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Conceptualising Judicial Independence and Accountability from a Regulatory Perspective

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Abstract
This article builds on a comparative study of judicial conduct regulation regimes in India and the United Kingdom. It critically assesses judicial independence and accountability from a regulatory perspective. The article argues that judicial independence and accountability have three essential dimensions: individual, internal and institutional. Therefore, the legal frameworks that set up and support regulatory regimes must adequately emphasise all three dimensions. However, the legal frameworks in India and the UK mostly focus on institutional independence, underemphasising individual independence in the process, while internal judicial independence has been a vanishing point of jurisprudence in both jurisdictions. Similarly, there are notable gaps in the accountability frameworks of both countries.

Keywords
judicial independence, judicial accountability, internal judicial independence, internal judicial accountability, judicial regulation

1. Introduction
There are several conceptions of judicial independence and accountability, as elaborated in this article. Though their contours vary from one jurisdiction to another, judicial independence and accountability aim to ensure access to independent, impartial and competent judicial institutions for all. To this end, judicial independence insulates the judiciary and judicial personnel from inappropriate influences that may undermine their impartiality or the appearance of it. In a narrow sense, the concept entails measures to insulate the judiciary from interference by the electorate, legislature and executive. In a broader sense, the concept requires protection from arguably less powerful forces, such as the media, the Bar, civil society, hierarchies and arrangements within the judiciary and other lobby groups that could detrimentally affect judicial impartiality indirectly or insidiously.[1] Taking into account both senses, this article argues that there are three essential dimensions of judicial independence, each of which has a set of overlapping yet distinct objectives. The first is *institutional* judicial independence, which aims to insulate the judiciary from inappropriate influences

1. See generally Lord Hodge, 'Preserving judicial independence in an age of populism' (Speech at the North Strathclyde Sheriffdom Conference, Paisley, 23 November 2018) <https://www.supremecourt.uk/docs/speech-181123.pdf> accessed 14 December 2022. Unless otherwise stated, all URLs were last accessed 29 December 2022.

emanating from outside the judiciary. The second is *internal* judicial independence, which aims to mitigate inappropriate influences arising from within the judiciary. Third, *individual* judicial independence aims to insulate individual judges from inappropriate influences that would undermine their impartiality or the appearance of it. Judicial accountability, on the other hand, obligates judicial personnel and judicial institutions to comply with voluntary, conventional, professional or legal obligations. The overarching aim of judicial accountability is to ensure that judicial personnel and institutions discharge their duties efficiently, effectively, transparently and in accordance with the law.

Although judicial independence and accountability are two fundamental values informing both the common law and civil law systems, there are other values of equal importance in this context. For example, competence and diligence are no less desirable qualities than the impartiality of a judge. Likewise, the efficiency of judicial institutions is of comparable importance to their accountability, as is public confidence in the judiciary. In reality, judicial administration pursues multiple values.[2] Thus, there is a need for regulatory mechanisms to ensure that these multiple values are realised in the most efficient way possible to serve the overarching purpose: the due administration of justice.[3] However, for effective regulation, values and mechanisms alone are not sufficient. Effective regulation is driven by and dependent on *outcomes*. In addition, effective regulation requires *resources*, and is operationalised through numerous *procedures*, *practices* and *processes*.[4]

Judicial regulation is a dynamic 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.[5]

Although the contemporary paradigms of judicial administration are shaped by the principles of good governance (eg efficiency, accountability and transparency), most academic inquiries into the need for robust judicial regulation mainly emphasise two key variables: judicial independence and judicial accountability. This dyadic paradigm has highlighted the inherent tensions between these values and emphasised the need for reconciliation between the two. This approach has produced, as Dalvin and Dodek note, 'a very rich conceptual and empirical literature'[6] 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 (other than independence and accountability) are subordinate values, which is not the case.[7] Second, it can lead to ideological polarisation, where judicial

2. Richard Devlin and Adam Dodek, 'Regulating judges: challenges, controversies and choices' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016) 9.
3. See generally Ministry of Justice, 'Judicial discipline: Response to consultation by the Lord Chancellor and Lord Chief Justice of England and Wales' (2022) <https://www.judiciary.uk/wp-content/uploads/2022/08/Judicial-Discipline-consultation-response-WEB.pdf> accessed 26 December 2022 [hereinafter, Judicial Discipline: Response to Consultation].
4. See generally Devlin and Dodek (n 2). See also Graham Gee, 'Judicial conduct, complaints and discipline in England and Wales: assessing the new approach' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar 2021) ch 6.
5. For a detailed outline of the salient features of judicial regulation, see Devlin and Dodek (n 2) 3–11.
6. ibid 2.
7. ibid.

reforms are favoured or opposed on an ideological basis, without understanding the need or the context.[8] Third, the dyadic approach does not adequately address the complexity of regulatory regimes. Judicial regulation, as noted already, 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 (which can be broadly termed regulatory purposes) without compromising the objectivity, fairness 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 dyadic approach does not adequately address the complexity of regulatory regimes.

As Devlin and Dodek rightly argue, the 'renovation and modernisation' of the dyadic approach with an adequate emphasis on the 'normativity, complexity, contextualism, hybridity and flux'[9] of judicial regulation is essential to explore regulatory mechanisms, protocols, conventions and procedures as an essential part of twenty-first century public law.[10] This new analytical framework proposed by Devlin and Dodek may be termed the *regulatory approach*. The novelty of the regulatory approach lies in its emphasis on the goals, outcomes and implications of judicial regulation, an emphasis that may be broadly termed *regulatory perspective*. The regulatory approach places *regulatory practices* at the heart of the analysis, avoiding undue emphasis on the theory that underpins the regulatory architecture. The constitutional and legal framework and the theoretical underpinnings are important, but so are the regulatory mechanisms, procedures, processes and practices. In this sense, the regulatory approach is outcome-driven, not exclusively driven by ideology or values. 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. This approach enables, *inter alia*, a critical assessment of the implications of regulatory regimes for judicial independence, accountability and competence.

This article revisits two particularly dominant values – independence and accountability – from a regulatory perspective. More specifically, this article 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 is less effective for regulatory purposes.[11] Therefore, this paper analyses the two values to examine if they are adequately conceptualised to serve regulatory purposes in India and the UK. An exhaustive analysis would be too broad to be covered in a single journal article. Therefore, this article adopts a narrower focus, concisely examining the judicial independence and accountability paradigms in India and the UK by exclusive reference to the subordinate judiciary (the courts below the superior courts).

The special emphasis on the subordinate judiciary is due firstly to the fact that academic inquiries mostly focus on the higher judiciary in their assessment of the judicial independ-

8. *Id.*
9. ibid 5.
10. Richard Devlin and Sheila Wildeman, 'Introduction: disciplining judges – exercising statecraft' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar 2021) 1, 2.
11. Devlin and Dodek (n 2) 2–3; Francesco Contini and Richard Mohr, 'Reconciling independence and accountability in judicial systems' (2007) 3(2) *Utrecht Law Review* 26, 27–29.

ence paradigm in India and the UK. Academic inquiries tend not to look beyond constitutional or public law perspectives on judicial independence, separation of powers, the rule of law, checks and balances and judicial appointments. Topics such as judicial ethics, administrative arrangements within the judiciary, and judicial conduct regulation regimes have not been comprehensively studied from a regulatory perspective.[12] Needless to say, these topics have implications for judicial independence and accountability at all levels of the judiciary.[13] Second, though the role of apex judicial institutions is not less significant, the lower judiciary is the real face of the judiciary for the majority of litigants.[14] Therefore, judicial independence and accountability discourses should also focus on the issues and challenges facing the lower judiciary. Finally, subordinate court judges are the ones who mostly endure regulatory oversight. Therefore, the regulatory arrangements and their implications for judicial independence should be viewed from the perspective of subordinate court judges.

The paper proceeds as follows. Section 2 provides a brief conceptual analysis of judicial independence, outlining each of its three core dimensions, with special emphasis on internal judicial independence. Section 3 examines whether India and the UK have adequate measures in place to safeguard all three dimensions of judicial independence. As this article attempts to audit the implications of judicial conduct regulation on judicial independence, the inquiry is critical. Section 3 illustrates that the legal frameworks in India and the UK focus on securing institutional independence and do not adequately emphasise individual and internal judicial independence. This conceptual asymmetry affects the decisional and administrative autonomy of judges and their career status.

Compared to judicial accountability, judicial independence has been adequately theorised, although not all its key aspects are adequately weighed. Judicial accountability is a more contested, imprecise and under-theorised concept.[15] Therefore, section 4 revisits judicial accountability by briefly delineating its evolution from 'accountability' as understood in the sphere of public administration. By briefly foregrounding the key challenges in conceptualising judicial accountability, the section argues that legal frameworks providing for judicial regulation should comprehensively and precisely define the content of judicial accountability. Against this backdrop, section 4 conceptualises judicial accountability from a regulatory perspective. It argues that, like judicial independence, judicial accountability also possesses three key aspects: institutional, internal and individual. The key aspects of independence and accountability have a direct bearing on each other. For instance, individual judicial independence is justified only to the extent that it reinforces impartiality, integrity, competence, efficiency and public trust in judicial personnel. Section 5, with the help of graphs, briefly outlines the congruence and conflicting dimensions of judicial independence and accountability. The section complements section 4 by arguing that robust regulatory mechanisms play a key role in reconciling the conflicting dimensions of judicial independence and accountability. Section 6 concludes.

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12. Graham Gee, 'Judicial conduct, complaints and discipline in England and Wales: assessing the new approach' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges Contemporary Challenges and Controversies* (Edward Elgar 2021) 130, 131–32.
13. Andrew Le Sueur, 'The Foundations of Justice' in Sir Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press 2019) 209, 211.
14. For example, out of 2.9 million cases handled by courts in England and Wales, magistrates' courts alone received 1.13 million cases. 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>.
15. See eg Gabriela Knaul, 'Report of the Special Rapporteur on the independence of judges and lawyers' (UNGA Doc A/HRC/26/32 2014) 10.

2. Understanding Judicial Independence from a Regulatory Perspective

Judiciaries, especially in countries like India, can draw attention to their alleged 'misconduct,'[16] 'corruption,'[17] 'arrogance,'[18] 'getting involved in politics'[19] and administrative incompetence and delays in the disposal of cases.[20] 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 allegedly not sufficiently transparent and accountable.[21] Even in the UK, judges have been exceptionally described as 'enemies of the people'.[22] There are accusations, though rare, of gross misconduct[23] or corruption.[24] Judges in the UK are more routinely accused of trespassing into the realm of politics through activist decisions and excessive judicial review.[25] 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 for judicial independence and accountability. As already stated, the legal framework needs to underscore all core dimensions of judicial independence and accountability. The conceptual foundations of regulatory regimes are causally important for their efficacy; conceptual foundations also set functional and procedural limitations on the regulatory regimes.

2.1 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 influence.[26] Therefore, the concept obliges the State to provide adequate measures, mechanisms, and resources to enable the judicial personnel and the judiciary to avoid inappropriate influences that may undermine (or threaten to undermine) their independence. As noted already, there are three essential aspects of judicial independence: institutional, individual and inter-

16. Jeffrey Gettleman, 'India's Chief Justice Is Accused of Sexual Harassment' *The New York Times* (New York, 20 April 2019).
17. The Invisible Lawyer, '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] <https://www.lawyerscollective.org/wp-content/uploads/2018/04/watermarked_impeachment-motion-dipak-misra.pdf>.
18. Alok Kumar, 'Kalikho Pul Suicide: Clumsy Handling Hurts Supreme Court's Image' *The Quint* (Delhi, 24 February 2017).
19. 'In Unprecedented Move, Modi Government Sends Former CJI Ranjan Gogoi to Rajya Sabha' *The Wire* (New Delhi, 16 March 2020).
20. K Shankar, 'Why Justice is delayed' *The Hindu* (Chennai, 2 February 2020).
21. Anjana Prakash, 'The Gogoi Case and After: For the Sake of Justice, India's Judiciary Needs Urgent Reform' *The Wire* (New Delhi, 4 June 2019).
22. 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* (Essex, 4 November 2016).
23. Sebastian Murphy-Bates, 'High Court judge who complained about his lost luggage during £3 billion British Airways case retires a week before disciplinary case' *Daily Mail* (Essex, 28 October 2017).
24. Mary Dejevsky, 'Serious corruption has happened in our justice system – and the penalties could stand to be harsher' *Independent* (Essex, 14 October 2015).
25. See eg John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (2019) *Policy Exchange* 5–6, 9.
26. Swart defines judicial independence as '…the ability of individual judges and the judiciary as a whole to perform their duties free of influence or control by other actors': Mia Swart, 'Independence of the Judiciary', *Max Planck Encyclopaedia of Comparative Constitutional Law* (1 March 2019).

nal. However, traditionally, only two aspects – institutional and individual – are emphasised in both international and domestic law.[27]

There are three key reasons why internal judicial independence has received inadequate attention in the UK. First, judicial independence has been almost exclusively viewed from a separation-of-powers perspective.[28] Separation of the judiciary from the other two branches of government has been considered quintessential for the independence and impartiality of the judiciary.[29] Therefore, judicial reforms in the UK have focused more on the institutional and functional separation of judicial institutions from the other two branches.[30] This is also true for India.[31]

