, 17.

In most upheld cases (see Fig.1), the JACO proposes the tendering of an apology by the first-tier body as a redress. In 2021-22, out of 12 upheld cases, in 7 cases, the JACO considered an apology as appropriate redress. The JACO also found that an apology was warranted in respect of matters that it did not uphold, in 9 cases.[56] As already noted, the JACO may also recommend compensation. However, in 2021-22, the JACO did not make any recommendations for the payment of compensation.[57] In 2013-14, the JACO recommended compensation of £150 to a Magistrate for the distress caused by the JCIO's regulatory lapses.[58]

As already noted, the JACO also makes policy recommendations to prevent a recurrence of maladministration and other deficiencies in judicial conduct regulation. These recommendations for systemic changes assist the first-tier investigation bodies in addressing regulatory concerns. Over the years, the JACO has made recommendations on various issues, allowing first-tier bodies to routinely refer suitable cases to the JACO,[59] prioritising older cases[60]and recommending first-tier bodies outline a policy on the disclosure of information.[61] The JACO plays an active role in reviewing the rules and regulations governing judicial conduct regulation.[62]

Comprehensive annual reports outlining the role, performance and achievements of the JACO speak well of its commitment to transparency, fairness, and accountability in judicial conduct regulation. The JACO also reports deficiencies and shortfalls in its services.[63] The JACO has consistently provided high-quality oversight over first-tier regulatory bodies in an effective, transparent and responsive manner. The stakeholders, especially the MoJ, should also be credited for providing a range of support services and funding to the JACO.[64] Although, as noted in Chapters 3 and 7, some of the structural flaws remain, over the years the JACO has been an effective regulator.

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[56] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 35.
[57] Id.
[58] Judicial Appointments & Conduct Ombudsman, *Annual Report 2013-14*, 9; Judicial Appointments & Conduct Ombudsman, *Annual Report 2012-13*, 8.
[59] Judicial Appointments & Conduct Ombudsman, *Annual Report 2017-18*, 25.
[60] Judicial Appointments & Conduct Ombudsman, *Annual Report 2019-20*, 25.
[61] Judicial Appointments & Conduct Ombudsman, *Annual Report 2020-21*, 28.
[62] Judicial Appointments & Conduct Ombudsman, *Annual Report 2012-13*, 5; Judicial Appointments & Conduct Ombudsman, *Annual Report 2011-12*, 5; Judicial Discipline: Response to Consultation (2022).
[63] Judicial Appointments & Conduct Ombudsman, *Annual Report 2018-19*, 32; Judicial Appointments & Conduct Ombudsman, *Annual Report 2019-20*, 30; Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 34.
[64] Judicial Appointments & Conduct Ombudsman, *Annual Report 2021-22*, 44-45.

Judicial complaints mechanisms in England and Wales: the potential risk of conflict between pastoral and disciplinary roles

The judicial complaints against the magistrates are mostly handled by the Advisory Committees (ACs); however, the ACs also deal with deployment, re-appointment, sitting and leave of absence, and training and appraisals of magistrates.[65] The tribunal chamber presidents are also similarly placed - they, apart from the disciplinary powers, have pastoral and other leadership roles.[66] This intersection of varied responsibilities may lead to conflict between the pastoral, administrative, supervisory, and disciplinary roles. As seen in India's context (Chapter 4), investiture of too many supervisory and disciplinary powers on senior judges, without robust checks in place, would undermine individual and internal judicial independence. The Review Panel (2022), with respect to complaints against the tribunal members, has recognised the potential conflict between the pastoral and disciplinary responsibilities of the tribunal president and it has rightly recommended that the JCIO should also deal with complaints about tribunal members.[67] However, with respect to magistrates, the advisory committees would continue to be in charge of the complaints mechanism.[68]

The potential risk of conflict between administrative, supervisory and disciplinary responsibilities is not limited to tribunal members or the magistrates; it extends to the whole of the judiciary in the UK. Reforms since 2005 have led to the delegation and further delegation of key leadership roles among senior judges. However, some of the senior judges (for example, the Presiding Judge in England and Wales) are also conferred with disciplinary powers. Therefore, it is highly likely that a conflict would arise between pastoral and disciplinary responsibilities; since the consequences of these conflicts have not been mitigated at the policy level, the judicial conduct regulation protocols might in practice run the risk of undermining individual and internal judicial independence. This fundamental regulatory flaw might manifest more severely in Northern Ireland and Scotland as the regulatory regimes are administered, almost exclusively, by senior judges (see Section 4 for

[65] Ministry of Justice, 'Lord Chancellor and Secretary of State's Directions for Advisory Committees on Justices of the Peace (2019) 6.
[66] Judicial Discipline: Response to Consultation (2022), 10-11.
[67] Id.
[68] ibid 29.

further discussion with respect to NI and Scotland). The other notable flaws in the regulatory regimes of England and Wales are discussed in Chapter 7.

III. The Supreme Court of the United Kingdom: the judicial complaints procedure

'Any complaint against a Justice of the Supreme Court when acting in that capacity, by whomever received, shall in the first instance be passed to the Chief Executive.'[69] The complaints procedure allocates key roles to the Chief Executive, the President, the Deputy President, and when the complaint relates to both the President and the Deputy President, to the most senior member of the court. The Chief Executive receives, scrutinises, and, in appropriate cases, refers the complaint to the President. The role of the Chief Executive is more than a facilitator. The complaint procedure provides that 'if the complaint relates only to the effect of a judicial decision or discloses no ground of complaint calling for consideration the Chief Executive if he thinks it appropriate, shall take no action save to inform the complainant (if identifiable) that no action will be taken.'[70] Therefore, the Chief Executive determines if the complaint *only* relates to a judicial decision or if it discloses no grounds and based on such determination, he/she proceeds to dispose of the complaint.

If the complaint, in the assessment of the Chief Executive, discloses grounds for further consideration, he shall put the matter before the President or the Deputy President, or the most senior member of the court as appropriate.[71] The President or the Deputy President or the senior member may, after consulting the next senior member, decide not to take any action or bring the complaint to the notice of the member concerned, or consider taking formal action.[72] Formal action may be appropriate 'where a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member's character, integrity or continuing fitness to hold office or where a member's conduct otherwise appears to be such as to throw serious doubt on that member's continuing fitness to hold office.'[73] Before any such action is taken, the Lord Chancellor will be informed

[69] The UKSC: Judicial Complaints Procedure <https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html#01>.

[70] Where the Chief Executive thinks that the complaint discloses grounds for further consideration, he shall refer the complaint to the President. This implies that there is an element of discretion that lies with the Chief Executive.

[71] The UKSC: Judicial Complaints Procedure, para 2 <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>.

[72] ibid para 3.

[73] ibid para 4.

of the facts, and he will be consulted on further actions to be taken.[74] Therefore, all complaints, until the formal action stage, are mostly handled by the Chief Executive, the President, and the Deputy President.

The formal action initiates with constituting a tribunal comprising of the Lord Chief Justice of England Wales, the Lord President of the Court of Session (Scotland), and the Lord Chief Justice of Northern Ireland (if any of them are disqualified, the next senior members), and two independent persons of high standing nominated by the Lord Chancellor.[75] The tribunal can investigate the complaint and submit a report on the matter to the Lord Chancellor. The Lord Chancellor decides what to do next; in any case, the report of the tribunal will be published.[76] The decision of removal must be approved by both Houses of Parliament (this has not occurred since 1830 with respect to a senior judge).[77]

Supreme Court Complaints Procedure: a critique

The complaint procedure relating to the Supreme Court judges (including the Lord President) requires a critical assessment. The office of the Chief Executive is undoubtedly a constitutional position.[78] It is also true that the 'role of Chief Executive has evolved within a very short period of time into one of the most effective and constitutionally significant guardians of the court.'[79] Nevertheless, the Chief Executive is appointed by the Lord President[80] and s/he must carry out functions 'in accordance with any directions given by the President of the Court.'[81] The Chief Executive closely works with and meets both the President and the Deputy-President every week.[82] If a complaint relates to either the President or the Deputy-President, the complainant has every reason to see the involvement of the Chief Executive with suspicion because of his/her close working relationship with the President or the Deputy President. If the Chief Executive decides that the complaint relates only to the effect of a judicial decision or he thinks it discloses no ground, the complainant has no other forum to review that determination.[83] Additionally, the complaints procedure does not require the Chief Executive

[74] ibid para 5.
[75] ibid para 7.
[76] ibid para 8.
[77] Gee et al., (2015) 59.
[78] CRA, s. 48.
[79] Graham Gee, 'Guarding the guardians: the Chief Executive of the UK Supreme Court' [2013] P.L. 545.
[80] CRA, s. 48(2).
[81] CRA, s. 48(3).
[82] Gee *supra* (n 79) 540.
[83] Gee et al., (n 77).

to record reasons for not taking action. It merely requires him 'to inform the complainant that no action will be taken.'[84] Conversely, at the later stage, when the President refer the complaint to an appropriate authority, and if that authority makes the decision not to take any action or to resolve the matter informally, it is required to record the reasons. However, at the preliminary stage, the Chief Executive is not under such obligation.

Further, whilst the Chief Executive has a prominent role in handling complaints against the President; the President, in turn, receives complaints against the Chief Executive;[85] the procedure empowers the President to ask a Non-Executive Director of the UKSC to investigate such complaints.[86] If the Lord President is merely to oversee the investigation of complaints relating to the Chief Executive by nominating an investigating officer, the same function could be performed by any puisne judge of the Supreme Court. Therefore, even though the findings of the investigating officer (Non-Executive Director) can be challenged in appeal, this complicated entanglement of the 'account holder-giver' relationship between the Chief Executive and the President needs reconsideration.

Furthermore, as pointed out elsewhere, the initial processing of the complaint is entirely within the remit of the court's 'leadership trinity'[87] (i.e., the Chief Executive, the Lord President, and the Deputy President). Although the UKSC to date, has not reported any substantive allegations requiring investigation, any such allegations would not only question the UKSC's commitment to higher standards but also expose the hitherto unseen weaknesses of the regulatory framework: the role of the Chief Executive, throughout the process, is vulnerable to be discredited. The regulatory mechanisms must be independent and appear to be so; otherwise, it is highly likely that they face distrust and incredibility.

IV. Northern Ireland

The Senior Judiciary: judicial conduct regulation and removal

There are many similarities between the legal systems of England and Wales and Northern Ireland in relation to judicial conduct regulation. Like senior judges of England and Wales, in

[84] The UKSC: Judicial Complaints Procedure, para 1.

[85] Complaints about a member of staff or the UKSC's administrative procedures <https://www.supremecourt.uk/docs/complaints-procedure-non-judicial.pdf>.

[86] Id.

[87] Richard Cornes, 'Gains (and Dangers of Losses) in Translation—The Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects' [2011] P.L. 509, 517.

Northern Ireland, the Lord Chief Justice, Lord Justices of Appeal, and judges of the High Court hold office during 'good behaviour' and they may be removed by Her Majesty on the address presented to her by both Houses of Parliament.[88] Before the removal motion in Parliament, a tribunal should be convened to inquire about the allegation and it should recommend the removal.[89] The procedure – requiring a separate tribunal to investigate complaints raising an issue of fitness to the judicial office – is unique to Northern Ireland (NI) and Scotland, and there is no such procedure in England and Wales.

The investigations tribunal draws its members from other jurisdictions in the UK i.e., from Scotland and England and Wales; it consists of (a) a person who holds high judicial office, within the meaning of Part 3 of the CRA[90] [not being the Lord Chief Justice, Lord Justice of Appeal, or judge of the High Court]; (b) a person who is or has been a judge of the Court of Appeal of England and Wales or the Inner House of the Court of Session; (c) a lay member of the Northern Ireland Judicial Appointments Commission – persons within categories (a) and (b) are selected by the Lord Chancellor in consultation with the President of the UKSC, the Lord Chief Justice of England and Wales, and the Lord President of the Court of Session. The person within subsection (9)(c) (of section 12C) is to be selected by the Northern Ireland Judicial Appointments Ombudsman. The person selected under category (a) will be the chairperson of the tribunal.[91]

In case of removal of other Justices and High Court judges, the Lord Chief Justice of Northern Ireland plays a critical role; the Lord Chief Justice (or the Northern Ireland Judicial Appointments Ombudsman), not the Lord Chancellor, constitutes the tribunal; the composition remains the same as discussed in the preceding paragraph, representing persons from the categories (a), (b), and (c).[92] However, the Lord Justice, on the selection of category (a) and (b) persons should consult the Lord Chancellor, the President of the Supreme Court of the United Kingdom, the Lord Chief Justice of England and Wales, and the Lord President of the Court of Session.[93] The tribunal has to report to the Lord Chief Justice recommending the

[88] Northern Ireland Act 2009, ss 12B and 12C.
[89] Northern Ireland Act 2009, Sch 2, sections 12B and 12C.
[90] Part 3 of the CRA exclusively deals with the permanent and acting judges of the Supreme Court; therefore, the Lord Chancellor can only appoint a person from this category.
[91] For a detailed procedure on judicial appointments and removal in NI, see Northern Ireland Act 2009, Sch 2.
[92] ibid Sch 2, s. 12C.
[93] ibid s. 12C (10).

removal of the judge in question. Following the recommendation of the tribunal, the Prime Minister and the Chancellor shall consult the Lord Chief Justice on the motion in Parliament; the Lord Chief Justice can also advise the Prime Minister and the Lord Chancellor to accept the tribunal's recommendation.[94]

The Northern Ireland Act 2009 has significantly strengthened the role of the Lord Chief Justice in judicial conduct enforcement by limiting the powers of the First and Deputy First Minister as regards conduct enforcement and removal of judges.[95] Now the 'listed judicial office' holders may be removed or suspended by the Lord Chief Justice, on the grounds of misbehaviour and inability.[96] The precondition for such removal is that a tribunal must be convened to investigate alleged misconduct or inability.[97] However, the Lord Chief Justice can disagree with the tribunal's recommendation on removal or suspension.[98] The scope of powers conferred upon the Lord Chief Justice in Northern Ireland, especially as regards listed judicial offices, is wide compared with the powers of the Lord Chief Justice of England and Wales.[99] The removal of listed judicial office holders has become primarily the responsibility of the Lord Chief Justice in Northern Ireland, it is a joint responsibility of the Lord Chancellor and the Lord Chief Justice in England and Wales.

Complaints against 'protected judicial office holders': the procedure

The Lord Chief Justice is empowered to prepare a code of practice on the handling of complaints against a person holding a 'protected judicial office'.[100] In the exercise of his power, the Lord Chief Justice has issued the Code of Practice (revised in 2021) on complaints about the conduct of judicial officeholders.[101] All complaints relating to judicial conduct (including conduct that occurred when the judicial officeholder was not acting in an official capacity) should be made to the Complaints Officer in the Lord Chief Justice's Office.[102]

[94] ibid s. 12C (4).
[95] Northern Ireland Act 2009, see Schs 2 and 3.
[96] Justice Northern Ireland Act 2002, s. 7.
[97] Justice Northern Ireland Act 2002, s. 7(3) and (4).
[98] ibid s. 7(6A).
[99] ibid s. 8.
[100] Justice (Northern Ireland) Act 2002, s. 16.
[101] Code of Practice issued by the Lord Chief Justice under section 16 of the Justice (Northern Ireland) Act 2002.
[102] ibid para 4.1.

Complaints about tribunal members can be made to the relevant tribunal President's Office.[103]

The categorization of complaints and the investigation procedure

In contrast to England and Wales, the Northern Ireland legal framework makes a clear distinction between complaints of 'gross misconduct' and 'misconduct'.[104] For this purpose, the Complaints Officer, if required, conducts a preliminary investigation to enable the Lord Chief Justice or the nominated judge to determine whether a complaint is 'gross misconduct'.[105] The complaints may be resolved informally.[106] The informal resolution will normally be managed by the Complaints Officer.[107] The Complaints Officer is responsible for investigating less serious 'misconduct' complaints. On completion of the investigation, the officer prepares a report for the Lord Chief Justice. Upon the receipt of such a report, the Lord Chief Justice will notify the complainant and the judicial officer about an action to be taken and the outcome of the inquiry.[108] At this stage, either of the parties, within 10 days of such a decision, can apply for review to the Chief Justice's Office - setting out the full grounds for such a request.[109] The Lord Chief Justice may refer the matter to an independent judge for review.[110] During the review, both parties will be heard. The Complaints Officer will notify the outcome of the review to the parties.[111]

The complaints are referred to a Complaint Tribunal for advice on how to deal with such complaints.[112] The tribunal consists of two judicial officers and a lay member.[113] The procedure followed by the tribunal is substantially similar to that of England and Wales. However, unlike in England and Wales, during the hearing, parties in Northern Ireland may be accompanied by a representative who can ask questions on behalf of that party, but he/she

[103] Id.
[104] Even in the E&W, we may see categorization of complaints in the near future as the Review Panel has proposed to amend the classification as follows: (a) Misconduct, (b) Serious Misconduct and (3) Gross Misconduct. Judicial Discipline: Response to Consultation (2022) 9.
[105] Code of Practice, paras 6 and 7.
[106] Code of Practice, para 5.
[107] Id.
[108] ibid see para 7.1 to 7.6.
[109] Code of Practice, para 7.8.
[110] ibid.
[111] Id.
[112] ibid para 8.
[113] ibid para 8.2.

cannot answer the questions on their behalf.[114] Furthermore, at the end of the proceedings, parties may apply to review the recommendations of the tribunal.[115]

The Lord Chief Justice, upon receipt of the report from the tribunal, invites the parties to comment on the report. The Lord Chief Justice's decision will set out whether or how far the complaint is substantiated, whether or how far the judicial office holder's conduct fell short of the required standard, and the outcome[116] – in England and Wales this is done by the Lord Chief Justice and the Lord Chancellor jointly. There is also a difference between the jurisdictions on the powers of the Lord Chief Justice on imposing disciplinary action (formal and informal) – the Lord Chief Justice in NI may seek an apology from the judicial officer; take no action or issue advice; issue informal/formal/final warning; place a restriction on practice. In other words, the Lord Chief Justice can impose all the disciplinary measures, except the dismissal or removal[117] – whereas in England and Wales, the Lord Chief Justice, on his own, can only take informal actions, the formal decisions must be made in consultation with the Lord Chancellor.[118] If complaints raise a question of fitness for judicial office, the LCJ(NI) and the nominated judge must refer the matter to a statutory tribunal for investigation.[119]

The Code of Practice also provides the procedure for 'whistleblowing'.[120] The Court staff or members of the legal profession may file a complaint with the Complaints Officer indicating their wish that the complaint is to be dealt with under the 'whistleblowing' provisions.[121] In such cases, the complainant's identity and his/her statement will not be disclosed to the judicial office holder. However, as per the code, it is not possible to use the complainant's statement as evidence unless he agrees with the statement being disclosed.[122] Whistleblowing provisions do not apply to complaints alleging criminal conduct.[123]

[114] ibid paras 3.2 and 8.3.
[115] ibid para 8.8.
[116] ibid para 9.
[117] Code of Practice, para 9.2.
[118] Restrictions may be placed on the types of cases assigned to the judicial office holder for a period of time or subject, for example, to training being undertaken. See Code of Practice, para 9.2.
[119] Code of Practice, para 9.2.
[120] ibid para 12.
[121] Id.
[122] Code of practice, para 12.
[123] ibid para 12.4.

Complaints relating to tribunal judiciary

Unlike England and Wales, in NI 'misconduct' cases against tribunal members are handled informally by the respective tribunal President.[124] If it is a case of 'gross misconduct', the tribunal's Complaints Officer should consult the Complaints Officer in the Lord Chief Justice's Office.[125] If informal resolution is unsuccessful or the complaint is not suited for informal resolution, the Tribunal's Complaints Officer will investigate it in accordance with the procedure prescribed in the Code of Practice and he shall prepare a report for the tribunal President.[126] The tribunal President may take action as per the report, and where he finds the complaint 'gross misconduct', he should contact the Lord Chief Justice's Office before making a determination.[127] The decision of the tribunal President will be communicated to the complainant and the judicial officeholder. Parties will have the opportunity to request a review within 10 days of notification of such a decision.[128]

Complaints concerning the Lord Chief Justice

There is a separate Code of Practice for complaints relating to the conduct of the Lord Chief Justice.[129] The Complaints Officer and the Principal Secretary to the Lord Chief Justice play a key role – whilst the Complaints Officer determines whether the complaint is within the remit of the code – s/he also, in consultation with the Principal Secretary, determines whether the complaint is 'serious'.[130] The Complaints Officer will investigate 'less serious' complaints[131] and prepare a report for the Lord Justice of Appeal.[132] At the scrutiny stage, if there is any doubt, the views of the senior Lord Justice of Appeal may be sought.[133] Besides, the Lord Justice of Appeal receives a report from the Complaints Officer on the inquiries made,

[124] ibid para 14.6.
[125] ibid para 14.3.
[126] ibid para 14.6 and 14.7.
[127] ibid para 14.8.
[128] ibid para 14.10.
[129] Complaints about the Conduct of the Lord Chief Justice: Code of Practice (year?) <https://www.judiciaryni.uk/sites/judiciary/files/media-files/Complaints%20about%20the%20Conduct%20of%20the%20LCJ_0.pdf>.
[130] The code of practice relating to complaints against the LJC (NI) is not yet revised; the current code categorizes complaints into 'serious' and 'less serious', see Code of Practice on Complaints Against the LCJ, 2. However, in an email response, the Complaints Officer, Mrs. Helen Brannigan, clarified that although the code governing the complaints against the LCJ (NI) is yet to be revised, the categories of complaints 'should be misconduct and gross misconduct,' even in the case of complaints against the LCJ (NI).
[131] Code of Practice on complaints against the LCJ (NI), 3.
[132] Id.
[133] ibid 2.

evidence collected, etc. The Lord Justice of Appeal may require the Complaints Officer to conduct a further inquiry or he may refer the matter to an independent judge of appropriate seniority if he feels that it is necessary.[134] As required, the decision of the Lord Justice Appeal will be notified to both the complainant and the Lord Chief Justice. Either of the parties may seek a review at this stage.[135]

If the complaint is considered 'serious', it will be referred to another Lord Chief Justice (in the UK) or a Justice of the Supreme Court for investigation.[136] The power to refer serious cases to a senior judge of England and Wales or the President of the Supreme Court is unique to Northern Ireland.[137] The decision of the investigating judge will be notified to both parties. The investigating judge will invite the parties to comment on his conclusions. Having considered any such comments, the investigating judge will notify the complainant and the Lord Chief Justice of the decision and any action to be taken.[138]

The complaint and investigation procedures with regard to the Lord Chief Justice, in comparison to the UKSC justices, differ in some respects. The Complaints Officer consults the Principal Secretary of the Lord Chief Justice to decide whether the complaint is within the remit of the code and to determine whether it is 'serious'. Another notable distinction is that if the Lord Justice of Appeal satisfies the complaint is serious, he can refer it to the Lord Chief Justice of England and Wales or to a Justice of the Supreme Court. However, there are similarities as well, for example - initial scrutiny and categorisation of the complaint is with an officer subordinate to the Lord Chief Justice.

Regulatory regime of Northern Ireland: a critique

The regulatory mechanism of Northern Ireland has notable features. While all three organs of the state participate in judicial administration, the judiciary, more particularly, the Lord Chief Justice, has an overwhelming set of disciplinary powers. Unlike England and Wales, in terms of 'protected judicial offices' the participation of the executive in judicial conduct regulation is almost absent. The regulatory mechanisms have been built around the Lord Chief

[134] ibid 4.
[135] Id.
[136] Code of Practice on complaints against the LCJ(NI), 6.
[137] ibid 5.
[138] Code of Practice on complaints against the LCJ(NI), 5.

Justice. Although there is an opportunity for the Lord Chief Justice to refer serious complaints to the senior judges of England and Wales, it is again subject to the discretion of the Lord Chief Justice. In smaller jurisdictions like Northern Ireland, accretion of power in the Lord Chief Justice may be justified, as it helps avoid excessive formalism; it is also cost-effective. But it defeats the need for wider participation, transparency and accountability in judicial conduct regulation.

Furthermore, the participation of the Complaints Officer and the Lord Chief Justice's Principal Secretary is open to question. The power to determine the seriousness of the complaint and to conduct a preliminary investigation is too vital to be conferred on subordinate officers – especially when the complaint is related to a judicial office central to the administration of justice. It is appropriate if the complaints against the Lord Chief Justice are filed to a committee of the senior judges of Northern Ireland to look into and, where appropriate, to conduct inquiries under the guidance of the Lord Justice of Appeal. If the complaint is found to be serious, it could be referred to senior judges of England and Wales. The role of the Complaints Officer (and of the Principal Secretary) in cases of complaints against the senior judges should be minimized to ensure public confidence in the regulatory mechanism. When a serious question is asked about the conduct of the Lord Chief Justice, it is unrealistic to assume that the public will trust the views and judgments of individuals who work under the judge facing accusation.

Another notable omission of Northern Ireland is the robust review body. Like England and Wales, Northern Ireland has the Judicial Appointments Ombudsman. However, unlike in England and Wales, only complaints relating to appointments are within its scope.[139] Just as the Lord Chancellor's appointment decisions are within the remit of the Ombudsman, it is desirable to bring the decisions of the Lord Chief Justice (and of other authorities) on judicial conduct issues within the remit of the Ombudsman. As discussed in this section, in Northern Ireland, parties at each stage may request review. However, compared to a dedicated review body, the review provision that exists at each stage of the disciplinary proceedings is less effective, except that a specialised review body would need more resources. Furthermore, once a request for review is made, it is up to the Lord Chief Justice to refer the matter to an

[139] Functioning from 1 April 2016, see Northern Ireland Public Services Ombudsman Act 2016, s. 58 and Sch 6.

independent judge. A robust review mechanism entails the intervention of an independent person – the discretion of the Lord Chief Justice on such critical issues makes the mechanism over-reliant on the Lord Chief Justice.

Furthermore, the demarcation of complaints into 'gross misconduct' and 'misconduct' is not entrenched in a sound theoretical basis. Para 2.1 of the Code of Practice attempts to clarify the basis of classification with some examples of 'gross misconduct', but it adds more ambiguity rather than clarifying the categorisation than clarity. For example, 'making exceptionally inappropriate remarks' on a person's religious or racial background is considered 'gross misconduct'. However, what constitutes an 'exceptionally inappropriate remark' is not clarified. In the absence of appropriate indicators, the meaning of 'exceptionally inappropriate remark' depends on the subjective view of the regulatory authority (the Complaints Officer or the LCJ). Unlike the previous code (2013 version), the revised code (2021) does not provide examples of complaints of 'misconduct'. In other words, there are no objective criteria that could guide the categorisation of complaints. For example, if a judicial officer makes derogatory comments on an individual's gender, does it amount to 'gross misconduct' or is it merely 'misconduct'? A typical response to this question would be that it depends on the full circumstances of the case. Perhaps to overcome subjectivity, the previous version (2013) of the code, Annex C – attempted to clarify that categorisation should be based on 'the full circumstances of the case'.[140] The Annex stipulated another anchor, it stated that 'the possible consequences of the complaint, if upheld, will be taken into account.' For instance, if a possible outcome is felt to be a referral to a removal tribunal then the complaint will be treated as 'serious.'[141] Both anchors stipulated in the previous version of the code attempted to rationalise the categorization of complaints; however, the stipulations were not specific and clear enough to overrule the potential subjectivity or the perception of it. As per the old Code of Practice, the tribunal would only be constituted if the complaint is considered to be 'serious'. The pre-emption of the possible outcome was itself a subjective decision.

Whilst the revised code of practice offers inadequate guidance on the categorization of the complaints, it enables the Complaints Officer in conducting a preliminary inquiry to help

[140] Code of Practice (2013), 34.
[141] Id.

decide the LCJ (NI) (or a nominated judge) whether the complaint is to be treated as 'gross misconduct' or misconduct.[142] Furthermore, the code also maintains that even during the investigation, if at any point it becomes clear that the complaint should be considered 'gross misconduct', the Lord Chief Justice or a nominated judge will convene a tribunal to take over the investigation.[143] However, the latter provision should be used with caution. If the complaint is to be referred to a Complaint Tribunal, the ongoing investigation of the Complaints Officer has to be halted abruptly; this may have serious ramifications on the succeeding investigation by the tribunal. An investigation by the tribunal involves the constitution of the tribunal; the framing of fresh charges; parties have to be notified about the constitution of the tribunal; the chairperson has to notify the procedure, and if in the meantime the judicial officer requests for the review, the investigation is bound to face unnecessary delays. Therefore, while it may be effective and appropriate to deal with 'gross misconduct' and 'misconduct' cases differently, the categorisation must be based on objective criteria. Furthermore, it is essential to conduct a preliminary investigation, in appropriate cases, to determine complaints as 'gross misconduct' or 'misconduct'.

V. Scotland

Judicial conduct regulation: the role of the Lord President

Northern Ireland and Scotland share a prominent similarity: in both jurisdictions, the head of the judiciary – the Lord Chief Justice and the Lord President – have a determinative role in judicial conduct enforcement. The Lord President in Scotland is responsible for making appropriate arrangements for '(i) the investigation and determination of any matter concerning the conduct of judicial officeholders, and (ii) the review of such determinations.'[144] The term 'judicial officeholders' includes, among others, the judges of the Court of Session, the Chairman of the Scottish Land Court, the Sheriff Principal, and the Justice of the Peace.[145] Therefore, the Lord President wields considerable disciplinary powers in Scotland.

[142] Code of Practice (2021), paras 6 and 7.
[143] ibid para 7.7.
[144] The Judiciary and Courts (Scotland) Act 2008, s 2(2)(e).
[145] ibid s. 43.

The Judiciary and Courts (Scotland) Act 2008 extensively deals with judicial conduct, powers of the Lord President, and the Judicial Complaints Reviewer.[146] The Lord President, in the exercise of his powers under section 28 of the Act, has made Complaints about the Judiciary (Scotland) Rules 2017. These rules apply to every judicial office in Scotland.[147] Rule 3 provides for the appointment of a judge of the Inner House of the Court of Session to be the 'disciplinary judge'. The disciplinary judge is responsible for the operation of these rules and to report to the Lord President about disciplinary matters as appropriate. Therefore, in Scotland, unlike England and Wales, there is some degree of express and specific delegation of the disciplinary responsibility of the Lord President to the disciplinary judge, as provided by the 2017 Rules.

The complaints procedure, initial assessment, and the investigation

Rule 4 of Complaints about the Judiciary (Scotland) Rules 2017 provides for a Judicial Office for Scotland (hereafter, the Judicial Office). The Judicial Office, in comparison to the JCIO, play a wider role as it supports the Lord President in the discharge of his functions as the head of the Scottish judiciary; whilst the JCIO only handles judicial complaints. However, the procedure concerning judicial complaints in Scotland is largely similar to the Judicial Conduct (Judicial and other office holders) Rules 2014 of England and Wales.

The complaints received by the Judicial Office for Scotland are subjected to initial assessment.[148] Complaints that get past the scrutiny stage are, along with necessary details, sent to the disciplinary judge for his/her consideration. The disciplinary judge may dismiss the complaint on the grounds mentioned in Rule 8 and Rule 11. Where the disciplinary judge determines that the allegation, if substantiated, would raise a possible question of the fitness for office, the Judicial Office must inform the Lord President. The Lord President may consider constituting a tribunal to consider the fitness of judicial officers on the grounds of inability, neglect of duty, or misbehaviour; the ground 'neglect of duty' is peculiar to Scotland.[149] The main advantage of the procedure is that before a tribunal is asked to investigate the complaint, a formal inquiry into the matter is done by a senior judge (the disciplinary judge);

[146] See also Chapter 4.
[147] Rule 2.
[148] For further discussion, see Chapter 3.
[149] In NI, an issue on the fitness to a judicial office arises on the grounds of 'misbehaviour' or 'inability to perform the functions of an office', see Justice (Northern Ireland) Act 2002, s. 16.

further, the Lord President will have an opportunity to look into the nature and seriousness of the complaint, material in support of the complaint and the recommendations/findings of the disciplinary judge, before taking any step.