The second reason is that the idea of judicial self-governance – seeking greater control of the judiciary in judicial administration – was not prevalent until the late twentieth century.[32] As a result, judicial administration, especially in the UK, was almost exclusively run by the government (for example, by the Lord Chancellor in England and Wales). Therefore, the higher echelons of the judiciary have had limited administrative and supervisory roles. Consequently, internal arrangements within the judiciary did not matter much from a judicial independence perspective. However, a paradigm shift has occurred in the wake of the Constitutional Reform Act 2005 (CRA), as elaborated in section 3 of this article. Now, senior judges across judicial hierarchies in the UK have key roles in judicial administration, and the judiciary is progressively moving towards self-regulation. However, judicial reform initiatives have continued to view judicial independence from a separation of powers and rule-of-law perspective.[33]

Arguably, the participation of senior judges in matters of judicial administration (for example, judicial appointments) would strengthen the institutional independence of the judiciary. However, where senior judges have the authority to make consequential decisions in matters of judicial appointments, promotion, deployment, training, discipline and welfare, the autonomy of less senior judges would suffer,[34] especially where senior judges have

27. See eg Lord Hodge (n 1). There are only relatively brief references to internal judicial independence in international instruments on judicial independence: see eg the Bangalore Principles of Judicial Conduct 2002, the Universal Charter of the Judge 1999 and Article 9 of the Mount Scopus International Standards of Judicial Independence 2008.
28. Sue Prince, 'Law and politics: upsetting the judicial apple-cart' (2004) 57 *Parliamentary Affairs* 288, 293; Roger Masterman and Colin Murray, *Constitutional and Administrative Law* (3rd ed Cambridge University Press 2022) 418–422.
29. Prince (n 28) 293.
30. Lord Judge, 'Constitutional Change: Unfinished Business' (Lecture at University College London Constitution Unit, 4 December 2013) paras 16–18.
31. 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 <https://doi.org/10.1080/24730580.2022.2068887>.
32. See generally Katarína Šipulová, Samuel Spáč, David Kosař, Tereza Papoušková and Viktor Derka, 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary' (2022) *Regulation & Governance* 13–14 <https://doi.org/10.1111/rego.12453>; David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) 19(7) *German Law Journal* 1567 <https://doi.org/10.1017/S2071832200023178>.
33. Justice Thomas, 'Judicial independence in a changing constitutional landscape' (Speech at the Commonwealth Magistrates' and Judges' Association, London, 15 September 2015) 1–8; Robert Hazell, 'Judicial Independence and Accountability in the UK' (2014) <https://discovery.ucl.ac.uk/id/eprint/10051317/1/Hazell_Law%20CLEAN%20Aug%202014.pdf>.
34. Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15(7) *German Law Journal* 1257, 1271 <https://doi.org/10.1017/S2071832200019362>.

supervisory or disciplinary roles that are not subject to robust review or external scrutiny.[35] For example, in India the Supreme Court has on several occasions determined instances of abuse of administrative and supervisory powers by the High Courts.[36] Even in the UK, allegations of bullying, discrimination and racism by senior judges have been increasingly reported in recent years.[37]

Although the chilling effects of judicial self-governance are more prominent in India and more frequent in recent years in the UK, there is a reluctance among the legislature and judiciary to address issues concerning 'internal judicial independence' (IJI) as the subject relates to internal arrangements within the judiciary.[38] Therefore, the third reason IJI needs are not addressed by the legislature is that it is a difficult topic. Since it relates to the internal dynamics of the judiciary, politicians are hesitant to openly engage in public conversations. At the same time, 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 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'.[39]

Similarly, in India, the Supreme Court, as early as 1993, established the determinative role of the collegium system for the appointment and transfer of senior judges (ie the High Court and Supreme Court judges).[40] Moreover, the Chief Justice of the Supreme Court exclusively administers the in-house procedure to regulate judicial conduct.[41] The Supreme Court has also recognised similar regulatory roles for High Courts with respect to subordinate court judges.[42] The court has shown considerable resistance to reforms aimed at strengthening

35. Diego García-Sayán, 'Report of the Special Rapporteur on the independence of judges and lawyers' (UN Human Rights Council, A/75/172 2020) 11, para 38; Leandro Despouy, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development' (UNGA Doc A/HRC/11/41 2009) 18–19, para 61; Basic Principles on the Independence of the Judiciary 1985, Principle 20.
36. See generally Huchhanavar (n 31). See also following determinations: abuse of disciplinary powers by the High Court in *Abhay Jain v The High Court of Judicature for Rajasthan,* MANU/SC/0327/2022 and *Krishna Prasad Verma v State of Bihar*, MANU/SC/1364/2019; disciplinary proceedings for alleged judicial error in *Lunjarrao Bhikaji Nagarkar v Union of India*, (2000) ILLJ 728 SC; unjustified strictures against lower court judges in *Alok Kumar Roy v Dr S.N. Sharma* [1968] 1 SCR 813; *Braj Kishore Thakur v Union of India* [1997] 2 SCR 420; *Kashi Nath Roy v The State of Bihar* [1996] CriLJ 2469.
37. Peter Herbert, 'Response to the Draft Recommendation of the Disciplinary Panel to the Lord Chief Justice and Lord Chancellor' *Society of Black Lawyers* (undated) 51–113 <https://societyofblacklawyers.co.uk/wp-content/uploads/2017/01/Recorder-Peter-Herbert-OBE-final-panel-report.pdf>; Catherine Baksi, 'Judges owed a duty of care, the government concedes' *Law Gazette* (London, 23 July 2021); Jo Faragher 'Judicial appointments system failing ethnic minorities' *Personnel Today* (Shropshire, 26 April 2021).
38. Jack Beatson, 'Judicial Independence and Accountability' (Speech at Nottingham Trent University 16 April 2008) 12.
39. Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 64.
40. *Supreme Court Advocates on Records Association v Union of India* (1993) 4 SCC 441. In this case, the Supreme Court of India ruled that recommendations of the Chief Justice of India (CJI) with respect to judicial appointments and transfers, made in consultation with the other senior-most judges of the Supreme Court, are binding on the government. In other words, no appointments to the Supreme Court of India and the High Courts can be made without the concurrence of the collegium of senior-most judges, headed by the CJI.
41. *Ms. X vs Registrar General* (2015) 4 SCC 91.
42. On the High Court's power of transfer, promotion and confirmation, see *State of Assam v Ratiga Mohammed* (1968) ILLJ 282 SC; *State of Assam v S.N. Sen* (1971) 2 SCC 899; *Chief Justice of Andhra Pradesh and Ors. v L.V.A. Dixitulu* (1979) 2 SCC 34.

internal judicial independence, and it has thwarted any attempt by Parliament to repeal judicial primacy in this arena.[43]

Therefore, even though there is a growing emphasis on securing internal judicial independence elsewhere,[44] the topic has not been properly addressed at the policy level in either India or the UK. However, the lack of adequate measures to uphold 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 article provides a brief conceptual analysis of judicial independence, with a special emphasis on internal judicial independence.

2.2 Institutional judicial independence

Institutional judicial independence aims to insulate the judiciary from all forms of inappropriate influences arising from nonjudicial actors that undermine or threaten to undermine its ability to perform its role in accordance with 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 interference. Nonjudicial actors may include the executive branch, Parliament, mass media, civil society, or parties to a dispute over which a court has to adjudicate. Inappropriate influences include any inducements, pressures, threats or interference, 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 sociocultural context, should have adequate measures to insulate the judiciary from extraneous influences. Cox aptly summarises some of 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 organisation or jurisdiction of the courts for the purposes of controlling their decisions on constitutional questions.[45]

To safeguard its institutional independence, the judiciary should additionally have the power to punish for contempt of court, and it should have financial security and meaningful participation in judicial administration. Likewise, there should be independent oversight mechanisms to regulate judicial conduct.[46]

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43. See eg *Supreme Court Advocates-on-Record Association v Union of India* (2016) 4 SCC 1, in which the SC struck down a constitutional amendment that provided for the National Judicial Council for judicial appointments and removal, finding it inconsistent with judicial independence.
44. David Kosař, '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(1) *European Constitutional Law Review* 96, 114–22 <https://doi.org/10.1017/S1574019616000419>.
45. Archibald Cox, 'The Independence of the Judiciary: History and Purposes' (1995–96) 21(3) *University of Dayton Law Review* 566.
46. International instruments on judicial independence prescribe various measures to secure and safeguard judicial independence. See eg the Mount Scopus International Standards of Judicial Independence 2008.

2.2.1 Individual judicial independence

Individual judicial independence aims to protect judicial personnel from all forms of inappropriate influences arising from their conduct or from the outside that undermine or threaten to undermine their ability to perform their duties in accordance with the oath of office, terms and conditions of service, and law. Individual judicial independence requires judges to possess certain qualities to exhibit independence and impartiality in the discharge of their duties.[47] The Bangalore Principles of Judicial Conduct list a few of the values expected of a judge, which are 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 is conditioned on the nature of the judicial office they hold. 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, they are expected to conduct themselves 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. For these reasons, the oath of office, the current assignment and terms and conditions of service should be taken into account in outlining the expected standards of judicial conduct or in assessing the conduct of a judge when called in question or in devising measures to secure and uphold individual independence.[48] Moreover, individual judicial 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.

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 apparatus of the court; (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.[49]

2.2.2 Internal judicial independence

Internal judicial independence (IJI) aims to protect 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 emphasises the internal dynamics within judicial hierarchies. The improper pressure could arise from senior judges, colleagues or other judicial personnel. Therefore, IJI aims to insulate the

47. In this sense, judicial independence can be characterised as a state of mind exhibiting independence, impartiality and objectivity. If the judge is biased or corrupt, no amount of institutional insulation would save judicial outcomes from being partisan or prejudicial. Therefore, the ability of a judge to decide cases independently and impartially as per the law and without (undue, inappropriate or illegal) interference from other parties or entities is vital. See generally Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2009) 71. See also Lord Philips, 'Judicial Independence' (Speech at Commonwealth Law Conference, Nairobi, 21 September 2007) 2 <https://www.judiciary.uk/wp-content/uploads/2020/08/lcj_kenya_clc_120907.pdf>.
48. Individual judicial independence is also called behavioural or positive or decisional independence. It is what judges do in the exercise of their adjudicatory powers. See Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64(4) *World Politics* 587 <https://doi.org/10.1017/S0043887112000160>.
49. See generally Diego García-Sayán, 'Report of the Special Rapporteur on the independence of judges and lawyers' (UNGA Doc A/HRC/35/31 2017) para 35; 'Basic Principles on the Independence of the Judiciary' (UNGA Doc 40/32 1985) Preamble.

ability of a judge to perform his duties without regard to administrative hierarchies within the judiciary and, in particular, without interference from senior judges.[50]

Internal judicial independence also implies that the judiciary should treat individual judges 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 they do on the judicial side (unless that judge wilfully contravenes the law) in terms of their 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'[51] to circumvent potential impediments to the administration of justice.

Internal judicial independence is intricately linked to individual judicial independence.[52] It aims to address inappropriate influences within the judiciary to safeguard the decisional autonomy of a judge, which is the essence of individual judicial independence.[53] Unsurprisingly, we can also see a considerable overlap between institutional and internal judicial independence. While institutional independence addresses, not exclusively but mostly, macro-level needs of the judiciary to safeguard judicial independence, internal judicial independence does the same to safeguard the decisional and administrative 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 the internal arrangements of the judiciary would gradually weaken.[54]

The inappropriate internal influences that challenge 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 (or career) of a judge.[55] In *Parlov-Tkalčić v Croatia*, the European Court of Human Rights (ECtHR) highlighted the significance of IJI for judicial impartiality 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 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

50. European Commission for Democracy through Law, 'Report on the Independence of the Judicial System' (2010) paras 68–72. Council of Europe, 'Judges: Independence, efficiency, and responsibilities' (2010) CM/Rec 12, 9, para 22.
51. Lord Mackay, cited in Tom Bingham, *The Business of Judging: Selected Essays and Speeches, 1985–1999* (Oxford University Press 2011) 55.
52. Kosař (n 44) 114–123.
53. 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.
54. Lord Judge, 'Constitutional Change: Unfinished Business' (Lecture at University College London Constitution Unit, 4 December 2013) para 7.
55. Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' (2019) 15(1) *European Constitutional Law Review* 104, 113 <https://doi.org/10.1017/S1574019619000014>.

> an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.[56]

The actual exertion of inappropriate influence by senior colleagues or court officials is not always necessary to breach this element of judicial independence. It is sufficient if the potential threat to decisional autonomy is, to paraphrase the ECtHR, capable of generating latent pressures resulting in judges' subservience to their judicial superiors or making individual judges reluctant to contradict their senior's wishes, that is to say, of having chilling effects on the judges' internal independence.[57] Where senior judges play a dominant role 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. In such a scenario, judicial independence measures that mainly stem from the separation-of-powers theory would be inadequate to safeguard judicial independence. When a senior judge or official within the judiciary has such a dominant role (in the absence of external oversight or adequate internal mechanisms to prevent inappropriate influences), it calls into question whether individual judges 'hold a sufficiently autonomous position within the judiciary'.[58] Furthermore, because inappropriate interferences come from within the judiciary, especially where there are no robust mechanisms to address such interferences, judges cannot defend themselves.[59]

Judicial conduct regulation regimes, particularly those that are almost exclusively administered by the judges themselves (as is the case, for example, in Scotland, Northern Ireland and India), have to guard judicial independence from a potential threat that might arise from within. In the words of the Consultative Council of European Judges, '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'.[60] When senior judges play critical roles in judicial conduct regulation, their 'attitude' and application of disciplinary protocols will have implications for how judges perceive regulatory regimes. The supervisory or disciplinary powers of senior judges can also impact the performance of junior judges on both the judicial and administrative sides. Therefore, the unchecked disciplinary power conferred on senior judges could undermine individual and internal judicial independence.

3. Do India and the UK have Adequate Measures of Institutional, Individual and Internal Judicial Independence?

Judicial independence is not a privilege of the judiciary and judicial personnel,[61] it is a fundamental constitutional value that aims to secure an independent, impartial and efficient judicial system for all. Therefore, the judiciary as a public institution and judicial personnel as public officeholders must be accountable. This means that there will be legitimate

56. No 24810/06 (ECtHR 22 December 2009) [86]. See also Sillen (n 55) 109.
57. *Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009) [91].
58. Sillen (n 55) 106.
59. Consultative Council of European Judges (CCJE), 'Preventing corruption among judges' (CCJE Opinion No 21, 2018) para 16.
60. CCJE, 'On Standards concerning the Independence of the Judiciary and the Irremovability of Judges' (CCJE Opinion No 1, 2001) para 66.
61. See generally Sir Igor Judge, Evidence to House of Commons Select Committee on the Constitution (1 May 2007, answer to Q 379) <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/7050102.htm>.

demands, pressures or influences that the judiciary and judicial personnel cannot evade, using judicial independence as a shield. However, before we examine the role and responsibilities of judges and the judiciary from accountability perspectives, it is important to audit whether the jurisdictions under study (the UK and India) have adequate measures that safeguard all three key aspects of judicial independence. This inquiry is critical for three key reasons: (a) as already noted, both India and the UK view judicial independence, almost exclusively from the separation of powers standpoint; (b) judiciaries in both countries play a dominant role, particularly in judicial (conduct) regulation, and (c), especially in the UK, some significant reforms have been made since 1997, among others, to strengthen judicial independence. Therefore, a comprehensive assessment of the legal frameworks is necessary to see if they adequately protect all three dimensions of judicial independence.

3.1 England and Wales

Individual independence of the judges in the UK is supplemented by statutes, common law and constitutional conventions.[62] As per the Act of Settlement 1701, judges hold office on good conduct and not at Royal pleasure.[63] It means judges have security of tenure – they cannot be removed on a whim by the executive branch or by their judicial superiors; senior judges can only be removed from office upon the address of both houses of Parliament.[64] The Act of Settlement also provides that judges' salaries be ascertained and established. Judicial immunity from civil and criminal liability is also guaranteed.[65] A constitutional convention insulates judges from direct and personal criticism by members of the executive branch;[66] 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.[67]

In addition to the 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. Prior to 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 at the same time, the Speaker of the House of Lords and a member of the Prime Minister's cabinet as a departmental minister.[68] The office of Lord Chancellor served as an archetypal example of the lack of strict separation of powers in the UK.[69] 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 the England and Wales judiciary, the Appellate Com-

62. Masterman and Murray (n 28) 273–75, 413–29.
63. Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press 2010) 209.
64. Senior Courts Act, s 11(3).
65. *Anderson v Gorrie* [1895] 1 QB 668.
66. Anthony Bradley, 'Judicial Independence Under Attack' [2003] *Public Law* 397; Committee on the Constitution, *Relations Between the Executive, the Judiciary and Parliament* (HL 2006–07) 17, para 42.
67. *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (25th ed, UK Parliament 2019): 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>.
68. Diana Woodhouse, 'The office of Lord Chancellor: Time to abandon the judicial role – the rest will follow' (2002) 22(1) *Legal Studies* 128–145.
69. Walter Bagehot termed the office of the Lord Chancellor as 'a heap of anomalies'. See Walter Bagehot, *The English Constitution* (2nd ed, 1867) 167 <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf>.

mittee of the House of Lords, and the House of Lords. The Act also formally obliged the LC to uphold and defend judicial independence.[70]

Under the CRA, the Lord Chief Justice (LCJ) is now the head of the England and Wales judiciary.[71] The LCJ is solely responsible for the welfare, training, deployment, allocation of work and guidance of the judiciary.[72] The LCJ has a key role in judicial appointments.[73] Judicial discipline is now a joint responsibility of the LCJ and the LC.[74] Court services are now run as a partnership between the executive and the judiciary.[75] As the CRA transferred some of the significant powers to the LCJ, the judicial leadership has been diversified. The Judicial Executive Board (JEB)[76] and the Judges' Council[77] headed by the LCJ assist the LCJ in managing the latter's responsibilities.[78] To assist the LCJ and the LC in matters of judicial discipline, the LCJ has established the Judicial Conduct Investigations Office (JCIO). The CRA also provided for a Judicial Appointments and Conduct Ombudsman, who acts as a review body for complaints relating to judicial appointments and discipline. Additionally, the CRA established the Supreme Court of the United Kingdom (SCUK).[79]

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 has strengthened institutional judicial independence to a considerable extent. The establishment of autonomous regulatory institutions, namely the Judicial Appointments Commission (JAC), JCIO and JACO, has further strengthened institutional judicial independence. Similarly, the participation of the judiciary (senior judges) in judicial administration has been significantly expanded. On some issues, the CRA confers a determinative role on the judiciary (eg judicial conduct regulation). However, there are areas of concern. For example, the financial and administrative concerns of judiciaries in the UK (England and Wales, Northern Ireland and Scotland, including the Supreme Court of the United Kingdom) have not been addressed satisfactorily; judiciaries across the UK continue to operate in challenging funding and administrative environments.[80]

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70. CRA, s 3.
71. CRA, s 7.
72. 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.
73. The Lord Chief Justice has the final say on the appointments of all judges below the High Court. See Courts and Crime Act 2013, Schedule 13, Part 4.
74. Court and Tribunal Judiciary England and Wales, *Judicial Conduct* <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-conduct/>.
75. HM Courts & Tribunals Service Framework Document (2014) para 2.4.
76. The JEB consists of ten senior members of the judiciary and two senior administrators. It meets monthly during term time: <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judicial-executive-board/>. See also Lord Justice Thomas, 'The Position of the Judiciaries of the United Kingdom in the Constitutional Changes Address to the Scottish Sheriffs' (Speech at Association, Peebles, 8 March 2008) 3-5.
77. The Judges' Council represents both court and tribunal judiciaries in England and Wales. It currently 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/>.
78. See further: <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/lord-chief-justice/>.
79. CRA, s 23.
80. See eg Lizzie Dearden, 'Lord Chief Justice warns government over "value of the rule of law" in courts funding plea' *The Independent* (London, 5 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 (London, 9 February 2011).

Even in England and Wales, the judiciary has had to endure a challenging transition period (2005–08) because of budgetary and resource constraints.[81] During the transition years, the LC continued to operate as if he still held primary responsibility for the administration of justice and had sole authority over how resources should be allocated, which caused the judicial leadership to feel overwhelmed by the executive branch. During this period, decisions about judicial administration were made by the executive branch, without consulting the LCJ.[82] Systemic issues, namely crumbling court infrastructure, shortage of judges,[83] and the mounting backlog[84] continue to strain the judiciary in England and Wales;[85] these concerns call into question the efficacy and adequacy of judicial independence measures that the CRA and the Crime and Courts Act 2013 in particular outline.[86] The 'conditions of the judiciary have got worse over the years'.[87]

3.1.1 Challenges to individual and internal judicial independence in England and Wales

While reforms have brought the English and Welsh judiciaries closer to being self-governing institutions, they have also broadened the role of judicial leadership in ensuring judicial independence. The LCJ has a critical responsibility for upholding judicial independence and enforcing judicial accountability. Post-CRA, the role of the LCJ has become more crucial than ever, as the LC can no longer be relied upon to defend and uphold judicial independence. Furthermore, the new responsibilities with respect to deployment, training, discipline and welfare have resulted in the expansion of leadership roles at different levels within the judiciary.[88] As a result, senior judges have gained administrative and supervisory duties, and the scope of leadership roles continues to expand.[89] Therefore, to regulate effectively the hierarchical relationship among judges, there is a need for internal mechanisms to address the concerns of judges on issues that are dealt with by senior judges. However, as illustrated below, in England and Wales there are no effective internal mechanisms to redress the grievances of the lower court judges.

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

Judges in the UK do not have an effective internal forum to address grievances that affect their working conditions and employment rights. For example, in *Gilham v Ministry of Justice,*[90] a district judge complained to the local judicial leadership and senior managers

81. Lord Phillips, 'Judicial Independence', Commonwealth Law Conference (2007) 7–10 <https://www.judiciary.uk/wp-content/uploads/2020/08/lcj_kenya_clc_120907.pdf>.
82. ibid 8.
83. The Lord Chief Justice's Report 2020, 12.
84. Flora Thompson, 'Rape victims "lucky" if their case gets to court within four years, MPs told' *Evening Standard* (London, 1 December 2021).
85. Select Committee on the Constitution, *Legal Services Committee of the Bar Council of England and Wales – Written Evidence* (HL 2019–21) 60; Jonathan Ames, 'Courts reach boiling point during cold snap' *The Times* (London, 2 December 2021).
86. House of Commons Select Constitutional Affairs Committee, *The Creation of the Ministry of Justice* (HC 2006–07 466) Ev 27 ('Judicial independence cannot exist on its own – judges must have the loyal staff, buildings and equipment to support the exercise of the independent judicial function').
87. Le Sueur (n 13) 211. See also Sophie Turenne and John Bell, *The attractiveness of judicial appointments in the United Kingdom: Report to the Senior Salaries Review Body* (2018) 28–30.
88. Now the LCJ is responsible for nominating judges for leadership roles, such as senior presiding judges, the deputy chief justice and the vice presidents of the Court of Appeals. The LCJ also appoints judges to various committees, sub-committees and boards. See Le Sueur (n 13) 217.
89. Cheryl Thomas, 'UK Judicial Attitude Survey 2020: Report of findings covering salaried judges in England & Wales Courts and UK Tribunals' (University College London Judicial Institute 2021) 78.
90. [2019] UKSC 44.

of Her Majesty's Courts and Tribunals Service about a lack of personal safety, inadequate administrative support and heavy workload.[91] 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.[92] 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.'[93]

The district judge had also raised 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.[94] This means that there were no intra-institutional mechanisms to address the issues. The district judge made a two-part claim before the Employment Tribunal. One part of her claim was based on the ground that the judiciary failed to make reasonable adjustments to accommodate her disability needs as per the Equality Act 2010.[95] The other claim was that being a 'worker' she was protected by the whistle-blower provisions in Part IVA of the Employment Rights Act 1996. Both of her claims depended on her being a 'worker' under the 1996 Act. The Employment Tribunal rejected both claims, while the Court of Appeal (CA) allowed her to raise a contention on the ground that the denial of whistle-blower protection was discriminatory and violated her right to freedom of expression [Art 14, ECHR]. However, her claim based on whistle-blower protection was also ultimately rejected by the CA.

In the appeal, SCUK noted that the judges 'are not as well protected against the sort of detriments that are complained about in this case – bullying, victimisation, and failure to take seriously the complaints which she was making.'[96] The court agreed that the issues raised by the judge were related to the violation of articles 10 and 14 of the European Convention on Human Rights. It ruled that judges are entitled to both qualified disclosure and whistle-blower protections. Lady Hale concluded that such protections for 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.'[97]

In April 2021, similar allegations were made by eight anonymous serving judges who asserted that their colleagues had been 'undermined, belittled, or accused of being mentally unstable' for raising concerns about the lack of diversity within the judiciary.[98] In response to increasing pressure, the judiciary has introduced a whistle-blower policy for judges. It is reported that 14 judges have been nominated as 'confidential and impartial points of contact and information'.[99] This is a welcome change. Qualifying disclosure and whistle-blower

91. This matter received extensive media coverage on bullying, racism and the lack of adequate security for the judges. See eg Catherine Baski, 'Judge Claire Gilham "bullied to the brink of suicide" after she raised fears over cuts' *The Times* (London, 11 March 2021).
92. Under s 47B(1) of the 1996 Act, a worker has the right 'not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure'.
93. *Gilham v Ministry of Justice* [2019] UKSC 44, para 7.
94. ibid para 43.
95. ibid para 8.
96. ibid para 26.
97. ibid para 36 (emphasis added).
98. Monidipa Fouzder, '"Undermined, belittled, ostracised": judges to get whistleblowing policy' *The Law Society* Gazette (London, 27 April 2021).
99. *Id.*

protections 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.