The Judiciary and Courts Act 2008, under Section 35, provides for the constitution of a tribunal if the judicial office holder in question is (i) Lord President (ii) Lord Justice Clerk, (iii) Judge of Court of Session, (iv) Chairman of the Scottish Land Court and the temporary judge.[150] The section applies to judicial officeholders alleged to be unfit to hold the office because of inability, neglect of duty, or misbehaviour. The tribunal is to be constituted by the First Minister;[151] she should consult the Lord Justice Clerk if the complaint relates to the Lord President and, where the tribunal is for any other purposes, the Lord President is to be consulted.[152] The tribunal consists of two individuals who hold or have held, high judicial office,[153] one individual who is and has been for at least 10 years, an advocate or solicitor, and a layperson.[154] The report of the tribunal is submitted to the First Minister, who lays it before the Scottish Parliament.[155] Only the Queen/King can remove judges of the Court of Session and the Chairman of the Scottish Land Court. The removal process requires a vote by (the Scottish) Parliament on a motion made by the First Minister.[156]

Complaints concerning Sheriffdoms and Sheriff Courts: the role of the First Minister

The Court Reform (Scotland) Act 2014 provides for the removal of judges of Sheriffdoms, Sheriff court districts and Sheriff courts. The First Minister may remove an individual from the office of sheriff principal, sheriff, part-time sheriff, summary sheriff or part-time summary sheriff - (a) if a tribunal constituted under Section 21 reports to the First Minister that the individual is unfit to hold that office because of inability, neglect of duty, or misbehaviour, and (b) only after the First Minister has laid the report before the Scottish Parliament under section 24(2).[157]

[150] For the composition of the tribunal, see Section 35(3)(a).
[151] The First Minister must constitute a tribunal when requested to do so by the Lord President, see section 31(1)(a).
[152] When there is no request from the Lord President to constitute a tribunal, the First Minister may constitute a tribunal, however, he must consult the Lord President to do so, see section 31(1)(b) and 35(3)(b).
[153] For the definition of 'high judicial office', see CRA, s. 60(2)(a).
[154] Section 35(4).
[155] The Judiciary and Courts Act 2008, s. 38.
[156] Scotland Act 1998, s. 95.
[157] Ibid s. 25 (1).

The investigation procedure where the tribunal is not constituted

In cases where the tribunal is not constituted, the Judicial Office must refer the allegation to a judicial officeholder nominated by the disciplinary judge.[158] The investigation procedure, like other jurisdictions in the UK, is adequately outlined. The peculiarity of the procedure is that the nominated judge is to see if the allegation is capable of resolution to the satisfaction of the person complaining and the judicial officeholder without further investigation.[159] If the settlement is achieved, the same shall be communicated to the Judicial Office; otherwise, the nominated judge is to investigate the allegation and produce a report determining the facts of the matter and, if the allegation is substantiated, recommend whether the Lord President should exercise powers of giving formal advice, warning, or reprimand to the judicial officeholder in question.[160] For the purposes of investigation, the nominated judge has the power to make inquiries, call for documents, and interview persons he considers appropriate.[161] However, in doing so, the nominated judge must observe the principle of natural justice and permit an interviewee to be accompanied by a person of his choosing for providing moral support, helping to manage papers, taking notes, or offering advice. The nominated judge may arrange for the recording of the interview.[162]

The report of the nominated judge on the investigation will be submitted to the disciplinary judge.[163] The disciplinary judge may review the determination made by the nominated judge, or he may require the nominated judge to reconsider the determination. Thereafter, the Judicial Office will place the report before the Lord President.[164] The Lord President is to write to the judicial officeholder for written representations. And such judicial officeholder must be served with all such information including the report as the Lord President considers appropriate.[165] After considering the representation, the Judicial Office is to write to the person complaining about the outcomes of the investigation of an allegation and any action taken by the Lord President in consequences, in the same manner, the judicial officeholder

[158] Complaints about the Judiciary (Scotland) Rules 2017, Rule 12(2).
[159] ibid Rule 12(6).
[160] Judiciary and Courts Act 2008, s. 29.
[161] Complaints about the Judiciary (Scotland) Rules 2017, Rule 14.
[162] ibid.
[163] ibid Rule 15.
[164] ibid Rule 16.
[165] Id.

will also be informed.[166] The Rules provide for the withdrawal of a complaint and continuation of investigation in suitable cases, even after the withdrawal of the complaint.[167] Rules also provide for *suo moto* consideration of matters where the disciplinary judge receives information about misconduct.[168]

Complaints concerning the tribunals

The Complaints about the Judiciary (Scotland) Rules 2017 apply also to judicial members of the Tribunal for Scotland. And for ordinary or legal members of the tribunal in the First-tier and Upper Tribunal for Scotland, the Scottish Tribunal Rules 2018 apply.[169] According to the 2018 Rules, the Lord President appoints the President of the Scottish Tribunals to supervise the operation of Rules in general and report to him as appropriate.[170] The role of the President of the Scottish Tribunals is analogous to that of the disciplinary judge. The procedures related to filing a complaint, initial assessment of a complaint by the Judicial Office for Scottish Tribunals, investigation and report, etc., are similar to the 2017 Rules. Additionally, there are separate rules for complaints about judicial misconduct by an employment judge in Scotland. The President of the Employment Tribunals is empowered to investigate and decide judicial complaints.[171]

The Judicial Complaints Reviewer: the need for improvement[172]

Section 30 of the 2008 Judiciary and Courts Act provides for the Judicial Complaints Reviewer (JCR) to review, upon the request of the complainant or the judicial office holder or *suo moto*, the handling of the investigation to determine whether the investigation has been carried out in accordance with the Rules.[173] '…the Judicial Complaints Reviewer is intended to offer a simple and cost-effective procedure for individuals who have been aggrieved by the judicial complaints process. Besides, in terms of perceptions of fairness and impartiality, the courts

[166] Complaints about the Judiciary (Scotland) Rules 2017, Rule 17.
[167] ibid Rule 18.
[168] ibid Rule 19.
[169] Complaints About Members of the Scottish Tribunals Rules 2018, Rule 2.
[170] ibid Rule 3.
[171] See Making a Complaint About Judicial Misconduct by an Employment Judge in Scotland <http://judicialconduct.judiciary.gov.uk/app/uploads/2015/12/Employment_Tribunal_Scotland_-_Making_a_complaint_of_Judicial_Misconduct_about_an_Employment_Judge.pdf>.
[172] See Chapter 7.
[173] Harrison, J., 'Judging the Judges: The New Scheme for Judicial Conduct and Discipline in Scotland' (2009) 13(3) *Edinburgh Law Review* 427-44.

may not be the most suitable body to review the decisions of the Head of the Scottish Judiciary in relation to judicial discipline…'[174] The Reviewer prepares and publishes reports on investigations carried out concerning the conduct of judicial officers; s/he also makes representation to the Lord President about the procedures for handling the investigation.[175] However, unlike JACO (England and Wales), the Reviewer in Scotland has no powers to set aside the inquiry held or to modify the recommendations made. S/He simply reports back to the Lord President, who may make appropriate decisions on such referrals.[176] Section 33(2)(d) coupled with Section 30(2)(b) of the Act reduces the Reviewer merely to a recommendatory body. Overall, the judicial conduct regulation scheme of Scotland heavily relies on the discretion of the Lord President.

The JCR works on a daily fee of £217.00. For the year 2017-18, the Reviewer dealt with 22 complaints and worked for 44 days. The Reviewer has a budget allocation of £2000.00 per year for all facilities/equipment costs and expenses.[177] The total cost incurred for the year 2017-18 was £1553.09.[178] The first Judicial Complaints Reviewer, Moi Ali's response while declining the second term aptly summarises the concerns of the mechanism. She said, '…it's difficult to make an impact within the constraints that I'm in at the moment. It's a bit like being in a straitjacket… enormously frustrating and difficult…Without the ability to implement change, the role feels tokenistic...'[179] Equally relevant is the recommendation of another Reviewer, Ian A Gordon. He noted, 'I recommend that Scottish Ministers should consider conducting a review of the role and process of the Judicial Complaints to determine its relevance and efficacy in the Judicial Complaints process.'[180]

Although the review of the JCR is necessary, considering the size of the Scotland judiciary, it is expected that both the Judicial Office[181] and the JCR are likely to receive fewer complaints and referrals. However, the mechanism must be adequately supported in terms of salary, perks, and infrastructure. The complaints against the members of the Scottish Tribunal now

[174] ibid 438; see also the Judiciary and Courts (Scotland) Act 2008, ss. 30 to 33.
[175] The Judiciary and Courts (Scotland) Act 2008, s. 30(2).
[176] ibid s. 33(2)(d).
[177] The JACO (England and Wales) has estimated its expenditure for the year 2019-20 to be £445,000. However, the comparison, in terms of the size of the expenditure, cannot be drawn between the JACO and the JCR as the volume and scope of the work differs significantly.
[178] Judicial Complaints Reviewer, Annual Report 2017-18.
[179] P. Hutcheon, 'Judicial Watchdog Quits from "Straightjacket" Role' *Sunday Herald* (Glasgow, 26 January 2014)
[180] Judicial Complaints Reviewer, Annual Report 2017-18, 9.
[181] For detailed functional analysis of the JCR, see Chapter 7.

are within the remit of the JCR; therefore, workdays must be increased.[182] Insufficient workload should not be a justification for having a part-time institution without adequate infrastructure and powers. It is too early to assess these institutions based on cost-benefit analysis. Therefore, a review of the JCR may be necessary, but such a review must regard the role and relevance of these institutions in ensuring judicial accountability, enforcing judicial conduct, and upholding judicial independence.

In comparison to England and Wales, both Scotland and Northern Ireland's regulatory models are more judiciary centric. The Lord President and the LCJ(NI) enjoy a greater degree of discretion to make appropriate decisions on disciplinary actions. Although it is convenient in smaller jurisdictions to devolve requisite powers to one person or office, it should not be at the cost of transparency and accountability. If 'judges assume greater control over the administration of the courts, over judicial appointments, and judicial conduct, 'responsibility without control' can be replaced by 'control without responsibility'.[183] Further, as in the case of the Chief Justice of India, Scotland also lacks formal guidance on complaints procedure relating to the Lord President.[184]

VI. The UK's legal and regulatory mechanisms enforcing judicial conduct: key features

Five key features of the oversight mechanisms of the UK (in comparison to India) are briefly presented in the following paragraphs. The thesis argues that these features are prerequisites of a robust regulatory regime that are missing in the Indian regulatory regimes.

(a) A comprehensive conceptual and legal framework

In all three jurisdictions of the UK, the judicial leadership responsible for conduct enforcement has laid down principles of judicial conduct in clearer terms. The code of judicial conduct is called 'A Statement of Ethics for the Judiciary' in Northern Ireland, 'Statement of Principles of Judicial Ethics for the Scottish Judiciary', and 'Guide to Judicial Conduct in England and

[182] Currently, the workday cap is 48 days per year.
[183] Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) C.L.J. 317.
[184] Section 35 (of the Judiciary and Courts (Scotland) Act 2008) provides for the constitution of a tribunal, but it does not prescribe the procedure to investigate complaints relating to the Lord President.

Wales'.[185] All three instruments are regularly revisited.[186] There is also a separate 'Guide to Judicial Conduct' for the Supreme Court of the UK (2009) prepared by the Justices of the Supreme Court.[187] Each of the instruments is strongly influenced by the Bangalore Principles of Judicial Conduct and its six core values: judicial independence, competence and diligence, impartiality, integrity, propriety, and equality. In addition, issues such as personal relationships and perceived bias, judge activities outside the court, interactions with media, participation in public debate, participation in commercial activities, community participation, gifts, hospitality and social activities and use of court property are also sufficiently stressed. These instruments, as they declare, are obligatory to all judges in courts and tribunals, whether salaried or fee-paid, legal or non-legal.[188]

Likewise, the rules on powers, functions, and procedures relating to regulatory mechanisms in all three jurisdictions are laid down. The rules relating to a nominated judge, investigating judge, disciplinary panel, disciplinary judge, Chief Executive, Complaints Officer and the Lord Justice of Appeal, etc. are also adequately prescribed. The procedure relating to the complaint, processing of complaint, inquiry, investigation, consultation, reporting, and role of the persons dealing with it, at each stage, are broadly laid down.[189] It is also clear that the scope of these regulatory mechanisms is limited only to judicial conduct regulation; they have little to do with judicial corruption or with any criminal accusation against judicial officeholders.[190] Therefore, the key feature that distinguishes regulatory regimes in India and the UK is the comprehensive legal framework comprising a detailed complaints procedure and elaborate conduct guidance.

(b) An inclusive accountability regime[191]

[185] These instruments, in a strict sense, are not 'codes'. These are set of judicial standards that are laid down to help the judges assess their personal and professional conduct and enable them to be informed on the conduct expected of a judge.

[186] A Statement of Ethics for the Judiciary in Northern Ireland revised in 2011; Statement of Principles of Judicial Ethics for the Scottish Judiciary revised in 2016 and Guide to Judicial Conduct in 2019.

[187] Available at <https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf>.

[188] Whilst the regulatory authorities, in the exercise of their disciplinary powers, may consult the judicial conduct norms, but they are not obliged to follow them. See e.g., the Guide to Judicial Conduct 2019, 5.

[189] As regards Northern Ireland and Scotland there is a concentration of powers in the Lord Chief Justice and the Lord President respectively, yet there is clarity on their role as a disciplinary authority.

[190] Complaints alleging the commission of a crime are referred to the police. See e.g., the code of practice (NI) 2021, para 2.5; see also Complaints about the Judiciary (Scotland) Rules 2017, Rule 6.

[191] Some of the notable gaps in the accountability regimes in the UK are discussed in Chapter 7.

As pointed out elsewhere in this section, oversight mechanisms in all three jurisdictions cover every judicial office, across judicial hierarchies, including tribunal members, prosecutors, coroners, commissioners, and the court staff. In addition, unlike in India, there is scope for reviewing investigations and disciplinary decisions of the disciplinary authorities. Although in comparison to England and Wales, both Scotland and Northern Ireland have a weaker review system, unlike in India, there is a second opportunity for the person dissatisfied with the first-tier investigative body.

The review mechanism, especially in England and Wales, has been effective. In 2017-18, the JCIO received 2,147 complaints, of which 1,435 are not accepted for investigation and 535 are dismissed at a later stage. Of these 1970 cases (1,435+535), more than 1500 cases were rejected on technical grounds.[192] Notwithstanding the outcome of the complaints filed, in 89% of the cases, JCIO was able to respond to complaints within two working days after receiving the complaint; in about 65% of the cases, it was able to issue a first substantive response to complaints within 15 working days; it provided monthly updates to parties in ongoing investigations in 87% of the cases.[193] During this period, only in 39 cases, were disciplinary actions taken and only 17 judicial officeholders were removed. However, for the same period, JACO noted a few instances of 'maladministration' regarding the remit of judicial conduct complaints of the JCIO, advisory committees, and tribunals. Of 79 complaints that JACO had received (including 6 regarding judicial appointments), only 8 review applications were upheld.[194] However, successful interventions of the JACO suggest that it adds value to the regulatory process by identifying instances of maladministration.

(c) An institutionalised approach

Although there is discernible dominance of judicial leadership in judicial conduct regulation in the UK (see Chapter 7 for further discussion), the disciplinary processes are sufficiently pluralised. Disciplinary decisions are invariably the product of a well-defined process, where individuals with different roles and responsibilities contribute to a disciplinary outcome. The

[192] The complaints either lacked an allegation amounting to misconduct or they were not adequately particular about the person against whom the allegations were made.

[193] However, it is to be noted that the performance of JCIO for the year 2016-17 was even better. See JCIO Annual Report 2017-18, para 5.8, 5.

[194] However, there are instances where a significant number of appeals against JCIO were upheld, for instance, in 2008-09 as many 45 cases are upheld as against 58 that were rejected.

institutionalized approach is particularly effective in England and Wales (since both the executive and the judiciary consult each other at critical stages of the disciplinary process). In England and Wales, complaint scrutiny, investigation, and advisory functions are carried out collectively by the JCIO, nominated judge, investigative judge and advisory panel as prescribed by relevant delegated legislation. At each stage, the complainant and the judicial officer are notified of the latest developments; they have the opportunity to be heard at each stage. Minimum procedural requirements are to be followed at each stage and based on the recommendations or decisions of the authorised persons (like a nominated judge), the course of follow-up actions is determined.

As regards Northern Ireland and Scotland, though the nominated judge, the disciplinary judge and (in appropriate cases) the tribunals play their role, the opinion of the Lord Chief Justice or the Lord President holds primacy [as discussed in subsection 3]. This is very similar to the practices of the Indian High Courts, where the Registrar (Vigilance), Inquiry Officers, the Administrative Judge, and, in some High Courts, Administrative Committees all play a role in conduct regulation. However, in most of the High Courts, the Chief Justice's decision takes precedence. Besides, in some cases, because the disciplinary procedures are informal, the disciplinary authority may not strictly follow them. Additionally, the plenary disciplinary power of the High Court [the High Court judges], as argued in Chapter 4, is antagonistic to the individual and internal judicial independence of subordinate court judges.

(d) Openness

The current regulatory regimes in the UK are a significant improvement over the pre-CRA (2005) regimes in terms of openness, transparency, and accountability. Although this study, in Chapter 7 argues that there are some notable gaps in the UK's accountability framework, compared to India, the regulatory regimes promote public confidence by providing timely, consistent, and tolerably transparent service. At every stage, the rights of a complainant are valued. The communication between the complainant and the mechanism is strictly time-bound.[195] Once the complaint is made, it will be acknowledged before the deadline.[196] For example, in Northern Ireland, the Complaints Officer shall acknowledge a complaint within 5

[195] See e.g., the Practice Code 2021, Annex D.
[196] See e.g., the complaint should be acknowledged within 3 working days of receipt, see Annex D, 44.

days, and the complainant will be provided with the contact details of the person dealing with his complaint.[197] If the complaint is related to judgment, order, or verdict, or it is incomplete, reasoned rejection is the mandate. At every stage, the complainant will be updated on the progress of his case. There will be a comprehensive, clear, and reasoned explanation of the outcomes of a complaint. If the complainant is dissatisfied with the investigation process, he can file an appeal or a review. In England and Wales, even the names of judicial officers guilty of misconduct or indiscipline are uploaded to the official website.[198]

The procedure of filing a complaint,[199] and the requirements of a cognisable complaint,[200] including information on jurisdictional limitations, appeal processes, rules and regulations guiding the process of investigation are web-published. In addition, information related to complaints and investigations could be sought under the Freedom of Information Act.[201]

(e) Account holders are also accountable[202]

The accountability of an account holder is paramount. It is vital that a regulatory regime's commitment to the core values that it seeks to enforce remains beyond reproach. Regulatory success is achieved when the transparency, openness, and accountability values that the regulatory agencies seek to enforce are reflected in the working of both the account-givers (e.g., the courts and judges) and the account holders (e.g., JCIO, JACO, and JCR). For this purpose, it is necessary to explain, at least to the individuals who have the right to know, the functions, powers and performances of the accountholder periodically. In this regard, the voluntary accountability practices of the UK's regulatory mechanisms reflect strong obedience to accountability demands. Each of the institutions submits reports to appropriate

[197] See subsection II (B) above.

[198] In Scotland, the Judiciary and Courts (Scotland) Act 2008 leaves it to the discretion of the Lord President to decide on how to deal with confidentiality of proceedings and the publication of information or its provision to any person. See Section 28 (2) of the Act. Judicial Conduct Investigations Office, *Publication Policy*, <http://judicialconduct.judiciary.gov.uk/disciplinary-statements/publication-policy/>.

[198] For instance, NICTS complaints and policy procedures, explains the procedure for filing a complaint stepwise. <https://www.justice-ni.gov.uk/articles/nicts-complaints-and-policy-procedures>.

[199] Id.

[200] JCIO: what do we need from you? <https://judicialconduct.judiciary.gov.uk/making-a-complaint/what-do-we-need-from-you/>.

[201] Northern Ireland Courts and Tribunal Services Freedom of Information <https://www.justice-ni.gov.uk/articles/nicts-freedom-information-0>; JCIO FOI provisions <https://judicialconduct.judiciary.gov.uk/about-us/>; Under the FOI Act of 2002, the Judicial Office for Scotland also provides information, unless it is exempt. <http://www.scotcourts.gov.uk/docs/default-source/default-document-library/publication-scheme-2019.pdf?sfvrsn=2>.

[202] For a critical analysis of judicial accountability frameworks in the UK, see Chapter 7.

authorities (like the Lord Chief Justice and the Lord Chancellor) as prescribed by the respective legal framework. In addition, they publish annual reports explaining their business.[203] Such voluntary accountability initiatives would enhance public trust in the regulatory mechanisms that are missing in India's in-house regimes.

VII. Conclusion

As analysed in this section, all three jurisdictions of the UK have comprehensive legal frameworks facilitating judicial conduct regulation across court judiciary and tribunals. Extensive complaints procedures, demarcation of powers and functions among various disciplinary authorities, delineation of the remit of the first-tier and review bodies, and comprehensive judicial conduct guidance have further strengthened the conduct enforcement mechanisms in the UK.

However, regulatory mechanisms in the UK need improvements in some areas (see Chapter 7); for example, the review in NI can be carried out by an arm's length body; the review may also be carried out at the conclusion of the disciplinary proceedings, replacing the review at each stage of the proceedings. Furthermore, in NI, the categorisation of complaints as 'gross misconduct' and 'misconduct' needs clarity. Meaningful participation of the executive and other stakeholders in judicial conduct regulation is necessary to reinforce public trust in the accountability process. Therefore, both in NI and Scotland, judicial conduct regulation regimes should involve the executive branch and the other stakeholders. Presently, especially as regards the lower judiciary, the regulatory process is largely built around the Lord Chief Justice in NI and the Lord President in Scotland.

The regulatory framework facilitating judicial conduct regulation at the UKSC, as pointed out in this section, is unsatisfactory. The discretion power conferred upon the Chief Executive may, considering his official subordination and day-to-day engagement with the President and the Deputy President, undermine the public trust in the complaints procedure. Therefore, initial scrutiny and determination on the credibility and substance of the complaint may be made by a committee of justices of the UKSC instead.

[203] For example, see Judicial Conduct Investigations Office, *Annual Report* [2015-16].

Chapter 6

Judicial conduct regulation in India: Do in-house mechanisms in India uphold judicial independence and effectively enforce judicial accountability?♠

I. Introduction

'It is recognised that judicial independence depends not only on freedom from undue external influence but also freedom from the undue influence which might in some situations come from the attitude of other judges.'[1] When senior judges have determinative roles in the judicial conduct regulation (e.g., India), not only their 'attitude' but also how they apply disciplinary protocols will have implications on how judges perceive regulatory regimes: supervisory or disciplinary powers of senior judges may also affect junior judges' performance on both the judicial and administrative sides. Therefore, the unchecked disciplinary power conferred on senior judges could undermine individual and internal judicial independence. Such power would also undermine judicial accountability needs. Against this backdrop, this Chapter attempts to answer the following question: Do in-house mechanisms in India uphold judicial independence and effectively enforce the standards of judicial conduct? The following sub-questions attempt to further contextualise the research question:

(1) Do in-house mechanisms in India uphold the internal and individual judicial independence of judges?

(2) Do in-house mechanisms in India adequately emphasise the judicial accountability needs?

In India, the apprehension of political intervention in judicial administration is commonly held among judges, academics, and the media.[2] Such apprehensions have underpinned judicial primacy in matters of judicial appointments, transfers, and conduct regulation. Furthermore, it is argued that the in-house mechanisms are essential to protect judges from frivolous and

♠ A substantial portion of this Chapter has been published in *Indian Law Review* as Shivaraj Huchhanavar (2022) Judicial conduct regulation: do in-house mechanisms in India uphold judicial Independence and effectively enforce judicial accountability? (2022) 6:3 *Indian Law Review* 352-386.

[1] CCJE Opinion No 1(2001), para 66.

[2] *In re Special Reference No. 1 of 1998*, AIR 1999 SC 1; *Supreme Court Advocates-on-Record Association v Union of India,* (2016) 4 SCC 1; Madhav Aney, Shubshankar Dam and Giovanni KO, 'The politics of post-retirement appointments: Corruption in the Supreme Court? (2020) *Ideas for India* <https://www.ideasforindia.in/topics/governance/the-politics-of-post-retirement-appointments-corruption-in-the-supreme-court.html>.

vexatious complaints from disgruntled litigants and others.[3] It is also believed that in-house mechanisms are necessary to avert inappropriate influences from the other branches in disciplining judges.[4] Therefore, in-house mechanisms are considered essential to secure and uphold judicial independence and public confidence.[5] Against this background, the study hypothesizes that the in-house mechanisms in India uphold judicial independence; and that key stakeholders of judicial administration – judges, lawyers, and academics – show a 'high level of confidence' in the efficacy of in-house mechanisms in upholding judicial independence. These directional hypotheses reflect the held view on the topic; the hypotheses are also consistent with the rationale that underpins judicial primacy in India.[6] In addition, to date, apart from doctrinal and analytical research that challenges the efficacy of in-house mechanisms, there is no empirical evidence to suggest that in-house mechanisms undermine judicial independence; therefore, the hypotheses that best reflect the normative literature (i.e., judicial decisions) are more credible.

The Chapter consists of four main sections. Section II briefly outlines the research method, statistical scales, and compliance with research ethics. Section III thematically presents key results drawn from quantitative data and informed by qualitative data. Section IV, with the help of statistical and qualitative analyses, tests the hypotheses and answers research questions. This section draws on empirical evidence to conclude that the in-house mechanisms in India fail to uphold judicial independence and are also ineffective in regulating judicial conduct. Part V concludes the Chapter.

II. Method

The research data was collected through online surveys and email correspondence.[7] The overarching objective of the surveys was to gather responses – information, opinions, and perception – from judges, advocates and academics on in-house mechanisms and their implications for judicial independence and accountability. The target groups for the surveys were serving and retired judges, advocates, and academics having an understanding of in-

[3] See e.g., *Ishwar Chand Jain v High Court of Punjab & Haryana*, MANU/SC/0198/1988.
[4] *C. Ravichandran Iyer v Justice A.M. Bhattacharjee,* (1995) 5 SCC 457.
[5] Report of the Committee on In-house Procedure (1999) 1-2.
[6] Law Commission of India Report No 195, 380-383.
[7] The data is mainly collected online through SmartSurvey.com and via email. A couple participants reverted the survey responses via WhatsApp as well.

house mechanisms. The study also attempted to capture the views of vigilance officers, who facilitate judicial conduct regulation at the lower levels of the judiciary in India. However, only two former vigilance officers participated in this study.

Selection of subject experts

In India, there is little publicly available information on the functioning of in-house mechanisms. The pilot study revealed that even some advocates, (most) academics, and junior judges lack an understanding of the working of in-house mechanisms (for example, vigilance mechanisms).[8] Therefore, advocates with adequate experience and understanding of in-house mechanisms were invited.[9] In the case of advocates, those practising in the High Court(s) or subordinate courts were preferred over those practising in the Supreme Court or tribunal judiciary exclusively.[10] Similarly, the study focused on collecting responses from subordinate court judges who are regulated through vigilance mechanisms.[11]

The surveys were conducted between December 2020 and July 2021. The survey template for judges had 10 questions, for academics 11 questions, and for advocates 14 questions, respectively. The surveys for judges and advocates covered the following topics:

- the role and efficacy of vigilance mechanisms in upholding judicial independence
- the efficacy of vigilance mechanisms in judicial conduct regulation
- monitoring and surveillance of subordinate court judges
- potential abuse of vigilance mechanisms
- merits and demerits of vigilance mechanisms
- exertion of inappropriate influences on subordinate court judges and court staff, and
- involvement of advocates in judicial corruption.

[8] The pilot study was carried out in Madhya Pradesh, Karnataka, and Maharashtra.

[9] Efforts were made to collect the data from all across India; therefore, all the potential respondents, having adequate knowledge, experience and expertise, were invited. Except for one High Court judge, a district judge, four advocates and two legal academics, none of the participants were previously known to the researcher.

[10] Out of 53 advocates consulted, 19 practised in the High Courts, 16 in the trial courts, and eight concurrently practised both in the High Courts and trial courts. Also, three advocates concurrently practised in the SC and HCs, whereas two advocates exclusively practised in the SC. Further, two public prosecutors also participated in the study; three participants, although practised law previously, but at the time of the survey were in academia. Except for three participants, all have had more than three years of legal practice.

[11] Except for one judge, all respondent judges have or had served the judiciary as subordinate court judges for more than 3 years.

Although the survey templates for judges and advocates were substantially similar, they were phrased and arranged differently to enable the participants to effectively articulate their viewpoints as members of entwined yet distinct professions.[12] The survey template for legal academics was designed differently: the first part of the survey focused on removal and in-house procedure that apply to the higher judiciary. In addition, it included a couple of questions on the transparency and openness of the in-house procedure. The second part had questions on High Court vigilance mechanisms; however, since most legal academics would have limited interaction with vigilance mechanisms, specific questions on the internal dynamics of the mechanisms were avoided.[13] However, their views on the effectiveness of the overall functioning of vigilance mechanisms and their implications on judicial independence were elicited. In addition, there were a few demographic questions, including name, designation, email, and High Court jurisdiction; these questions, along with the participants' voluntary consent for participation, were mandatory.

In total, 110 participants responded to online surveys. Relevant demographic information of the participants is as follows:

The number of participant judges: 19 (10 district judges, 8 other subordinate court judges, and a High Court judge).[14]

The number of participant advocates: 53.[15]

The number of legal academics: 36.[16]

The number of former vigilance officers: 2.[17]

[12] The surveys were initially designed to be paper surveys; however, due to the Covid pandemic, field visits had to be abandoned. With a view to conducting online surveys, the survey templates are redesigned, and the number of questions had to be reduced. For this reason, data collected during the pilot study could not be used for the analysis.

[13] Out of 36 legal academics consulted, five hold/held the position of Professor, another five were Associate Professors, 17 were Assistant Professors, two were research scholars and seven others held other academic positions.

[14] Out of 19 judges, 6 judges were retired, and the remaining were sitting judges. The judges represented 9 different High Courts out of 25 (i.e., the High Court of Patna [3], Delhi [2], Rajasthan [2], Karnataka [2], Punjab and Haryana [2], Bombay [2], Orissa [2], Madras [1], and Allahabad [1]). The numerical noted in '[]' represents the number of participants from that High Court.

[15] The participant advocates represented the High Court of Delhi [9], Madras [6], Karnataka [5], Bombay [5], Allahabad [3], Rajasthan [3], Punjab and Haryana [3], Calcutta [3], Kerala [2], Madhya Pradesh [2], Jammu and Kashmir [2], Guahati [2], Patna [1], Gujarat [1], Andhra Pradesh [1], and Odisha [1]. Four participants did not mention the High Court jurisdiction. In all, advocates represented 16 High Courts, out of 25.

[16] The participant legal academics represented the State of Uttar Pradesh [3], Maharashtra [3], Gujarat [2], Himachal Pradesh [2], Kerala [2], Madras [2], Madhya Pradesh [2], Uttarakhand [1], West Bengal [1], Rajasthan [1], Assam [1], Odisha [1], Karnataka [1], and union territories New Delhi [4] and Andaman Islands [1]. Another 9 participants did not mention the name of a state or union territory that they have represented. In all, the legal academics represented 13 states (out of 29) and 2 union territories (out of 7).

[17] One of the former vigilance officers is presently serving as a High Court judge, therefore, demographic details of the vigilance officers are not disclosed here.

Statistical analysis scales

The 10-point Likert rating scale (that is, on a scale of 1-10[18]) is used to assess the confidence of respondents in vigilance mechanisms' efficacy in upholding judicial independence. The 10-point scale is interpreted as follows:

a) 1-2 signifies 'no confidence' in the vigilance mechanisms
b) 3-4 signifies 'very low confidence'
c) 5-6 signifies 'low confidence'
d) 7-8 signifies 'high confidence'
e) 9-10 signifies 'very high confidence'

The initial prediction was that the respondents would grade the vigilance mechanisms with higher points, that is, not less than 7, which means 'high' or 'very high' confidence in the vigilance mechanisms' efficacy in upholding judicial independence. The prediction was consistent with the hypotheses. Considering the overwhelming significance the judiciary attaches to the in-house mechanisms to secure and uphold judicial independence, the initial assumption was strongly justified.

To assess the confidence of each group, the mean value is used to present the analyses, according to the scale presented above.[19] For example, a 4-point Likert scale ('strongly agree', 'somewhat agree', 'somewhat disagree' and 'strongly disagree') is used to examine the potential misuse of vigilance mechanisms. Likewise, to assess the efficacy of the mechanisms, for example, in combating judicial corruption or misconduct, close-ended questions are used.

III. Results

1. Regulatory mechanisms for the lower judiciary in India

A. Judges' views on vigilance mechanisms

(i) on protection from false and vexatious complaints

[18] Where '1' meant the mechanism 'does not protect at all' and '10' meant 'protects to a great extent'.

[19] If the mean value is a fractional part of a mixed number, and the fractional part is more than half (i.e., more than 0.50) it is rounded up to the next whole number (for example, 5.55 is rounded as 6) and if it is less than a half, the preceding whole number stays the same (for example, 5.45 is read as 5).

The judges (n=16) were asked to what extent (on a scale of 1-10[20]) the vigilance mechanisms protect them from false and vexatious complaints. It was assumed that most of the participant judges would rate the vigilance mechanisms highly, supporting the hypothesis; however, the responses did not strongly corroborate the hypothesis: of 16 judges, 9 (56.25%) did not grade more than 5. Only 7 participants (43.75%) award more than 5. The overall mean was 5.81 (std. error 0.8), which signifies the 'low confidence' of judges in the vigilance mechanisms' efficacy in protecting them from false and vexatious complaints.

(ii) on the misuse of vigilance mechanisms

Critics of vigilance mechanisms regard the potential misuse of vigilance as a significant flaw.[21] The misuse of the vigilance mechanism at the instance of High Court judges and High Court officials has been substantiated by several SC judgments.[22] Participants were asked if they agree that the mechanisms are susceptible to misuse at the instance of High Court judges or senior officials in the High Court. Almost two-thirds of judges (62.50%; std error 0.28) either 'strongly agree' or 'somewhat agree' that the mechanisms are prone to misuse (see Fig. 1).

Fig. 1

Critics say that the vigilance mechanism could be misused against subordinate court judges at the instance of High Court judges or higher officials in the High Court Registry. Do you agree?

		Response Percent	Response Total
1	Strongly agree	37.50%	6
2	Somewhat agree	25.00%	4
3	Somewhat disagree	18.75%	3
4	Strongly disagree	18.75%	3

Statistics									
	Minimum	1	Mean	2.19	Std. Deviation	1.13	Satisfaction Rate	39.58	answered 16
	Maximum	4	Variance	1.28	Std. Error	0.28			skipped 0

(iii) Informal nature of vigilance mechanisms

[20] Where '1' meant the mechanism 'does not protect at all' and '10' meant 'protects to a great extent'.

[21] G Mohan Gopal, 'Corruption and the judicial system' <https://www.indiaseminar.com/2011/625/625_g_mohan_gopal.htm>.

[22] See e.g., *Ishwar Chand Jain v High Court of Punjab & Haryana*, MANU/SC/0198/1988.

Subordinate court judges are subjected to informal surveillance by the High Courts; the court staff, advocates, colleagues, and senior judges are discreetly contacted to seek relevant information or input concerning a judicial officer. Likewise, surprise visits and inspections are carried out by vigilance officers and senior judges to uncover any nonfeasance or malfeasance by judges or court staff. However, informal oversight could undermine or disrupt the work of a judge; such measures could also propagate insecurities and distrust in judges, affecting their interpersonal relationships with colleagues, senior judges, advocates, and court staff. In this regard, judges (n=16) were asked whether informal oversight affects their judicial or administrative work. Most judges (62.50%) confirmed that it affects their work. A considerable percentage of judges (43.75%) also felt that they are unnecessarily questioned or subject to disciplinary proceedings by the High Court or the vigilance officers. A significant minority (31.25%) of judges felt that they are unnecessarily watched or monitored by the High Court or the vigilance officers. These findings substantially diminish confidence in the assumption that vigilance mechanisms uphold the decisional independence and administrative autonomy of subordinate court judges.

(iv) on judicial independence and overall performance of the vigilance mechanism

To test the validity of the hypotheses, participants were asked whether in their view vigilance mechanisms uphold the independence of lower court judges. Although a good majority of judges (56.25%; n=16) graded more than 5 (on a scale of 1-10[23]), the mean value remained below 6 (5.81; std. error 0.78); even when we round up the mean value to 6, it does not meet the critical value to lend strong credence to the hypotheses; it clearly shows 'low confidence' of judges in the efficacy of the vigilance mechanisms' in upholding judicial independence. On the contrary, a significant minority of judges (43.75) grade less than 6 which is indicative of a weak correlation between the hypothesis and the perceptions of the participant judges. Responses to follow-up questions on the effectiveness of vigilance mechanisms in dealing with judicial misconduct and corruption further diminish confidence in the hypotheses. Only half of the judges (50%; n=16) graded more than 5,[24] suggesting the 'low confidence' of judges in the efficacy of vigilance mechanisms in dealing with judicial misconduct; the mean value also remained low (5.25; std. error 0.65), confirming a weak correlation between the

[23] Where '1' means 'not at all' and 10 means 'to a great extent' upholds the independence of lower court judges.
[24] On a scale of 1 - 10 where '1' means 'not at all effective' and 10 means 'effective to a great extent'.

hypotheses and the views of the judges. While 68.75% of judges (n=16) did not grade more than 5, indicating that vigilance mechanisms are not very effective in dealing with judicial corruption (mean 5.06; std error 0.63). As noted already, the role of the High Court vigilance mechanism goes beyond keeping vigil, conducting inquiries, and facilitating disciplinary proceedings; the mechanism also plays a critical role in the inspection of courts, performance evaluation of judicial officers, keeping records of income, assets, and liabilities of the judges, etc. Therefore, judges' views on the overall performance of the vigilance mechanisms were elicited. A considerable percentage of judges (56.25; n=16) did not grade more than 5,[25] which means that they were not satisfied with the overall performance of the vigilance mechanism (mean 5.25; std error 0.6).

B. Advocates' views on vigilance mechanisms

The survey for advocates included some additional questions (14 in total). Given that advocates see the courts, judges, and vigilance system very closely, the project intended to gauge their perception of judicial corruption and misconduct. Since vigilance mechanisms deal with corruption and misconduct complaints, the conceptual demarcation has become irrelevant and blurred.[26] Therefore, the project uses the term 'inappropriate influences' to survey the overall perception of advocates of judicial corruption and misconduct. Similarly, participants were asked to comment on the role of advocates in judicial corruption and conduct enforcement. They were also asked to comment on the merits and demerits of in-house vigilance mechanisms.

(i) exertion of 'inappropriate influences' on judges and court staff

The advocates (n=50) were asked to what extent they agree that judges could be inappropriately influenced. 60% of the respondents either strongly agree or somewhat agree that inappropriate influences may induce judges to decide cases in a specific way (see Fig. 2). Respondents who strongly agreed or somewhat agreed were asked how often judges' decisions were inappropriately influenced. A strong majority of advocates (57.89%; n=38)

[25] On the scale of 1 to 10 where '1' means 'not at all satisfied' and 10 means 'highly satisfied'.

[26] Two of the former vigilance officers were asked to note, on average, how many judicial officers are prosecuted for corruption per year. Only vigilance officer replied, 'none' [RegV1/JHK/Jan2020/02] and another did not respond [Jus.J1/CHT/Jan2020/04].

responded that judicial decisions are inappropriately influenced regularly or occasionally (see Fig. 3). The findings clearly suggest a correlation between a widely shared perception of judicial corruption (including misconduct) and the views of advocates.

Fig.2

5. To what extent do you agree that individual judges can be induced to decide cases in a specific way by exerting inappropriate influences?

			Response Percent	Response Total
1	Strongly disagree		18.00%	9
2	Somewhat disagree		12.00%	6
3	Somewhat agree		58.00%	29
4	Strongly agree		12.00%	6

Statistics									
	Minimum	1	Mean	2.64	Std. Deviation	0.91	Satisfaction Rate	54.67	answered 50
	Maximum	4	Variance	0.83	Std. Error	0.13			skipped 0

Fig. 3

6. If you strongly disagree or somewhat disagree with question (5), please take up the next question. If you somewhat agree or strongly agree with question (5), did this occur –

			Response Percent	Response Total
1	Very Rarely		21.05%	8
2	Rarely		21.05%	8
3	Occasionally		52.63%	20
4	Regularly		5.26%	2

Statistics									
	Minimum	1	Mean	2.42	Std. Deviation	0.88	Satisfaction Rate	47.37	answered 38
	Maximum	4	Variance	0.77	Std. Error	0.14			skipped 12

In addition to subordinate court judges, court staff have been shown to be corrupt and dishonest by Transparency International.[27] Therefore, advocates were asked whether court

[27] Transparency International, 'Global Corruption Report: Corruption in Judicial Systems' (CUP, 2007) 215.

staff can be induced to treat cases or litigants in a specific way. More than two-thirds of advocates (68%; n = 50) somewhat agree or strongly agree that court staff can be induced by inappropriate influences to treat cases or litigants in a specific way (std. error 0.14).[28] Those who strongly agreed or somewhat agreed were asked how often court staff can be inappropriately induced. Again, a considerable majority of advocates (62.17%; n=37) noted that court staff can be inappropriately induced occasionally (35.14%) or regularly (27.03%; std. error 0.16). The findings substantiate the widely held assumption that court staff are more prone to 'inappropriate influences' than judges.

(ii) The role of advocates in judicial corruption, etc.

Transparency International reported that advocates act as a conduit for judicial corruption in India.[29] To reassess this finding, participants were asked whether advocates act as an agent (a conduit) of judicial corruption. The considerable majority of advocates (58%; n=50) either strongly agree or somewhat agree[30] that advocates act as a conduit for judicial corruption (std. error 0.14). Those who strongly agreed or somewhat agreed were asked how often advocates act as an agent of judicial corruption. Around 61% of advocates agree that advocates occasionally (43.90%) or regularly (17.07%) act as a conduit of judicial corruption (std. error 0.16).

Many subordinate court judges allege that advocates try to intimidate/bully judges by threatening to complain against them to the High Court. Therefore, advocates were asked to respond to this widely shared allegation. The findings strongly corroborated the allegation. Almost 60% of the respondents (n=49) somewhat agree (38.78%) or strongly agree (20.41%) that advocates tend to intimidate judges by threatening to complain (std. error 0.16). A considerable percentage of advocates (47.22; n=36) also agree that such intimidation occurs occasionally (36.11%) or regularly (11.11%; std. error 0.17). The findings establish that some advocates in India act as a catalyst in abetting judicial corruption, and some also resort to bullying tactics to intimidate subordinate court judges.

[28] Somewhat agree 46% and strongly agree 22%.
[29] Transparency International India, 'Indolence in India's judiciary' in *Global Corruption Report: Corruption in Judicial Systems* (2007) 215.
[30] Somewhat agree 36% and strongly agree 22%.

(iii) Advocates' views on in-house mechanisms and protection of judicial independence

To test the hypotheses, advocates were asked their views on to what extent the vigilance mechanisms uphold the independence of lower court judges. However, similar to what was found in the case of judges, the views of advocates also did not establish a *strong* correlation between the hypotheses and the views of advocates. Most advocates (56.25; n=48) grade more than 5 (on a scale of 1 to 10), indicating that to some extent vigilance mechanisms uphold the independence of lower courts; however, as in the case of judges, the mean value remained slightly below 6, signifying a weaker correlation and 'low confidence' of advocates in vigilance mechanisms (for further details, see Fig. 4).

Fig. 4

On a scale of 1-10 (where '1' means 'not at all' and '10' means 'to a great extent'), please check the box to indicate your response as to what extent the vigilance mechanism upholds the independence of lower court judges in India.

		Response Percent	Response Total
1	1	4.17%	2
2	2	2.08%	1
3	3	2.08%	1
4	4	12.50%	6
5	5	22.92%	11
6	6	20.83%	10
7	7	8.33%	4
8	8	12.50%	6
9	9	10.42%	5
10	10	4.17%	2

Statistics									
	Minimum	1	Mean	5.98	Std. Deviation	2.12	Satisfaction Rate	55.32	Answered 48
	Maximum	10	Variance	4.48	Std. Error	0.31			Skipped 2

The response to a question on the potential misuse of vigilance mechanisms further diminishes the confidence in the hypotheses. Two-thirds of advocates (65%) either somewhat

agree (42.86%) or strongly agree (22.45%) that the vigilance mechanisms could be misused against subordinate court judges at the instance of High Court judges or higher officials in the High Court (for further statistical details, see Fig. 5 below).

Fig. 5

Critics say that the vigilance mechanism could be misused against subordinate court judges at the instance of High Court judges or higher officials in the High Court Registry. Do you agree?

		Response Percent	Response Total
1	Strongly disagree	22.45%	11
2	Somewhat disagree	12.24%	6
3	Somewhat agree	42.86%	21
4	Strongly agree	22.45%	11

Statistics								
	Minimum	1	Mean	2.65	Std. Deviation	1.06	Satisfaction Rate	55.1
	Maximum	4	Variance	1.12	Std. Error	0.15		

Answered	49
Skipped	1

The responses of advocates on the effectiveness of vigilance mechanisms did not reinforce 'high confidence'. However, a good majority of advocates (56%) (n=50) somewhat agree or strongly agree that the vigilance mechanisms are effective in handling allegations of judicial corruption or misconduct. In contrast, a considerable minority of the advocates (44%) either strongly disagree (22%) or somewhat disagree (22%) that the vigilance mechanisms are effective in handling allegations of judicial corruption or misconduct.

(iv) On the merits of vigilance mechanisms

Advocates were asked to note the merits of vigilance mechanisms. Some respondents noted that the in-house mechanisms help maintain institutional integrity, institutional image, public confidence, and confidentiality of judges during the investigation.[31] A few respondents thought that, to some extent, the mechanism maintains effective oversight over judges and court staff and reduces opportunities for corruption and misbehaviour;[32] a couple of

[31] ID: 154734355; ID: 157051664; ID: 161401287; ID: 164223256; ID: 166736355; ID: 168719684; RegV1/JHK/Jan2020/02

[32] ID: 161653035; ID: 161461895; ID: 162410723; ID: 163607350; ID: 163611187; ID: 164559401; YPS/RFNJA/MP/Jan2020/03.

participants regarded the vigilance mechanism as 'quick'.[33] A couple of advocates thought that the mechanism shields judges against baseless and motivated allegations.[34] An advocate noted that the mechanism if it functions properly would instil fearlessness in honest judges while discouraging dishonest judges from engaging in corruption.[35] Another advocate noted that the vigilance officer 'is one of the senior-most District Judges waiting in the aisles to be elevated to the High Court. It can be presumed that he would have the utmost integrity and honesty to conduct a proper preliminary enquiry upon receipt of a complaint against a judicial officer.'[36] There were conflicting views on whether the vigilance mechanisms are transparent.[37] Some respondents noted that in-house vigilance mechanisms have no merits.[38]

(v) On the weaknesses of vigilance mechanisms

Most advocates noted that vigilance officers exert undue influence and threaten the decisional autonomy of judges;[39] some alleged that vigilance officers act with ulterior motives[40] and bias,[41] and several others noted that vigilance mechanisms are non-existent, non-transparent, and ineffective[42] and are 'plagued by delay'.[43] Some respondents noted that the mechanisms do not strictly comply with the rules.[44] Others viewed the mechanisms as opaque.[45] Some alleged that mechanisms harbour cronyism, cover-up, and act as a veil.[46]

A former High Court judge [now an advocate] described the weaknesses of vigilance mechanisms in the following terms:

> '[the vigilance mechanism] takes enormous time - to be precise many years… while the corruption charges are being enquired into the officer continue getting…benefits and in some cases superannuates as well! The Judge of the [High] courts is reported to influence the outcome in favour of the corrupt on caste and other considerations… [The] weakness of the

[33] ID: 164311957; ID: 152954304.
[34] SPV/SADV/KAR/Jan2020/01; ID: 15473435.
[35] DJ/Just.J8/PAT/Jan2020/06.
[36] HS/SADV/MAD/Jan2020/09.
[37] ID: 161653035; ID: 152955782.
[38] ID: 163056759; ID: 152919891; ID: 157047560.
[39] ID: 152955782; ID: 154734355; ID: 158303814; ID: 162989039; ID: 165043934.
[40] One participant noted that 'Sometimes, the vigilance officer eliminates a contender for elevation as Judge of the High Court by initiating an enquiry against that officer': HS/SADV/MAD/Jan2020/09.
[41] ID: 161653035; ID: 163056759; ID: 165043934; ID: 164311957; ID: 152954304.
[42] ID: 157051664; ID: 163103411; ID: 163611187; ID: 164223256; ID: 164311957; ID: 164559401; ID: 165043934.
[43] HS/SADV/MAD/Jan2020/09; YPS/RFNJA/MP/Jan2020/03.
[44] ID: 152895294; ID: 163607350.
[45] ID: 163611187; ID: 161452866; ID: 164561732.
[46] ID: 155546510; ID: 161452866; ID: 164561732.

vigilance wing of a [High] Court is [that it is] not being allowed to function freely. My personal experience says that due to the shackles of working under High Court judges, the section [the vigilance mechanism] appears demoralised...'[47]

C. Views of legal academics on in-house mechanisms

(i) on the effectiveness of vigilance mechanisms

The legal academics were asked to what extent the High Court vigilance mechanism is effective in combating judicial corruption. Most of the respondents (60%; n=35) did not grade more than 5, suggesting that vigilance mechanisms are not very effective in dealing with judicial corruption (std. error 0.34). The mean value also remained low (5.17, the lowest among all three groups of respondents), signifying a weak correlation between the hypotheses and the views of the academics. Even with respect to judicial misconduct, more than half of the respondents (52.77%) graded less than 6, and the mean value also remained below 6 (5.5; std. error 0.36), denoting the 'low confidence' of respondents with respect to the effectiveness of vigilance mechanisms to enforce the judicial conduct. Almost all respondents (91.66%; n=36) either somewhat agree or strongly agree that vigilance mechanisms could be misused against subordinate court judges at the instance of High Court judges or higher officials in the High Court Registry (std. error 0.1; see Fig. 6).

Fig. 6

12. Critics argue that the High Court vigilance mechanism, as it is an informal and in-house apparatus, could be misused against the subordinate court judges at the instance of High Court judges or higher officials in the High Court Registry. Do you agree?

		Response Percent	Response Total
1	Strongly agree	22.22%	8
2	Somewhat agree	69.44%	25
3	Somewhat disagree	5.56%	2
4	Strongly disagree	2.78%	1

Statistics									
	Minimum	1	Mean	1.89	Std. Deviation	0.61	Satisfaction Rate	29.63	answered 36
	Maximum	4	Variance	0.38	Std. Error	0.1			skipped 0

[47] DJ/Just.J8/PAT/Jan2020/06.

(ii) on upholding judicial independence

Among the three groups of respondents, academics have shown a considerable 'low confidence' in vigilance mechanisms' efficacy in upholding judicial independence; most of the respondents (61.11%; n=36) did not grade more than 5, demonstrating 'low confidence' in the vigilance. The mean value also remained considerably low (5.06), suggesting a weak correlation between the hypotheses and the views of legal academics.

(iii) on the role of advocates in judicial corruption

Most legal academics (88.67%; n=35) either strongly agree or somewhat agree that advocates in India act as a conduit of judicial corruption (see Fig. 7).

Fig.7

Critics say that the advocates often act as a conduit (an agent) of judicial corruption. Do you agree?

		Response Percent	Response Total
1	Strongly agree	42.86%	15
2	Somewhat agree	45.71%	16
3	Somewhat disagree	8.57%	3
4	Strongly disagree	2.86%	1

Statistics									
	Minimum	1	Mean	1.71	Std. Deviation	0.74	Satisfaction Rate	23.81	answered 35
	Maximum	4	Variance	0.55	Std. Error	0.13			skipped 1

2. The removal and in-house procedure for Supreme Court and High Court judges

A good majority of the respondents (52.78%; n=36) concluded that the removal procedure as provided in the Constitution is ineffective (std. error 0.08), while most of the respondents (77.78%; n=36) viewed the in-house procedure to be ineffective in combating judicial corruption (std. error 0.07). Likewise, a strong majority of respondents (61.11%; n=36) also found the in-house procedure ineffective in dealing with judicial misconduct cases (std. error 0.08). The legal academics were also asked if they are satisfied with the transparency, openness, and accountability measures that in-house committees follow. Most of the

respondents (77.78%; n=36; see Fig. 8) answered negatively, signifying their dissatisfaction (std. error 0.07).

Fig.8

In terms of transparency, openness, and accountability, are you satisfied with the way in which the in-house committees work? Please feel free to use the text box below for additional comments.

			Response Percent	Response Total
1	Yes		22.22%	8
2	No		77.78%	28

Statistics									
	Minimum	1	Mean	1.78	Std. Deviation	0.42	Satisfaction Rate	77.78	Answered 36
	Maximum	2	Variance	0.17	Std. Error	0.07			Skipped 0

3. Suggested reforms

(i) Judges

The participant judges were asked to suggest reforms to strengthen the vigilance mechanism. Quite a few recommendations were made; some notable ones are thematically presented below.

(a) On strengthening vigilance setup

Several judges suggested that the 'vigilance [mechanism] should be restructured to function as an effective body';[48] they recommended that judicial officers with integrity and honesty should be appointed as vigilance officers.[49] Officers who simply follow the instructions of senior judges ('yes men' or 'favourites') should not be appointed as vigilance officers;[50] the judges also urged that vigilance officers be objective, competent and professional, and should not act 'without ascertainment of facts'.[51] Some of the judges observed that there should be

[48] ID: 154595225; ID: 154575585.
[49] ID: 157362796.
[50] ID: 157362796.
[51] ID: 163126401; ID: 166110773; ID: 154434217; ID: 154575585; ID: 154580906; ID: 154611821.

a separate law regulating vigilance mechanisms;[52] and that there should be rules to guide the vigilance mechanism.[53]

(b) On complaints and inquiries

The judges noted that despite the clear guidelines from the CJI to dismiss complaints that are not supported by an affidavit, the vigilance mechanisms continue to initiate inquiries based on such complaints.[54] It was also revealed that anonymous complaints are investigated and disciplinary actions are taken against judicial officers, at the discretion of the vigilance officer.[55] The judges recommended that false and vexatious complaints should not be investigated[56] and judicial officers should not be asked to respond to unsubstantiated complaints.[57] One of the judges proposed a 'well-defined and specific policy'[58] on complaints to avoid abuse of discretionary power by vigilance officers, without impeding judicial independence and sovereignty [of the] judicial system.[59] Another judge observed that '…complaints requiring clarification should only be sent for comments [of a concerned judge]. The process needs to be balanced. So that the honest officers also do not feel discouraged and corrupt officers are not spared. Scrutiny of the complaint needs a thorough preliminary assessment to make the final call… [Disciplinary inquiry] should not be a routine thing.'[60]

(c) On High Court officials and senior judges

The views of some of the judges reflect their discontent with senior judges and High Court officials. A judge urged that 'higher-ups must not look [at] the judicial officer on a caste basis to proceed against the officer.[61] The High Court is not at all objective in dealing with [the] district judiciary. They are being punished for *bonafide* judicial order[s]. District judiciary works in [an] environment of the fear of Bar and High Court, unwholesome for the system',[62] noted another judge. Another judge recommended that '...the vigilance [department] needs

[52] ID: 154575585.
[53] ID: 157362796; ID: 163126401.
[54] ID: 163126401; ID: 154575585.
[55] ID: 154575585; ID: 163126401.
[56] ID: 154611821.
[57] D: 164560839; ID: 166110773.
[58] ID: 163126401.
[59] ID: 163126401.
[60] ID: 154611821.
[61] ID: 163365860.
[62] ID: 164560839.

to be changed frequently. The High Court officials…should be rotated with subordinate courts.'[63] A judge called for 'an independent authority under the exclusive control of the Chief Justice [of the High Court]'[64] to deal with judicial complaints. Judges also demanded transparency[65] and adherence to the principle of natural justice in disciplinary proceedings.[66]One judge recommended that the High Courts ensure that the vigilance mechanisms work fairly, fearlessly and independently. No judge should pressurise or bully the officer who leads it for extraneous reasons.[67]

The recommendations strongly reflect the inadequacies of vigilance mechanisms and the dissatisfaction of judges[68] with the functioning of the High Court vigilance. Judges felt that vigilance mechanisms need organisational and functional reforms; there is also a strong perception of discriminatory and unfair treatment of judges by High Court judges and officials; some judges have also doubted the competence and objectivity of vigilance officers. The perception of working in 'an environment of fear',[69] allegations of caste bias,[70] favouritism,[71] and potential misuse of vigilance mechanisms strongly deprecate the hypothesis that vigilance mechanisms uphold the individual and internal judicial independence of subordinate court judges.

(ii) Advocates

'Transparency' topped the list of suggestions offered by advocates.[72] Participants also recommended adequate autonomy for the vigilance mechanisms.[73] In this regard, one of the respondents noted as follows:

> '...this mechanism [the vigilance mechanism] can be used against the subordinate judicial officers by the High Court judges or the High Court registrars if they [judges] don't abide by their orders or any unofficial need…

[63] ID: 157362796.
[64] ID: 154595225.
[65] ID: 154966963; ID: 164560839; ID: 154434217.
[66] ID: 154966963.
[67] DJ/Just.J8/PAT/Jan2020/06.
[68] It is to be noted that one judge [ID: 154420643] found the present mechanism 'quite effective'.
[69] ID: 164560839.
[70] ID: 163365860.
[71] ID: 157362796.
[72] ID: 152955782; ID: 157047560; ID: 162326778; ID: 163056759; ID: 165043934; SPV/SADV/KAR/Jan2020/01; YPS/RFNJA/MP/Jan2020/03.
[73] ID: 154734355; ID: 152919891; ID: 166736355.

> the higher judiciary completely controls the subordinate judiciary in various ways…'[74]

The advocates also recommended that the vigilance mechanisms should be unbiased and protect the independence of subordinate courts[75] and use the oversight powers proportionately.[76] Unsurprisingly, speedy disposal of complaints, immediate action and regular monitoring of subordinate courts were also recommended.[77]

(iii) Suggestions from legal academics on vigilance mechanisms

Like advocates, the academics also recommended independent, transparent, accountable and robust mechanisms for judicial conduct regulation.[78] They also called for objectivity in the treatment of subordinate judges by the mechanisms.[79] Several participants demanded that the findings of the vigilance mechanisms must be made available online.[80]

(iv) Comments and suggestions of legal academics on the in-house procedure for the higher judiciary

As noted elsewhere in the method section above, questions relating to the efficacy of the removal and in-house procedure for the higher judiciary were only posed to legal academics. Along with the open-ended questions, the survey questionnaire provided a comment section to elicit detailed responses from the participants. The analysis presented in the subsections ['(a)' to '(e)'] below is based on the descriptive responses of the academics. Similarly, four respondents (3 advocates and a former High Court judge) also responded to the same descriptive questions on the removal and in-house procedure for the higher judiciary. Therefore, the analysis in the following sections is based on responses from 36 legal academics, three advocates, and a former High Court judge (in all, 40 respondents).

(a) on the effectiveness of the removal procedure

The removal procedure is too slow, lacks transparency, and there is no provision to prevent the judge facing the removal motion from exercising his or her judicial functions.[81] Some

[74] ID: 166736355.
[75] ID: 168719684; ID: 164311957; ID: 155546510.
[76] ID: 163607350.
[77] ID: 157047560; ID: 161653035; ID: 163607350; ID: 163611187.
[78] ID: 162244636; ID: 162394329; ID: 163285123; ID: 163530287; ID: 164598752; ID: 167244105; ID: 162578025.
[79] ID: 165882975.
[80] ID: 167244105.
[81] HS/SADV/MAD/Jan2020/09.

participants found the procedure cumbersome[82] and that it lends immense assurance to a judge against indulgences amounting to misconduct.[83] Even when a judge is convicted of misconduct or corruption, party politics in parliament may sabotage the process of removal (for example, *Ramaswami case*[84]), observed one participant.[85] 'Though independence of [the] judiciary is really important, making removal almost impossible, [it] does not really serve independence,' said another respondent.[86]

(b) on the effectiveness of the in-house procedure

The respondents noted that the in-house procedure lacks transparency;[87] some participants condemned the in-house procedure as informal, a cloak and 'farcical'.[88] Another participant noted that the in-house committees consist of an exclusive coterie of judges, without the participation of laypersons or 'distinguished jurists'.[89] A former High Court judge noted that 'in some cases, the politics of caste, regional bias, and things like these may find favour with the members [of the in-house committee] to wantonly put an honest judge in trouble.'[90] The procedure has failed to inspire public confidence;[91] another participant viewed that there is a lack of genuine interest within the judiciary to address issues of judicial corruption and misconduct, therefore, unless there is a public outcry, the judiciary does not act.[92] In contrast, a couple of respondents opined that the in-house procedure is not entirely ineffective.[93]

(c) recommendations to reform the in-house procedure

Complaints against the High Court and the Supreme Court judges should be expeditiously inquired into, and appropriate disciplinary actions should be taken without undue delay.[94] One participant, while supporting the National Judicial Appointments Commission Act [which was struck down by the SC], observed that 'setting up the National Judicial commission was a

[82] [SPV/SADV/KAR/Jan2020/01]; ID: 162707070.
[83] DJ/Just.J8/PAT/Jan2020/06; ID: 162244636.
[84] *Sarojini Ramaswami v Union of India*, 1992 4 SCC 506.
[85] HS/SADV/MAD/Jan2020/09.
[86] ID: 162394329.
[87] SPV/SADV/KAR/Jan2020/01; ID: 162244636; ID: 162707070.
[88] DJ/Just.J8/PAT/Jan2020/06.
[89] HS/SADV/MAD/Jan2020/09.
[90] DJ/Just.J8/PAT/Jan2020/06; Similar views were expressed by academics as well - ID: 162244495.
[91] ID: 162000213.
[92] ID: 162244495.
[93] ID: 167244105; ID: SPV/SADV/KAR/Jan2020/01.
[94] ID: 162794877.

small step in the right direction... I feel that the power of judicial review, if not abused on such occasions, [is] overstretched to create a safety shield for judges as regards their misdeeds.'[95] Another advocate made a couple of key suggestions to strengthen in-house mechanisms: (i) even when the judge facing the allegations retires or resigns, the investigation and the removal procedure should continue; and (ii) once an investigation committee is formed, it should not be reconstituted until the conclusion of the proceedings, even if one of its members is elevated to the Supreme Court.[96]

(d) on transparency, openness, and accountability of in-house mechanism

The majority of the respondents commented that the in-house mechanisms are opaque and obscure.[97] One respondent commented that '[T]he in-house committee must take issues concerning transparency, openness, and accountability more seriously....'[98] A High Court judge proposed constitutional amendments to create a transparent and accountable body of imminent persons to deal with judicial conduct regulation.[99]

(e) suggestions to improve the judicial accountability

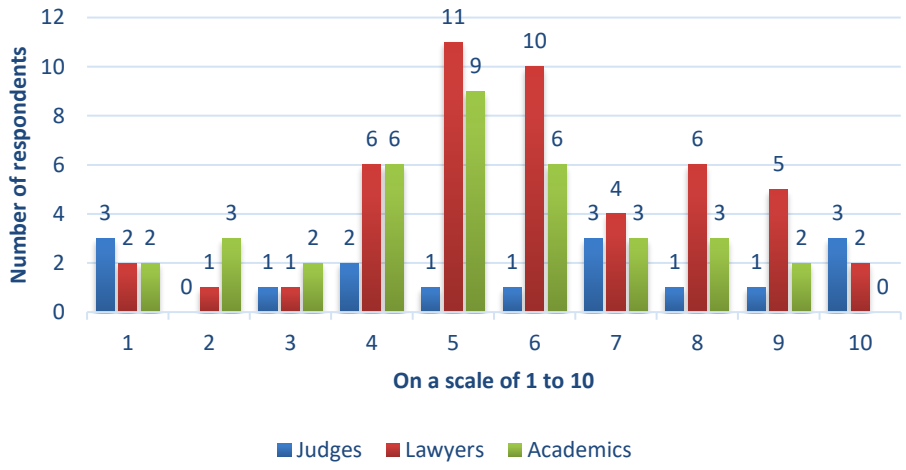
The participants urged reforms in the judicial appointment process.[100] Some felt that there is a need for legislative reforms with respect to conduct regulation and accountability.[101] One participant noted that '[T]here is an urgent need for an independent oversight body free from the dictates of all the three wings of the government to enquire, investigate and deal with matters of judicial misconduct and corruption. The garb of the independence of judiciary can no longer be used by the judiciary to thwart such mechanisms created to ensure judicial accountability.'[102]

[95] HS/SADV/MAD/Jan2020/09.
[96] HS/SADV/MAD/Jan2020/09.
[97] ID: 162244495; ID: 162000213; ID: 162707070; ID: 163012806.
[98] ID: 165882975.
[99] DJ/Just.J8/PAT/Jan2020/06.
[100] ID: 167244105; ID: 163544803; ID: 163244520; ID: 163012806; ID: 162794877; ID: 161688852.
[101] ID: 162579400; ID: 165882975; ID: 162000213; ID: 162244636; ID: 162377764.
[102] ID: 162244495

IV. Analysis

Of the 110 respondents, 100 of them graded the vigilance mechanisms on the question of whether the vigilance mechanisms uphold the judicial independence of subordinate court judges. Of the 100 respondents, 11 grade less than 2 (on a scale of 1-10), which means that they show 'no confidence' in the vigilance mechanisms. 18 respondents grade between 3-4, signifying 'very low confidence'; 38 respondents grade between 5-6, indicating 'low confidence'; 20 respondents grade between 7-8, signifying 'high confidence' and only 13 grade between 9-10, demonstrating 'very high confidence' in the vigilance mechanisms' efficacy in upholding judicial independence of subordinate court judges. Of the total number of respondents (100), two-thirds of respondents (67) did not grade more than 6; exactly 50 respondents have graded the vigilance mechanisms between 1-5, and the same number of respondents have graded the mechanisms with points between 6-10 (see Fig. 9). The grand mean value of all responses, across three groups, remained low (5.62), confirming the 'low confidence'. The data clearly indicate that respondents showed 'low confidence' in vigilance mechanisms.