The judiciary in England and Wales is also reluctant to address complaints of racism within the judicial fraternity.[100] In recent years, several allegations of racial discrimination have been reported, but responses to these allegations have not been satisfactory.[101] These allegations may be inaccurate or false, but they must be investigated promptly, or else they will form the basis for conjectures that will undermine the public trust in the judiciary.[102] The promotion of diversity within the judiciary is high on the agenda; however, to attract and retain competent judicial personnel from marginalised sections of society, the judiciary should have robust forums to address their concerns.[103]

(ii) Promotion and performance appraisal

Promotion and performance evaluation are long-standing issues in judicial reform in the United Kingdom. Judicial appointees such as circuit judges, recorders, district judges and 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 branches to senior branches.[104] However, it is not that there is no scope for promotion, but hitherto no serious attempts have been made to streamline the complex judicial superstructure to accommodate the progression of competent judicial personnel. Judicial officers are not particularly satisfied with the judicial promotion process. Of the 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. Similarly, 28 judges (of 87) from Scotland and two of seven judges from Northern Ireland felt the same.[105] This is a significant anomaly since the UK ranks high on other parameters concerning judicial independence.[106] There is a need for a robust promotion policy based on the objective appraisal of the performance, expertise, experience and skills of the judges needed for the job. Providing a clear career structure for judges is essential to securing judicial independence.[107]

The latest Judicial Attitude Survey shows that almost two-thirds of judges (61%) in England and Wales thought career progression opportunities were important.[108] A significant portion of judges (43%) felt that career progression opportunities are 'poor' (31%) or 'non-existent' (12%).[109] A significant minority in the judicial hierarchies (from tribunal

100. 'Peter Herbert claimed in his 2015 speech that racism was "alive and well" in the judiciary' *The Guardian* (London, 6 April 2017).
101. 'Three judges sue Ministry of Justice for race discrimination' *The Guardian* (London, 19 December 2017).
102. Ismet Rawat, Association of Muslim Lawyers <https://www.theguardian.com/law/2017/dec/19/three-judges-sue-ministry-of-justice-for-race-discrimination> ('We are aware of a number of BME judges and magistrates that have suffered discriminatory use of misconduct proceedings in circumstances where their white counterparts have not faced any action whatsoever').
103. For example, flexible working conditions could encourage qualified women to take up judgeship.
104. House of Lords Constitution Committee, *Judicial Appointments* (HL 2012) ch 7, para 174.
105. European Network of Councils for the Judiciary (ENCJ), *Project on Independence and Accountability* (ENCJ 2014–15) 138.
106. ibid 32.
107. Council of Europe, Recommendation Cm/Rec(2010)12 of the Committee of Ministers to the Member States on judges: independence, efficiency and responsibilities ch VI.
108. Cheryl Thomas, 'Judicial Attitude Survey 2020: England and Wales' (University College London Judicial Institute 2021) 46.
109. Ibid. The latest judicial attitude surveys show similar trends for Scotland and Northern Ireland. See Cheryl Thomas, 'Judicial Attitude Survey 2020: Scotland' (University College London Judicial Institute 2021) iii–v; Cheryl Thomas, 'Judicial Attitude Survey 2020: Northern Ireland' (University College London Judicial Institute 2021) iii–v.

judges to Court of Appeals judges) said that there are no opportunities for career progression in the judiciary.[110] Barriers to career progression should, at a minimum, be removed and judges should be given a clear career structure at the time of recruitment.[111] A lack of career growth would demotivate judicial personnel and could also affect their performance.

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 *ad hoc* arrangements and communication channels across 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 vertical movement of judicial personnel would strengthen internal judicial independence. Furthermore, the UK could use the judicial promotion scheme as an instrument to build a unified judiciary. As the Advisory Panel on Judicial Diversity rightly 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.'[112]

There is no doubt that career progression within the judiciary needs to be encouraged and any artificial barriers should be removed, but this has to be done prudently. The promotion of judges should be based on objective factors including merit, competence, integrity, experience and institutional need.[113] The hope of promotion or the fear of career stagnation could affect judicial decision-making.[114] Now that the LC does not have effective control over judicial appointments and promotions, the potential intrusion of the executive branch into judicial promotions is addressed.[115] However, it is equally important that, as the judicial leadership now plays a dominant role in judicial appointments,[116] the scheme of promotion should avoid inappropriate influence 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 the potential to enhance judicial integrity, accountability and independence.[117] Also, it can be used as a medium of intervention that could lead to appropriate pastoral or judicial training support for judges in need.[118] Appraisals improve the quality of the judiciary by assessing any weaknesses in performance and providing adequate support for judges to develop the required skills.[119] But the UK judiciary does not have a formal judicial performance assessment mechanism. Interestingly, judicial officers favour appraisal.[120] It is

110. ibid 49.
111. Council of Europe (n 107) Principle III.
112. Advisory Panel on Judicial Diversity, *Judicial Diversity* (Recommendation 1, 2010) 18.
113. The Basic Principles on the Independence of the Judiciary 1985, para 13.
114. Antony Allot, 'Independence of the Judiciary in Commonwealth Countries: Problems and Provisions' (1994) 20(4) *Commonwealth Law Bulletin* 1435.
115. Lord Phillips, 'House of Lords Select Committee on Relations between the Executive, the Judiciary and Parliament' (HL 2006–07) 128.
116. Courts and Crime Act 2013, Part IV, Sch 13.
117. Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' (2002) 29 *Fordham Urban Law Journal* 1053. See also *Rajendra Singh Verma (Dead) through L. Rs v Lt. Governor of NCT of Delhi* (2011) 12 SCR 496.
118. See generally Stephen Colbran, 'The Limits of Judicial Accountability: The Role of Judicial Performance Evaluation' (2003) 6 *Legal Ethics* 55.
119. Constitution Committee, *Judicial Appointments* (HL 2012–13) ch 7, para 182 <https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27210.htm#a47>. See also Allot (n 114) 1435.
120. Constitution Committee (n 119) para 181.

not ideal for accountability-seeking institutions like the judiciary to be accountability complacent, especially when performance evaluations are common in other sectors – 'without an effective appraisal system, the public cannot be assured that the judiciary is of the highest possible quality.'[121] The LCJ's annual reports since 2017 emphasise the importance of appraisals for career development and recruitment; however, the appraisal schemes have not been applied in all jurisdictions.[122]

Besides the 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 the UK. The latest Judicial Attitude Survey (2020) reveals that only 59% of judges feel valued by the senior judiciary;[123] 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.[124] A significant minority of judges (16%) felt that a rigid hierarchical work environment could deter people from taking up judgeships.[125] Inflexible working conditions are another reason for dissatisfaction among judges.[126] For example, 61% of judges in England and Wales think that the availability of flexible working hours is either 'poor' (16%) or 'non-existent' (45%).[127] Even part-time fee-paid judicial officers in the UK feel that there is no easy access to flexible working arrangements.[128] The general impression is that judicial leadership fails to recognise judges' 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.[129] Therefore, the judiciary in the UK has to revisit its internal processes that could impinge on the individual autonomy of its personnel.

3.2 India

In India, judicial discipline is almost exclusively enforced by the judiciary through in-house mechanisms. The founding justification for in-house mechanisms is that they are indispensable to upholding judicial independence.[130] Therefore, to highlight inadequate safeguards to individual and internal judicial independence, the plenary supervisory power of the High Courts is critically assessed briefly below.

The administration of subordinate courts is under the supervision and 'total and absolute control'[131] of the High Courts.[132] Judicial appointments, promotions, transfers, removal and other judicial service matters are almost exclusively dealt with by the High Courts.[133]

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121. ibid para 186.
122. See Lord Chief Justices' Annual Reports of 2017 to 2021.
123. Thomas (n 108) 6.
124. ibid 84.
125. *Id.*
126. Sophie Turenne and John Bell, 'The attractiveness of judicial appointments in the United Kingdom: Report to the Senior Salaries Review Body' (2018) 14–19. See also Dame Hazel Genn, 'The attractiveness of senior judicial appointment to highly qualified practitioners', Report to the Judicial Executive Board (2008) 29, para 102.
127. Thomas (n 108) 46. The latest judicial attitude surveys show similar trends for Scotland and Northern Ireland. See Cheryl Thomas, 'Judicial Attitude Survey 2020: Scotland' (University College London Judicial Institute 2021) iii–v; Cheryl Thomas, 'Judicial Attitude Survey 2020: Northern Ireland' (University College London Judicial Institute 2021) iii–v.
128. Constitution Committee (n 119) ch 3.
129. See generally Knaul (n 15) 5, para 22.
130. See eg *C. Ravichandran Iyer v Justice A.M. Bhattacharjee* (1995) 5 SCC 457 [35], [479].
131. *Registrar General, High Court of Patna v Gajendra Prasad* (2012) 6 SCC 357.
132. Constitution of India 1950, Art 235.
133. Constitution of India 1950, Pt VI, Ch VI. See also *Ashok Kumar Yadav v State of Haryana* (1985) 4 SCC 417.

Supervision of the High Courts, including in matters of judicial discipline, is considered indispensable to secure the judicial independence of subordinate court judges.[134] Moreover, the Supreme Court of India (SC) has held that the High Courts have complete administrative control over the subordinate courts. 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.[135] 'Such control is exclusive in nature, comprehensive in extent and effective in operation'.[136] In summary, 'control' involves all necessary administrative and disciplinary powers for the High Court to oversee the functioning of lower judges and staff. The scope of the controlling power extends to managing human resources, court infrastructure, planning, budgeting and record keeping. These overwhelming administrative and disciplinary powers of the High Courts make them custodians or guardians of the lower judiciary, which means that the High Courts of India have both 'stick' and 'carrot' at their disposal.

The dominance of the High Courts over the subordinate courts is writ large, and the subordinate court judges, from selection to a judicial office to retirement, work under the supervision and control of the respective High Court. Decisions on matters including appointment, training, posting, appraisal, transfer, promotion, retirement and removal are made by the High Courts in the form of recommendations to the respective state governments. The Constitution also confers extensive rule-making powers on the High Court; as a result, the High Courts are free to design regulatory mechanisms as they see fit.[137] Nonetheless, almost all High Courts have designated committees comprising High Court judges as members, to deal with various issues pertaining to subordinate court judges.[138] In some matters, the decisions of these committees attain finality, but they are mostly recommendatory in nature, and the final decision will have to be made by the Chief Justice or the full court.[139]

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 also no scope for the participation of the executive branch. 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.[140] Against the decisions of these committees, there are no formal appeal mechanisms. The aggrieved party has to invoke the 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.[141] As a result, subordinate court judges often perceive administrative decisions as unfair. One of the subordinate court judges who participated as a subject expert in the empirical study that forms part of the background for this article (hereafter 'the study')[142] noted:

134. 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).
135. *Renu v District and Sessions Judge, Tis Hazari* [2014] AIR 2175.
136. ibid.
137. Constitution of India 1950, Articles 227 and 229(2).
138. Allahabad High Court Rules 1952, Ch III, 7–9.
139. ibid Ch III, 7–8.
140. Constitution of India 1950, Pt VI, Ch VI.
141. See generally Tony George Puthucherril, '"Belling the cat": judicial discipline in India' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar 2021) ch 7.
142. For the key findings of the empirical study, see Huchhanavar (n 31).

> [the] High Court is not at all objective in dealing with the district judiciary. They [district judges] are being punished for *bona fide* judicial orders. The district judiciary works in [an] environment of fear of [the] Bar and High Court, unwholesome for the system.[143]

Another district judge alleged that the High Judges 'look [at] the judicial officer on a caste basis'.[144]

Unlike in England and Wales, the High Courts in India carry out performance appraisals annually. The performance of district judges is generally evaluated by a designated High Court judge or a committee of High Court judges. Senior district judges oversee the performance of the other subordinate court judges. However, the judges who participated in this study expressed their concerns about the system of evaluation of judicial performance 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 judge and whether the officer is attending irrelevant judicial get-togethers are what counts' [sic].[145] The lack of comprehensive standards of judicial appraisal, objectivity, formality, transparency and uniformity has been a long-standing concern in India,[146] which has been recognised by the Supreme Court in numerous cases.[147] Unbridled subjectivity in the evaluation of judicial performance threatens individual and internal judicial independence; therefore, the High Courts of India should review their regulatory protocols, including performance evaluation and disciplinary mechanisms.

4. 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. Requirements such as open and accessible courts,[148] the principle of *audi alteram partem*, reasoned decisions and the appeal procedure were, until recently, considered adequate measures of judicial accountability.[149] Besides, judges are traditionally held accountable to the constitution and law, the oath of office, judicial precedent and judicial ethics.[150] However, the growing demand for efficiency, economic rationality, responsiveness and accountability in the public sector, along with the growing autonomy of the judiciary as a self-governing branch in the latter half of the twentieth century, have had implications for these traditional notions of judicial accountability.[151]

143. ibid 21.
144. *Id.*
145. Respondent ID: 166110773.
146. See eg Geeta Oberoi, 'Need for standardizing performance evaluation criteria for judicial magistrates in India' (2018) 44(2) *Commonwealth Law Bulletin* 251 <https://doi.org/10.1080/03050718.2019.1612259>.
147. See eg *Khazia Mohammed Muzammil v State of Karnataka*, Civil Appeal No. 596 of 2007; Registrar General, *Patna High v Pandey Gajendra Prasad*, MANU/SC/0444/2012; *Ishwar Chand Jain v High Court of Punjab and Haryana* [1998] AIR 1395.
148. The principle of open justice, in its various manifestations, is the basic mechanism for ensuring judicial accountability. See generally James Spigelman, 'Seen to be done: The principle of open justice: Part 1' (2000) 74 *Australian Law Journal* 290.
149. Judicial accountability has received considerable attention in the last two decades. See generally Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24(1) *Legal Studies* 73 <https://doi.org/10.1111/j.1748-121X.2004.tb00241.x>.
150. White (n 117) 1061–62.
151. See generally Irving Kaufman, 'Chilling Judicial Independence' (1979) 88(4) *Yale Law Journal* 681; Arghya Sengupta, *Independence and Accountability of the Higher Indian Judiciary* (Cambridge University Press 2019) ch 5.

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 means a contraction in public spending, decentralisation and devolution of key functions; it also leads to objective-driven administration and performance management.[152] The New Right Conservative governments under Margaret Thatcher and John Major (1979–1997) attempted 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'.[153] 'New Labour' (1997–2007) envisioned 'democratic socialism and liberalism' that involved new administrative reforms transcending cost-benefit (economic) analysis. The reforms proposed a 'holistic' approach that involved optimal use of resources, a collaboration between departments and streamlining of public services. These market-minded and customer-orientated reforms have had notable implications for budget and resource allocation; structures of bureaucracy had to be flattened (downsized); greater emphasis on human resource management and accountability to the customer (citizens) has emerged as a legitimate concern of public services. These reforms did affect the judiciary, but not as much as sectors such as health, education, social services, and police.[154]

Consequently, 'judicial accountability', although a progeny of 'public accountability', has remained largely unmoulded by reforms in the latter half of the twentieth century. Furthermore, even though managerialism and new public management reached developing nations such as India, they had little or no effect on judicial accountability. As a result, although the reach of judicial accountability has increased greatly in some jurisdictions over the past few decades, this expansion has not been uniform across the board. Its scope continues to be mostly jurisdiction-specific, with different stages of its conceptual evolution and practical application manifesting themselves differently from one jurisdiction to another.[155] 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. Therefore, the conceptual analysis in section 4.1 below begins with a rudimentary elaboration of 'accountability' before briefly traversing the conceptual nuances of 'judicial accountability'.

4.1 Accountability: a brief conceptual overview

'Accountability' in common parlance lacks precise meaning; however, as a dynamic concept,[156] it is prone to overuse.[157] The ever-expanding nature of 'accountability' is both its

152. See generally Sylvia Horton and David Farnham, 'The Politics of Public Sector Change' in Sylvia Horton and David Farnham (eds), *Public Management in Britain* (Palgrave 1999) ch 1.
153. Peter Aucoin and Ralph Heintzmann, 'The Dialectics of Accountability for Performance in Public Management Reform' (2000) 66(1) *International Review of Administrative Sciences* 45 <https://doi.org/10.1177/0020852300661005>.
154. Reg Butterfield and Christine Edwards, 'The New Public Management and the UK Police Service' (2004) 6(3) *Public Management Review* 395 <https://doi.org/10.1080/1471903042000256556>; Margaret A Arnott, 'Restructuring the Governance of Schools: The impact of managerialism on schools in Scotland and England' in Margaret A Arnott and Charles Raab (eds), *The Governance of Schooling: Comparative studies of devolved management* (Routledge 2000) ch 2.
155. For instance, in the United States, where the judges are elected, they are also accountable to their constituents. Likewise, the practice of televising confirmation hearings in the USA and Canada is another jurisdiction-specific means of accountability that is not favoured in the UK and India.
156. Melvin J Dubnick, 'Seeking Salvation for Accountability' (Speech at the American Political Science Association, Boston, 29 August – 1 September 2002) 14–15.
157. Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33(5) *West European Politics* 946 <https://doi.org/10.1080/01402382.2010.486119>.

strength and its weakness.[158] 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 according to context.[159] Broadly, it connotes the quality of being accountable, liability to give an account and answer for the discharge of duties or conduct, and responsibility and amenableness to a person or an authority.[160]

In public administration discourse, accountability is considered a concept and a mechanism. In the former case, accountability is used primarily as a positively laden normative concept (or virtue) – a set of desired standards for evaluating public actors' behaviour. As a mechanism, accountability is seen as an institutional arrangement where an actor can be held to account by an oversight body. Here, the locus of accountability studies is not on the behaviour of public agents, but on how these institutional arrangements operate.[161] Accountability as a virtue provides legitimacy to public officials and public organisations. As a mechanism, it is instrumental in enforcing these virtues through regulatory mechanisms. Thus, it contributes to the legitimacy of public governance in general and, in particular, facilitates the interaction between public institutions and the citizenry. The combination of accountability as a virtue and as a mechanism embodies the foundation of accountability institutions, including courts, tribunals and other oversight bodies. On the contrary, the accountability deficit manifests itself as 'inappropriate behaviour or bad governance – unresponsive, opaque, irresponsible, ineffective, or even deviant.'[162]

Accountability 'has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular public'.[163] Generally, in a narrow sense, it signifies *external scrutiny*, *justification*, *sanctions and control*. In a wider sense, it includes: (i) individual responsibility and concern for the public interest expected from public servants ('professional' and 'personal' accountability); (ii) institutional checks and balances by which democracies seek to control the actions of governments (accountability as 'control'); (iii) the extent to which governments pursue the wishes or needs of their citizens (accountability as 'responsiveness'); and (iv) the public discussion between citizens on which democracies depend (accountability as 'dialogue').[164]

4.2 Judicial accountability: a brief 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 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'.[165] This conception of

158. Richard Mulgan, '"Accountability": An ever-expanding concept?' (2000) 78(3) *Public Administration* 555 <https://doi.org/10.1111/1467-9299.00218>.
159. Mark Bovens, 'New Forms of Accountability and EU-Governance' (2007) 5 *Comparative European Politics* 104 <https://doi.org/10.1057/palgrave.cep.6110101>.
160. See Oxford English Dictionary (OED 2001, Update 2011).
161. Bovens (n 157).
162. *Id.*
163. Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Governance Papers* (2006) <https://www.ihs.ac.at/publications/lib/ep7.pdf>.
164. Mulgan (n 158).
165. Herbert A Simon, Victor A Thomson and Donald W Smithberg, *Public Administration* (Routledge 1991) 513.

accountability may be unproblematic in public administration, and arguably it is also relevant to judicial administration to a great extent, but it does not entirely befit the latter type of administration. While the judiciary interprets pre-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 as to how that authority shall be exercised, other than the pre-existing principles of law, would be an infringement of that authority. In countries like India, where the doctrine of *ultra vires* allows judicial review of the laws made by Parliament,[166] 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. Although adjudication is the primary function of the judiciary, it has an administrative structure like any other public institution. The administrative apparatus provides ancillary services to court users. In this perspective, in addition to the purely adjudicatory functions of a judge (examination of witnesses, appreciation of evidence, application and interpretation of the law, and making a formal judgment), the rest of the functions of judges or court personnel could be classified 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.[167] Similarly, a principal judge in a court complex has various administrative functions ranging from maintaining the court infrastructure to overseeing ancillary services to court users.[168] 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. Judicial conduct regulation regimes, for example, the Vigilance Cells (India), Complaints Officer (NI), and Judicial Office for Scotland must be held accountable, just as any other oversight mechanism of the government. Therefore, while conceptualisation should underscore the salient features of judicial administration, it cannot be entirely oblivious to public accountability discourse.

4.3 Conceptualising judicial accountability: key challenges

Differing constitutional, political, social and cultural settings in a country mean that the accountability mechanisms and protocols would vary. However, contextual variants are neither novel nor an insurmountable constraint. It could be argued that differing contextual settings offer opportunities to tailor a sound conceptual base for accountability mechanisms, instead of a one-size-fits-all approach that would inevitably fail. However, 'to tailor a conceptual base', one should be able to identify the 'core components' of judicial accountability in a given context. The 'core components' are essential for two reasons: (a) they offer clarity to the account giver (eg judges and the judiciary) and the account holder (eg judicial conduct regulation regimes), and (b) they help define the manner and means of enforcing accountability measures. The core components provide a solid foundation for robust regulatory mechanisms.

Therefore, the relevant question is the following: What are the potential challenges that could hinder the identification of the core components of judicial accountability? This sec-

166. See eg *Ms Maneka Gandhi v Union of India* [1978] AIR 597 (SC).
167. There are court managers, but still the Chief Judges or Principal Judges have numerous administrative functions.
168. See Justice Palanisamy Sathasivam, 'Effective District Administration and Court Management' (2013) <http://www.tnsja.tn.gov.in/article/Effectuve%20Dist%20Admn-PSJ.pdf>.

tion argues that ambiguities surrounding the roles of individual judges and the judiciary, inadequate or ill-defined measures of judicial independence, and a lack of or ill-defined accountability rationale are some of the notable challenges to the identification of core components of judicial accountability.

4.3.1 The role of judges and the judiciary

As already noted, judges play adjudicative, administrative and coordinative roles. For example, in India, Principal District Judges are responsible for the effective functioning of courts in their district.[169] They also act as the ex-officio Chairperson of the District Legal Services Authorities (DLSA).[170] The latter provide free legal aid and organise *Lok Adalats*[171] and legal literacy camps to help the poor and marginalised.[172] The Chairperson (a judge) has to coordinate and organise free legal aid and legal literacy camps and *Lok Adalats*; s/he also has to implement various legal aid and legal services schemes formulated by the National Legal Services Authority.[173] As the role demands, the judicial officer in question has to interact with the members of the Bar, officials of state and local self-governments (eg *Panchayats* and Municipal Corporations), NGOs, the media and the public. Likewise, as a manager of the court, a judge must engage with various officials within and outside the judiciary. Both administrative and coordinative functions require different interpersonal skills and competencies. The administrative role of a judge mostly involves issues relating to court management, including case flow management, financial issues, policy and planning issues.[174]

If standards of judicial conduct are indiscriminately applied ignoring the multifaceted role judges play, either the judge in question faces difficulties in performing administrative and coordinative roles or s/he must ignore the conduct rules where inevitable. From an accountability perspective, a multi-role scenario is a significant problem, particularly because judges are held to higher standards of conduct even when they are operating in administrative capacities. A judge should also refrain from any actions that undermine the impartiality and public confidence in the judiciary, whether they are taken in their official or personal capacities.[175] The conduct requirements of impartiality, integrity and propriety for a judge are stringent.[176] Higher standards of judicial conduct (temperament, merit, character and integrity expected from judges) would hinder the efficiency of a judge as an administrator of the court. Although some of the administrative functions of judges are inevitable, the excessive administrative and coordinative roles of judges would render judicial conduct codes inadequate and ineffective. The content of judicial accountability is largely contingent on the nature of the judicial function and the role of a judge. Therefore, too many

169. The District Judges play significant role in the administration of courts in India. They are responsible for the allocation and flow management, supervision of court managers and court staff, inspection of subordinate courts, coordinate with all the stakeholders (like the Police and the Jail authorities), planning, and preparation of budget. See Sathasivam (n 168).
170. Legal Services Authority Act 1987, s 9.
171. *Lok Adalats* (People's courts) are alternative dispute resolution mechanisms established and recognised by the Legal Services Authorities Act 1987.
172. Legal Services Authority Act 1987, s 10.
173. Schemes of NALSA: <https://nalsa.gov.in/brochures/schemes-of-nalsa-english>.
174. See generally G Larry Mays and William A Taggart, 'Court clerks, court administrators, and judges: Conflict in managing the courts' (1986) vol 14(1) *Journal of Criminal Justice* 1 <https://doi.org/10.1016/0047-2352(86)90022-X>. See also Sathasivam (n 168).
175. See eg Restatement of Values of Judicial Life 1999.
176. The Bangalore Principles of Judicial Conduct 2002, see principles 2, 3 & 4.

non-adjudicatory roles of a judge would inhibit the identification and enforcement of core components of judicial accountability.

4.3.2 The need for a sound rationale for judicial accountability

The accountability measures should have a sound rationale. Generally, measures of accountability may aim to improve transparency, efficiency, responsiveness, competence, impartiality and independence. As regards judicial conduct enforcement or behavioural accountability, one could argue that it enhances competence, integrity, independence, reputation, accountability and public confidence in the judiciary.[177] Similarly, administrative accountability could achieve optimum use of resources and it can also help audit the performance of the judiciary. Accountability measures like media scrutiny, reporting, appellate review, and academic critique would promote ideological consistency, substantive correctness and responsible decision-making.[178] Likewise, every accountability measure should have a purpose; accountability that has no valid justification would have counteractive consequences, for example, it could affect efficiency or independence. Therefore, while defining the content of an accountability measure, its intended purpose and its potential implication on the efficiency, impartiality and independence of the judiciary or judges should be carefully weighed.