Fig. 9



Therefore, hypotheses that the vigilance mechanisms uphold the judicial independence of subordinate court judges; and that key stakeholders – judges, lawyers, and legal academics – show a 'high level of confidence' in the efficacy of in-house mechanisms in upholding judicial independence, do not have sufficient empirical evidence in support. On the contrary, a strong majority of respondents (62.74%; n=51, judges and academics; mean value 5.13) showed 'low

confidence' in the efficacy of vigilance mechanisms' ability in combating judicial corruption in India. And more than half of the respondents (51.92%; n=52, judges, and academics; mean value 5.36) showed 'low confidence' in vigilance mechanisms' efficacy in dealing with judicial misconduct in India. Furthermore, most of the respondents (74.25% =62.50% of judges, 65% of advocates, and 91.66% of academics; n=101) either strongly agreed or somewhat agreed that vigilance mechanisms can be misused against subordinate court judges. Furthermore, a strong majority of judges (56.25%; n=16) did not think that the vigilance mechanism protects them from false and vexatious complaints. The perception of potential abuse of vigilance mechanisms against subordinate court judges and the inability of vigilance mechanisms to protect subordinate court judges from false and vexatious complaints not only disprove hypotheses but also strongly indict the mechanisms for undermining the individual and internal independence of lower court judges.

The founding rationale that underpins in-house mechanisms for higher and lower judiciaries is that they are indispensable to secure judicial independence;[103] the existing in-house mechanisms, to some extent, safeguard institutional independence. For example, the vigilance mechanisms for subordinate courts avert external influences, as the mechanisms are exclusively administered by judges: judicial complaints are received, scrutinised, inquired about, investigated, and sanctioned by senior judges. However, the informal and *ad hoc* nature of the mechanisms, as evident from the empirical data analysed above, threatens the decisional and functional autonomy of subordinate court judges. Therefore, it is necessary to examine the implications of in-house (vigilance) mechanisms on the individual and internal judicial independence of judges.

Although the research question aimed to audit the implications of in-house mechanisms on judicial independence, the respondents (judges, lawyers, and academics) were not asked to respond to a direct question on the implications of the in-house mechanisms on individual and internal independence for two key reasons. First, internal judicial independence, though a key aspect of judicial independence, is yet to emerge as a normative concept in India; the distinction between individual and internal judicial independence is blurred to a great

[103] DJ/Just.J8/PAT/Jan2020/06.

extent.[104] Second, though 'internal' judicial independence is not adequately conceptualised, it covers a range of issues involving judges, court personnel, and judicial administration. However, the scope of the project is limited to assessing *the implications of in-house mechanisms, inter alia*, on internal judicial independence. Therefore, in order not to superimpose conceptual distinctions on the respondents, they were asked to respond on the overall functioning of the vigilance mechanisms, which would help assess the implications of the mechanisms on individual and internal independence.

Do regulatory mechanisms in India uphold judicial independence and effectively enforce the standards of judicial conduct?

As noted, the research question is reformulated into two sub-questions to sufficiently emphasise the implications of in-house mechanisms on judicial independence and judicial conduct regulation (i.e., judicial accountability). Given the relevant international standards, by critically analysing the structure, composition, practices, procedures, and functioning of the in-house mechanisms, both sub-questions are answered below.

(1) Do regulatory mechanisms in India uphold internal and individual judicial independence?

International standards and best practices require that judicial conduct regulation regimes be independent, impartial, and competent. The regulatory regimes should have a robust institutional framework, and they should follow a clear disciplinary procedure; judicial conduct rules should be applied and enforced fairly and consistently.[105] Regulatory regimes should also be transparent and accountable. The contravention of any of these standards would impinge on individual or internal judicial independence. Therefore, in the following subsections, the functioning of the in-house mechanisms is audited against these international standards to assess whether the mechanisms in question uphold individual and internal judicial independence.

A. Independent and impartial regulatory mechanisms

[104] More particularly, 'internal judicial independence' has not been emphasized by the courts, the law commissions and, even the academic literature on the topic is limited.

[105] Diego García-Sayán, 'Report of the Special Rapporteur on the independence of judges and lawyers' (2020) UNGA Doc A/75/172, 20-21.

In India, in-house mechanisms for higher and lower judiciaries are exclusively administered by senior judges. As a result, the mechanisms are seen as an integral part of the judiciary, lacking any semblance of being independent. The lack of independence also calls into question the impartiality of these institutions. To protect judges and regulatory mechanisms from the undue influence of senior judges, 'the power to discipline a judge should be vested in a body that is independent of external influence.'[106] Unless there is a credible, independent, impartial, and competent conduct regulation body, it is difficult to envisage that the regulatees would show a 'high level of confidence' in the efficacy of mechanisms to protect their decisional and administrative autonomy. This body may comprise a majority of judges but should include representatives of the Bar, civil society, and the public to sustain the confidence of the community.[107] And as required by the United Nations Convention against Corruption 2003, adequate autonomy should be guaranteed to the regulatory mechanisms to carry out their functions effectively and independently.[108]

Presently, in some High Courts, the vigilance mechanisms work under the direct control of the Chief Justices of the High Courts to avert interferences from puisne High Court judges and officials.[109] However, this reform is not consistent with international standards, as it does not confer any autonomy on vigilance mechanisms. Judicial conduct regulation is too important to be left to the Chief Justice of the High Court alone. It is also to be noted that the High Court Chief Justices are from outside that High Court, they lack adequate understanding of the local judicial environment, and as a result, they tend to rely on local judges of that High Court. Therefore, in reality, vigilance mechanisms are susceptible to the undue influence of local High Court judges. Hence, as noted in Section II, allowing the vigilance mechanisms to work under the exclusive control of the Chief Justice of the High Court is not a solution, it neither guarantees much-needed autonomy nor can it free the vigilance mechanisms from the undue influence of the High Court judges. The lack of autonomy of vigilance mechanisms and the fear of interference by High Court judges inhibit the subordinate court judges that they are

[106] Implementation Guide and Evaluative Framework for Article 11 of the United Nations Convention against Corruption, para 71, 32.
[107] Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct 2010, para 2.2, 6.
[108] United Nations Convention against Corruption 2003, art 5(4).
[109] ibid.

regulated by an independent, impartial, and competent body; it is needless to say that such perceptions are not conducive to individual and internal judicial independence.[110]

B. Institutionalised approach

Vigilance mechanisms in India aim to abate judicial corruption and enforce judicial discipline through formal disciplinary actions and informal oversight over subordinate court judges. The aim is too ambitious for informal and ill-structured mechanisms. For instance, the Rajasthan High Court has 1026 subordinate court judges operating in its jurisdiction,[111] but to oversee these judges there is only one Registrar (Vigilance) supported only by the High Court staff. When necessary, with the permission of the Chief Justice of the High Court, the vigilance officer can take the assistance of other judges, but the officer has to discharge the regular vigilance functions within the constraints of the High Court's resources. Resource constraints are not rare; most of the High Court Vigilance Cells have less than 3 vigilance officers to assist the Registrar (Vigilance) in the discharge of anticorruption, judicial conduct regulation, and vigilance functions.[112] But not all High Courts have established District Vigilance Cells; even in High Courts where there are district vigilance cells, they deal only with complaints against court staff. The complaints against judges are forwarded to the vigilance cell at the High Court.[113]

Like the vigilance mechanism, the in-house procedure for the higher judiciary is an informal mechanism and it is not guided by formal rules. The mechanism is also *ad hoc,* a three-member in-house committee is constituted by the Chief Justice of India as and when a credible complaint is filed. Although the in-house procedure has been developed by the Supreme Court, the court has failed to reform the mechanism to be a credible institution that could address judicial conduct issues. It is in this context, as already noted, some participants have condemned the in-house procedure as informal, a cloak and 'farcical';[114] it is also described as an exclusive coterie of judges, without participation from laypersons or

[110] As noted in Section IV above, close to two-thirds of judges (62.50%; std error 0.28) either 'strongly agreed' or 'somewhat agreed' that the vigilance mechanisms are prone to misuse.

[111] See National Judicial Data Grid: Court Judge Report <https://njdg.ecourts.gov.in/njdgnew/?p=disposed_dashboard/info_mang>.

[112] For example, the High Court of Jharkhand, Chhattisgarh, Patna, Kerala, Orissa, Jammu and Kashimr, Sikkim, and Himachal Pradesh have only Registrar (Vigilance) to facilitate judicial conduct regulation. See The Chief Justices' Conference 2015, Item no 20, 1185-1222.

[113] Id.

[114] DJ/Just.J8/PAT/Jan2020/06.

'distinguished jurists';[115] and as a safety shield for judges.[116] To address these concerns, the regulatory mechanisms must be institutionalised; they should comprise representatives of the Bar, civil society, laypersons, and judges.

C. Clear procedure and objective criteria

The three groups of respondents – judges, advocates, and academics – clearly indicated that the in-house mechanisms do not act objectively; some respondents urged that the mechanisms do not act 'without ascertainment of facts'.[117] The judges recommended that false and vexatious complaints should not be investigated[118] and that judicial officers should not be asked to respond to unsubstantiated complaints.[119] 'Scrutiny of the complaint needs a thorough preliminary assessment to make the final call. [The disciplinary inquiry] should not be a routine thing',[120]noted one judge. A couple of judges also noted that, despite clear guidelines from the CJI not to entertain complaints that are not supported by affidavits, the High Court vigilance cells continue to initiate inquiries based on such complaints.[121] It was also revealed that anonymous complaints are also investigated, and disciplinary actions are taken against judicial officers, at the discretion of the vigilance officer.[122] These concerns of the respondents uncover a serious lacuna in the vigilance mechanisms: there is a lack of well-defined procedures to guide the mechanisms and those involved in judicial conduct regulation. The procedural void entails uncertainty and inconsistency in the functioning of the mechanisms; or worse, the procedural ambiguity could threaten the individual independence of a judge, as an ill-defined and poorly conducted disciplinary proceeding would subject a judge to undeserving consequences. In this regard, it is noteworthy that the respondents themselves have emphasised the need for a comprehensive legal framework to regulate judicial conduct.[123] Similarly, international standards also prescribe that the disciplinary process and procedure should be established by the law.[124]

[115] HS/SADV/MAD/Jan2020/09.
[116] HS/SADV/MAD/Jan2020/09.
[117] ID: 163126401; ID: 166110773; ID: 154434217; ID: 154575585; ID: 154580906; ID: 154611821.
[118] ID: 154611821.
[119] ID: 164560839; ID: 166110773.
[120] ID: 154611821.
[121] ID: 163126401; ID: 154575585.
[122] ID: 154575585; ID: 163126401.
[123] ID: 154575585; ID: 157362796; ID: 163126401
[124] See e.g., García-Sayán (n 105), para 87.

Quite contrary to the practices and procedures of the in-house mechanisms in India, international standards require that complaints against judges should be processed expeditiously and fairly, by 'an independent and impartial body pursuant to fair proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights'.[125] The implementation measures of the Bangalore Principles Implementation Measures state, *inter alia*, that '[A]ll disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.'[126]

The implementation measures also recognise the victim's right to complain about judicial misconduct.[127] It is pertinent to note that the United Nations Convention against Corruption 2003 (UNCAC) also mandates the State parties to encourage reporting of corruption incidences by the public; this includes anonymous reporting of corruption.[128] Article 33 of the Convention also requires State parties to protect individuals reporting incidences of corruption from any unjustified treatment.

The practices of vigilance mechanisms regarding anonymous complaints contravene article 13(2) and Article 33 of UNCAC; the CJI's direction to all the High Court[129] that mandated vigilance mechanisms not to entertain anonymous and pseudonymous complaints against subordinate court judges is inconsistent with UNCAC. To discourage judicial corruption, stakeholders must be encouraged to file complaints against judicial personnel under the condition of anonymity. Furthermore, to protect judges from false and vexatious complaints, anonymous complaints should be thoroughly investigated before requesting a response from the judge in question. Advocates and court staff, as their interests would be prejudicially affected by judges against whom they have complained, should be protected by maintaining confidentiality and anonymity. Therefore, the current practice should change.

However, it is important to ensure that judges under investigation have due process rights 'bearing in mind the vulnerability of judges to false and malicious allegations of corruption by

[125] See Gabriela Knaul, 'Report of the Special Rapporteur on the independence of judges and lawyers' (2014) UNGA Doc A/HRC/26/32, para 79.
[126] ibid; see also the Universal Declaration on the Independence of Justice 1983, para 2.32-2.39. The Basic Principles on the Independence of the Judiciary 1985, paras 17-20.
[127] See para 15.2.
[128] Article 13(2).
[129] D.O. No. CJI/CC/Comp/2014/1405, dated 03.10.2014.

disappointed litigants and others'.[130] In this regard, it is indispensable to have clear procedures to deal with complaints against judiciary personnel. The disciplinary processes must be applied fairly and consistently; the disciplinary sanctions should follow the principle of proportionality. Parties should also have the right to appeal to an independent body. In-house mechanisms in India lack most of these safeguards.

Furthermore, the rights of complainants are also not adequately upheld; two of the vigilance officers who participated in the study confirmed that complainants have a limited role in the entire process of disciplining judges.[131] Complainants are not updated on the outcomes of the investigation or inquiry. They cannot ask for a copy of the report of the vigilance officer or the report of the inquiry officer. Consequently, the process spawns the perception that the mechanisms serve only the interests of the judges and act with the sole purpose of protecting the image and reputation of the judiciary.

E. Adequate emphasis on individual and internal judicial independence

In-house mechanisms are designed fundamentally to secure the independence of the judiciary.[132] However, regrettably, the understanding of judicial independence in India is mainly centred on institutional independence. There is no adequate emphasis on the internal judicial independence of judges who are subjected to these ill-structured, poorly functioning, informal, opaque, and subordinate mechanisms. One of the subject experts rightly noted that 'I feel that the power of judicial review, if not abused… is overstretched to create a safety shield for judges as regards their misdeeds'[133]; the flawed peer review mechanism (i.e., in-house procedure) works at the discretion and for the satisfaction of Chief Justice of India.[134] As envisaged by the SC in *Indira Jaising v Registrar General, Supreme Court,*[135] if the in-house committee is to act exclusively on behalf of the CJI and it is 'only for satisfaction of the Chief Justice of India'[136] and the report of the in-house committee is 'purely preliminary in

[130] Technical Guide to the United Nations Convention Against Corruption 2009, 51.
[131] [RegV1/JHK/Jan2020/02] and [Jus.J1/CHT/Jan2020/04]. One vigilance officer noted that 'After a preliminary inquiry, if it is ordered by High Court to initiate disciplinary proceedings then the enquiry officer calls the complainant to record his statement. After the statement of the complainant before the enquiry officer, he has no particular role.' See [RegV1/JHK/Jan2020/02].
[132] DJ/Just.J8/PAT/Jan2020/06.
[133] DJ/Just.J8/PAT/Jan2020/06.
[134] *Indira Jaising v Registrar General, Supreme Court*, MANU/SC/0395/2003.
[135] MANU/SC/0395/2003.
[136] *Indira Jaising*, *ibid.*

nature,'[137] then one has to ask why should Parliament wait for the inquiry to be completed by an in-house committee constituted by the SC? Parliament can invoke the provisions of the Judges Inquiry Act 1968 and appoint an inquiry committee of its own. More importantly, why should the complainant and the concerned judge appear before the in-house committee that has no legal or constitutional basis to exist in the first place? Such a narrow reading of the purpose of the in-house procedure, as analysed below, is counterproductive.

Indira Jaising did not consider the main purpose of developing the in-house procedure. The purpose of establishing the in-house procedure is to find a middle course between a rigid and long-winded constitutional procedure[138] and a lack of regulatory mechanisms to deal with misconduct issues that are not serious enough to call for removal but need to be addressed to maintain judicial discipline, integrity, competence, and public confidence in the judiciary. The very creation of the in-house procedure was extra-constitutional. This had been done with the full understanding that the SC or the CJI has no disciplinary powers over the puisne judges of the SC or the High Court judges.[139] What was needed then and even now is that the in-house procedure should be institutionalised, formalized, open and transparent; it should not be administered solely by the CJI. Therefore, *Indira Jaising* did not clarify the law, nor did it address the constitutional void, but it further diminished the legitimacy and efficacy of the in-house procedure, by interpreting it as an investigation agency acting on behalf of and for the satisfaction of the CJI. The in-house procedure has survived *Indira Jaising* (2003), but as noted earlier, not much has changed since then, in terms of its remit and functioning.[140]

As noted already, the lack of a comprehensive legal framework is also a key concern of vigilance mechanisms. Respondents have proposed a 'well-determined and specific policy'[141] on complaints to avert the abuse of discretionary power by vigilance officers, without impeding judicial independence.[142] Vigilance mechanisms play multiple roles in judicial administration, in addition to being a regulator of judicial conduct. Mechanisms play a critical role, for example, in the inspection of courts, judicial performance evaluation, and keeping

[137] ibid.
[138] *C. Ravichandran Iyer v Justice A.M. Bhattacharjee* MANU/SC/0771/1995, para 42.
[139] ibid.
[140] *Addl. District & Sessions Judge 'X' v High Court of M.P.*, (2015) 4 SCC 91
[141] ID: 163126401.
[142] ID: 163126401.

records of the income, assets, and liabilities of judges.[143] Mechanisms may also deal with investigation and inquiry concerning 'defalcation, criminal breach of trust and such other irregularities in the district courts.'[144] Vigilance reports are also sought when decisions are made on the promotion, transfer, confirmation, and continuation of justice officers.[145] Vigilance mechanisms have a role in matters of judicial appointments,[146] deployment, promotion, transfer, confirmation, fixing of seniority, suspension, disciplinary actions, reduction in rank, and compulsory retirement. In these matters, the High Courts play a determinative role. Therefore, the role of vigilance mechanisms in these matters is decisive. However, regrettably, there are no oversight mechanisms to avert potential abuse of power by vigilance officers. An aggrieved judicial officeholder can only approach the same High Court on the judicial side. There is an unhealthy intersection of administrative and judicial powers of the High Court that engender the perception of bias. This again implies that the administrative and supervisory arrangements of High Courts lay insufficient emphasis on the individual and internal independence of subordinate court judges.

In India, the subservience of subordinate court judges is built on the administrative and hierarchical relationship – as evidenced by survey responses, these administrative and supervisory relationships are having chilling effects on the individual and internal independence of subordinate court judges. Therefore, to prevent abuse of power and improper influence by senior judges in India, a clear set of standards, procedures, and robust accountability mechanisms should be established. The individual and internal independence of subordinate court judges are cardinal to judicial individualism and decisional autonomy; the conduct regulation regimes should not override these values, except in accordance with the law.

F. Transparency in judicial conduct regulation

Transparency and accountability, and regulatory mechanisms in India seem diametrical to each other. The UNCAC under its various provisions requires the State parties to put in place

[143] Shivaraj Huchhanavar, 'Regulatory Mechanisms Combating Judicial Corruption and Misconduct in India: a critical analysis' (2020) *Indian Law Review* 58.
[144] Report from the High Court of Madhya Pradesh in the Chief Justices' Conference Report 2015, Item no 20, 1213.
[145] The Chief Justices' Conference Report 2015, Item no 20, 1185-1222.
[146] In some High Courts, the vigilance mechanisms verify the antecedents of the candidates selected for judicial offices: see *supra* (n 143).

anti-corruption measures that improve transparency, accountability, and access to information concerning anti-corruption authority (Articles 5, 7, 9, 10, and 11). As the Special Rapporteur rightly noted, 'transparency in the judiciary must be guaranteed so as to avoid corrupt practices that undermine judicial independence and public confidence in the justice system.'[147] The Kyiv recommendations also require that 'transparency shall be the rule for disciplinary hearings of judges…The decisions regarding judicial discipline shall provide reasons. The final decisions on the disciplinary measures shall be published.'[148] However, in contrast, India's internal mechanisms are inaccessible: adequate information related to the filing of complaints is not available to the public; the proceedings are also not published. The rules guiding the activities of the vigilance mechanisms are also kept secret.

The lack of transparency inhibits the confidence of the public and stakeholders in the mechanisms. Both judges and advocates recommend that the vigilance mechanisms be transparent.[149] Although most legal academics (77%) noted that transparency, openness, and accountability measures of the in-house committee are inadequate (n=36; see Fig. 8; std. error 0.07). Most of the respondents commented that the in-house mechanisms are opaque and obscure.[150] A respondent noted that '[T]he in-house committee must take issues concerning transparency, openness, and accountability more seriously'.[151] Therefore, it is necessary to enhance transparency in judicial conduct regulation by promoting the freedom to seek, receive, publish, and disseminate information about judicial corruption, misconduct, and the mechanisms that deal with these issues.[152]

(2) Do regulatory mechanisms in India adequately emphasise judicial accountability needs?

The lower-level judiciary in India faces an excessive burden of accountability and a multiplicity of accountability holders, while the higher judiciary lacks sufficient accountability mechanisms. In essence, as the succeeding paragraphs underscore, the judicial accountability systems in India are inconsistent and lacking in comprehensiveness. This is a result of the inadequate emphasis on judicial accountability as a concept and also as a mechanism.

[147] Gabriela Knaul (n 125) para 39, 8.
[148] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia 2010, para 26.
[149] Judges: ID: 154966963; ID: 164560839; ID: 154434217; Advocates: ID: 152955782; ID: 157047560; ID: 162326778; ID: 163056759; ID: 165043934; SPV/SADV/KAR/Jan2020/01; YPS/RFNJA/MP/Jan2020/03.
[150] ID: 162244495; ID: 162000213; ID: 162707070; ID: 163012806.
[151] ID: 165882975.
[152] This is one of the mandates of the United Nations Convention Against Corruption 2003, see article 13.

A. Accountability of account holders

The imposition of accountability measures upon judicial personnel, at all levels, through independent mechanisms in accordance with the law is imperative. Unfortunately, senior judges in India are not held accountable, despite their position of authority. In recent years, various allegations of corruption and criminal behaviour have been levelled against the high court judges, but only three retired high court judges are currently facing criminal prosecution.[153] Moreover, it is notable that no High Court or Supreme Court judges have been convicted under criminal law for corruption since India's independence. The current chapter highlights that four of India's chief justices have faced serious allegations of misconduct, but none of these allegations was adequately investigated. The lack of robust regulatory mechanisms partly accounts for this complete absence of accountability of senior judges.

In addition, the instances of maladministration in judicial appointments and transfer of High Court judges have been perennial accountability concerns. There is also no accountability for High Court judges and chief justices who abuse disciplinary powers. In several cases, the vigilance mechanisms were abused to harass subordinate judges, but there is no accountability framework in place to address these issues. The accountability deficit is obvious, but to date, judicial leaders have not addressed the issue. The judicial leadership often evade the accountability conundrum by citing judicial independence as a pretext or by highlighting the constitutional gaps that they do not want Parliament to address, asserting that legislative measures would undermine judicial primacy.[154] India's concerns about judicial accountability are not a result of unintended omissions of the Framers of the Constitution or the incompetence of Parliament but are a result of the masterly inaction of the judicial leaders.

B. Judicial accountability: looking beyond judges

The findings of Transparency International and this study suggest that there is a strong correlation between the conduct of advocates and court staff and instances of judicial

[153] Subhankar Dam, 'Why is judicial corruption invisible?' (2022) 33 *Public Law Review* 220.
[154] *Supreme Court Advocates on Record Association v Union of India*, WP Civil No 13 of 2015.

corruption. Therefore, accountability regimes should not only focus on judges. Regarding court staff, the High Courts should establish a robust accountability mechanism; the present in-house mechanisms are ill-equipped to deal with corruption or misconduct at the ministerial level. There should be a separate code of conduct for court staff; at present, there is no code of conduct for both subordinate court judges and staff. With regard to advocates, although there are Bar Councils (State Bar Council and the Bar Council of India), the fact that to date, no advocate has been found guilty of professional misconduct for having been involved in judicial corruption, *ipso facto*, proves the ineffectiveness of these professional regulators. Therefore, the judiciary, the Bar, and Parliament should address the accountability deficit. The dialogue between three institutions—the Bar, the bench, and the legislature—is essential to spearhead the radical changes (for example, the creation of independent disciplinary mechanisms for advocates), without compromising the independence of the bar. The relevant provisions of the Advocates Act 1961 should be amended to create independent regulatory bodies having representations from the bar, bench, and civil society, both at the state and central levels.

C. Institutional accountability

The judiciary, as an institution, must be open to external scrutiny, for example, from the media, civil society, academia, parliament, and the bar. For this purpose, it should publish relevant information on courts, judges, and the judiciary through its websites, periodic reports, and account statements. Both parliament and state legislatures should have access to relevant information concerning budget utilisation, annual expenditure statements, judicial workload, and funding allocation; in essence, the legislative body as an account holder should have access to all the information to satisfy itself whether the executive branch has made adequate resource allocation; and also, to assess whether the judiciary has made optimal utilisation of the resources allocated to it. Although the principal responsibility of judicial administration lies with the judiciary and the executive branch, the legislative branch should be in a position to assess the performance of the other two branches in this regard. Such oversight and working relationship between three branches of government are missing

today at both the national and state levels.[155] The lack of extensive institutional interactions on issues concerning judicial administration has also diminished the role of the other two branches of the government in holding the judicial branch to account. On the contrary, the judiciary also loses opportunities to raise its concerns and demands before the other two branches, leading to a communication gap, poor planning, and execution. In other words, poor inter-branch communications and interactions have led to weak inter-branch accountability arrangements.

D. Internal judicial accountability

The authority of High Courts is not solely restricted to disciplinary powers, it encompasses various other areas such as the appointment, transfer, and advancement of judicial officers. However, regretfully, even in these matters, the High Courts do not have robust internal accountability systems to address the complaints and concerns of judges and court personnel. Almost all the issues, grievances, or communications, such as a request for leave, of a lower court judge are transmitted through a hierarchical chain of senior judges ultimately to the High Court.

Justice P Devadass describes the duties of a district judge with respect to interaction with the High Court in the following terms:

> 'The High Court is the controlling body. Such controls are exercised by the High Court over the district judiciary through the Hon'ble Portfolio Judges of the concerned District. The District Judges *must maintain continuous interaction with the Hon'ble Portfolio Judges* and *apprise them of all the activities and developments related to courts in the district*. He must place *various requirements, such as staff, new court, building and furniture requirement*, etc. to the High Court also with the knowledge of the concerned Portfolio Judge.'[156]

The duties outlined by Justice Devadass are only a fraction of the responsibilities expected of district judges. Therefore, the emphasis is not on what district judges must do, but rather on the manner in which they must fulfil their duties, which is overseen by the Portfolio Judge,

[155] There are regular ceremonial meetings between the executive and the judiciary, which yield no fruitful outcomes. For critical review of gaps in judicial planning, see National Commission to Review the Working of the Constitution, 'A consultation paper on the financial autonomy of Indian judiciary' (2001), Chapters 8, 9 and 11.

[156] Emphasis added. See Justice P. Devadass, 'Administrative Powers and Duties of District Judges' (2013) *Effective District Administration* 49.

a High Court judge who oversees the district courts. This serves as a mode of operation for district judges, who are senior members of the subordinate courts. Junior judicial officers must communicate through the district judge as navigating the administrative hierarchy would be overwhelming. Although streamlining internal arrangements and accountability protocols is essential, a major concern is the lack of mechanisms to address and rectify abuse of supervisory or disciplinary powers. This is because, as interpreted by the Indian courts, institutional judicial independence prohibits non-judges or outsiders from overseeing the internal workings of the judiciary. As a result, senior judges have administrative, supervisory, disciplinary, and pastoral oversight over subordinate court judges. The lack of a policy to reconcile the conflicting roles of senior judges leads to an unhealthy intersection of their disciplinary role with their other leadership responsibilities. To address this issue, the judiciary should re-evaluate its administrative processes and procedures to clearly distinguish the disciplinary role of senior judges from their other leadership roles or allow the administrative and supervisory arrangements of the judiciary to be overseen by an independent body with a wider representation of relevant stakeholders.

E. Individual judicial accountability

In India, as noted in Chapter 5, complaints of judicial corruption are not being investigated under criminal law; the fear that the executive branch would use anti-corruption agencies to impinge judicial independence partly underpins this practice. There are other justifications as well, for example, even if the complainant has alleged a criminal offence, the High Court, as a disciplinary authority, has to inquire into the matter for disciplinary purposes. However, it should be noted that the UNCAC mandates the State parties to criminalise judicial corruption and sanction/sentence judicial personnel as per the criminal law;[157] the approach has strong justification, as such proportionate measures would abate the corrupt behaviour. disciplinary measures would be inadequate, and such measures would incentivise corrupt behaviour. Therefore, penalty, incarceration, forfeiture of property or a combination of these penal sanctions should be imposed on judicial personnel where appropriate. The UNCAC also requires State parties to criminalise other forms of corrupt behaviour, for example, influence

[157] See Chapter III of the Convention.

peddling,[158] abuse of functions,[159] and illicit enrichment.[160] These criminal offences must also be enforced against judges.

V. Conclusion

The empirical evidence rejects the hypotheses that the in-house mechanisms in India uphold judicial independence; and that the key stakeholders of the judiciary – judges, lawyers, and academics – show a 'high level of confidence' in the in-house mechanisms' efficacy in upholding judicial independence. In contrast, empirical evidence shows that there is a weak correlation between the hypotheses and the views of the respondents. On the question of the vigilance mechanisms' efficacy in upholding judicial independence, the mean value across three groups remained low (5.30; n=100; on a scale of 1-10), signifying the low confidence of the respondents. The findings on the efficacy of vigilance mechanisms in combating judicial corruption and misconduct further diminished the confidence in the hypotheses.

Quantitative and qualitative analyses of data also provide a clear answer to the research question that the regulatory mechanisms do not uphold judicial independence and are also not effective in enforcing judicial accountability. As analysed in Section V, the regulatory mechanisms fail to uphold two essential facets of judicial independence: individual and internal independence. Various systematic and functional inadequacies inhibit in-house mechanisms' efficacy in upholding judicial independence and enforcing higher standards of judicial conduct.

The in-house procedure for the higher judiciary also exhibits notable flaws. Most of the legal academics surveyed also found the in-house procedure to be ineffective in combating judicial corruption and judicial misconduct. The academics were dissatisfied with the transparency, openness, and accountability measures that in-house committees observe. By design, the in-house procedure aims to serve institutional judicial independence; however, there is little to no regard for individual or internal independence; likewise, there are no safeguards whatsoever for the rights of the complainant. Therefore, the mechanism is not fit for purpose. Its functioning endangers judicial independence; it impedes other modes of accountability of

[158] Article 18(1).
[159] Article 19.
[160] Article 20.

judges (for example, through the parliamentary procedure) and erases public confidence in the regulatory process itself.

Empirical and critical analyses also answer the second component of the research question in clear terms, i.e., whether regulatory mechanisms effectively enforce judicial accountability in India: regulatory mechanisms, for various reasons discussed in this chapter, are not effective in enforcing judicial accountability.

Chapter 7

Do regulatory mechanisms in the UK uphold judicial independence and effectively enforce the standards of judicial conduct?

I. Introduction

As shown in Chapter 3 and briefly analysed in Section II below, there is an inadequate emphasis on individual and internal judicial independence in the UK. This conceptual asymmetry is also reflected in the architecture of judicial conduct regulation regimes. With a view to offering a critical assessment of judicial conduct regulatory regimes in the UK, this Chapter aims to answer the following question: do regulatory mechanisms in the UK uphold judicial independence and effectively enforce the standards of judicial conduct? The following sub-questions attempt to further contextualise the research question:

(1) Do regulatory mechanisms in the UK uphold the internal and individual judicial independence of judges?

(2) Do regulatory mechanisms in the UK adequately emphasise judicial accountability needs?

Section II addresses sub-question (1), while Section III responds to sub-question (2). Each of these sections is further outlined below, highlighting the key conclusions that they draw in response to respective sub-questions.

Subsection II(a) evaluates the potential threat to judicial independence posed by the dominant role of senior judges in judicial conduct regulation in the UK. Subsection II(b) analyses the fairness and consistency of disciplinary protocols in the UK, by examining the allegations made by and against judges. Subsection II(c) examines 130 disciplinary statements issued by JCIO, aiming to determine whether these regulatory mechanisms are prone to inappropriate influences. Additionally, subsection II(d) investigates the issue of proportionality in disciplinary sanctions, by analysing disciplinary statements. Except for subsection (a), subsections (b) to (d) exclusively focus on England and Wales, as Scotland and Northern Ireland do not publish disciplinary statements that could facilitate qualitative analyses of regulatory mechanisms.