4.3.3 Judicial accountability frameworks must adhere to the requirements of substantive and procedural due process

The 'content' of judicial accountability must be precise. For example, if judges are to be held accountable for their misconduct, the legal framework should define 'misconduct' with sufficient precision. If the grounds for disciplinary sanctions are vague – for example, if judges are removed for 'conduct which brings the judicial office into disrepute' or for 'conduct unbecoming of a judge' or 'corrupt behaviour', they 'open the door to overly broad or abusive interpretations and therefore risk undermining the independence of the judiciary'.[179]

In addition, 'accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct'.[180] The disciplinary framework must be established by law. Disciplinary procedures should be administered fairly, objectively and consistently.[181] The framework should guarantee minimum safeguards to parties to the disciplinary proceeding. Complaints should be investigated by an independent body, and they should be adjudicated by an independent and impartial tribunal.[182] Disciplinary sanctions should be established by law. The aggrieved parties should have the right to review or appeal before an independent and competent authority.[183]

Most of the requirements of a robust regulatory mechanism, as noted in the previous paragraph, are absent in India. The regulatory mechanisms are not independent; they are part of the judiciary. The rules that guide these mechanisms are not comprehensive, the pro-

177. Judicial discipline: Response to consultation, 7–8.
178. Sengupta (n 151) 137.
179. Diego García-Sayán, 'Report of the Special Rapporteur on the independence of judges and lawyers' (UNGA Doc A/75/172 2020) 7, para 17; Knaul (n 15).
180. Diego García-Sayán, 'Report of the Special Rapporteur on the Independence of Judges and Laywers' (UNGA Doc A/HRC/26/31 2014) para 100.
181. See generally The Commonwealth (Latimer House) Principles on the Three Branches of Government 2003.
182. Bangalore Principles of Judicial Conduct 2002, Preamble.
183. García-Sayán (n 180) para 38.

cedure followed by these mechanisms is often informal, and there are no codes of judicial conduct to guide the subordinate court judges and court staff.[184] Some of the safeguards noted above are also missing in the UK. For example, in Scotland, Northern Ireland (NI), and the Supreme Court of the United Kingdom, judicial complaints are handled by in-house mechanisms.[185] These in-house mechanisms not only scrutinise complaints at the initial stage, but they also have consequential investigative powers. For example, the Complaints Officer (NI) has the power to investigate and dismiss misconduct complaints.[186] The Chief Executive of the SCUK has similar powers.[187] To make matters worse, none of these jurisdictions, including the SCUK, has a robust review mechanism to reconsider the determinations made by first-tier bodies. Scotland has an independent Judicial Complaints Reviewer, but the limited remit and powers have significantly affected the efficacy of the office.[188] NI has internal review mechanisms, whereas India and SCUK have no review mechanisms at all. These significant accountability lapses – the lack of independent regulatory regimes and review mechanisms – endanger substantive and procedural safeguards for judges facing disciplinary proceedings.

4.3.4 To whom are judges and the judiciary accountable?[189]

Judges and the judiciary will be accountable in various forms. Therefore, there is no straightforward answer to the question mentioned above; it would depend on multiple factors: namely, the position of individual judges; the position of the judiciary as an institution;[190] the constitutional and legislative framework defining judicial independence and accountability; the framework providing for judicial appointments and removal; and the oath of office. As noted elsewhere, one could argue that judges are also accountable to the Constitution and laws and ultimately to the people in whom the sovereign power resides.[191] Therefore, judges and the judiciary could be held accountable to various 'account holders'. The judiciary would be responsible to Parliament, the executive, the media, court users, internal accountability mechanisms and the people. However, the content of judicial accountability must be adequately defined, there should be a sound rationale for every accountability provision, and the legal framework should clearly establish to whom judicial personnel should be accountable and through which procedures, practises and processes.[192] Moreover, the

184. Shivaraj S Huchhanavar, 'Regulatory mechanisms combating judicial corruption and misconduct in India: a critical analysis' (2020) 4(1) *Indian Law Review* 47 <https://doi.org/10.1080/24730580.2020.1711498>.
185. Supreme Court of the United Kingdom, *Judicial Complaints Procedure* <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>; Judicial Conduct and Complaints (NI) <https://www.judiciaryni.uk/judicial-conduct-and-complaints>; Judicial Office for Scotland <https://www.judiciary.scot/home/publications/judicial-complaints>.
186. The Conduct of Judicial Officers – Making a Complaint Code of Practice, paras 6–7.
187. Supreme Court of the United Kingdom (n 185) para 1.
188. See generally Moi Ali, *Judicial Complaints Reviewer Annual Report 2013–14*; Gillian Thompson, *Judicial Complaints Reviewer: Annual Report 2015–16*; Gillian Thompson, *Judicial Complaints Reviewer: Annual Report 2014–15*.
189. Mashaw, drawing partly on the work of Mulgan, requires accountability regimes to specify six important things: who (who is accountable), to whom, about what, through what processes, by what standards, and with what effect. See Jerry L Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas, Experiences* (Cambridge University Press 2006) 115, 118.
190. Stephen B Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations' (2007) 95 *The Georgetown Law Journal* 909, 912; see also Accountability of the Judiciary, *Judiciary of England and Wales* <judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf>.
191. Michael Kirby, 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 42.
192. Knaul (n 15) 10, para 55.

accountability framework should ensure that the avenues of judicial accountability are not susceptible to misuse at the instance of the account holder.

4.3.5 Accountability of the account holders

In relation to judicial conduct regulation in India and the UK, the primary 'account holder' is the judiciary itself. In other words, the disciplinary protocols are mostly administered by the (senior) judges themselves. Even in England and Wales, where the Lord Chancellor, in theory, has coterminous disciplinary powers as that of the Lord Chief Justice, the senior judges play a dominant role. The investigation of judicial complaints is carried out by a nominated judge or by an investigating judge, who is drawn from the senior judiciary.[193] Likewise, the disciplinary panels, which are rarely constituted, are also dominated by senior judges,[194] although they comprise an equal number of (two) lay members.[195]

In Northern Ireland, complaints that are categorised as 'misconduct' are handled by the Complaints Officer.[196] Where a judicial complaint is categorised as 'gross misconduct', the LCJ (NI) constitutes a three-member tribunal, comprising two senior judicial officers and a lay member.[197] This regulatory framework differs from the one in England and Wales (E&W) where the LCJ and the LC nominate (two) judicial members, and (two) lay members respectively. In NI, however, the LC has no role in constituting the tribunal.[198] Moreover, the LCJ (NI) (or a nominated judge on their behalf)[199] has the exclusive authority to make a final determination of judicial complaints. Northern Ireland also has an internal review process for both 'gross misconduct' and 'misconduct' complaints, but even review officers are drawn from within the judiciary, and in some cases, investigations are reviewed by the LCJ (NI) himself/herself.[200] In other words, for the most part, the judicial discipline in Northern Ireland is enforced exclusively by the judiciary.

Scotland has a more complicated regulatory architecture. Once the complaint withstands initial scrutiny by the Judicial Office for Scotland (JOS), it is referred to the disciplinary judge for advice on further action.[201] The disciplinary judge is a judge of the Inner House of the Court of Session, one of the senior-most judges in Scotland; the disciplinary judge supervises the disciplinary process and makes decisions on behalf of the Lord President, and where necessary, he or she also consults the Lord President [LP] through JOS.[202] Where the findings of the nominated judge substantiate the commission of misconduct that does not warrant removal, the LP can impose informal or formal sanctions.[203] However, if a complaint raises an issue of fitness for the judicial office and if it refers to a senior judge,[204] it will

193. UK Ministry of Justice, 'Judicial Discipline: Consultation on proposals about the judicial disciplinary system in England and Wales' (2022) 21, 26.
194. The panels are chaired by an officeholder who is of a higher rank than the officeholder concerned.
195. Judicial Discipline: Response to Consultation, 23.
196. Lord Chief Justice's Office, 'Complaints about the Conduct of Judicial Office Holders: Code of Practice' (August 2021) 5.
197. ibid para 8.
198. *Id.*
199. ibid para 9.
200. ibid paras 7.8 and 8.8.
201. ibid rule 10.
202. ibid rules 3 and 11.
203. Judiciary and Courts (Scotland) Act 2008, s 29.
204. Senior judicial offices include (a) the office of Lord President, (b) the office of Lord Justice Clerk, (c) the office of judge of the Court of Session, (d) the office of Chairman of the Scottish Land Court, and (e) the office of a temporary judge. See Judiciary and Courts (Scotland) Act 2008, s 35(2).

be referred to a statutory tribunal. The tribunal will be constituted by the First Minister, in consultation with the LP.[205] Akin to NI, the tribunal will be dominated by judicial members; out of four, two will be individuals who hold, or have held, a high judicial office in the UK. It also comprises an individual who is and has been an advocate or solicitor and a lay member; one of the judicial members will be the chairperson of the tribunal.[206] Except in the case of JPs, the judicial office holders are removed by the First Minister; this is in contrast with the consultative model of the E&W. All other conduct issues (other than those that raise an issue of fitness for the judicial office) are dealt with by the LP and other senior judges.

As in the case of in-house mechanisms in India, the judicial complaints to the SCUK justices are handled by an in-house arrangement. The Chief Executive has the remit to receive and scrutinise judicial complaints. If the complaint withstands initial scrutiny, the Chief Executive has to consult the President, of the SCUK; the President in consultation with the next senior member of the court determines the next course of action.[207] Where formal action is appropriate, the President should also inform and consult the LC.[208] To initiate a formal action, a tribunal must be constituted. The composition of the tribunal will again be dominated by senior-most judges in the UK.[209] The judicial complaints are exclusively handled by the two most senior judges and the Chief Executive of the SCUK up until they consult the LC for formal action.

Although senior judges have been conferred with varying degrees of disciplinary powers, it is clear that in India and the UK senior judges play a dominant role in judicial conduct regulation. However, there are no robust review mechanisms to abet or remedy the abuse of disciplinary powers by senior judges, except for England and Wales which has a relatively robust review mechanism in the form of Judicial Appointments and Conduct Ombudsman. Furthermore, the in-house mechanisms in India, unlike the UK mechanisms, do not publish data relating to judicial complaints, investigations and disciplinary sanctions. As a result, almost nothing is known about the mechanisms, especially about the Vigilance Cells. Therefore, there is limited public, media and academic scrutiny of these mechanisms.[210] Even in the UK, the SCUK does not publish any data on judicial conduct regulation, whereas in-house mechanisms in NI and Scotland publish brief statistical returns in the form of annual reports. Only England and Wales publish brief disciplinary statements, along with annual reports.[211] While in India, the judiciary holds all information with respect to judicial complaints and investigations as confidential, no information is accessible to the public even under the Right to Information Act 2005.[212] Even in the UK, as per section 139 CRA, information about disciplinary proceedings that relates to an identified or identifiable individual is held confidential, and the regulatory authorities are exempt from disclosure under the Freedom of Information Act 2000. These transparency and accountability deficiencies should be addressed to mitigate regulatory lapses in both jurisdictions.

205. Judiciary and Courts (Scotland) Act 2008, s 35(3).
206. ibid ss 35(9) and (10).
207. Supreme Court of the United Kingdom, *Judicial Complaints Procedure*, para 3 <https://www.supremecourt.uk/docs/judicial-complaints-procedure.pdf>.
208. ibid para 5.
209. The tribunal will consist of the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, and the Lord Chief Justice of Northern Ireland, and 2 lay members nominated by the LC: ibid para 7(i).
210. Huchhanavar (n 184) 73.
211. Judicial Conduct Investigations Office, *Disciplinary Statements* <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/>.
212. See eg *the Registrar General v K. Elango*, 2013 (5) MLJ 134.

The accountability deficiencies briefly discussed above demonstrate that the accountability frameworks in the UK and India are founded on an incorrect understanding of judicial accountability. While there is an adequate emphasis on individual accountability, there is a limited emphasis on institutional accountability, and internal accountability needs have been overlooked. As a result, there is an accountability overload at the subordinate court level; conversely, there is a discernible accountability deficit in the higher judiciary. For example, in India, subordinate court judges are subjected to performance evaluation, whereas senior judges are not. The permission of the Chief Justice of India is mandatory to register a criminal case against High Court or Supreme Court judges.[213] Critique or evaluation of performance often attracts criminal contempt proceedings.[214] There is a tendency for the senior judiciary to quickly invoke the defence of judicial independence and evade accountability demands;[215] on the contrary, the subordinate court judges are subject to *ad hoc* and informal oversight of senior judges.

4.4 Conceptualising judicial accountability from a regulatory perspective

This paper 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.

4.4.1 Individual judicial accountability

Judicial accountability at the individual level is a responsibility to comply with the 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 provide 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 it participates in any activity that could compromise the dignity or efficacy of their office or affect public confidence in the judicial system.[216] These conventional accountability demands complement the professional (conduct codes) and legal obligations that are required of judicial personnel.

Individual judicial accountability measures encompass various aspects of judicial accountability. Individual judicial accountability includes adjudicative, behavioural and managerial accountability measures. It can also accommodate the accountability demands for content, probity, process and performance accountability as long as they are directed at individual judges.[217] It extends to extrajudicial conduct or the private lives of judicial per-

213. *Ravichandran Iyer v Justice A.M. Bhattacharjee*, 1995 SCALE (5)142
214. Vasujit Ram, 'Evaluating Judicial Performance: A Comparative Perspective' (2016) *State of the Indian Judiciary* <http://dakshindia.org/state-of-the-indianjudiciary/21_chapter_10.html>; see also Huchhanavar (n 184) 80–81.
215. Samanwaya Rautray, 'Judiciary under attack, says SC bench on allegations against Chief Justice Ranjan Gogoi' *The Economic Times* (Mumbai, 20 April 2019).
216. Consultative Council of European Judges (CCJE Op. N° 3, 2002) 7, para 39.
217. For the meaning of content, probity, process and performance accountability, see Le Sueur (n 149) 81–87.

sonnel.[218] Unlike any other classification, from a regulatory perspective, individual judicial accountability offers a discernible accountability rationale. Some of such rationales that can underpin individual judicial accountability measures would be immunity and a greater degree of decisional autonomy for judicial personnel to serve the ends of justice.[219] This understanding establishes a direct correlation between individual judicial independence measures and individual accountability demands: individual judicial independence is justified only to the extent that it reinforces impartiality, integrity, competence, efficiency and public trust in judicial personnel. It evades an overemphasis on judicial independence and diverts much-needed attention from other equally important values, for example, competence and efficiency.

Adequate emphasis on individual judicial accountability would also help define the accountability rationale. For instance, should judges be held accountable for their repeated judicial errors? If so, who should enforce such accountability? What are the mechanisms and processes through which this accountability should be enforced? These questions could be answered much more efficiently if the rationale, content and processes of accountability are clear. Individual judicial accountability, if understood and applied correctly, helps design accountability frameworks that are context-specific: the nature of the judicial office, the work expected of a judge, and the peculiar circumstances that call for accountability would be adequately weighed at the design stage. Furthermore, since the emphasis is on the 'individual', there will be an adequate emphasis on the rights and minimum safeguards (ie measures of individual judicial independence) that the account-giver should have. Consequently, adequate emphasis on the individual 'account giver' leads to limitations on the 'account holder'.

4.4.2 Internal judicial accountability

The judiciary as an administrative structure is a complex web of interactions of individuals, procedures, processes and practices. The outcome – ie dispute resolution through judgements – does not just happen;[220] 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 (eg within a judge's administrative setup), meso-level (eg among judges working at the same level) and macro-level (eg across the administrative and judicial hierarchies).

From the regulatory standpoint, these micro, meso and macro-level interactions are the most significant, as they help admit, assess, process and decide the 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. Therefore, internal judicial accountability – as a concept and as a mechanism – is the foci of judicial regulation. For this reason, internal judicial accountability must be treated as an independent aspect of institutional accountability, not just as one of the aspects of institu-

218. Knaul (n 15) 10, para 58.
219. See generally *Hinds v The Queen* [1977] AC 195, paras 210, 221-G.
220. Le Sueur (n 13) 209.

tional accountability. Prevailing jurisprudence, domestic and international, fails to see internal judicial accountability as a distinct area needing equal treatment compared to individual and institutional judicial accountability. Arguably, this under-emphasis 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. Therefore, internal judicial accountability—both 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. A robust internal judicial accountability framework provides for the accountability of key actors in the judiciary, including senior judges and court officials. It offers robust complaints redressal mechanisms on various aspects of judicial personnel – ranging from racism to lack of adequate staff; it provides minimum safeguards, procedural and substantive, to every actor within the judiciary to rightfully defend himself.

The emergence of judicial self-regulation has strengthened the judiciary's competence to redesign its internal arrangements. For example, after the 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 regarding deployment, training, and welfare. These reinvigorated competencies of the LCJ also mean that the principal responsibility of judicial administration now lies with the judiciary itself. This means that it is the principal duty of the judiciary, especially where it has the competency 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 paper, on several aspects of judicial administration, the judiciaries in the UK have 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.[221]

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 account the potential implications of internal judicial interactions on judicial personnel at the micro- or meso-level. In India, for example, High Court judges invariably conduct performance appraisals of district judges;[222] such High Court judges, by virtue of being guardian/administrative judges, have a critical role in judicial conduct regulation, deployment and promotion of such district judges.[223] Similarly, guardian judges have administrative oversight and superintendence over the assigned district courts.[224] 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. Therefore, the categorisation of judicial

221. See eg Huchhanavar (n 184) 47.
222. Oberoi (n 146) 251.
223. Huchhanavar (n 184) 80.
224. *Id.*

accountability into three aspects helps adequately emphasise the need for securing individual and internal judicial independence and also appreciates internal judicial accountability demands.

4.4.3 Institutional judicial accountability

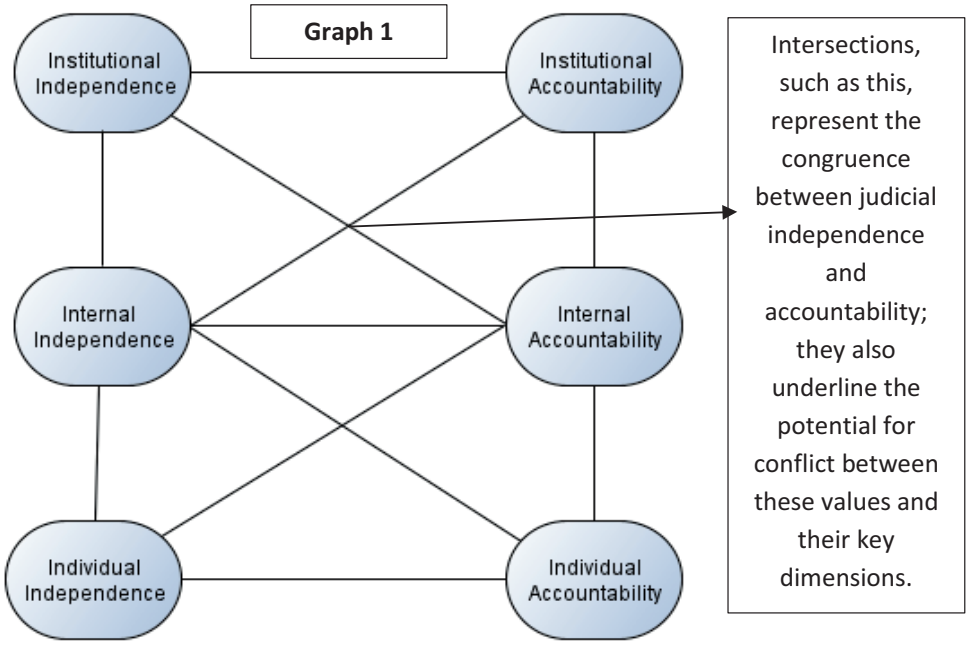
Institutional judicial accountability is the responsibility of complying with voluntary, conventional, professional or legal obligations that are required or expected of the judiciary as a public institution. The judiciary, as an institution, must be open to external scrutiny, for example, by media,[225] civil society, academia, Parliament and the Bar. For this purpose, it should make available relevant information about courts, judges and the judiciary through its websites, periodic reports and account statements. Parliament (and provincial legislatures in a federal system) 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. 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.[226] 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.[227]

Institutional accountability of the judiciary is a distinct and critical component of judicial accountability. The scope of institutional accountability is dependent on the degree of administrative autonomy; the degree of infrastructural dependence of the judiciary on the government; and the judiciary's control over its institutional structure and arrangements (vertical, horizontal, and internal).[228] 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.

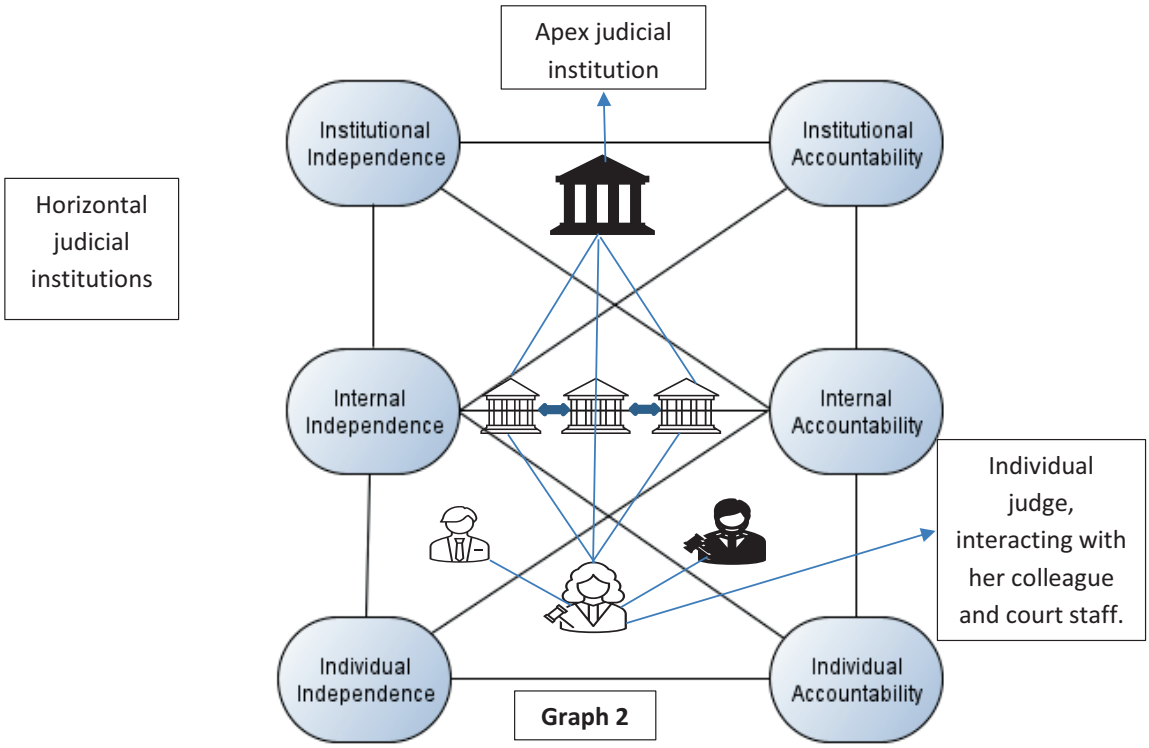
4.5 The congruence and potential conflicting dimensions of judicial independence and accountability

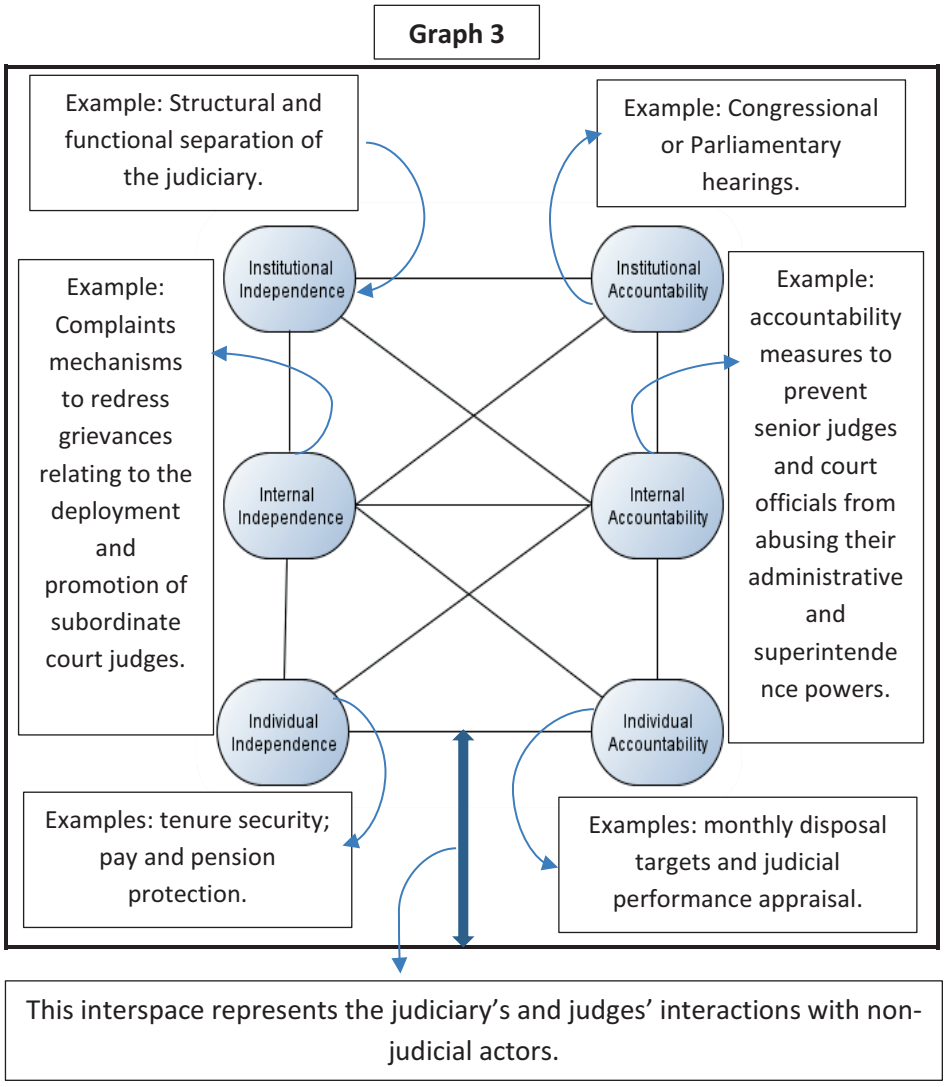
As this article briefly outlines, there are three key aspects of judicial independence and accountability. These three aspects synchronously interact with each other, mirroring the functioning of a judge, court or judiciary, respectively. The bipartite graph (see Graph 1) attempts to depict bidirectional interactions between the two values and their key dimensions. For this purpose, the key aspects of judicial independence and accountability are divided into three nodes [⬭] connected by lines (—), representing bidirectional interactions.

225. Patrick O'Brien, '"Enemies of the People": Judges, the media, and the mythic Lord Chancellor' (2017) *Public Law* 135.
226. See generally Stephen B Burbank, 'Judicial Independence, Judicial Accountability and Inter-branch Relations' (2007) *Faculty Scholarship at Penn Law* 917–918.
227. Knaul (n 15) 10, para 55.
228. 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 irregularity.