This section draws the following conclusions: firstly, it suggests that the dominant role of senior judges in judicial conduct regulation could potentially threaten judicial independence, especially in the absence of effective measures to prevent the abuse of disciplinary powers. Secondly, the study acknowledges that allegations of unfair or discriminatory application of disciplinary protocols in England and Wales are not entirely unfounded. Thirdly, given the widespread allegations of institutional bias, discrimination, and racism in judicial regulation, independent scrutiny of regulatory regimes in the UK is needed. Fourthly, although a disproportionately large percentage of judges from minority communities face disciplinary processes in England and Wales, as this initial assessment is based on limited data, there is a need for further research to validate the findings. Finally, drawing on the analyses presented in previous chapters and this section, the study concludes that the existing judicial conduct regulation regimes in the UK do not provide adequate safeguards for individual and internal judicial independence.

In response to sub-question (2), Section III critically examines the judicial conduct regulation regimes of England and Wales, Scotland and Northern Ireland. With the help of statistical analysis, it strengthens the conclusion drawn in the previous chapters that there are notable flaws in the judicial accountability frameworks of each jurisdiction.

II. Do regulatory mechanisms in the UK uphold individual and internal judicial independence?

(a) Judicial conduct regulation: the dominant role of senior judges

As analysed in Chapter 5, there is a discernible degree of dominance of the senior judiciary in conduct regulation in the UK.[1] The dominance of senior judges is more pronounced in NI and Scotland than in England and Wales (E&W). However, even in E&W, the dominance is clearly visible in the disciplinary processes. For instance, after the initial filtering of a complaint by the JCIO, a nominated judge (a High Court judge) investigates the complaint;[2] where necessary, the same complaint will be further investigated by an investigating judge (again a senior judge).[3] In addition, at the request of the judicial officer in question or *suo motu*, the

[1] Robert Hazell, 'Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005' [2015] P.L. 202.
[2] See e.g., Judicial Conduct (Judicial and Other Office Holders) Rules 2014, Rules 38–40.
[3] ibid Rule 44.

LCJ may constitute a disciplinary panel. The panel comprises two judicial office holders (nominated by the LCJ) and two lay members (nominated by the LC). At least one of the judicial members should be of higher rank, and another could be from the same rank as the judge in question; the panel will be chaired by the senior judicial member.[4] The investigative process where only judges can serve as nominated judges,[5] investigative judges, and chairpersons of disciplinary panels signify their dominant role in judicial conduct regulation. Moreover, disciplinary decisions are made by relevant senior judges. Only in a small number of cases do disciplinary decisions made by the LCJ and the LC.[6] Ordinarily, the LCJ and the LC will not override the recommendations of the first-tier investigating authority.

The broadening of leadership roles of senior judges is not limited to judicial conduct regulation. One of the notable implications of constitutional reforms since 2005 is that the participation of senior judges in judicial regulation has broadened significantly. The latest Judicial Attitude Survey reveals that 34% of salaried judges hold formal leadership positions; in addition, 82% of judges undertake additional leadership responsibilities. Between 2016 and 2020, the proportion of judges with formal leadership doubled (from 17% to 34%). Similarly, during the same period, the proportion of judges with additional leadership responsibilities has almost doubled (from 44% to 82%).[7] Unencumbered delegation of supervisory and disciplinary responsibility on senior judges would, as noted in Chapter 5 (section II), entail conflict between pastoral, supervisory, and disciplinary roles. This would in the long run upset intra-branch harmony and affect the confidence of judicial officeholders in the regulatory process.

Furthermore, regulatory mechanisms should not, by design or by default, become a peer-review process (aka judges judging judges).[8] The regulatory framework must accommodate meaningful inter-branch and lay participation; such participation should extend to all the main stages of the disciplinary process. The determinative role of any branch, sans effective external participation, in the key stages of the disciplinary process would undermine the impartiality, accountability, transparency, and credibility of the regulatory regimes. In this

[4] The Judicial Discipline (Prescribed Procedures) Regulations 2014, Regulation 11.
[5] ibid 21-22.
[6] Judicial Discipline: Response to Consultation (2022) 11.
[7] Cheryl Thomas, 'UK Judicial Attitude Survey 2020: Report of findings covering salaried judges in England & Wales Courts and UK Tribunals' *UCL Judicial Institute* (2021) 78.
[8] The exclusion of judges from judicial regulation is also equally problematic.

context, the determinative role of the judiciary or senior judges in the UK should be seen as an area for further reforms. The dominance of senior judges in the regulation of judicial conduct also calls into question the functional autonomy of the arm's length bodies.

Participatory or accommodative regulatory regimes are indispensable to securing and strengthening the independence and impartiality (particularly the appearance of independence and impartiality) of the regulatory process. The participation of individuals outside the judiciary would check when the regulatory regimes act overly harsh; external participation can discourage the excessively sympathetic application of disciplinary standards, procedures, and sanctions to judges.[9] For this purpose, the non-judicial members must be able to participate, and where necessary, oversee the judicial conduct regulation. Therefore, some of the regulatory arrangements in the UK need further improvements. For instance – as noted in Chapter 5, the Chief Executive of the UKSC – an officer appointed by and working under the direction of the President of the UKSC[10]– has a key role in the initial assessment of complaints against the President and other judges of the UKSC.[11] As discussed in Chapter 5, it is also pertinent to note that the Chief Executive has a close working relationship with the President (and the Deputy President).[12] The annual reports of the JCIO and other regulatory bodies suggest that most of the complaints relate to judicial determinations and case management;[13] therefore, even in the case of the UKSC, the Chief Executive would eventually reject most of the complaints on similar grounds. However, the Chief Executive's close and subordinate relationship with the other two prominent disciplinary authorities (the President and the Deputy President)[14] would lead to suspicion from complainants or the general public. This could occur even when the Chief Executive discharges his or her duties independently and impartially.

[9] Devlin and Dodek (2016) 14.

[10] CRA, s. 48.

[11] Judicial Complaints Procedure: UK Supreme Court, paras 1 and 2 <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>.

[12] R. Cornes, 'Gains (and Dangers of Losses) in Translation—The Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects' [2011] P.L. 509, 517.

[13] See e.g., JCIO's 2019-20 Annual Report (page 9) which reported that 66% of judicial complaints received were related to judicial decisions and case management, and hence such complaints were dismissed.

[14] The leadership trinity has the power to dismiss the complaint or resolve the matter informally or close the initial investigation if they determine that the formal action is not appropriate: see para 3 of Judicial Complaints Procedure: UK Supreme Court <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>.

The regulatory mechanisms in NI and Scotland prompt similar concerns. As discussed already, in NI and Scotland, judicial discipline is almost exclusively administered by in-house mechanisms, with the support, guidance and participation of the LCJ(NI), the LP and other senior judges. Although judicial conduct regulation is a complex task, the multiple roles of the Complaints Officer in NI, involving filtering and preliminary investigation of complaints, are problematic.

The determinative role of the LCJ(NI) in the disciplinary process with respect to junior judges (judges below the rank of justices of the Court of Appeal) should also be revisited to make the disciplinary process more participatory. The regulatory framework in NI should be consultative and participative rather than being administered solely by the LCJ(NI) or a body of senior judges; this recalibration is imperative considering that there is no external review mechanism. Some of these issues reoccur in the case of Scotland, as the JOS is also an in-house mechanism; however, the disciplinary regime, compared to NI, is more decentralised, as a disciplinary judge administers the disciplinary protocol, although the Lord President still has the vital role in judicial conduct regulation. However, the dominant role of the executive branch in cases involving fitness for judicial office issues should be revisited. In other words, whilst the determinative role of the LP and senior judges with respect to less serious allegations is problematic, in the same vein, the dominance of the executive branch with respect to serious allegations is also a concern.

(b) The fair and consistent application of disciplinary protocols

International standards presuppose that robust regulatory frameworks complement judicial independence;[15] they should also apply regulatory standards, procedures, and sanctions fairly and consistently across various levels of the judicial hierarchy.[16] Fair and consistent treatment of complaints, complainants, and judicial personnel is a prerequisite of a robust regulatory regime. The complex and intricate judicial system of the UK needing distinct regulatory regimes at various levels is another reason why fairness and consistency in judicial conduct regulation need particular emphasis. Against this background, the Chapter examines recent

[15] United Nations Convention against Corruption 2003, art 11.
[16] Graham Gee (2021) 132.

cases where disciplinary processes are called into question for unfair and inconsistent application of disciplinary protocols.

Mr Justice Peter Smith, High Court Judge, England and Wales

In 2015, a recusal controversy raised an issue involving Justice Smith's fitness for judicial office. Justice Smith's luggage went missing on his return from Florence on a British Airways (BA) flight. At the time, the judge was hearing a similar matter involving BA. The judge had already contacted BA's chairperson for his missing luggage,[17] but during the hearing, he repeatedly asked the Counsel for BA the following question: 'Mr Turner, here is a question for you. What happened to [the] luggage?' Unimpressed by the Counsel's response, the judge intervened: 'In that case, do you want me to order your chief executive to appear before me today?'[18] Although the judge eventually recused himself from the case, his intemperate and unbecoming conduct received strong criticism.[19]

Lord Pannick QC, a member of Blackstone Chambers, in a newspaper column, questioned 'whether action to address Mr Justice Peter Smith's injudicious conduct has, like his luggage, been delayed for too long' and demanded the LCJ to consider the matter for disciplinary actions.[20] In response to Lord Pannick's article, Justice Smith contacted Mr Anthony Peto, a joint head of Blackstone Chambers, to voice his anguish. Later, the judge also wrote a letter to Peto, noting that the 'outrageous letter' has caused him difficulties and 'the article had been extremely damaging to the Blackstone Chambers within the Chancery Division… Smith stated that he had strongly supported the chambers, especially in applications to take silk.'[21] In the letter, the judge also concluded that 'I will no longer support your Chambers please make that clear to members of your Chambers. I do not wish to be associated with Chambers that have people like Pannick in it.'[22] Justice Smith also claimed that he received 29 letters critical of Lord Pannick's letter. It is clear that the judge threatened to exert his influence on

[17] Rozenberg, Joshua, 'Take the Hint, Mr Justice Peter Smith: Leave the Bench Now' (2016) *The Guardian* (London, 17 June 2016).
[18] *Anan George Harb v HRH Prince Abdul Aziz bin Fahd Bin Abdul Aziz*, [2016] EWCA Civ 556, para 52.
[19] Rupert Myers, 'Yes, m'lud, an airline losing your luggage is awful – so is raising the issue in court' *The Guardian* (London, 30 July 2015).
[20] *Supra* (n 18).
[21] Barrie Lawrence Nathan 'Ain't Misbehavin'**:** Judicial Conduct and Misconduct (2020) 2(2) *Amicus Curiae* 21.
[22] *Anan George Harb v HRH Prince Abdul Aziz bin Fahd Bin Abdul Aziz*, [2016] EWCA Civ 556, para 53.

the detriment of Blackstone Chambers in response to Lord Pannick's criticism of him, which would amount to influence peddling, a form of (judicial) corruption.

The matter reached the CA, not as a direct appeal, but through another connected case: *Anan George Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz.*[23] In this case, the CA observed that the letter of the judge to Blackstone Chambers was 'shocking' and 'disgraceful', and it remarked that the letter showed 'a deeply worrying and fundamental lack of understanding of the proper role of a judge, which was all the worse since it came "on the heels of the baggage affair".'[24] The matter was referred to JCIO for investigation. Later, it was reported that Justice Smith had 'agreed to continue to refrain from sitting...'[25] A disciplinary panel was convened to hear the case. However, the disciplinary proceeding did not progress. Despite overwhelming evidence that was available against Sir Peter Smith (as evident in *Harb v Abdul Aziz*), the judge was not suspended.[26] It was reported that the judge had 'agreed to refrain from sitting',[27] the key question was why Sir Peter Smith's agreement was necessary. Under Section 108, the LCJ in consultation with the LC can suspend even a senior judge for various grounds [see Chapter 3 for further discussion].'[28] And once the judge is suspended, there is no need for his or her agreement for the LCJ to withdraw the work.[29] Therefore, why did the concerned authorities not suspend the judge with immediate effect or after receiving the report from the nominated or investigating judge?

The plausible answer is that he was a High Court Judge who could only be removed by the Queen/King on an address of both the houses of Parliament. However, even this does not fully explain the hesitancy of the LCJ and the LC, as they had adequate powers to apply the regulatory norms consistently and proportionately. What triggered further scepticism of the disciplinary process was that the disciplinary panel was constituted in 2016 and it could not hear the case at all – it was scheduled to meet in March 2017, but the hearing was postponed as Justice Smith did not appear, citing ill-health. The next hearing was set for 30 October 2017.[30] Again, the disciplinary authority provided no information or update on the ill health

[23] [2016] EWCA Civ 556.
[24] ibid para 68.
[25] Rozenberg, Joshua, 'Take the Hint, Mr Justice Peter Smith: Leave the Bench Now' (2016) *The Guardian* (17 June 2016).
[26] Graham Gee (2021) 143.
[27] Rozenberg, *supra* (n 25).
[28] CRA 2005, s. 108(5).
[29] ibid s. 108(8).
[30] Barrie Lawrence Nathan, *supra* (n 21) 24.

of the judge in question.[31] Nor did they explain why they fixed the next hearing date on 30 October 2017, when the judge was about to reach retirement age (65) on 1 May 2017. The disciplinary protocol allows the continuation of disciplinary proceedings even after the retirement of a judge,[32] so why did the disciplinary authority drop the investigation after the retirement of Justice Smith on 28 October 2017? The disciplinary authorities also did not provide any explanation.

Joshua Rozenberg speculated that the investigation was delayed because '...Smith and the disciplinary panel have reached some sort of tacit understanding'.[33] This would suggest that Justice Smith would resign upon reaching the age of superannuation on 1 May 2017, but this speculation was partly inaccurate as the judge only resigned on 28 October 2017, months after attaining the age of retirement. However, by not continuing the investigation (after Justice Smith's retirement), the disciplinary authorities corroborated Rozenberg's speculation that there was a 'tacit understanding'. Perhaps the judiciary leadership was worried that the removal process would damage the image of the judiciary, and hence convinced itself to relieve Justice Smith from the disciplinary process, who arguably deserved nothing less than impeachment from the judicial office. As noted above, transparency was also lacking in the disciplinary process at several levels.[34] It is also pertinent to note that the JCIO did not release the letters that Justice Smith claimed he had received in his support; a request for a copy of letters under the Freedom of Information Act 2002 was also rejected.[35] The disciplinary authority did not publish a report outlining relevant facts, findings, and evidence, enabling the public to be adequately informed about the controversy and the outcome. It is inconceivable that any magistrate or district judge could have succeeded in avoiding disciplinary sanctions facing such serious allegations. The unjustified disparity in applying disciplinary standards and process, as seen in this case, delegitimises the disciplinary regime

[31] As per the JCIO's publication policy, the LCJ and the LC can issue a joint statement on matters under investigation. See Publication Policy <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/>.

[32] Judicial Discipline (Prescribed Procedures) Regulations 2014, Regulation 23(3).

[33] Rozenberg, Joshua, 'Take the Hint, Mr Justice Peter Smith: Leave the Bench Now' (2016) *The Guardian* (London, 17 June 2016).

[34] Graham Gee (2021) 145.

[35] Michael Richards, 'Freedom of Information Request' (1 September 2016) <https://www.whatdotheyknow.com/request/349977/response/861755/attach/html/3/106904%20Michael%20Richards.pdf.html>

in the long run; junior judges would think there is one system for the higher echelons in the judiciary and another for the rest.[36]

Allegations of misconduct against Lord Justice Adrian Fulford (2014)

The Mail on Sunday claimed that Justice Fulford campaigned for a paedophile group that lobbied to legalise adults' sexual relationships with children.[37] It was alleged that Justice Fulford had supported the Paedophile Information Exchange (PIE) in the late 1970s while he was a volunteer at the National Council for Civil Liberties. Justice Fulford was also alleged to be a founding member of the Conspiracy Against Public Morals and the Campaign for Homosexual Equality to support the leaders of PIE. *The Mail* has also claimed that Justice Fulford authored an article arguing that PIE was merely a way for paedophiles to 'make friends and offer each other mutual support'.[38] Although these alleged misconducts were committed by Justice Fulford when he was a barrister, the JCIO initiated an investigation. Subsequently, the judge was reported to have agreed not to hear pending criminal cases until the completion of the investigation. However, the reason for the partial suspension of the judicial work of Justice Fulford was not made public at the time.[39] The judge continued to hear civil matters. Why did the LCJ and the LC allow Justice Fulford to hear civil matters? Did these matters not demand as much judicial integrity as criminal appeals and trials?[40] The disciplinary authorities (LCJ and LC) did not rationalise the partial suspension/withdrawal of work.

Through an undated press release, the JCIO notified the conclusion of its investigation. Justice Fulford was exonerated of all allegations by the LCJ and LC, as there was 'no evidence to support the allegations of misconduct or to undermine his position as a judicial officeholder.'[41] The press statement noted that the investigation was conducted by Lord Kerr of Tonaghmore. The investigating judge, as claimed in the statement, had considered 'a

[36] Judge Herbert (discussed below) accused the disciplinary panel of discriminatory treatment, citing the example of Lady Hale's speech, see Report of the Disciplinary Panel 83-85.

[37] Martin Backford, 'High Court judge and the child sex ring: Adviser to Queen was founder of pedophile support group to keep offenders out of jail' *The Mail on Sunday* (London, 08 March 2014).

[38] ibid.

[39] The plausible speculation would be that Justice Fulford, on the criminal side, had heard and decided a number of cases relating to child sexual abuse, and *the Mail on Sunday* has cast aspersion on the correctness of these decisions. However, this does not explain the blanket suspension of the judge from hearing all criminal cases.

[40] Joshua Rozenberg, 'Who is judging the judges?' *The Guardian* (London, 25 March 2014).

[41] JCIO: Press Statement <https://www.whatdotheyknow.com/request/298848/response/760614/attach/3/fulford%20press%20statement.pdf>

number of documents' and conducted 'two lengthy interviews' with Justice Fulford; the judge was 'closely questioned' and faced and responded to 'searching questions'. Based on 'a challenging and interrogative inquiry, Lord Kerr concluded that the allegation that Sir Adrian had been a supporter of the PIE was without substance.' The investigating judge also found 'nothing in the least untoward about any of the decisions that had been reached [by Justice Fulford].'[42] And the statement also clarified that Justice Fulford had voluntarily refrained from sitting in criminal proceedings pending the outcome of the investigation; however, it still did not explain why the LCJ and the LC had to accept the 'voluntary' withdrawal of Justice Fulford from hearing only criminal matters.

Although JCIO was at pains to emphasise the rigour of Lord Kerr's investigation, it did not publish the report.[43] The report could have allowed the public to fully comprehend the accusations made against Justice Fulford; it would have provided insights into the procedure followed, questions asked, material considered, and responses of Justice Fulford. The publication of the report was desirable, as the allegations were related to one of the senior-most judges in the UK; the controversy was given extensive media coverage; therefore, in light of the brief and abstract press statement, the publication of the full report would have strengthened public confidence in the judiciary and the disciplinary regime. Unsurprisingly, the JCIO also rejected a freedom of information request that sought a copy of Lord Kerr's report. The JCIO refused to share a copy of the report on the grounds that the information requested is exempt under Section 44 of the Freedom of Information Act 2000, as releasing the report would be contrary to a statutory prohibition against disclosure under Section 139 of the Constitutional Reform Act 2005.

No doubt, Section 139 prohibits the disclosure of 'confidential information' except with lawful authority, but it 'does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision.'[44] Therefore, instead of prioritising the privacy of the judge facing allegations, the complainant, and witnesses, the LCJ and the LC should prefer transparency and openness. Especially when senior judges face serious allegations, disciplinary authorities

[42] ibid.
[43] Joshua Rozenberg, 'The report exonerating Lord Justice Fulford should be published' *The Guardian* (London, 18 June 2014).
[44] CRA, s 139(6).

must prefer public interest over confidentiality and privacy. The lack of openness and transparency, coupled with inaccurate media coverage,[45] would foster a negative perception of the disciplinary process. Therefore, reports and updates on serious judicial misconduct should 'not be a privilege for those who choose to complain. Open justice demands nothing less'.[46]

Allegations of discrimination, racism, and bullying against senior judges: Gilham case (2019)

Gilham v Ministry of Justice is discussed in Chapter 2.

Judge Peter Herbert: allegations of racial bias and discrimination (2015-2021)

Peter Herbert, a Crown Court Recorder and a part-time immigration judge, was disciplined [by issuing a formal warning] for implying that racism is 'alive and well' in the judiciary.[47] At a rally, in April 2015, the judge was alleged to imply that the decision of the Electoral Commissioner to remove the Mayor of Tower Hamlets [Lutfur Rahman] was tainted by racial bias. Although the JCIO's investigations against the judge were ongoing, Judge Peter was asked to voluntarily withdraw from his judicial duties.[48] The judge objected to withdrawing from his judicial work and cited the comparative treatment of the three white judges, but he did refrain from attending his duties after receiving a stern letter from the Lead Presiding Judge who had threatened to formally suspend Judge Herbert if he continues to sit.[49] From the conversation between the JCIO and Lead Presiding Judge, it is clear that they were unsure whether in such a non-serious matter the judge should be suspended; apparently, they knew if the matter was placed before the LCJ, the suspension, which they were contemplating, would not be carried out.[50] In effect, Herbert was asked to refrain from sitting, which arguably amounted to wrongful suspension, as the decision was made without informing the LCJ.[51] However, later, after accepting the undertaking of the judge, he was allowed to resume his

[45] See generally, Patrick O'Brien, '"Enemies of the people": judges, the media, and the mythic Lord Chancellor' [2017] P.L. 135-149.
[46] Joshua Rozenberg, 'Open justice for judges' *Law Society Gazette* (London, 2 October 2017).
[47] Diane Taylor, 'Retired judge Peter Herbert settles race claim against judiciary' *The Guardian* (London, 2 July 2021).
[48] The Draft Recommendation of the Disciplinary Panel to the Lord Chief Justice and Lord Chancellor in the case of Judge Peter Herbert OBE (hereafter, Report of the Disciplinary Panel) 8.
[49] Report of the Disciplinary Panel, 8.
[50] ibid 9, para 27.
[51] ibid para 113.

judicial work.[52] But this led the judge, as he argued, to believe that he was treated unfairly and was deliberately misled to think that the allegation was so serious that it required suspension. Subsequently, the disciplinary panel asked the JCIO to issue a formal apology for requesting a senior judge to ask Justice Peter to withdraw from sitting; the panel also recommended that in such non-serious matters the JCIO, the Presiding Judges and Presidents should not ask judicial office holders to voluntarily refrain from sitting.[53]

In an elaborate defence before the disciplinary panel, Judge Peter Herbert argued that the recommendation made by Underhill LJ (to issue a formal warning to the judge) was unfair. He illustrated that judges facing similar allegations have not received the same sanction. He argued that 'there is no example of a judge being disciplined for alleging any form of discrimination.'[54] The crux of his argument was that the disciplinary rules were not applied uniformly and that 'he had been treated less favourably than a white judge would have been.'[55]

Rejecting the defence of Judge Herbert, the disciplinary panel concluded that the judge's speech constituted a serious and damaging accusation; therefore, the judge was found guilty of misconduct. The panel concluded that 'to say that another judge (i.e., the Electoral Commissioner) has been guilty of unconscious racism is to make a grave attack on that judge'.[56] The panel recommended formal advice as a disciplinary sanction. In response to the sanction imposed, Herbert in his letter to the LCJ and LC claimed that the disciplinary decisions were influenced by institutional racism, and he did not accept the sanction.[57] He challenged the disciplinary sanction and sued the LCJ, the LC, the JCIO and the Ministry of Justice for racial discrimination in the Employment Tribunal.[58] In July 2021, reportedly, the parties reached an outside-of-court settlement.[59] Although the judiciary maintained that the settlement was made without accepting liability or wrongdoing on its part, the fact that it had to settle the

[52] Id.
[53] Report of the Disciplinary Panel, 11, 30-31 and 39.
[54] ibid 13.
[55] ibid 14-15.
[56] ibid 27.
[57] ibid 51-113.
[58] Josh Halliday, 'Peter Herbert becomes first judge to sue MoJ over race discrimination' *The Guardian* (London, 12 September 2019).
[59] Diane Taylor, 'Retired judge Peter Herbert settles race claim against judiciary' *The Guardian* (London, 2 July 2021).

matter just a few days before it was to be heard by the employment tribunal implies that the judge's claims were not entirely baseless.

Judge Kalyani Kaul (2021): allegations of mistreatment and bullying

In 2021, a Crown Court Judge sued the Ministry of Justice, the LC and the LCJ claiming that she was bullied and mistreated by the senior judges after she complained about disrespectful, discourteous, unprofessional, and rude barristers appearing before her.[60] The judge alleged that senior judges and court staff did not support her and that she was 'battered by a judge who grabbed her forcefully by the arm forcefully, shouted at her, undermined and oppressed her.'[61] The claims of the judge appear to be credible, as the Bar Standards Board found one barrister guilty of misconduct for acting in a rude and unprofessional manner towards the judge. And the Crown Prosecution Service has also found that the conduct of another barrister fell below the required standard.[62] Both High Court proceedings and Employment Tribunal proceedings against the Ministry of Justice, the Lord Chancellor, and the Lord Chief Justice are still awaiting an outcome.

Recent claims of bullying and racism in the judiciary

In recent years, issues of racism, bullying, biased leadership, and the lack of intra-institutional mechanisms to address these concerns of judges have come to the fore. For example, in May 2021, the Judicial Support Network[63] asked the Equality and Human Rights Commission to investigate 'serious, serial, and systemic' failings of the system of judicial appointments and promotion in England and Wales amid widespread claims of bullying and racism.[64] In March 2021, the House of Commons moved a formal motion on the issues, among others, lack of adequate protection against bullying, harassment, and discrimination against judges;[65] including the denial of such allegations by members of the senior judiciary, JCIO, JAC and JACO.[66] In 2021, eight judges wrote to the Commons Justice Select Committee for a

[60] Catherine Baksi, 'Judges owed a duty of care, the government concedes' *Law Society Gazette* (London, 23 July 2021).
[61] ibid.
[62] Id.
[63] This network [registered as a private limited] has been launched in March 2021 by Judge Kaul QC and Claire Frances Gilham, two judges who have made allegations of mistreatment and bullying by senior judges. Joshua Rozenberg, 'What's the Judicial Support Network? And what is it trying to do?' *A Lawyer writes* (17 August 2021).
[64] Catherine Baksi, 'Judicial appointment system is 'institutionally discriminatory' *The Times* (London, 20 May 2021).
[65] Representation and the Judiciary (Early Day Motion 1591: tabled on 04 March 2021) <https://edm.parliament.uk/early-day-motion/58196/representation-and-the-judiciary>.
[66] Id.

parliamentary inquiry into systemic 'discrimination against ethnic minorities, bullying, and biased leadership structures'[67] within the judiciary.

These developments show that there are no adequate mechanisms to deal with allegations of discrimination, bullying, and racism within the judiciary. According to the Equality Act 2010, the judiciary, as a public authority, has the duty, among others, to eliminate discrimination, harassment, and victimisation, advance equality of opportunity, and 'promote good relations between persons who share a relevant protected characteristic and persons who do not share it.'[68] Additionally, as the issues such as discrimination and harassment have implications for individual and internal judicial independence, the judiciary must develop mechanisms to effectively address these issues. The judicial conduct regulation regimes, as admitted by the Disciplinary Panel in Herbert's case, are inadequate to deal with allegations of racism and discrimination.[69] Although Equality and Diversity Policy for the Judiciary notes that there are Judicial Grievance Procedures to govern the complaints made by judicial personnel,[70] the efficacy of these internal mechanisms in abating and addressing racism and discrimination has to be critically analysed.

(c) Is the regulatory regime in England and Wales tainted by inappropriate influences? the need for independent scrutiny

Critics attribute the widespread 'unconscious bias'[71] among an 'old boys' network' as a cause for the diversity deficit in the judiciary.[72] It is argued that inexperienced but well-connected traditional candidates from 'prosperous traditional backgrounds' are preferred over women and ethnic minorities, particularly for the upper echelons of the judiciary.[73] However, from the judicial conduct regulation standpoint, it is necessary to examine whether the 'unconscious bias' of senior judges that continues to hinder judicial diversity also results in unfair treatment of judges from ethnic minorities. For this purpose, the disciplinary

[67] Jo Faragher 'Judicial appointments system failing ethnic minorities' *Personnel Today* (Surrey, 26 April 2021).
[68] Equality Act 2010, s 149.
[69] Peter Herbert, 'Response to the Draft Recommendation of the Disciplinary Panel to the Lord Chief Justice and Lord Chancellor' in Disciplinary Panel in the case Judge Peter Herbert OBE: Recommendations to the Lord Chief Justice, 63, 65.
[70] Equality and Diversity Policy for the Judiciary 2012, 4.
[71] Nathalie Lieven, 'Increasing judicial diversity' (2017) *JUSTICE* 46.
[72] David Collins and Tom Calver, 'Discrimination is keeping UK bench white, say judges' *The Times* (London, 25 April 2021).
[73] Monidipa Fouzder, 'Judicial Appointments Commission to face questions on 'systemic discrimination' *The Law Society Gazette* (London, 28 June 2021); Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' (2021) *Policy Exchange* 1-36.

statements published by JCIO for the period between 2021-20 and 2016-15 were studied. The researcher accessed 130 disciplinary statements issued during the said period (see Table 1).

Table 1: Statements of JCIO between 2015-16 to 2020-21

Year	2020-21	2019-20	2018-19	2017-18	2016-17	2015-16	Total
Number of disciplinary statements examined	24	31	12	37	19	7	**130**
Number of minority community judges who faced disciplinary action	6	9	4	2	7	2	**30**
Percentage of judges from the minority communities	25%	29.03%	33.33%	5.4%	36.84%	28.57%	**23.07%**

Of 130 judicial office holders who faced disciplinary measures, 30 (23.07%) belonged to ethnic minority communities, which is, in percentage points, more than double of all judges in posts for courts and tribunals judiciary in England and Wales.[74] The ethnicity of judges is determined solely based on their names, and details given in the statements and, in some cases, details available online are used.[75] This also means that the judges concerned may not necessarily identify themselves as members of minority communities.[76]

Despite the potential marginal errors in identifying the exact number of judges belonging to ethnic minority communities, the percentage of judges of the minority community (23.07%) sanctioned by disciplinary bodies is disproportionately high. However, based on this limited data, it would be presumptuous to conclude that the JCIO or senior judges responsible for judicial conduct regulation act unfairly or that disciplinary decisions are tainted with bias or racism. Nevertheless, considering the widespread allegations of institutional bias, discrimination, racism, and bullying, the disciplinary protocols, processes, and practises in the

[74] Black, Asian and minority ethnic individuals together constitute 10% of the total number of judicial office holders in England and Wales, see 'Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics' *Ministry of Justice* (2021).

[75] The disciplinary statements nor the annual report of disciplinary bodies disclose their ethnic background. For ethnic details of judges, see Judges and non-legal members of the judiciary (2020) <https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/workforce-diversity/judges-and-non-legal-members-of-courts-and-tribunals-in-the-workforce/latest>.

[76] Identification of ethnicity based on the names and limited personal information available online may have resulted in the erroneous attribution of ethnic category; also, the researcher's limited understanding of ethnic minority communities of the UK may have contributed to inaccurate identification.

UK should be audited by an independent body. Only an independent and comprehensive study would determine if the statistical anomaly noted above has any substance.

(d) Imposition of disciplinary sanctions in England and Wales: do disciplinary statements facilitate a qualitative analysis?

The JCIO publishes disciplinary statements summarily noting the findings of the investigation and sanctions imposed on the judicial officeholders.[77] However, the statements are abstract and do not provide details of cases that would facilitate adequate understanding and critical assessment of the disciplinary process [see Section 2(B)(i) below]. As a result, it is difficult to ascertain if the disciplinary process is carried out fairly or if the conduct norms are applied consistently, except in cases that are extensively and accurately covered by the media. For example, of the 130 cases examined, 53 judges received disciplinary sanctions 'for failing, without a reasonable excuse, to meet the minimum sittings requirement of his appointment'.[78] Of these 53, 41 judges were removed, six officeholders received a formal warning, five received a reprimand, and one judge received formal advice (see Fig.1); clearly, there is a range of sanctions available to the disciplinary authorities for similar misconduct.

From the disciplinary statements examined, it is evident that the disciplinary authorities strive to impose sanctions proportionately by considering the previous conduct of the judge in question; they also consider mitigating or exaggerating circumstances. For example, if a judge had an 'unblemished record of service' he or she has, in most cases, received a formal warning.[79] However, of the 53 cases, only in 12 cases mitigating or exaggerating circumstances were recorded/considered (see Fig. 2). In other words, in the remaining 39 removal cases and three cases of reprimand, the disciplinary authorities either did not emphasise mitigating or aggravating circumstances; or the authorities thought a brief reference to mitigating circumstances in the statement was not necessary.[80] In the same way,

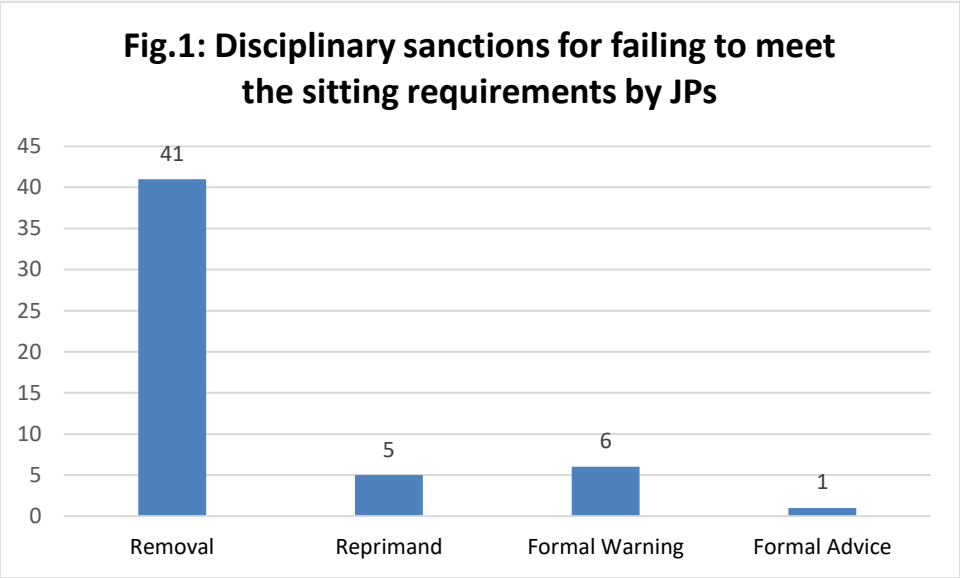
[77] Judicial Conduct Investigations Office: Disciplinary Statements <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/>.

[78] The statements contain an almost identical recital of misconduct in question. See e.g., Judicial Conduct and Investigations Office, Statement from the Judicial Conduct Investigations Office: Mrs Felicia Siebritz JP (12 July 2021) <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement2221/>.

[79] See e.g., Judicial Conduct and Investigations Office, Statement from the Judicial Conduct Investigations Office: Mr Freddy Lawson JP (03 August 2021); However, in one case, a judge received formal advice for failing to meet the minimum sitting requirement: Judicial Conduct and Investigations Office, Statement from the Judicial Conduct Investigations Office: Mohammed Kabir (04 November 2020).

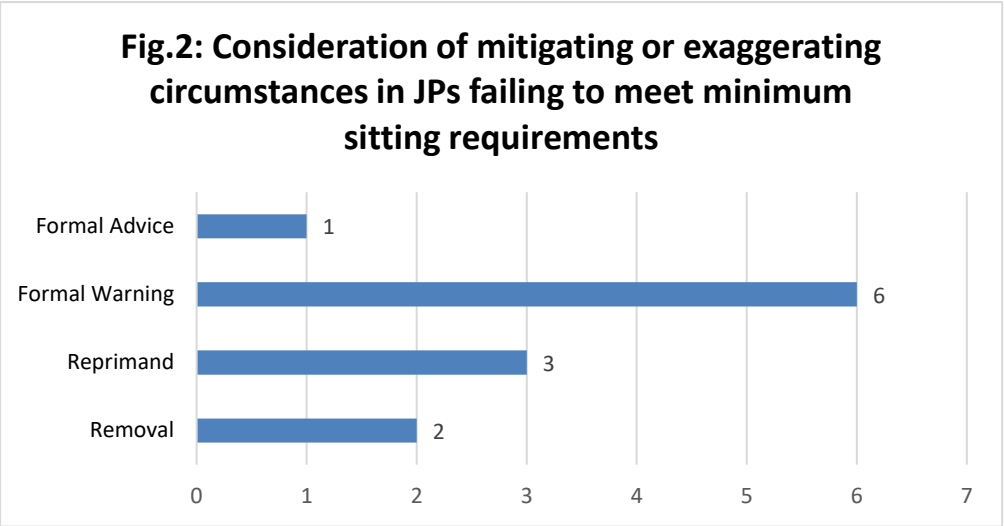
[80] See e.g., Judicial Conduct and Investigations Office, Statement from the Judicial Conduct Investigations Office: Ms Sameena Parvaz JP (12 July 2021).

out of 130 statements examined, only 21 statements noted mitigating or exaggerating circumstances. To address the deficiency of relevant information, the JCIO should publish detailed and structured disciplinary statements. Even the Review Panel (2022) has recommended that disciplinary statements should contain more detail about (a) the circumstances in which the misconduct occurred, (b) the details of the misconduct, (c) the response of the officeholder, and (d) any aggravating or mitigating factors.[81]



The disciplinary authorities should follow a well-defined sanctioning policy. Although the sanctioning policy cannot address all the variables that disciplinary authorities must consider, there should be intelligible differentia between formal advice and formal warning, reprimand, and removal – the gradated sanctioning policy should have a sound basis and it should be applied consistently and proportionately; such policy should be accessible to the public. Additionally, the suspension criteria should be clearly laid down: the current policy of suspending judges only in 'extreme circumstances' offers little clarity.[82] Similarly, the circumstances in which judicial office holders [facing allegations] should be allowed to resign from office or retire should be addressed at the policy level.

[81] Judicial Discipline: Response to Consultation (2022) 43-44.
[82] Disciplinary Panel in the case Judge Peter Herbert OBE: Recommendations to the Lord Chief Justice, 9, 67.



Regrettably, the reporting policy is not consistent; between 2013-2020, only 68 cases of resignation were reported. The data on resignation has not been disclosed for some years (see Table 5). Likewise, policy relating to reporting of suspensions is also not consistent, only six suspensions were reported for the period between 2013-2020 (see Table 5). Only detailed reports, outlining decisions of the LCJ, the LC, and all other key actors (e.g., nominated judge, investigating judge and disciplinary panel) would sustain comprehensive scrutiny aimed at determining if the disciplinary regime is administered fairly and consistently.[83] Detailed reports also ensure that the public has effective access to information, as presupposed by Article 13 of the United Nations Convention Against Corruption 2003 to which the UK is a signatory.[84]

III. Do the regulatory mechanisms in the UK adequately emphasise judicial accountability needs?

The new regulatory architecture in the UK is a significant improvement over the informal and opaque system that existed before.[85] The establishment of arm's length bodies, particularly in England and Wales, has bolstered judicial independence while simultaneously rationalising, standardising and diversifying the regulation of judicial conduct. Despite these advancements, there remain areas for further improvement across all three jurisdictions of

[83] The Bangalore Principles – Implementation Measures 2010, para 15.7.

[84] Article 13, *inter alia*, requires the State parties to ensure that the public has effective access to information and promote the freedom to seek, receive, publish and disseminate information concerning corruption.

[85] For example, prior to 2005, the Judicial Correspondence Unit, a department in the Office of Lord Chancellor handled the judicial complaints. In 2005, a Judicial Complaints Office was established as an arm's length body to deal with judicial complaints, later it was renamed the Judicial Conduct Investigations Office in 2013. Not much is known about the Rules and Regulations that governed the business of the Judicial Correspondence Unit – its operation was mostly opaque.

the United Kingdom. To address these concerns and respond to the research question, Subsection (A) examines the absence of a procedural framework guiding the removal of senior judges in England and Wales; and Subsection (B) critically evaluates the effectiveness of the regulatory regimes in England and Wales, Scotland and Northern Ireland.

(A) Senior judges (i.e., Judges of the High Court, Court of Appeal [in England and Wales], and the Supreme Court) can only be removed by the King on an address presented to him by both the Houses of Parliament, but what is the procedure for such removal?

Interestingly, the CRA and other recent reforms (e.g., the Crime and Courts Act 2013) have not addressed this question. It is unclear whether Parliament would rely solely on the report of the JCIO and the recommendation of the LCJ and the LC (first-tier body), or whether it will conduct an independent investigation. Gee argues that Parliament may vote to impeach a judge based on the report and recommendations of the first-tier body, without further inquiry. This procedure, as he argues, would strengthen the security of tenure of senior judges, and it also would prevent Parliament 'to second-guess the Lord Chancellor and the LCJ, whose recommendation has been informed by the detailed investigation conducted under the auspices of the JCIO with all the procedural safeguards that are part and parcel of that process'.[86] Two key points emphasised by Gee are consistent with the Bangalore Principles – Implementation Measures which mandate that '[W]here the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with the power to discipline judges.'[87]

However, as Gee recognises, the proposed procedure severely undercuts the role of the legislative body in the removal process. As the highest accountability body in the UK, Parliament should not abdicate its powers to review and reconsider the findings and recommendations of the first-tier body. This thesis argues that Parliament's role as an accountholder is the last citadel of fairness, objectivity, proportionality, and consistency in judicial conduct regulation. As noted elsewhere, the judicial conduct regulation regime in E&W is dominated by the judiciary [by senior judges]; how effective the LC's role in judicial conduct regulation is unknown. Therefore, the judge in question should have the full

[86] Graham Gee (2021) 150.
[87] Para 16.2.

opportunity – without any presumption in favour of the findings/recommendations of the first-tier body – to prove his innocence in Parliament. Here, it is also pertinent to recall that there is no formal appeal provision against determinations made by the first-tier body. Furthermore, the remit of the Judicial Appointments and Conduct Ombudsman is also limited to determining whether the first-tier body has 'complied with the prescribed procedures or whether there was any aspect of maladministration in the investigation process.'[88] The JACO cannot decide whether the actions of a judicial officeholder constituted misconduct, nor can it review the decision of the first-tier body on this point. Therefore, Parliament should not rely solely on the findings of the first-tier body. The likelihood of unfair treatment of the judge in question (or at least the perception of it) cannot be ruled out.

The regulatory practice in NI and Scotland offers some guidance in formulating the procedural framework for the removal of senior judges in E&W. Both in NI and Scotland, especially if the complaint relates to senior judges and raises an issue of fitness to the judicial office, the LC (in case of NI) and the First Minister (Scotland) have to constitute a separate tribunal – these tribunals are also called statutory tribunals.[89] The statutory tribunals are different from ones constituted by the LCJ (NI) or the Lord President (Scotland) initially; the findings and recommendations of first-tier bodies will be passed on to the statutory tribunal, but the statutory tribunal will hear the case afresh. One would argue that both in NI and Scotland there are no arm's length bodies akin to JCIO, hence, reconsideration of the matters involving senior judges by statutory tribunals is justified, but such a procedure in E&W is unnecessary. However, such arguments will not be entirely convincing for two reasons. First, though the JCIO is an arm's length body, in reality, it is administered by judges themselves, with the help of around 15 dedicated staff; therefore, there is discernible dominance of the judiciary in the entire process. Second, when complaints relate to senior judges, as per the existing procedure in E&W, a tribunal will be constituted which will comprise other senior judges nominated by the LCJ along with laypersons nominated by the LC. The participation of other stakeholders, for example, members of the legal profession, is lacking.

[88] Judicial conduct remit and information about complaints <https://www.gov.uk/government/publications/judicial-conduct-remit-and-information-about-complaints/judicial-conduct-remit-and-information-about-complaints>.
[89] Judicature (Northern Ireland) Act 1978, ss 12B and 12C and Judiciary and Courts (Scotland) Act 2008, Ch 5.

Therefore, in cases of fitness for office proceedings against senior judges, Parliament should act as a second-tier body. A joint committee of both houses, based on the report of the first-tier body, should frame charges and nominate two members of each house to investigate and present the case against the judge in question. The judge should have the right of the audience, where necessary the judge may seek legal assistance for presenting his/her case. For this purpose, a joint sitting of Parliament should be called. This procedure would make the impeachment more political; however, it would ensure that all three organs have a meaningful role in upholding judicial independence and enforcing judicial accountability. Another option would be that when an allegation has raised a question involving fitness for the office of a senior judge, in consultation with the LCJ, the LC may constitute a tribunal having wider representation from the key stakeholders of judicial administration. If the misbehaviour is proven, the LC or the Prime Minister can initiate the impeachment procedure in Parliament – the latter option is similar to the procedure that exists in NI and Scotland.

(B) Judicial Conduct Regulation Regimes in the UK: a critical appraisal

The Judicial Conduct Investigations Office has a substantial caseload. There are 3,174 court judges and 1,826 tribunal judges in office as of 1 April 2020.[90] Moreover, there are more than 13000 magistrates in England and Wales.[91] Complaints relating to magistrates are mostly handled by the relevant Advisory Committee, but the JCIO and the LCJ are consulted if there is a need to impose a formal disciplinary sanction. The regulatory mechanisms in NI and Scotland deal with a smaller pool of judicial officeholders. NI has 85[92] and Scotland has 242 judicial officeholders.[93] Another key challenge that judicial conduct regimes face in the UK is the complexity of disciplinary architecture. The multilayer judiciaries have well-defined yet, in some respects, peculiar disciplinary protocols that the regulatory bodies, with the help of investigating judges and tribunals, have to administer. Against this backdrop, the performance of the key regulatory mechanisms is audited below.

[90] 'Diversity of the judiciary: Legal professions, new appointments and current post-holders: 2020 statistics' (2020) Ministry of Justice 3.

[91] Judicial Conduct Investigations Office: Annual Report 2019-20, 14.

[92] Judiciary of Northern Ireland: Salaried Judicial Complement (as of 05 July 2021) <https://www.judiciaryni.uk/about-judiciary/judicial-members>.

[93] Judicial Diversity statistics (2018) <https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/diversity-statistics/2018.pdf?sfvrsn=af957e5f_4>.

(i) England and Wales: Judicial Conduct Investigations Office

The JCIO succeeded the Office for Judicial Complaints (OJC) in 2013; since then, it has received 14,296 judicial complaints, averaging 2,042 cases per year. The OJC was in operation from 2006 to 2013, during which period it received 11,424 at an average of 1,632 per year. With respect to the Judicial Correspondence Office, a predecessor of OJC, reliable data is available for the period between 2002-06; during this period, it received 5,163 complaints, averaging 1,291 per year. Over a period of 18 years (2002-2003 to 2019-20), the regulatory mechanisms in E&W have received 30,883 complaints at an average of 1,716 per year (see Table 5). Reliable data on the number of formal disciplinary sanctions imposed is available since 2004. Between 2004-2005 to 2019-20 (16 years), the disciplinary authorities imposed 945 disciplinary measures on judicial officeholders, which includes 351 removals, 249 reprimands, 146 formal advice, 98 formal warnings, 93 resignations, and six suspensions. However, as Table 4 demonstrates, comprehensive data, especially on resignations and suspensions, are not available. Table 4 also does not include the informal disciplinary measures imposed by the LCJ.

The data suggests that out of 100 complaints received, only in 2.75 cases have the disciplinary authorities imposed formal disciplinary measures. The data also reveals that not all complaints filed with the JCIO are investigated. On the contrary, two-thirds of cases are rejected at the initial assessment stage (see Table 6). The data presented in Table 4 for the years 2016 to 2020 clearly shows that most of the complaints do not contain an allegation of misconduct on the part of a named or identifiable person holding judicial office, and hence such complaints are rejected. Also, the annual reports between 2017-2020 show that more than two-thirds of a complaint filed to the JCIO relate to judicial decisions and case management[94] - such complaints are beyond the remit of the JCIO; therefore, they get rejected at the initial stage itself.

After initial scrutiny, on average around 500 complaints remain with the JCIO every year that require further investigations. For an institution of not more than 15 staff, the responsibility to facilitate further investigations, and communicate with complainants, investigating judges, the other disciplinary authorities, and the JACO would be an overwhelming workload.

[94] See the Annual Reports of 2017-18 to 2019-20.

However, as the annual reports show, the JCIO has consistently performed well during 2013-14 to 2016-17. However, in recent years, the JCIO has failed to achieve the self-imposed targets (see Tables 2 and 3). The 2017-18 JCIO annual report identifies staff shortages as the main reason for its underperformance.[95] The 2018-19 report blames it on the introduction of new digital case management and staff shortages.[96] The JCIO's performance for 2019-20 was better than the previous year, but during this period it did not meet one key target (see Table 3).

Table 2: Performance of JCIO 2013-18					
Action	2013-14	2014-15	2015-16	2016-17	2017-18
Acknowledge letters within two working days of receipt	**93%**	*98%*	*98%*	*98%*	**89%**
Provide an initial response to complainants within 15 days of receiving a complaint or enquiry	*94%*	*98%*	*99%*	*93%*	**66%**
Monthly updates	*95%*	*97%*	*98%*	*88%*	*87%*

Table 3: Performance of JCIO 2018-20			
Action	Target	2018-19	2019-20
Respond to complaints within two working days of receipt	95%	**81%**	DNA
Notify complainants within two weeks of receipt if a complaint falls outside our remit	90%	**40%**	*90%*
Issue first substantive response to complaints within 15 working days of receipt	85%	**52%**	DNA
Conclude complaints accepted for further consideration, including those which proceed to a full investigation, within 20 weeks of receipt	85%	**67%**	*93%*
Provide monthly updates to parties in ongoing investigations	100%	DNA	**82%**

- The figures in **bold** font indicate that the JCIO did not achieve the set target during the reported year.
- The figures in *italics* indicate that the JCIO achieved or exceeded the set target during the reported year.
- DNA: Data not available

Another area of concern, as evidenced by the annual reports, is that there are frequent changes in the key indicators and annual targets. There is also an inconsistency in reporting. For example, in 2018-19, the JCIO changed indicators, but it could not publish performance

[95] JCIO: Annual Report 2017-18, 5.
[96] JCIO: Annual Report 2018-19, 4.

outcomes on all the criteria for that year; the report did not indicate specific reasons why reporting on one of the self-imposed criteria was not possible. And for the following year (2019-20), as mentioned in the 2018-19 report,[97] the JCIO's performance on only three criteria was reported. The report did not even mention the changes made in 2018-19; there is no explanation as to why it could only report on three criteria (out of 5) for 2019-20. Performance evaluation (PE) should be based on set standards that could be applied consistently; the PE should provide a stable foundation for policy decisions and future improvements. Frequent changes in indicators and reporting policy undermine the significance and credibility of PE. However, despite the dip in the performance of the JCIO, its voluntary accountability initiatives (i.e., self-imposed challenging targets) and critical self-assessment demonstrate its deep commitment to higher standards of service.

JCIO: Annual Reports

The reporting practises of the JCIO needs improvement. In contrast to JCIO, the OJC's annual reports provided more detailed data on its background, remit, workload, and outcomes.[98] The OJC reported the data on informal disciplinary measures, resignations, and suspension; the details of review bodies, disciplinary panels, and staff were also published. The comparative data and case studies of the OJC were also helpful for assessing its performance. The JCIO also makes frequent changes in its reporting policy; since 2018-19, it has stopped reporting figures of five or fewer both in the category-wise breakdown of complaints and outcomes – this prevents further breakdown of the number of complaints received and disposed of and the disciplinary measures imposed. The JCIO also does not report the time length between the key stages of the disciplinary process. Additionally, even though the JCIO does not investigate criminal allegations against judicial officeholders, the conduct code requires the officeholders to report criminal allegations, charges, and convictions to the JCIO.[99] Disciplinary authorities also impose disciplinary measures, including suspension, in response to criminal allegations, charges, and convictions. Therefore, the JCIO should also publish accurate data on criminal allegations, charges, convictions, and disciplinary measures imposed on judicial officeholders in response to such allegations or convictions.

[97] JCIO: Annual Report 2018-19, 4.

[98] See eg., OJC: Annual Reports for 2007-08 and 2008-09; however, even then the reporting policy was not consistent, for instance, the OJC's annual report for 2012-13 is brief, compared with its previous reports.

[99] See Guide to Judicial Conduct 2020, 16 and fn 23.

Table 4

Number of complaints received by judicial complaints mechanisms in E&W since 2002																			
Judicial Offices	1998-99	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	**Total**
District Bench	DNA	DNA	DNA	DNA	DNA	947	878	539	620	661	556	754	651	971	963	944	DNA	DNA	DNA	DNA
Circuit Bench								244	334	397	266	435	329	510	487	590				
High Court								81	84	84	80	119	81	152	161	122				
Court of Appeal								23	24	41	19	30	30	55	65	63				
Court of Protection								3	5	10	1	2	2	6	4	1				
Magistrate Courts						263	121	72	70	64	43	28	30	55	44	47				
Coroner						38	39	20	36	35	32	44	51	262	556	70				
Tribunals						87	48	15	7	21	16	14	15	22	12	12				
Others						338	351	338	391	325	602	728	829	399	317	277				
Total	**2109**	**1191**	**1122**	**1004**	***1846***	**1674**	**1437**	**1335**	**1571**	**1638**	**1615**	**2154**	**2018**	**2432**	**2609**	**2126**	**2147**	**1672**	**1292**	**32992**
Disciplinary actions	**5**	**DNA**	**DNA**	**38**	***67***	**32**	**49**	**86**	**87**	**82**	**79**	**71**	**58**	**75**	**43**	**42**	**39**	**55**	**42**	**945+5**

1. The data **underlined** are taken from Hansard, 'Judiciary (Complaints)' Volume 329: debated on Wednesday 21 April 1999 <https://hansard.parliament.uk/Commons/1999-04-21/debates/0d62fa2c-3576-4f41-afc0-8b1423efb515/Judiciary(Complaints)?highlight=office%20judicial%20complaints#contribution-041dc412-a0eb-4a39-956d-6f46b8ee08d7> accessed on 16.08.2021.
2. The data ***italicised*** is of the Judicial Correspondence Unit for the years 2002-2006, taken from Hansard, 'Judicial (Complaints)' 31 January 2008 <https://publications.parliament.uk/pa/cm200708/cmhansrd/cm080131/text/80131w0016.htm> accessed 24 August 2021.
3. DNA: Data not available.
4. The number of disciplinary actions imposed during 2002-2003 to 2019-2020 is 945, **+5** are from 1998-99.

Table 5: Disciplinary measures imposed during 2004-05 to 2019-20							
Year	**Removal**	**Resignation**	**Suspension**	**Reprimand**	**Formal Warning**	**Formal Advice**	**Total**
2019-20	14	DNA	DNA	6	14	8	42
2018-19*	13	DNA	DNA	7	13	20	55
2017-18	17	DNA	DNA	4	7	11	39
2016-17	19	DNA	DNA	8	4	11	42
2015-16	16	DNA	DNA	9	3	15	43
2014-15	32	DNA	1	16	11	15	75
2013-14	17	DNA	2	14	13	12	58
2012-13	20	16	DNA	19	9	7	71
2011-12	30	14	1	22	4	8	79
2010-11**	29	25	DNA	28	DNA	DNA	82
2009-10	28	18	1	11	11	18	87
2008-09	25	20	1	22	4	14	86
2007-08	21	DNA	DNA	19	2	7	49
2006-07	16	0	0	13	3	0	32
2005-06	34	0	0	33	0	0	67
2004-05	20	0	0	18	0	0	38
	351	**93**	**6**	**249**	**98**	**146**	**945**

* For 2018-19, 55 disciplinary actions were imposed, but the details of only 53 cases were given.

** The OJC Annual Report for the year 2010-11 is not available online; the data noted here are taken from the OJC 2011-12 report.

DNA: Data not available

Table 6: Number of complaints rejected at the initial assessment stage: 2016-2020				
Reasons for rejection	2016-17	2017-18	2018-19	2019-20
The complaint does not contain an allegation of misconduct on the part of a named or identifiable person holding judicial office	1,193	1,312	1,293	643
Rule 12 (Complaint is made out of time)	46	74	39	30
Complaint withdrawn	DNA	11	18	10
Other	18	38	23	DNA
Total number of complaints rejected	**1257 (60.49%)**	**1,435 (71.42%)**	**1,373 (72.45%)**	**683 (57.73%)**
Total disposals	2,078	2,009	1,895	1183

(ii) Scotland: Judicial Office for Scotland (JOS)

(a) The absence of accountability of account holders

The role of the Judicial Complaints Reviewer (JCR) of Scotland is limited; the Reviewer lacks the power to override the decisions of the first-tier disciplinary body headed by the Lord President. The Reviewer can only determine if the first-tier body has carried out the disciplinary process in accordance with the Rules.[1] The review can only make referrals to which the Lord President (LP) must have regard, but the LP is not bound to comply with the referrals or recommendations of the Reviewer.[2] Moreover, the JCR is a part-time office, authorised to work up to four days a month (48 days per year). The Reviewer has no office or administrative staff; he works with an annual budget of £2000 to cover all the running costs.[3] This suggests that, by design, the review is 'a paper-based exercise based on selected case papers provided…by the JOS.'[4] It cannot investigate the merits of a complaint; it cannot recommend reinvestigation or overturn a decision of the first-tier authority.[5] Like the JACO (E&W), the JCR has no remit over the judicial complaints that are rejected by the first-tier body.[6]

The dual constraints of the number of days available for carrying out the work and lack of administrative support mean that the Reviewer is unable to conclude the investigation of all complaints received during a business year. Reviewers have reported that they often had to work beyond the allotted number of days.[7] Gillian Thompson, the JCR during 2014-17, reported that managing reviews within the allotted number of days have led to delays and inconvenience for complainants.[8] In her first report, Thompson candidly noted the constraints within which the JCR operates.

> '(1) I see only what is shared with me about the handling of complaints…I do not automatically get access to all papers.
> (2) The singleton nature of the role together with the limited number of contracted days results in a poor service...'[9]

[1] Judiciary and Courts (Scotland) Act 2008, s. 30.
[2] ibid s. 33.
[3] Judicial Complaints Reviewer: Annual Report 2019-20, 6.
[4] Gillian Thompson, Judicial Complaints Reviewer: Annual Report 2015-16, 7.
[5] ibid.
[6] ibid 8.
[7] Moi Ali, Judicial Complaints Reviewer: Annual Report 2013-14, 4.
[8] Gillian Thompson, Judicial Complaints Reviewer: Annual Report 2015-16, 3.
[9] Gillian Thompson, Judicial Complaints Reviewer: Annual Report 2014-15, 8.

The blame lies on the government for not supporting the JCR with the necessary resources and the legislature for not conferring adequate powers on the JCR to be an effective review body. However, the judicial leadership has also failed to cooperate with and support the JCR. As the first JCR, Moi Ali, recorded in her successive annual reports that there were clear disagreements between her and the LP. In her 2013-14 report, she noted that '[M]y interactions with both the Lord President's office and the Judicial Office have focussed more on what I cannot do rather than what I can do, and as such an opportunity for the whole system improvement has been lost.'[10] Her 2012-13 report revealed that the Judicial Office Scotland did not share the complete file with the JCR concerning the cases under review – as a result, the review process was hindered. She lamented that she had 'no power to demand complete files and have to undertake reviews without all of the paperwork relating to the complaint. I inform complainers of the situation, but there is nothing more that I can do.'[11] This means that disciplinary rules could be flouted with impunity and that 'such sterile procedures make Scottish justice a laughingstock.'[12]

In its early years (i.e., 2011-16), the JCR had received a considerable number of review requests (on an average of 30/per year; see Table 7); however, for the last three years, it has received fewer than 12 requests/year. As the current Reviewer noted, awareness among the public that 'the JCR cannot resolve their complaint to their satisfaction leads them to avoid the process'[13] Fading public confidence in the JCR is unsurprising since the JCR, in its current form, is a toothless body with limited resources and inadequate support. But the lack of a robust review body also means that the first-tier disciplinary authorities are not held to account.

Table 7: number of complaints reviewed by JCR[14]

Year	Number of complaints reviewed
2019-20	6
2018-19	7
2017-18	22
2016-17	DNA
2015-16	37
2014-15	40

[10] Moi Ali, Judicial Complaints Reviewer: Annual Report 2013-14, 4.
[11] ibid 12.
[12] Moi Ali, Judicial Complaints Reviewer: Annual Report 2012-13, 20.
[13] Ian Gordon, Judicial Complaints Reviewer: Annual Report 2017-18, 8.
[14] Ian Gordon, Judicial Conduct Reviewer: Annual Report 2019-20, 7.

2013-14	29
2012-13	23
2011-12	20

DNA: Data not available

(b) Disciplinary protocols in Scotland: repeated non-compliance and abuse

Moi Ali's final report as the JCR also revealed gross abuses of the disciplinary procedure: in one case, during the investigation of a judicial complaint, it was revealed that the judicial officeholder covertly recorded the proceedings without the knowledge or consent of the parties. The complainant intended to raise this as a new complaint. However, neither the JOS nor the LP allowed the filing of the new complaint; the issue was dropped without any investigation.[15] In another case, a credible complaint of discrimination and bias against a judicial officeholder was not adequately investigated. The allegation was that the judicial officeholder abused the witnesses as 'all liars & not credible witnesses' and characterised them by referring to their low-level jobs.[16] The JOS also overlooked serious allegations of bullying, intimidation, and unacceptable behaviour of judicial officeholders.[17] Occasionally, the JOS lost track of complaints.[18] All too often, the JOS did not allow the JCR to have access to the complete file concerning a matter under review.[19] Instances of poor recording of reasons for dismissal of complaints, lack of clarity in correspondence of the JOS, failure to inform the judicial office holders promptly about the ongoing investigation, and inconsistent application of disciplinary rules are all too often reported by the JCR.[20] In several cases, the complaints were dismissed without conducting further inquiry or investigation.[21] During her 3-year tenure as the JCR, Moi Ali reported a very high number of breaches [in total 79 breaches: 2011-12 (12), 2012-13 (20) & 2013-14 (47)] of rules and guidelines that regulate the disciplinary process in Scotland. This demonstrates that the legal framework that regulates judicial discipline in Scotland requires considerable improvement – the Rules, practices and processes that facilitate conduct enforcement should be revisited; more importantly, the attitudes of the judicial leadership towards the JCR should change. The recent sexual

[15] Moi Ali, Judicial Complaints Reviewer: Annual Report 2013-14, 30.
[16] ibid 35.
[17] ibid 39.
[18] ibid 40; see also, Moi Ali, Judicial Complaints Reviewer: Annual Report 2012-13, 19-21, 32.
[19] ibid 31.
[20] See e.g., Moi Ali, Judicial Complaints Reviewer: Annual Report 2012-13, 20-25.
[21] ibid 27 and 31; see also, JCR: Annual Report 2013-14.

harassment allegation against Sheriff John Brown[22] further evidence that the disciplinary authorities fail to administer the disciplinary protocols fairly, consistently, and in accordance with the principles of natural justice.

(c) Inadequate transparency and accountability measures

Unlike E&W, both Scotland and Northern Ireland do not publish disciplinary statements, which is a significant transparency and accountability deficit. The court users and the public have no access to information on the judges who were sanctioned, the grounds for disciplinary actions, and the disciplinary process. The dearth of basic information also discourages a qualitative assessment of the disciplinary process. Surprisingly, even the complainants do not have access to the full report of the investigation. In her 2013-14 report, the then JCR noted that upon her persuasion the Lord President agreed to 'share a summary of the key findings of investigations with complainers, having initially decided that he would not'.[23] As the JCR has pointed out, there is no reason why the full investigation report cannot be shared with the complainant.[24] The JCR also reported that the investigation report of the nominated judge is not given to the complainant.[25] This procedural lacuna is inconsistent with the principles of natural justice; it can also create a perception in the complainant that the nominated judge is protecting the judicial officeholder.[26] Even the recent Rules (2017) do not mandate the supply of a copy of the investigation report to the complainant. This lack of transparency would turn 'an otherwise fair and well-run investigation into one that gave the impression of a cover-up. Sharing reports with the complainer can only be a good thing.'[27]

Initially, the LP refused to inform the JCR of the steps he had taken in response to a referral made by the JCR.[28] On the ground that third parties, such as the JCR, cannot be given information relating to the final outcome of the case.[29] It is unclear how the JCR could be considered as the third party when it has made the referral as mandated by the relevant statute [Judiciary and Courts (Scotland) Act 2008]. It is reported that since 2013-14, the LP

[22] *'X' v Sheriff John Albert Brown*, [2022] CSOH 15, paras 9-10.
[23] Moi Ali, Judicial Complaints Reviewer: Annual Report 2013-14, 2.
[24] Id.
[25] Moi Ali, Judicial Complaints Reviewer: Annual Report 2012-13, 27.
[26] ibid.
[27] ibid.
[28] Moi Ali, Judicial Complaints Reviewer: Annual Report 2013-14, 2.
[29] ibid.

has agreed to inform the JCR about the outcome of the referral.[30] However, there is no reason why the same information should not be made available to the public.