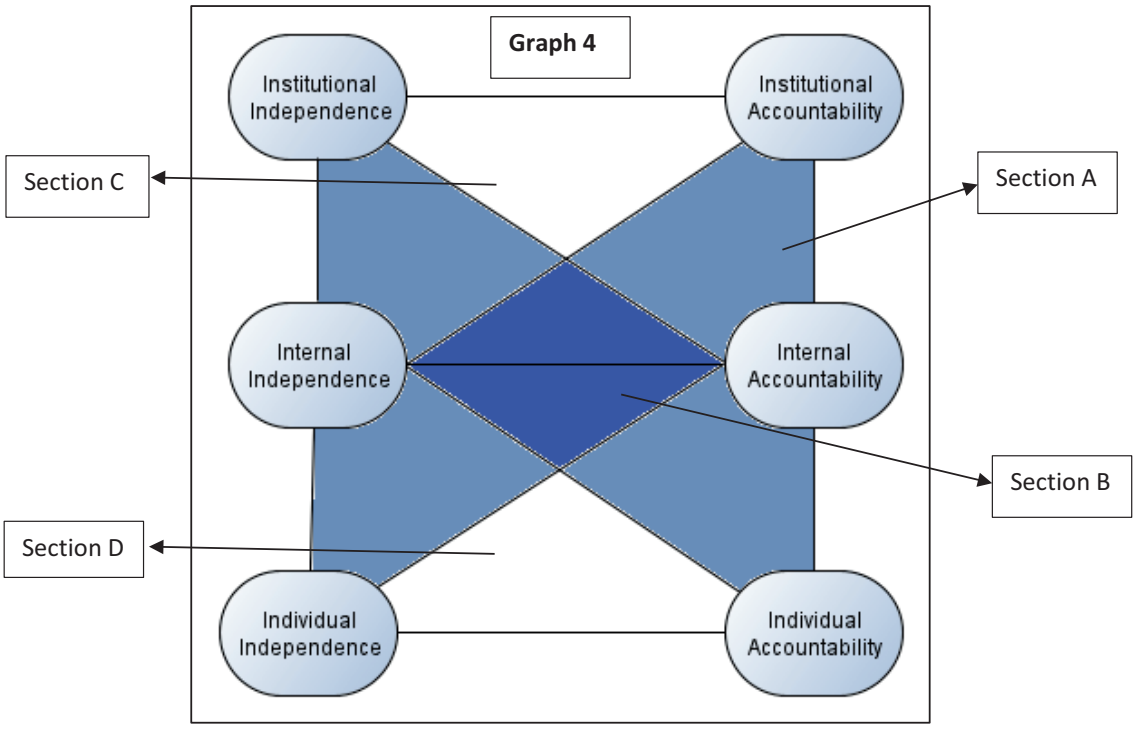
Myriad vertical and horizontal interactions between individual judges, court staff and judicial institutions significantly widen the extent of congruence with respect to the potential for conflict. Graph 2 below attempts to illustrate the complex interplay of judicial interactions vertically and horizontally among judicial personnel, excluding the interactions between nonjudicial actors and the judiciary.





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.[229] 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 internal interactions within the judiciary. Graph 4 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.

229. As this article places special emphasis on internal interactions within the judiciary, Graph 3 does not illustrate the congruence and conflicting dimensions of judicial independence and accountability.



5. Reconciling Judicial Independence and Accountability: The Role of Regulatory Mechanisms

Independence is necessary but not sufficient to secure judicial impartiality; judicial impartiality relies on the competence and integrity of judges as much as it relies on independence. Constitutional and legal safeguards against plausible external influences do not secure judicial independence unless judges resist temptations that could undermine their impartiality or the appearance of it. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate checks, they may become corrupt, arbitrary or reckless. An excessive emphasis on judicial independence would be counterproductive.[230] Thus, the State must insulate judicial institutions from improper influences, and at the same time, it is necessary to have adequate checks to ensure the integrity, impartiality, and competence of judges and the judiciary. Since regulatory regimes aim to enforce judicial accountability and thereby strengthen judicial independence, the following paragraphs briefly explain how regulatory mechanisms could help reconcile the conflicting dimensions of both values.

5.1 Independent and competent regulatory mechanisms would augment public confidence in the judiciary's competence

The regulatory mechanisms, along with misconduct and corruption issues, can also address issues of incapacity, incompetence and inefficiency of the justice system. Where judicial officeholders lack an adequate understanding of the law or fall short of the conduct

230. Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations' (2013) 20(1) *Indiana Journal of Global Legal Studies* 253.

expected of him/her, the regulatory mechanism could recommend judicial training or pastoral support. For example, regulatory mechanisms in the UK and vigilance cells in India are empowered to identify cases that require judicial education and training. In this sense, regulatory mechanisms could help improve the competence of courts. Therefore, a robust regulatory framework, while widening the scope of accountability could act as an effective means for enhancing judicial competence, which is necessary to preserve public confidence in the judicial system.[231]

5.2 Regulatory mechanisms can help address the accountability deficit or the accountability overload problem

Too much independence or too little accountability is problematic as it would undermine public trust in the judiciary.[232] Therefore, the right degree of judicial accountability is critical, and the regulatory mechanism can serve this cause efficiently. The regulatory mechanisms (internal or external) address a wide range of accountability requirements. For instance, they can address complaints concerning judicial appointments (JACO); judicial conduct (JCIO); respond to media queries (Judicial Press Office, England and Wales); provide input for judicial promotion (vigilance cells); facilitate judicial performance evaluation (vigilance cells); disseminate information under the Right to Information Act (Information Officers, India); and deal with complaints relating to deficiency in court services (Customer Investigation Teams, England and Wales). Thus, regulatory mechanisms can significantly enhance the accountability profile of the judiciary.

Judges (especially subordinate court judges) work in a charged atmosphere.[233] Even in the UK, due to austerity measures, judges have to work with limited resources. The lack of resources would lead to a delay in justice delivery, or litigants could face deficiencies in legal and court services.[234] These systemic inadequacies, such as an excessive caseload or inadequate administrative support, may result in judges being unfairly targeted or pressured to eliminate delays; a less supportive work environment may impair judicial performance. In the face of these challenges, the role of regulatory mechanisms in identifying misplaced complaints and filtering and flagging them as not involving judicial misconduct is critical to securing judicial independence and avoiding accountability overload.

5.3 A robust regulatory mechanism is a panacea to negative accountability phenomena

A robust regulatory framework is necessary to enforce 'the right amount of judicial accountability'. In countries like India, where the regulatory mechanisms are mostly in-house,[235] the judiciary is uniquely positioned to control the functioning of the regulatory mechanisms;

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231. See ABA Code of Judicial Conduct 2010, Canon 1.2 ('A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety').
232. See generally Mark Tushnet, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) ch 3; Lord Judge, 'The Judiciary and the Media' (Lionel Cohen Lecture, Jerusalem, 28 March 2011) 500.
233. *K.P. Tiwari v State of Madhya Pradesh* [1994] AIR 1031 (SC).
234. The austerity measures have affected legal aid, advice and assistance services; they also led to reductions in court staff and court counter hours and a sharp rise in the number of people representing themselves in the courts, with a knock-on effect on the ability of judges to hear cases in a timely and just manner. See Stanley Burnton and others, 'Delivering Justice in an Age of Austerity' (2015) *JUSTICE* <https://justice.org.uk/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>.
235. Regulatory mechanisms are part of the judiciary. They are composed wholly of serving members of the judiciary.

as a result, there is scope for the self-serving use of regulatory bodies. For example, the in-house mechanisms could deny the publication of investigation reports;[236] they may avoid the publication of data on the number of judges removed and the names of judges who were guilty of misconduct. Judicial corruption can also be concealed from the public.[237] Another negative phenomenon is *simulating judicial accountability*. It is a situation where judges pretend that they are held accountable, but all the judges involved know that they are 'safe' and that they will not face any consequences. In other words, there are nominal (eyewash) mechanisms of judicial accountability in place, but there is no real accounting.[238] It is also possible that, under the pressure of the judiciary, the internal mechanism may manipulate the data to obscure irregularities within the judiciary. This is known as '*output perversions of judicial accountability*'.[239] Furthermore, an oversight mechanism lacking autonomy can be used as a tool to victimise honest officers; this amounts to *selective accountability*, where accountability is deliberately enforced against a selected judicial officer.

The accountability mechanisms that lack autonomy are susceptible to several types of misuse. Through inappropriate interferences, forces within or outside the judiciary can employ accountability mechanisms to impose 'disguised sanctions'[240] without following or abusing the disciplinary procedure. These sanctions could be 'portrayed as legitimate decisions taken by the hierarchical superior with a view to rationalise the organisation or strengthen its effectiveness.'[241] Disguised sanctions include measures that could affect the career, financial, or reputational interests of judicial personnel. The disguised sanctions may come in the form of subtle administrative decisions, for example, withdrawing and reallocating a matter in a way that harbours doubt about the integrity of a judge. There are some overt ways of imposing the disguised sanction, for example, punitive transfer, withholding promotion, extending the probation period or temporary appointment, writing a negative performance report, imposing temporary suspension, terminating the extension of retirement of a judge or forcing a judge to take 'voluntary' retirement.[242] In the absence of robust internal accountability mechanisms, judicial self-regulation could abet disguised sanctions by the judicial hierarchy.[243]

The rationale for in-house accountability mechanisms is that arm-length institutions could be susceptible to executive or legislative intrusions, which would undermine judicial independence. However, if the in-house mechanisms are not robust, there could be a greater threat to internal judicial independence, as the mechanisms are pliable to internal pressures. At the same time, in-house mechanisms would also fail to serve accountability demands as well, as the in-house arrangement offers greater scope for secrecy and precludes independent external scrutiny. Therefore, robust mechanisms are necessary to reconcile judicial independence and accountability.

236. In India, investigation and inquiry process and reports against subordinate court judges are kept confidential.
237. In India, no such information is available, even though there are numerous allegations of misconduct and corruption.
238. David Kosar, 'The least accountable branch' (2013) 11(1) *International Journal of Constitutional Law* 234, 260 <https://doi.org/10.1093/icon/mos056>.
239. Id.
240. García-Sayán (n 179) 14–15.
241. ibid para 68.
242. ibid paras 63–67.
243. ibid para 60.

5.4 The regulatory mechanisms can reinforce judicial independence and accountability by efficiently enforcing established standards of judicial conduct

By efficiently handling complaints of judicial conduct, the regulatory mechanisms could avert inappropriate interferences from outside the judiciary; the inefficiency of the regulatory mechanisms in handling judicial misconduct issues could be an invitation to external interferences that could potentially undermine judicial independence. Especially in a country like India, judiciary-led regulatory mechanisms are arguably necessary to secure judicial independence. This is because the anti-corruption agencies of the state lack autonomy and often succumb to political pressures; allowing such agencies to investigate complaints against judges may put judicial independence in jeopardy.[244] However, the in-house mechanisms must have sturdy structure, adequate powers, infrastructure and competent personnel. 'The existing in-house mechanisms are bereft of functional autonomy; the powers and functions of these mechanisms are not adequately prescribed, and the procedures concerning complaints, inquiries and disciplinary actions are *ad hoc*. The mechanisms for subordinate courts are opaque, inaccessible, slow, and ineffective. Whereas the in-house mechanism for the higher judiciary is informal and *ad hoc*.'[245] In-house committees are constituted on a case-by-case basis, this approach is not compatible with judicial independence.[246]A robust regulatory mechanism would address these concerns.

6. Conclusions

The foundation of judicial regulation is embodied in the legal frameworks that establish and govern regulatory regimes. The legal frameworks should adequately emphasise the key aspects of values that are central to judicial administration. The asymmetrical conceptual arrangement would inhibit the efficacy of regulatory regimes. As seen in this article, neglecting internal judicial independence has negative implications for the functional autonomy of judicial personnel in India and the UK. In addition, the regulatory mechanisms must be independent and accountable.[247] However, there are no robust internal mechanisms in either jurisdiction 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. Issues like transfer, promotion, performance evaluation and flexible working conditions are critical for efficient human resource management in any institution. The judiciary, as an autonomous institution, should have effective internal complaints and accountability mechanisms to redress the grievances of judicial personnel on these matters.

Regulatory regimes have the potential to play a significant role in balancing judicial independence and accountability. A robust regulatory mechanism would effectively address accountability deficit and overload problems, and it could contain negative accountability phenomena. However, if the mechanisms are not well governed, are ill-structured and lack autonomy and adequate powers, then they would have counteractive consequences. That is, regulatory mechanisms would upset accountability arrangements, and inhibit judicial

244. *Ishwar Chand Jain v High Court of Punjab and Haryana* [2001] AIR 575 (SC); *Shamser Singh v State of Punjab* [1974] AIR 2192 (SC). See generally Jon ST Quah, 'Anti-Corruption Agencies in Asia Pacific Countries: An Evaluation of their Performance and Challenges (2017) *Transparency International* <https://www.transparency.org/files /content/feature/ACAs_background_paper_2017.pdf>.
245. Huchhanavar (n 184) 47.
246. See generally García-Sayán (n 179) 8 para 23.
247. Bangalore Principles of Judicial Conduct 2002.

independence, efficiency and competence. Therefore, a country like India, which is heavily dependent on in-house, informal, *ad hoc* and weak regulatory regimes, should review the legal and constitutional framework to restructure the regulatory regimes for both the higher and lower judiciaries.

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