Under the Complaints about the Judiciary (Scotland) Rules 2017, the JOS publishes a three-page[31] annual report. Unlike the JCIO's reports, the reports of JOS are mostly statistical – the reports provide a category-wise breakdown of the number of complaints concluded during that business year; there is barely any description of the complaint handling process; the reports do not delve into the performance of the JOS during that period; there is no further breakdown or comparison of data that provide insights on the performance of the JOS. The annual reports also do not provide information on the review process. There is no guidance for the public on how and when they can approach the JCR. The JOS reporting practice is unsatisfactory, to say the least.

During 2011-12 to 2019-20 (nine years), the JOS concluded 876 judicial complaints. Only 14 formal disciplinary measures have been imposed during this period. It means that out of 100 complaints, only 1.59 cases of misconduct warranting formal disciplinary sanction have been proved; the percentage, as compared to E&W, is low. The number of informal disciplinary measures is also considerably low (15) – only 29 disciplinary measures have been imposed during 2011-19 (for more details, see Table 9). It is pertinent to note that the JOS consistently reports the number of informal disciplinary measures, unlike the JCIO.

Table 8: JOS - the number of complaints concluded during 2011-12 to 2019-20

Judicial Office	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	Total
Senator/ Temp Judge	31	38	34	40	60	26	11	11	9	260
Sheriff Principal/ Temp SP	10	9	4	2	4	3	4	1	2	39
Scottish Land Court Chairman/ Members	DNA	DNA	DNA	DNA	DNA	0	0	0	0	0
Sheriff /PT Sheriff	57	62	52	47	81	63	76	52	54	544
JP	NA	5	2	6	3	3	6	4	3	32
Total	**98**	**116**	**92**	**95**	**147**	**95**	**97**	**68**	**68**	**876**

DNA: Data not available

[30] Id.

[31] For the years 2011-12 to 2015-16, the reports were comparatively detailed (of around 6 pages).

Table 9: JOS - number of disciplinary measures imposed during 2011-12 to 2019-20								
Year	Removal	Resignation/ Retirement	Reprimand	Formal Advice	Formal Warning	Informal Advice	Informal Resolution	Total
2019-20	1	1	0	0	0	2	1	**5**
2018-19	0	1	1	1	0	1	1	**5**
2017-18	0	1	0	0	1	0	0	**2**
2016-17	0	1	0	0	0	0	2	**3**
2015-16	0	0	2	0	0	0	1	**3**
2014-15	0	1	2	1	0	0	1	**5**
2013-14	0	0	0	0	0	0	4	**4**
2012-13	0	0	0	0	0	0	2	**2**
2011-12	0	0	0	0	0	0	0	0
Total	**1**	**5**	**5**	**2**	**1**	**3**	**12**	**29**

(iii) Northern Ireland (NI)

(a) The lack of an independent, impartial, and competent review body

As already discussed in this Chapter, the judiciary's dominance in judicial appointments and conduct enforcement is more pronounced in NI. However, the existing legal framework that provides for judicial regulation overlooks the need for robust accountability measures and mechanisms that would abate and redress abuse of disciplinary oversight by senior judges. NI lacks an independent review body, which could allay the fear of judicial officeholders of unfair treatment or misuse of powers by senior judges and the suspicion of complainers who might perceive that the regulatory mechanisms are overly sympathetic to judges since the mechanisms are administered by judges themselves. Furthermore, in NI, the executive branch has no role in judicial conduct regulation, except in cases of senior judges. This means there is no effective inter-branch oversight over judicial conduct regulation. In contrast, the partnership model of E&W offers opportunities for the executive branch to oversee and, where appropriate, intervene to ensure that the disciplinary regime is applied fairly, consistently and effectively. Arguably, in E&W, the executive branch has a constructive role as an enabler and auditor of the disciplinary regime, but that is not the case in NI.

(b) Inadequate transparency and accountability measures

Unlike E&W and Scotland, the Complaints Officer (NI) consistently reports information on judicial complaints received by the LCJ(NI) and by Tribunal Presidents (on behalf of the Lord Chief Justice) by judicial tier. Annual reports also provide comparative data from three previous years for the court judiciary. However, the reports, like the JOS' reports, are too brief

to be helpful. Reports contain the minimum statistical information on judicial complaints, the final outcomes of the complaints, and the disciplinary measures imposed on the judicial officeholders. The statistical reports merely categorise outcomes into 'upheld in part' and 'upheld' (or upheld in full for the tribunal judiciary), but it is not clear what type of disciplinary measures is imposed in 'upheld' and 'upheld in part' cases (see Table 10).[32] As regards the tribunal judiciary, the comparative data for three previous years is also not published (see Table 11). The reports do not provide relevant information about the performance of the disciplinary authority, including the Complaints Officer who is responsible for an initial assessment and classification of complaints. The failure to publish disciplinary statements, coupled with ephemeral statistical returns, has led to a significant dearth of information.

Annual reports for the years 2013-2019 (7 years) for the Court Judiciary (NI) have reported only 2 disciplinary measures. The total number of complaints received during this period is 361, so only in 0.55 cases did judicial officeholders face a disciplinary measure, which is significantly lower compared to E&W (see Table 10). However, this analysis is based on incomplete data, as the data for 2013 to 2015 was not available - the actual number of disciplinary measures imposed could be higher. In the case of the tribunal judiciary (NI), during the four-year period (2016 to 2019), six tribunal members faced disciplinary measures for 181 complaints during this period (see Table 11). It means that 3.31 tribunal members faced disciplinary measures, which is a little higher compared to other jurisdictions in the UK. But since the data is available only for four years, the statistical divergence reported here may not be significant. However, inadequate data reveals that there are some significant lapses in the publication policies of regulatory regimes in NI.

Table 10 provides information on judicial complaints (by judicial tier) received by the LCJ(NI) for the 2019 reporting period, together with 6 previous years for comparative purposes.

Table 10: NI: number of complaints received during 2013-2019: court judiciary

Judicial Office	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**Total**
High Court	11	8	9	5	7	11	19	**70**
County Court	7	8	5	7	9	10	5	**51**
District Judge (Magistrate's Court)	15	14	11	10	22	7	3	**82**
District Judge Civil	0	0	0	0	4	16	19	**39**

[32] See e.g., Complaints about the Conduct of Judicial Office Holders - Code of Practice issued by the Lord Chief Justice of Northern Ireland: statistical return 2019, 2-3.

Statutory Officers and Coroners	11	6	16	10	2	1	10	**56**
Others	2	14	6	16	10	12	3	**63**
Total	**46**	**50**	**47**	**48**	**54**	**57**	**59**	**361**
Disciplinary actions	NA	NA	NA	1	0	1	0	**2**

Table 11: Tribunal Judiciary (NI) - number of complaints filed during 2016-2019					
Office	**2016**	**2017**	**2018**	**2019**	**Total**
Appeals Tribunal	31	25	41	42	**139**
Criminal Injuries Compensation Tribunal	2	1	1	NA	**4**
Industrial Tribunal & Fair Employment Tribunal	7	8	8	9	**32**
Pensions Appeals Tribunal	1	0	NA	1	**2**
Traffic Penalty Tribunal	2	0	NA	NA	**2**
Lands Tribunal	NA	1	NA	NA	**1**
Others	NA	NA	NA	1	**1**
Total	**43**	**35**	**50**	**53**	**181**
Disciplinary action	3	0	3	0	**6**

III. Conclusions

Do regulatory mechanisms in the UK uphold (internal and individual) judicial independence?

The regulatory architecture in the UK is a considerable improvement over the previous informal, opaque, and in-house complaint mechanisms that were administered by the executive branch. The current regulatory architectures in all three jurisdictions of the UK have a well-defined legal framework, organisational structure, and a comprehensive scheme of procedures and processes that are administered by a body of individuals from diverse backgrounds. The mechanisms, compared to the previous regulatory regimes, are tolerably open and transparent. Although a comprehensive review is necessary to assess the efficacy and effectiveness of regulatory mechanisms, the initial assessment of the mechanisms suggests that they are effective in enforcing standards of judicial conduct.[33] However, there are several reasons why the regulatory regimes in the UK are less effective in securing judicial independence, more specifically individual and internal judicial independence. Some of the key reasons are encapsulated below.

(a) A mix of primary and secondary legislation that define the regulatory framework in the UK does not place adequate emphasis on safeguarding internal judicial independence. As a result,

[33] See generally, with respect to the regulatory mechanisms in England and Wales, see Graham Gee (2021) 153-54.

there are no robust mechanisms to thwart the abuse of disciplinary processes administered predominantly by senior judges.

(b) A substantial part of the LC's regulatory functions and powers (read as responsibilities) were transferred to or shared with the heads of the judiciaries.[34] These 'responsibilities' have handed down significant leverage to senior judges with leadership roles. But regrettably, when these responsibilities are exercised to the detriment of some judges, there are no mechanisms to consider their concerns. As a result, allegations of racism, bullying, abuse, and neglect by senior judges, which have a direct bearing on individual and internal judicial independence, could not be effectively addressed.

(c) The structural asymmetry of regulatory regimes favouring the judicial branch emerges from primary and secondary legislation that establishes and governs judicial conduct regulation in the UK, including England and Wales. From a functional perspective, the autonomy that JCIO enjoys is much less significant, as it acts merely as a facilitator; the entire disciplinary protocol is administered almost exclusively by judges.

Regulatory mechanisms in NI and Scotland are part of the larger administrative setup that assists the head of the judiciary in the discharge of his/her administrative and supervisory duties. Therefore, as long as the regulatory mechanisms work under the dominance of the judiciary (or for that matter any other organ) or the chief judge, it is highly likely that they would be perceived as a potential threat to individual and internal judicial independence or overly sympathetic to judges. A plausible solution lies in having robust mechanisms to thwart abuse of disciplinary, supervisory, and administrative powers by senior judges, but NI and Scotland are currently lacking such mechanisms.

(d) The regulatory regimes in the UK are hierarchical. Since the court system is complex, regulatory regimes needed to be organised schematically to effectively address judicial discipline at every level; the UK's regulatory landscape is flexible and dynamic. However, a flexible legal framework broadens the scope of discretionary powers of a disciplinary authority, which could lead to inconsistent or selective application of the disciplinary protocol. The case of Justice Peter Smith illustrates that a senior judge facing serious

[34] E.g., CRA, s. 7.

allegations could evade accountability if the disciplinary authorities, for whatever reason, are reluctant to apply the disciplinary protocol rigorously. Unchecked disciplinary authority and inconsistent application of the disciplinary protocol are serious threats to judicial independence.

Do regulatory mechanisms in the UK adequately emphasise judicial accountability needs?

As discussed above, there are several aspects of judicial conduct regulation regimes that remain insulated from scrutiny. For instance, in Scotland, there is a procedural void with respect to the complaints against the LP, namely the complaints that do not raise an issue involving fitness for office. As discussed already, since there is no first-tier body to investigate allegations of a misdemeanour, even the Judicial Complaints Reviewer has no remit over such allegations. Similarly, the regulatory regime of Scotland is also ineffective in dealing with allegations of bullying, intimidation, and unacceptable behaviour of judicial officers. As revealed by the Judicial Complaints Reviewer, such allegations have often been overlooked by the JOS. As analysed, in this chapter, there are notable gaps in the accountability frameworks of England and Wales and NI.

The commitment to transparency and openness of the regulatory regimes in the UK are on shaky grounds: regulatory mechanisms – especially JOS, the complaints officer (NI), and the Supreme Court of United Kingdom (UKSC) – should cultivate robust accountability practices that inspire public confidence in judicial conduct regulation. There is nothing publicly known about the complaints filed against the supreme court judges; the JOS and the Complaints Officer do not publish disciplinary statements after the conclusion of investigations. And, as discussed elsewhere, the statements of JCIO are too brief to facilitate an adequate understanding of the allegation and the investigation. Therefore, judicial leaders and legislators should address significant transparency and accountability deficit at the policy level so that regulatory mechanisms are encouraged to publish adequate information that enhances public confidence in the regulatory process.

Chapter 8: Conclusion

I. Introduction

This Chapter will conclude the study by summarising key research findings in relation to the research objectives and questions. The Chapter will briefly underline the relevance of this study to regulatory reforms in India. It will outline key recommendations for strengthening regulatory regimes in India and the UK. The Chapter reflects on the key challenges to regulatory reform in India and the UK. In the concluding sections, the Chapter will briefly emphasise the contribution of the study, review its limitations, and propose opportunities for future research.

II. Do regulatory mechanisms in India and the UK uphold judicial independence and effectively enforce the standards of judicial conduct?

India

Empirical data showed that the in-house mechanisms, both for the higher and subordinate judiciaries, do not adequately safeguard internal and individual judicial independence. Empirical evidence rejected the hypotheses that the in-house mechanisms in India uphold judicial independence; and that the key stakeholders of judicial administration – judges, lawyers and academics – show a 'high level of confidence' in the efficacy of the in-house mechanisms in upholding judicial independence. On the contrary, the evidence demonstrated that there is a weak correlation between the hypotheses and the views of the respondents. On the question of vigilance mechanisms' efficacy in upholding judicial independence, the mean value across three groups remained low (5.30; n = 100; on a scale of 1-10), signifying the low confidence of the respondents.

The respondents did not show confidence in the in-house mechanisms' ability to effectively enforce the standards of judicial conduct. For example, the analysis showed that vigilance mechanisms lack robust organisational structure, adequate resources, powers, and functional autonomy. The absence of a comprehensive legal framework is also the key weakness that has allowed the vigilance mechanisms to function informally and opaquely, which, as empirical evidence showed, has undermined the confidence of stakeholders in these mechanisms.

The mechanisms are overly dependent on senior judges. However, there are no accountability provisions for the disciplinary authorities (senior judges) and vigilance officers. As there is no institutionalised approach to judicial conduct regulation, the mechanisms mostly operate at the whims of the Chief Justice of the High Court or senior judges of the High Courts. The *informality* and *ad hocism* of the regulatory process has led to accountability overload for the subordinate court judges. The in-house procedure for the higher judiciary also exhibited similar flaws. The mechanism is not independent. It exists only to support the CJI in the discharge of his/her disciplinary functions; it is informal, *ad hoc*, and opaque. Therefore, the in-house mechanisms, both for the higher and subordinate judiciaries, fail to effectively enforce the standards of judicial conduct.

The United Kingdom

The project aimed to answer the research question with the help of comparative and critical analyses of the regulatory architecture in the UK. The analyses showed that the current regulatory architecture of the UK is a considerable improvement over the previous opaque mechanisms. The current regulatory architectures in the three jurisdictions of the UK have well-defined legal frameworks, organisational structures, and comprehensive schemes of procedures and processes that are administered with the help of a body of individuals from diverse backgrounds. The mechanisms are tolerably open and transparent. The critical analyses show that the regulatory mechanisms have been effective in enforcing the standards of judicial conduct. The mechanisms comply with established disciplinary and investigative procedures and processes; it is also evident that there is a constructive and time-bound engagement between the regulatory mechanisms and the complainants and other stakeholders. Unlike the vigilance mechanisms in India, the regulatory mechanisms in the UK have not been severely constrained by a lack of resources,[1] except for the Judicial Conduct Reviewer in Scotland. Therefore, as the initial assessment suggests, the regulatory mechanisms in the UK are effective in enforcing the standards of judicial conduct.

However, the critical analyses in the preceding Chapters demonstrated that recent legal reforms that have established regulatory mechanisms in the UK do not adequately emphasise

[1] This is not to suggest that the regulatory regimes have been supported with adequate resources across the UK. The regulatory mechanisms, including the JCIO of England and Wales, have resource constraints. However, these resource constraints, compared to India's regulatory regimes, are not acute.

individual and internal judicial independence; the reforms specifically aimed at strengthening judicial institutional independence by separating the judiciary – institutionally and functionally – from the other two organs of the state. As this thesis argues, institutional judicial independence is not the only aspect that requires safeguards against inappropriate influences. The regulatory process may impinge on individual and internal judicial independence if the safeguards are inadequate. The dominant (in some cases, the determinative) role of senior judges in judicial regulation in the UK may adversely impact the subordinate court judges. To address this potential threat to individual and internal judicial independence, the regulatory architecture of the UK should have provided adequate safeguards to minimise the discretionary powers of senior judges with respect to judicial conduct regulation.[2] This critical study, with the help of relevant case studies, has demonstrated that the judiciary in the UK has not developed robust internal mechanisms that could address issues such as abuse of disciplinary discretion by senior judges, violation of regulatory protocols by first-tier bodies, and unfair and inconsistent application of regulatory processes by the investigative authorities.

III. Comparative Analysis of Regulatory Regimes in India and the UK: Key Findings

A. The regulation theory

This research has shown that there is a discernible divergence between India and the UK in their approaches to regulation theory. Whilst the dyadic paradigm (i.e., judicial independence vs judicial accountability) remains a dominant regulation theory in both jurisdictions, as the analyses in previous Chapters have shown, the UK is open to the contemporary regulation theory that recognises the significance of other values (for example, transparency, accountability, and efficiency). The jurisdictions in the UK have embraced contemporary regulatory approaches. This paradigm shift is evident in the constitutional reforms since 2005. This theoretical reorientation has reshaped the regulatory architecture in the UK. As a result, reforms since 2005 have broadened the breadth of judicial accountability; there has been a renewed emphasis on transparency, openness, and accountability of regulatory regimes.

[2] International Bar Association 'Maintaining judicial integrity and ethical standards in practice,' (2021) *IBA Judicial Integrity Project* 151-52.

In contrast, India has firmly embraced an archaic regulatory theory that regards contemporary judicial accountability needs as antithetical to judicial independence. There has been an overwhelming emphasis on institutional judicial independence, whereas judicial accountability has been almost completely ignored. As analysed in Chapter 4, in India, judicial independence has been construed to mean judicial self-regulation without any external oversight. As a result, judicial primacy has been firmly established in the matters of judicial appointments, deployment, and discipline, both for the higher and subordinate judiciaries. This regressive regulatory theory has been the edifice of ineffective, informal, *ad hoc*, and opaque regulatory regimes. Therefore, future regulatory reforms must revisit the prevalent regulatory theory and develop a new theoretical paradigm informed by contemporary regulatory insights, values, and accountability needs.

B. Accommodative judicial regulation

Who guards the guardians? India's regulatory architecture, especially the in-house mechanisms, has a definitive answer to this question. The regulatory framework allows only judges to regulate judicial conduct. The peer review process is the *modus operandi* of judicial conduct regulation in India. In contrast, the regulatory architecture in the UK accommodates the participation of the executive branch and lay persons at the different stages of the disciplinary process. However, there is no uniformity on this among different jurisdictions within the UK. For instance, whilst the Lord Chancellor (LC) has a joint responsibility in judicial conduct regulation in England and Wales, whereas in Northern Ireland (NI), for the most part, judicial discipline is exclusively enforced by the judiciary. In Scotland, the participation of the executive branch and laypersons is limited to complaints raising fitness to judicial office questions. Although there are notable divergences in the regulatory practices within the UK, there is nonetheless wider participation. The participation of lay persons, the executive branch, the Judicial Appointments Ombudsman (NI) and lawyers (Scotland) enhances the legitimacy, transparency, and accountability of the regulatory regimes.

C. The role of senior judges

The in-house mechanisms of India are the least collaborative, as only senior-most judges have a role in matters of judicial regulation. Among the jurisdictions under study, E&W emerges as

the most accommodative regulatory regime, although the extent to which the LC plays an effective role in judicial conduct regulation is unclear. Whereas in Scotland, the determinacy of senior judges is qualified only by a few exceptions, the dominance of the executive branch with respect to complaints raising the fitness for judicial office is a notable anomaly. In other words, Scotland has not found the right balance. Ideally, regardless of the judicial hierarchy or type of complaint, both the judiciary and the executive branches should have played a constructive role in judicial regulation. The regulatory architecture of NI is closest to India's. The disciplinary determinations of the JCJ(NI) are final, except for senior judges above the rank of the High Court judges.

The dominant or determinative roles are indicative of the uninhabited discretionary powers of the senior-most judges in the respective jurisdiction. As has been demonstrated in the previous Chapters, the uninhabited discretionary powers are further delegated to the second-tier leadership within the judiciary. Therefore, if these determinative powers are not sufficiently circumscribed, there is a danger that disciplinary processes will undermine individual and internal judicial independence. More importantly, a plenary delegation of supervisory, pastoral, and disciplinary powers on senior judges would lead to conflict between pastoral and other leadership roles of senior judges. This conflict would affect the entire scheme of judicial regulation, not just judicial conduct regulation. Therefore, relevant jurisdictions should develop and implement appropriate safeguards to mitigate potential conflict between the pastoral and other leadership roles of senior judges.

D. Institutional infrastructure and the regulatory remit

As analysed in the preceding Chapters, India and the UK have some notable differences with respect to institutional infrastructure and regulatory remit; in turn, there are differences within the UK. Among the jurisdictions examined, only England and Wales have autonomous regulatory bodies (i.e., JCIO and JACO). In Scotland, only the Judicial Complaints Reviewer is independent of the judicial and executive branches. The first-tier bodies in Scotland, Northern Ireland, and the UKSC are in-house, i.e., these mechanisms are part of the administrative machinery of the judiciary, lacking institutional separation and functional autonomy. The regulatory mechanisms in Scotland, Northern Ireland and the UKSC are organisationally identical to the in-house mechanisms in India – they are composed, administered, and

controlled by the judiciary. However, there are operational differences; the in-house mechanisms of Scotland, NI, and the UKSC have well-defined legal frameworks that clearly outline the regulatory powers, functions, procedures, and processes. In India, the in-house mechanisms lack such a legal framework. Notably, the in-house mechanisms in India mostly function discretely, informally, and opaquely. On the contrary, the in-house mechanisms in the UK, have adopted a more formal and transparent approach to judicial conduct regulation. The autonomous regulatory regime of England and Wales is the most transparent among the regimes examined.

The regulatory regimes in all the jurisdictions of the UK have the remit only over judicial misconduct issues. Not all the judicial misconduct issues are enquired about by these regulatory regimes: complaints alleging mishandling of cases by judges, judicial bias, unfair treatment of parties or witnesses, and violation of recusal norms, among others, are beyond the remit of the regulatory regimes.[3] Whereas in India, the in-house mechanisms have remit over allegations of judicial corruption and misconduct. The remit of India's in-house mechanisms is wider, but considering their organisational inadequacies and infrastructural limitations, it would be effective if the mechanisms focused only on misconduct complaints concerning judges.

E. Review mechanisms

A robust and independent review mechanism is a must for effective judicial conduct regulation. As emphasised in Chapter 7, a robust review mechanism would enhance the trust of judges, complainants, and the public in the regulatory process. It is also essential to hold first-tier regulatory bodies accountable. However, among the jurisdictions under study, only England and Wales have an effective review mechanism. As analysed in previous Chapters, the JACO, despite its limited remit, can exercise effective oversight over the first-tier bodies. On the contrary, the review system in Scotland is inadequate; its powers and remit are limited, resources are inadequate, and the attitude of judicial leadership towards the review has been often antagonistic, whereas NI lacks an independent review system. The UKSC and the in-house mechanisms in India have no formal review mechanisms. The lack of a robust

[3] Judicial Conduct Investigations Office: what can I complain about? <https://www.complaints.judicialconduct.gov.uk/what_can_i_complaint_about/>.

review mechanism is a significant regulatory flaw that the relevant jurisdictions should address.

F. Transparency and accountability of the regulatory regimes

The study finds that among the jurisdictions examined, India has the least transparent and accountable regulatory regimes. Almost nothing is publicly known about the functioning of the vigilance mechanisms. The High Courts do not publish any information on the number of complaints handled by the vigilance mechanisms. Investigative reports and disciplinary statements are also not published. The High Courts do not share the investigation report with the complainants. None of the High Courts publishes data on the number of judicial officers who faced disciplinary sanctions during a calendar year. The in-house committee for the higher judiciary also shares these shortcomings.

Compared to India, the UK has tolerably transparent and accountable regulatory regimes, except for the regulatory regime for the UKSC. Like the in-house mechanisms of India, except for the judicial complaints procedure, nothing is publicly known about the judicial complaints that relate to the UKSC. The UKSC does not publish any data on judicial complaints handled by its in-house regulatory mechanism. Among the jurisdictions examined, England and Wales have the most transparent and accountable mechanisms. As analysed in previous Chapters, the regulatory regimes in England and Wales comply with reporting and publication policies; although, as argued in Chapter 7, the publication policies and reporting policies of E&W need improvements, regulatory mechanisms publish relevant information on the complaints handled.

In NI and Scotland, the commitment to transparency and openness of the regulatory regimes is less apparent; regulatory mechanisms publish some relevant data through annual reports. However, as shown in Chapter 7, the data is insufficient and too abstract to be useful for an adequate understanding of the mechanisms. The JOS and the Complaints Officer do not publish disciplinary statements after the conclusion of investigations. The UKSC, NI and Scotland should cultivate robust accountability practices that inspire public confidence in judicial conduct regulation.

IV. The relevance of the UK's recent regulatory reforms to India

Although India's judiciary operates in different social, legal, political and constitutional contexts, the recent regulatory reforms in the UK offer the same guidance on its future regulatory reforms. The relevance of the UK's regulatory reengineering stems not only from the shared legal heritage or continuing convergence of constitutional values but also because, in recent decades, the normative regulatory theory has moved away from the traditional dyadic approach. It is unsustainable for India's judiciary to continue to embrace judicial primacy in matters of judicial regulation. For the reasons noted in Chapter 2, the conventional dyadic approach has proven to be inadequate. Therefore, a theoretical framework that is informed by and adaptable to contemporary regulatory demands and goals is essential. In India's case, this would mean reimagining regulatory theory beyond the historic, constitutional, legal, social, political, and cultural contexts that have shaped its regulatory architecture. It is in this context that the UK's regulatory reforms since 2005 offer some notable guidance. For instance, the merits of accommodative and collaborative regulatory regimes in the UK, as this study underscores, are self-evident. The conspicuous affirmative effects of independent, robust and specialised regulatory regimes, especially in England and Wales, should appeal and compel policy reassessment in a fellow common law country like India. It is axiomatic that India needs transparent, open and accountable regulatory regimes. In this regard, the constitutional reforms that paved the way for more accountable and transparent regulatory regimes, the secondary legislation that governs the regulatory protocols, and the voluntary accountability initiatives of the regulatory regimes are highly relevant to India.

V. Key recommendations

India

Revisiting the regulation theory

Judicial independence cannot be employed as a pretext to evade judicial accountability. *Judges' cases I, II*, *III* and *the NJAC* case reflect an overzealous approach to securing and strengthening institutional independence at the cost of judicial accountability, efficiency, and transparency. Unless this misunderstanding of 'judicial independence' and neglect of other foundational values is addressed at the policy level, the accountability deficit, regulatory

failures, and erosion of judicial integrity cannot be effectively addressed. Therefore, India must review the prevalent regulatory theory and develop a new theoretical paradigm that is informed by contemporary regulatory insights, values, and accountability needs.

Revisiting the constitutional scheme

The Constitution entrusted Parliament with regulating judicial conduct in the higher judiciary.[4] However, for the reasons noted in Chapter 4, Parliament has failed to establish a robust regulatory framework to deal with judicial conduct regulation. The removal procedure provided in the Constitution has proved to be too rigid and long-winded to be effective. Whereas the in-house procedure, which was conceived to be an alternative means of enforcing judicial conduct, has been ineffective. Against this backdrop, India should revisit its Constitution. The Constitution should be amended to establish an independent and robust regulatory regime to investigate judicial complaints and advise the President of India on appropriate disciplinary measures with regard to the judges of the SC and HCs. Such a regulatory regime should comprise people of diverse backgrounds, including judges, lawyers, members of the executive branch, civil society, and laypeople.

Articles 124 and 217 of the Constitution should be amended to facilitate the establishment of independent judicial conduct regulation regimes.[5] The amendments should also distinguish between instances of 'proved misbehaviour or incapacity' that lead to the removal and other judicial misconduct that warrant disciplinary measures short of removal. Furthermore, the Constitution should provide robust investigation mechanisms for both lower and senior court judges. The reform should outline the remit, composition and investigation procedures for the regulatory regimes. A gradated disciplinary sanction policy proportionate to the severity of the misconduct must also be laid down. The decisions and recommendations made by the regulatory body should be subject to review by the Supreme Court of India. The regulatory framework should operate with transparency and openness, and the specific measures pertaining to transparency and accountability should be expounded upon by Parliament through legislation.

[4] Constitution of India 1950, Art. 124(5).
[5] Articles 124 and 217 provide for the appointment and removal of the Supreme Court and High Court judges, respectively.

The Constitution has entrusted the superintendence and control of subordinate courts to the respective High Courts. The power of superintendence and control has been expanded by the judiciary through various rulings. As a result, in practice, the subordinate court judges work at the pleasure of the High Court (i.e., at the pleasure of the senior-most judges in the High Court). In the matters of appointment, deployment, transfer, promotion, and removal of subordinate court judges, the recommendation of the High Court is binding on the state government. The senior judges' determinant role in judicial regulation, in the absence of robust checks to thwart the abuse of such a role, has emerged as a notable threat to the individual and internal judicial independence of subordinate court judges. Informal, *ad hoc,* and ephemeral accountability measures have led to accountability overload. The reforms should address these concerns by establishing independent and robust regulatory regimes and review mechanisms for the lower judiciary.

Comprehensive legal framework and judicial conduct codes

India's regulatory frameworks have a piecemeal and exiguous legal framework. The powers, functions, procedures, and practices of in-house mechanisms are not clearly prescribed. The role of the investigating and other senior judges in judicial conduct regulation has not been defined and circumscribed. Similarly, the policies relating to judicial complaints, the remit of the in-house mechanisms and the imposition of disciplinary sanctions have not been adequately outlined. In addition, there are no judicial conduct codes for subordinate court judges and court staff. The Restatement of Judicial Values 1997, which applies to the SC and HCs judges, is too abstract to be useful. Therefore, there is a need for a comprehensive legal and policy infrastructure to guide regulatory mechanisms. In line with the Bangalore Principles of Judicial Conduct 2002 and international best practices in relevant common law jurisdictions, the judiciary must develop a judicial code of conduct that encompasses both the higher and lower judiciaries. A code of conduct for court staff is also essential. These initiatives will foster integrity, impartiality, independence, professionalism and accountability within the judiciary, ensuring the administration of justice in a manner that upholds public trust.

Adequate emphasis on internal and individual judicial independence

As international standards and best practices presuppose, judicial officers facing disciplinary proceedings should be treated fairly and consistently by independent, impartial, and

competent regulatory mechanisms. The regulatory architecture should also ensure that administrative and supervisory hierarchies within the judiciary do not impinge on the decisional and administrative autonomy of judicial officeholders. Therefore, there should be internal, and where necessary, independent mechanisms to abate the abuse of disciplinary or supervisory powers. However, as shown in this research, India's regulatory architecture lacks adequate safeguards for the individual and internal judicial independence of judicial officeholders facing the regulatory process. Consequently, future regulatory reforms should specifically and adequately safeguard individual and internal judicial independence.

Transparency, openness, and accountability of regulatory mechanisms

India's regulatory mechanisms are averse to transparency and accountability demands. There is a deep-seated belief in the judicial leadership that external participation in judicial conduct regulation would undermine public confidence in the judiciary. For the same reason, the judicial conduct regulation processes are held in secrecy. However, this orthodoxy should give a way to contemporary values of good governance. The regulatory processes must be transparent, and the regulatory authorities, including senior judges, must be held accountable for the abuse of disciplinary powers.

Judicial conduct regulation: looking beyond court judiciary

The in-house regulatory mechanisms of the High Courts have remit over the subordinate court judges that fall within their administrative superintendence and control. Hence, the tribunals (e.g., Administrative Tribunals) and quasi-judicial bodies (e.g., Land Tribunals) and alternative dispute resolution mechanisms like arbitration, mediation, and conciliation that are not subjected to the administrative superintendence of the High Courts are outside the remit of the regulatory mechanisms. The tribunal judiciary and quasi-judicial bodies should also be brought within the fold of the judicial accountability regime. Misconduct issues are equally critical to these alternative justice dispensation mechanisms. Inattention to the irregularities in these institutions seriously undermines the rule of law. Moreover, it increases the burden on state courts as alternative mechanisms face a legitimacy crisis.

The United Kingdom

A. England and Wales

The removal of senior judges: the absence of procedure

In general, England and Wales have a comprehensive legal architecture. However, the legal framework does not provide for the investigation mechanism and procedure in relation to senior judges (i.e., the High Court and Court of Appeal judges). It is unclear whether Parliament should conduct an independent investigation or whether it should act on the investigation report of the JCIO and the recommendation of the LCJ and LC. It is recommended that, as the highest accountability body in the UK, Parliament should not abdicate its powers to review and reconsider the findings and recommendations of the first-tier disciplinary authorities. Parliament's role as an accountholder is the last citadel of fairness, objectivity, proportionality, and consistency in judicial conduct regulation. As demonstrated in this thesis, the conduct regulation regime in E&W is dominated by the judiciary [by senior judges]; the effectiveness of the LC's role in judicial conduct remains unexplored. Therefore, senior judges facing disciplinary proceedings should have the full opportunity – without any presumption in favour of the findings/recommendations of the first-tier body – to prove their innocence in Parliament. Alternatively, England and Wales may adopt a removal procedure similar to that which applies to senior judges in Northern Ireland. Where senior-most judges and lay people constitute a removal tribunal, alongside a first-tier investigation tribunal/panel.

Adequate emphasis on internal and individual judicial independence

England and Wales need robust mechanisms to effectively handle the grievances of subordinate court judges in relation to the abuse of supervisory or disciplinary powers. The allegations of unfair treatment, racism, bullying, mistreatment, and biased leadership should be handled effectively. Recent complaints of 'serious, serial and systemic' failings and widespread claims of bullying and racism[6] point to the lack of robust mechanisms to address such grievances. Therefore, regulatory policy should be revisited to adequately safeguard internal and individual judicial independence, especially of subordinate court judges.

[6] See e.g., Catherine Baksi, 'Judicial appointment system is 'institutionally discriminatory' *The Times* (20 May 2021).

Effective workplace management is of paramount importance to create an inclusive and equitable work environment that is free from discrimination, harassment, retaliation and abuse.[7] As the LCJ and the Senior Tribunals President (STP) hold formal responsibility for the welfare of judicial office holders, it becomes the duty of the LCJ and STP, Heads of Divisions, as well as mid-level and tertiary-level judicial leaders, to safeguard judicial officers from abuse and discrimination at the workplace. In *Gilham v Ministry of Justice,*[8] complaints of bullying and discrimination were deemed unsuitable for the judicial complaints procedure. However, the Judicial Diversity and Inclusion Strategy 2022 now recognises that bullying, harassment, discrimination, abusive conduct, and retaliation by judges against other judges constitute misconduct. Consequently, the JCIO is empowered to investigate complaints alleging such conduct.[9] While it is crucial to establish robust mechanisms for addressing complaints of abuse, discrimination, and racism, relying solely on the JCIO may not be the optimal approach. The latest Judicial Attitude Survey gives some indication as to why recourse to the JCIO may not be effective. A notable percentage of judges reported having experienced bullying, harassment or discrimination. Nevertheless, around 70% of these incidents have gone unreported, and among those that were reported, many were not satisfied with the way the complaint was resolved.[10]

Judges' reluctance to report incidences of abusive, discriminatory and bullying behaviour can be partly attributed to the predominant occurrence of such behaviour from their presiding judge (31%), another judge within their court or tribunal (27%), and a senior judge (22%).[11] It may also be that the Judicial Grievance Procedure, which provides for reporting mechanisms to raise bullying and harassment issues, is ineffective.[12] Raising a complaint, whether formal or informal, against colleagues or senior judges, is not devoid of risk. From the perspective of junior judges, the JCIO may appear to be a complaints-handling agency where the disciplinary protocols and decisions mostly stem from select senior judges. In this sense, the JCIO is not

[7] See generally, United States Courts, *The Judiciary Workforce and Workplace* <https://www.uscourts.gov/statistics-reports/issue-4-judiciary-workforce-and-workplace> accessed 15 June 2023.
[8] [2019] UKSC 44
[9] Judiciary of England and Wales, *Judicial Diversity and Inclusion Strategy Update 2022*, 16; JCIO, What can I complain about? <https://www.complaints.judicialconduct.gov.uk/what_can_i_complaint_about/> accessed 16 June 2023.
[10] Cheryl Thomas, Judicial Attitude Survey 2022: England and Wales (2023) *UCL Judicial Institute*, 60-63.
[11] The percentages for fee-paid judges in England and Wales slightly vary, see *ibid*, 62.
[12] Judiciary of England and Wales, *Judicial Diversity and Inclusion Strategy Update 2022,* 15. Judicial Grievance Procedure Policies are not accessible to the public, they are available only on the Judicial Intranet. See MoJ response to John Roberts' Freedom of Information Request (2019) <whatdotheyknow.com/cy/request/judicial_grievance_procedure_pol#incoming-1470551>

sufficiently removed from the judiciary to be seen as an independent investigative agency. Moreover, the internal reporting mechanisms would be handled exclusively by the judges themselves, whether through a fellow colleague or a designated judicial officeholder. Additionally, substantiating allegations of bullying or discrimination by a judicial colleague or senior judge poses a formidable challenge, as the complainant must provide supporting evidence, which often relies on the willingness of court staff or judicial officeholders to stand against the judge facing the allegation.

To address such complex issues, this thesis proposes a layered approach to regulation. Rather than applying disparate sets of rules to address sensitive judicial complaints, this approach proposes treating each complaint differently based on layered characteristics.[13] The layered approach could be employed to redress complaints relating to sensitive issues such as racism, bullying, discrimination, abuse and harassment by judges against their colleagues and court staff. The layered approach is inclusive – it does not discount the need for judicial education, pastoral intervention and informal and summary complaints redressal methods. It also emphasizes the need for disciplinary, civil and criminal proceedings. However, the decision on which of these formal or informal interventions should be used, would be determined by an independent body comprising judges, representatives of the LC, lay persons and external experts specialising in culture and organisational psychology, workplace management and gender studies. The layered approach would enhance the confidence of lower court judges, female judges and judges from minority communities in raising complaints on sensitive topics against their colleagues or seniors. The layered regulatory approach would serve as a robust safeguard for individual and internal judicial independence. This approach is relevant to all jurisdictions under study.

Fair and consistent application of the disciplinary process

Fair and consistent treatment of complaints, complainants, and judicial personnel is a prerequisite of a robust regulatory regime. The complex and intricate judicial systems of England and Wales having distinct regulatory regimes at various levels is another reason why

[13] Such as (a) the gravity, frequency, pattern, and intent of the alleged misconduct; (b) exaggerating and mitigating circumstances; (c) the availability of evidence; (d) the realistic prospect of conviction on the balance of probabilities; and (e) the immediate and long-term implications of pursuing an informal or formal mechanism of redressal on the complainant and judge facing the allegation, if the complaint does not raise a fitness to judicial office issue.

fairness and consistency in judicial conduct regulation need particular emphasis. However, the disciplinary authorities have failed, on more than one occasion, to apply regulatory protocols fairly and consistently. The mishandling of complaints against Mr Justice Peter Smith, the unjustified suspension of Judge Peter Herbert, and the unfair treatment of Judge Gilham (*Gilham v Ministry of Justice*, see Chapter 2) underline the vulnerabilities of the regulatory architecture of England and Wales. These notable failings, coupled with growing accusations of racism, bullying, and mistreatment of judges by regulatory institutions and senior judges, would undermine public confidence in the regulatory regimes and the judiciary itself. Therefore, regulatory authorities should apply disciplinary protocols fairly and consistently.

Comprehensive and consistent publication and reporting policy

Although England and Wales have the most transparent and accountable regulatory architecture among the jurisdictions studied, there is a need for further improvement. In particular, the publication and reporting policies of the JCIO should be reconsidered. The publication of detailed investigation reports and disciplinary statements would raise the accountability profile of these regimes and strengthen public trust in the regulatory process. Currently, the JCIO only publishes abridged disciplinary statements, without adequate information on the alleged misconduct, the investigations carried out, and the findings. Similarly, annual reports are mostly statistical in nature. Furthermore, as shown in Chapter 7, the reporting policy is inconsistent. In light of these deficiencies, the LCJ and the LC should revisit the publication and reporting policies of the regulatory regimes.

B. Scotland

The need for rationalising uneven regulatory architecture

In Scotland, the Lord President has a decisive role in handling judicial complaints that do not warrant removal from the judicial office. On the contrary, the First Minister plays a dominant role in complaints involving fitness to hold judicial office. It would be ideal if the regulation of judicial conduct regulation were a joint responsibility of the judiciary and executive branches, as is the case in England and Wales. This would mean that the executive branch, along with other stakeholders, should have a meaningful role in judicial conduct regulation, regardless

of the nature of the complaint. Similarly, the judiciary should also have a meaningful role in handling complaints raising fitness to judicial office questions. In this regard, a re-calibration of the regulatory policy is a must. The current regulatory policy is unsustainable, as the allocation of powers and functions is uneven.

Complaints against the Lord President: the need for the complaints procedure

As analysed in Chapter 7, the regulatory architecture of Scotland does not provide for an investigation procedure for complaints against the LP that are not serious enough to require his removal but would merit other disciplinary sanctions.[14] Scotland also has another procedural anomaly – where the allegations do not raise a question concerning the fitness for office of the senior judges – as per the Rules made by the LP in Scotland,[15] the LP has the authority to impose or recommend disciplinary measures. However, when complaints are made against the LP himself/herself, who should recommend disciplinary sanctions? The existing procedural framework does not answer this question. Also, since no first-tier body has the remit over the complaints concerning the LP, the Judicial Complaints Reviewer is precluded from exercising review powers. These regulatory gaps are significant, as they leave the LP office unregulated; therefore, the regulatory framework should provide a disciplinary mechanism to handle and investigate complaints against the LP.

The resolution of judicial complaints against the LP should be entrusted to a panel comprising senior judges from Scotland, England and Wales, and Northern Ireland, as well as an equal number of lay individuals. It should also include a representative of the executive branch and the Bar. To facilitate this process, the initial examination of the complaint can be assigned to the Disciplinary Judge (see Chapter 5), who currently holds the responsibility of administering disciplinary protocols for lower court judges in Scotland. For this purpose, the Judiciary and Courts (Scotland) Act 2008 may be amended.

The need for independent and robust regulatory mechanisms

The regulatory mechanisms in Scotland lack institutional autonomy and functional independence. The LP has near-complete control over the regulatory mechanisms. The

[14] See e.g., Judicial Complaints Reviewer: Annual Report 2012-12, 28-29.
[15] Judiciary and Courts (Scotland) Act 2008, s. 29.

Judicial Office for Scotland (JOS) is part of a larger administrative structure that assists the LP in carrying out his or her administrative and supervisory responsibilities, besides a disciplinary judge. Therefore, as long as the regulatory mechanisms work under the dominance of the chief judge or a few senior-most judges, it is highly likely that they will be perceived as a potential threat to individual and internal judicial independence or overly sympathetic to judges. A more accommodative and collaborative mechanism, having adequate institutional and functional autonomy, should replace the JOS in matters of judicial conduct regulation.

The need for an independent and robust review mechanism

A robust review mechanism in matters of judicial conduct regulation is one of the potent safeguards to internal and individual independence; as Scotland has an in-house complaints mechanism, there is a compelling case for a robust review mechanism. The JCR should be invested with adequate powers and supplemented with adequate resources to mitigate some of the systemic challenges that it is facing.

Transparency, openness, and accountability of the regulatory mechanisms

As analysed in Chapter 7, the annual statistical reports of the JOS are too brief to facilitate an adequate understanding of the judicial complaints process. Unlike the JCIO, the JOS also does not publish disciplinary statements. As often observed by the JCR, the complaints handling and investigation procedures are not meticulously followed. Moreover, there are no mechanisms to hold the concerned disciplinary authorities to account. These fundamental regulatory flaws must be addressed to enhance the efficacy of the regulatory regime in judicial conduct regulation and in protecting individual and internal judicial independence.

The annual reports of the JOS should encompass comprehensive details of its jurisdiction, workload, and outcomes. With the help of illustrative case studies, as has been done by the JACO in England and Wales, the JOS can outline the procedural intricacies of the regulatory regimes in Scotland, which would effectively serve the interests of court users and potential complainants. Moreover, the annual reports ought to incorporate sufficient data about informal disciplinary measures, resignations, and suspensions. Furthermore, upon concluding an investigation, the JOS must publish a disciplinary statement encompassing (a) the circumstances in which the misconduct occurred; (b) the details of the misconduct; (c) the

response of the officeholder; and (d) any aggravating or mitigating factors considered by the disciplinary authority.

C. Northern Ireland

The need for an accommodative and collaborative regulatory architecture

The NI judiciary almost exclusively regulates judicial discipline. Except in the cases of senior judges, almost all disciplinary decisions are made by the LCJ(NI). This judicial exclusivity must give way to more inclusive disciplinary regimes, as collaborative regulatory regimes are better suited to accommodate multiple values that judicial regulation regimes seek to serve. It is in this vein that the executive branch should also bear adequate, if not equal, responsibility in judicial conduct regulation. Similarly, the participation of lawyers and laypeople should not be limited to considering only removal from judicial office issues. All formal disciplinary decisions of the LCJ must be informed by the views of relevant stakeholders in the justice system. Therefore, NI should abdicate judicial exclusivity in favour of a collaborative regulatory architecture.

The need for independent and robust regulatory mechanisms

As in the case of Scotland, NI also has an in-house regulatory mechanism. The Complaints Officer (CO) is a part of the Office of the LCJ(NI). The CO lacks institutional and functional autonomy. There is a need for an independent judicial complaints office. This office should have recommendatory powers in addition to being a facilitator of judicial complaints' investigation. Likewise, with respect to complaints relating to the LCJ(NI), the Complaint Officer's role in handling or investigating such complaints should be dispensed with. The complaints related to LCJ(NI) should also be handled by an independent body. Therefore, NI, despite having fewer judges, requires an independent and robust regulatory mechanism similar to the one in England and Wales.

Adequate emphasis on internal and individual judicial independence

The investiture of disciplinary powers solely in the senior-most judge and their devolution to other senior judges has led to the dominance of senior judges in matters of judicial conduct regulation. This could undermine individual and internal judicial independence, especially in

the absence of a robust review mechanism. Additionally, the increasing role of the judiciary in judicial appointments and administration suggests that it is becoming a self-regulating institution. This institutional transformation could adversely affect mid-level and lower-court judges' judicial and administrative autonomy unless it is adequately safeguarded. Therefore, the regulatory architecture in NI should be revisited to address the inadequacies in judicial conduct regulation regimes and secure subordinate court judges' judicial and administrative autonomy in practice.

Transparency, openness, and accountability of regulatory mechanisms

As analysed in Chapter 7, NI shares similar flaws in its regulatory architecture with regard to transparency and accountability measures. Annual statistical reports issued by the LCJ (NI) office are too brief. Like the JOS, the office does not publish disciplinary statements. The publication of detailed annual reports, disciplinary statements, and press briefs is necessary to facilitate adequate understanding in the general public of the disciplinary mechanisms.

Need for an independent review body

As discussed in Chapters 5 and 7, NI has no separate review mechanism. Reviews are carried out either by the LCJ(NI) herself or by a judicial officeholder nominated by her. This internal review mechanism should be replaced by an independent review body. As the judicial regulation regime in NI is dominated by the judiciary, the internal review arrangement may not be perceived as impartial by the aggrieved party. Although a specialised review body would require additional funding and administrative support, the need for an independent, impartial, and competent review body could not be dispensed with on these grounds, as the confidence of the judicial officeholders and the complainants is paramount.

In NI, there is the Northern Ireland Judicial Appointments Ombudsman (NIJAO) to investigate complaints of maladministration or unfairness alleged to have occurred in the judicial appointments process by the Northern Ireland Judicial Appointments Commission or Committees of the Commission; the Northern Ireland Courts and Tribunals Service; or by the Lord Chancellor in respect of his role in making recommendations for appointment.[16] The

[16] NIJACO: What we do <https://nipso.org.uk/nijao/>

remit of the NIJACO should be extended to cover complaints of maladministration in judicial conduct regulation. This expansion of the NIJAO's remit would entail amending the Northern Ireland Public Services Ombudsman Act 2016 and the CRA 2005.

Like JACO in England and Wales, the NIJAO has correctional, compensating and advisory roles with respect to judicial appointments. It primarily points out a violation of prescribed rules or instances of maladministration in the form of a recommendation. The NIJAO also has the power to propose compensation if a complainant has suffered because of maladministration or mismanagement. In the context of judicial conduct regulation, it is imperative that the NIJAO exercise these powers autonomously, free from external interference observed in England and Wales by the LCJ or the LC.

D. The Supreme Court of the United Kingdom

The need for an independent and robust regulatory mechanism

As analysed in the previous Chapters, the Chief Executive of the UKSC has a critical role in judicial conduct regulation. However, the discretionary power conferred on the Chief Executive may, considering their official subordination and daily interaction with the President and the Deputy President, undermine public trust in the complaint's procedure. Therefore, initial scrutiny and determination on the credibility and substance of the complaint may be made by a committee of justices of the UKSC instead.

Participation of Parliament in judicial conduct regulation

The judicial complaints procedure in relation to the UKSC judges would likely be rarely used. However, this is not a justification for not having a robust regulatory framework. The existing judicial complaints procedure does not provide for a review mechanism. Although the aggrieved party may seek judicial review, such intervention in the case of the UKSC judges would likely undermine public trust in the regulatory process. Therefore, the judicial complaints policy must provide for a robust review mechanism. In the absence of a robust review body, Parliament should have an active role in judicial conduct regulation in relation to the UKSC. An active role of Parliament in judicial conduct regulation would also safeguard

internal and individual judicial independence by thwarting inappropriate influences arising from within or outside the judiciary.

Transparency, openness, and accountability of regulatory mechanisms

The study finds the UKSC's regulatory regime to be the least transparent in the UK. Except for the judicial complaints procedure, almost nothing is publicly known about the complaints mechanism. Unlike the other regimes (namely JCIO, JOS, and Complaints Officer), the UKSC does not publish data on judicial complaints handled by the Chief Executive. Since the initial scrutiny of complaints is done in-house (by the Chief Executive and the President of the UK), the lack of data precludes any assessment of the complaints handling procedure. The UKSC should adopt voluntary accountability practises similar to JCIO's and publish relevant data on judicial complaints. It is essential that the UKSC, as the highest court in the land, led by example by adopting best practices by adequately emphasising the transparency, openness, and accountability needs. Such steps are necessary to enhance public awareness of, and engagement and trust in, the regulatory processes.

VI. Key challenges to regulatory reforms in India and the UK

India

(a) Judicial Politics and Judicial Regulation

In a democratic system, tensions between the judiciary and the other branches of government are not necessarily a cause for concern; however, persistent and ongoing frictions between these branches are.[17] In India, deep divisions between the judiciary and the executive are evident across a wide range of issues pertaining to judicial governance and regulation.[18] The relationship between these two estates is embodied mostly in mutual distrust; there is an unending struggle for supremacy, power and patronage.[19] This relentless

[17] For some points of friction between the judiciary and the executive in India, see Surendra Kumar Yadawa, 'Understanding the Friction Between Executive and Judiciary And Why Collegium Needs More Transparency' *Outlook* (12 March 2023).

[18] As discussed in Chapter 4, there are disagreements on judicial appointment, salary, transfer, confirmation and removal issues *vis-à-vis* courts and government do not agree on funding, court infrastructure and resource allocation. See A P Shah, 'The attack on the last bastion — the judiciary' *The Hindu* (14 December 2022); Ministry of Law and Justice, *National Judicial Infrastructure Authority of India* <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1807611> accessed 15 June 2023.

[19] Bhagwan D. Dua, 'A Study in Executive-Judicial Conflict: The Indian Case' (1983) 23 (4) *Asian Survey* 463-483; Austin, Granville, 'The Judiciary under Pressure', in *Working a Democratic Constitution: A History of the Indian Experience* (Delhi, 2003; Oxford Academic, 18 Oct. 2012), <https://doi.org/10.1093/acprof:oso/9780195656107.003.0017> accessed 14 June 2023; Madhav Khosla, Judicial Accountability and Independence in Niraja Gopal Jayal (ed), *Re-forming India: The*

power struggle is a serious challenge to judicial reforms in India. Unfortunately, judicial leadership have contributed as much as self-serving politicians to this regulatory stagnation.[20] 'For far too long the mantra of judicial independence has been used as a cloak for judicial incompetence, indolence, inefficiency, insensitivity and ignorance'.[21] By establishing self-regulatory models exclusively administered by senior judges, India's judiciary has effectively achieved independence from accountability.[22]

To foster effective regulatory reform, it is imperative to establish a constructive relationship between the judiciary and the executive. The formulation and successful implementation of regulatory reforms necessitate the support of politicians and judges alike. Therefore, as a prerequisite, the government and the judiciary should collaborate, relinquishing outdated conceptions of judicial independence, separation of powers and narrow departmental or personal interests.

(b) The complexity of the reform dialogue

The Supreme Court, particularly the Collegium of the Supreme Court (CSC) and the Chief Justice of India, have disproportionally occupied constitutional space, overshadowing the role of the High Courts. While the CSC consults the High Court Collegiums (HCCs) on matters of judicial appointment, transfer and confirmation, the HCCs cannot be deemed to be representatives of their respective High Courts. The constitutional framework grants regulatory authority to the 'High Court,' which refers to a collective body comprising all the judges of the High Court, rather than just the three or four senior-most judges. Therefore, if the senior-most judges of the Supreme Court were to lead regulatory reforms on behalf of the entire judiciary, they must duly consider the viewpoints of all High Courts, taking into account local necessities and challenges. In a similar vein, the union executive has to take on board the interests and concerns of the state governments, which provide funding and infrastructure for state judiciaries. Moreover, when establishing a regulatory framework for

Nation Today (Penguin Random House India, 2019); Madan B. Lokur, 'The Government Wants a 'Committed Judiciary' – And Could Be Close To Getting One' *The Wire* (13 January 2023).

[20] See Chapters 4 and 5; Badra Sinha, '4 letters, 1 response — how Modi govt's tussle with SC on judge appointments played out over 7 yrs' *The Print* (21 February 2023).

[21] Borrowed from Gee et al., *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP, 2015) 130; the statement is quoted in the context of England and Wales which aptly reflects the realities of judicial politics in India.

[22] Subhankar Dam, 'Why is judicial corruption invisible?' (2022) *Public Law Review* 224.

the judiciary, Parliament should consider the legislative competencies of state legislatures and governors.

The regulatory reform dialogue would be a complex interplay of various interests, aspirations and perspectives. This complex reform dialogue would mature into a robust regulatory architecture only if the judicial leadership and the political executive act in a collaborative spirit and look beyond narrow departmental interests. In this regard, the leaders' reluctance to engage with the executive is unhelpful. Since the National Judicial Appointments Commission (NJAC) was struck down by the Supreme Court,[23] the Collegium has been unwilling to consider further reforms in judicial appointments and conduct regulation.[24] Similarly, the executive's manipulation of the judicial appointment protocol to its advantage exacerbates the power dynamics between the judiciary and the executive.[25] As it stands, neither branch of government is actively pursuing reform; instead, they are exploiting the regulatory void to further their departmental and personal interests.

(c) Constitutional constraints

This thesis recommends independent regulatory regimes for both the higher and lower judiciaries in India for judicial conduct regulation. Implementing this recommendation would require amendments to the constitution. The need for such amendments arises from the fact that the current constitutional provisions do not account for disciplinary measures other than the removal of judges.[26] Furthermore, the Constitution does not explicitly provide for independent investigation mechanisms in cases where judges face allegations of misconduct that may not warrant removal but necessitate proportionate disciplinary measures.

More importantly, under the constitutional scheme, there is no explicit provision empowering Parliament to establish an independent regulatory body for the purposes of judicial conduct regulation. In light of the NJAC ruling, Parliament has to revisit the relevant constitutional and legislative changes. However, this exercise is complicated, as it requires a special (2/3rd)

[23] *Supreme Court Advocates-on-record Association v Union of India*, (2016) 5 SCC 1.
[24] Badra Sinha, '4 letters, 1 response — how Modi govt's tussle with SC on judge appointments played out over 7 yrs' The Print (21 February 2023).
[25] Madan B. Lokur, 'The Government Wants a 'Committed Judiciary' – And Could Be Close to Getting One' *The Wire* (13 January 2023).
[26] Constitution of India 1950, Art 124.

majority in Parliament in support of the amendment and it shall also be ratified by the legislatures of not less than one-half of the states.[27] This rigid and cumbersome amendment exercise requires broad political support both at the union and state levels. Thus, the enactment of regulatory reforms poses a significant challenge that necessitates careful consideration and extensive political backing.

The United Kingdom

(a) Regulatory reforms by the judiciary: a problem of perspective

In all three jurisdictions of the UK, as discussed in Chapters 3 and 5, there is a statutory delegation of rule-making power to the judicial leadership [i.e., the LCJ(E&W), the LCJ(NI) and the LP (Scotland)].[28] Therefore, most of the regulatory reforms would be formulated and implemented by the judicial leadership in consultation with relevant stakeholders. In formulating the regulatory reforms, the judicial leadership [e.g., the LCJ(E&W)] would be relying heavily on the leadership group immediately surrounding them, the civil servants [e.g., the Judicial Office] and arm's length bodies [e.g., JCIO].[29] This heavy reliance is problematic as it would lead to overemphasis on the regulatory perspective that this close-knit and functionally interlocked group would prefer. Moreover, this cohort of regulatory actors is prone to approaching reforms primarily from a managerial standpoint, prioritizing factors like efficiency, cost-effectiveness, responsiveness, and transparency. Consequently, there is a risk of insufficient attention being given to important principles such as individual judicial independence and internal autonomy within the judiciary. The latter values could be underemphasized or overshadowed in the reform process due to the prevailing managerial orientation.

[27] ibid, Art 368(2).

[28] Ministry of Justice, *Judicial Discipline: Response to Consultation* (2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1095699/judicial-discipline-consultation-response.pdf> accessed 17 June 2023.

[29] See, for example, the ongoing regulatory reforms in England and Wales, which are being implemented by regulatory agencies that ought to operate under them. The consultation document states that "[t]he JCIO will now begin the work to produce the new statutory rules and regulations for approval by Parliament." Theoretically, the JCIO, as a key stakeholder, should have been only a consultee, not a formulator and drafter of the rules and regulations that are meant to govern it. However, the drafting of rules precedes a public consultation process. Notably, the rules and regulations made by the LCJ are subject to the negative resolution procedure. It is less likely that these rules will be extensively debated in Parliament. A critical reading of the proposal reveals that there is an overemphasis on enhancing the efficiency and transparency of the regulatory agencies. As a result, the JCIO has been afforded a significant degree of regulatory discretion without adequate checks in place. See Ministry of Justice, *Judicial Discipline: Response to Consultation* (2022) 54.

(b) Regulating delegates

The ever-expanding administrative, supervisory, pastoral and disciplinary roles of the senior-most judges (the Lord Chief Justice in E&W and Northern Ireland and the Lord President in Scotland) are a serious regulatory challenge facing all three jurisdictions in the UK. For instance, in England and Wales, the responsibilities conferred on the LCJ are so extensive that it is 'exhausting even to contemplate.'[30] 'The Lord Chief Justice of England must be, in short, a trade-union official, a charismatic General, Chief Executive Officer, Head of Training, and the foremost Judge. Surely even Solomon would turn down this invitation.'[31] This overwhelming consolidation of various roles/powers means that there will be delegation and further delegation of powers on the mid-level and tertiary-level judicial leadership.

In relation to judicial conduct regulation, there has been a successive delegation of powers; however, insufficient attention has been directed towards ensuring accountability for regulatory failures by the delegates. Over the years, the disciplinary authorities and the JCIO have committed some serious failures and there have been a few instances of maladministration – the JACO annual reports consistently evidence such failures (see Chapter 5, Section II). In cases where serious breaches of prescribed procedures are identified, a mere apology from the JCIO or nominal compensatory measures from JACO would be an inadequate accountability measure. The judicial leadership responsible for judicial conduct regulation in the UK must address this regulatory deficit and take proactive measures to ensure robust collective and individual accountability mechanisms are in place.

VII. Key contributions of the study

India

One of the key contributions of this study is that it highlights the theoretical inadequacies of India's regulatory frameworks. It foregrounds implications of the erroneous interpretation of judicial independence by the Supreme Court of India on regulatory mechanisms in terms of their composition, powers, and functions. The study elucidates that reading 'judicial primacy'

[30] Neil Andrews, 'Judicial Independence: The British Experience', in S. Shetreet and C. Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Leiden, 2012) 365; Graham Gee et. al., *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 130-131.

[31] Neil Andrews, *ibid.*

as an essential aspect of judicial independence, the judiciary has shunned the participation of other stakeholders in judicial regulation. The same rationale has informed the prevailing judicial view that conduct regulation should only be administered through in-house mechanisms. As a result, in-house mechanisms, despite their inherent systemic inadequacies and operational failures, continue to exclusively regulate judicial conduct.

The study, with the help of empirical evidence, refutes the claim that in-house mechanisms are indispensable to regulating judicial conduct. It demonstrates that the relevant stakeholders of the justice system, including subordinate court judges, do not demonstrate high-level confidence in the in-house mechanisms' efficacy in securing judicial independence. These findings emphasise the need for an elementary review of regulatory theory, mechanisms, and protocols. The study emphasises that the regulatory framework should aim to serve all key aspects of judicial independence and accountability; it rejects the overwhelming emphasis on institutional independence. In a similar vein, it argues that the regulatory framework should serve multiple values, not just independence and accountability. These critical reflections and recommendations would serve as a reference point for further research and policy re-evaluation with respect to judicial conduct regulation in India.

The United Kingdom

The study highlights notable gaps in the regulatory theory, mechanisms and practices in relation to judicial conduct regulation in the UK. It points out that the regulatory theory in all jurisdictions of the UK places inadequate emphasis on internal and individual independence. As a result, there are no robust (internal or external) mechanisms to abate the abuse of disciplinary powers by senior judges. The study stresses that the determinative role of senior judges in judicial conduct regulation, coupled with weak review mechanisms (except in England and Wales), impinges on individual and internal judicial independence.

Similarly, as the study underscores, there are notable gaps in judicial accountability frameworks in the UK. For example, the legal framework in England and Wales does not include a procedure for removing senior judges from judicial office. Likewise, there is no mechanism to handle and investigate judicial complaints against the Lord President of

Scotland, unless such complaints raise fitness to judicial office questions. In the case of NI and the UKSC, the subordinate administrative officers are conferred with a critical role in handling and investigating complaints against the President of the UKSC and the LCJ (NI), respectively. As deliberated in the previous Chapter, these regulatory arrangements overlook the need for independent and impartial judicial conduct regulation regimes. Therefore, as this study emphasises, there is a need for revisiting the regulatory policy in line with the recommendations made in this Chapter. Thus, the research findings and policy recommendations of this initial assessment of regulatory regimes would inform further research and reassessment of regulatory policy in the UK.

VIII. Limitations of the research and recommendations for future research

India

As stated in Chapter 1, the empirical analysis of in-house mechanisms is limited by the number of responses received. Although the responses provided by the subject expert were detailed and facilitated a critical analysis of the regulatory regimes, the results of the quantitative analysis may vary with an increase in the number of responses. There is also a need to broaden empirical research. A comprehensive evaluation of regulatory regimes necessitates the inclusion of perspectives and experiences from a good number of complainants, judicial officers facing the disciplinary process and authorities administering the disciplinary protocols. Similarly, it is of utmost importance to engage with litigants and court users to gauge the efficacy of regulatory mechanisms in upholding standards of judicial conduct. In the context of this thesis, India's regulatory mechanisms are examined based on inputs from a rather limited group of subject experts and a constrained number of responses. Consequently, future research endeavours should aim to consult a wider and more diverse pool of subject experts to ensure a more robust critical analysis of the regulatory regimes.

The study highlights the commonalities and differences in regulatory regimes between the UK and India and analyses these regimes within their respective contexts. However, the study examines in-house mechanisms operating at the High Court level, which are not uniform. Consequently, some minor divergences may have been overlooked in the analysis. This limitation is partly unavoidable, as the study aimed to provide a thematic analysis of the regimes, rather than a detailed discussion of all similarities and divergences. To address this

limitation, future research should conduct jurisdiction-specific analysis of in-house mechanisms to provide a more comprehensive understanding of the strengths and weaknesses of regulatory regimes. Such an approach would offer a granular-level understanding of judicial conduct regulation regimes.

The United Kingdom

Although the initial assessment suggests that UK regulatory regimes effectively regulate judicial conduct, a thorough empirical and qualitative review is necessary to determine their effectiveness in safeguarding individual and internal judicial independence. To achieve this, the review should audit the perceptions and experiences of relevant stakeholders in the judicial administration, including subordinate court judges.

Furthermore, although the study identifies significant gaps in the judicial accountability framework in the UK, a detailed analysis is required to determine how these regulatory gaps impede judicial conduct regulation. It is also essential to investigate the relationship between conduct regulation and other regulatory matters, such as judicial appointments, appraisals, and promotions, to underscore the importance of judicial conduct regimes beyond conduct regulation.

Finally, the study's thematic analysis of regulatory mechanisms across the three UK jurisdictions did not highlight minor similarities and differences among these mechanisms. Similarly, jurisdiction-specific peculiarities were not explored in detail to maintain the comparison's asymmetry. However, such peculiarities merit in-depth analysis, such as the role of the LC in the regulation of judicial conduct in England and Wales. Jurisdiction-specific studies or structured comparative analyses in the future could address these gaps.

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