OSLO LAW REVIEW

NO.2 | 2022 | VOL. 9

Universitetsforlaget

Oslo Law Review
2-2022, volume 9
https://www.idunn.no/oslo_law_review

Oslo Law Review was established in 2014, and publishes research articles from all areas of legal scholarship, as well as interdisciplinary articles or articles that engage with law from the perspective of other related disciplines (e.g. political science, anthropology, sociology, linguistics and philosophy).

Sats: Type it AS, Trondheim
Design: Scandinavian University Press
Cover design: Scandinavian University Press, Sissel Tjernstad
ISSN online: 2387-3299
DOI: 10.18261/issn.2387-3299

The journal is published by Scandinavian University Press (Universitetsforlaget) on behalf of the Faculty of Law at the University of Oslo.

Content

Articles

Oslo Law Review

Universitetsforlaget

RESEARCH PUBLICATION

Volume 9, No. 2-2022, p. 74–91
ISSN online: 2387-3299
DOI: https://doi.org/10.18261/olr.9.2.1

Beyond the Principle of Proportionality: Controlling the Restriction of Rights under Factual Uncertainty

Borja Sánchez Barroso
Associate Professor, Universidad Católica de Valencia San Vicente Mártir
borja.sanchez@ucv.es

Abstract
The principle of proportionality is considered the main legal tool to control restrictive measures of rights, both in ordinary courts and at a constitutional level. In addition to its general limitations, new shortcomings of the principle have played a central role during the pandemic, questioning the principle's efficacy in situations of factual uncertainty, especially in technically or scientifically complex contexts. This article analyses this efficacy problem and exemplifies it with specific measures adopted to prevent COVID-19. It also analyses potential ways to counter those shortcomings, such as refining the principle itself, emphasising judicial deference to legislative and executive powers, or adopting prior decisions as to the information that must be taken into account in case of uncertainty. Finally, the article proposes some additional checks that could complement the culture of justification promoted by the principle and strengthen the control of public powers when restricting rights under conditions of uncertainty.

Keywords
Proportionality, Fundamental Rights, Scientific Uncertainty

1. Introduction
The principle of proportionality has progressively become the key constitutional tool to control the restriction of rights approved by legislative or executive powers.[1] The principle itself has been expressly stated in several constitutional texts (Switzerland, Romania, Turkey, etc)[2], as well as in the Charter of Fundamental Rights of the European Union (Article 52).[3] It has also been invoked to interpret the Human Rights Act 1998 in the UK, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by the European Court of Human Rights (ECtHR).[4] As for the European Economic Area, proportionality can be considered one of its fundamental principles.[5]

1. Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: the Historical Origins' (2010) 8(2) *I•CON* 263 <https://doi.org/10.1093/icon/moq004>; Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law* Journal 3094.
2. Víctor Ferreres Comella, 'Beyond the principle of proportionality' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018) 229.
3. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375, 391ff <https://doi.org/10.1017/S1574019612000260>.
4. Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 145.
5. Carl Baudenbacher and Theresa Haus, 'Proportionality as a Fundamental Principle of EEA Law' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law* (Springer 2017) 169.

Traditionally, scholars across the globe have focused on the advantages and limitations of the proportionality principle as a standard for constitutional review of laws, regulations, and individual measures by constitutional and other apex courts.[6] The main discussion has centred on the balancing stage of the proportionality test based on the great margin of appreciation it leaves to the courts as opposed to legislative and executive powers.[7] This is especially problematic in civil law countries, where case law is not a primary source of law. Solutions to these classical objections, also widely debated, have thus focused on the need to justify every step of the proportionality test.[8] They have also analysed mechanisms to appoint judges in apex courts, the duration of their term and other institutional checks to balance democratic legitimacy with an effective and eventually counter-majoritarian constitutional control.[9]

Recently, other limitations of the proportionality principle have started to play a central role, in particular, those related to contexts of factual uncertainty, where complex and dense technical or scientific data are needed to understand reality. When public authorities and the courts do not know for sure the situation they face but still have to adopt or review restrictions to rights, the principle of proportionality seems relatively useless. This article examines these specific limitations, offering recent examples related to COVID-19 to illustrate them (section 2). It further explores eventual solutions to these weaknesses and their potential shortcomings (section 3), before proposing additional legal tools to reinforce the culture of justification promoted by the principle of proportionality (section 4). Section 5 of the article concludes.

Many of these issues have been partially addressed by scholarship before, mostly in relation to epistemic uncertainty surrounding the normative and empirical data underlying the application of the proportionality principle. Similarly, some of the potential solutions offered to the shortcomings of the principle have been tried by different apex courts, though never consistently. This article draws from all these sources, supplemented by literature focusing on risk management in the face of scientific uncertainty, in order to offer a more comprehensive account of the problem which could improve legal justification in various contexts. Despite mentioning examples drawn from different jurisdictions, both at national

6. David Beatty, *The Ultimate Rule of Law* (OUP 2004) 162; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012); Robert Alexy, 'Proportionality, Constitutional Law, and Sub-Constitutional Law: A Reply to Aharon Barak' (2018) 16(3) *I•CON* 871 <https://doi.org/10.1093/icon/moy084>.
7. Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7(3) *I•CON* 468, 475ff <https://doi.org/10.1093/icon/mop011>; Francisco J Urbina, 'A Critique of Proportionality' (2012) 57(1) *The American Journal of Jurisprudence* 49, 66; Timothy Endicott, 'Proportionality and Inconmensurability' in Grant Huscroft and others (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 311. A wider critique of the rhetoric of proportionality can be found in Grégoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2015) 23(1) *Canadian Journal of Law & Jurisprudence* 179 <https://doi.org/10.1017/S0841820900004860>.
8. Robert Alexy, 'Balancing, constitutional review, and representation' (2005) 3(4) *I•CON* 572 <https://doi.org/10.1093/icon/moi040>; Malcolm Thorburn, 'Proportionality' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 305; Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales* (3rd ed, Centro de Estudios Políticos y Constitucionales 2007) 199.
9. Christopher L Eisgruber, 'Constitutional Self-Government and Judicial Review: A Reply to Five Critics' (2002) 37(1) *University of San Francisco Law Review* 115, 144ff; Bernard Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) 22(1) *Duke Journal of Comparative & International Law* 291, 301-302; Dimitrios Kyritsis, 'Whatever works: Proportionality as a Constitutional Doctrine' (2014) 34(2) *Oxford Journal of Legal Studies* 395, 396-397 <https://doi.org/10.1093/ojls/gqt033>. The principle of proportionality could even require a new account of the theory of the separation of powers: see further Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *The Cambridge Law Journal* 174, 176 <https://doi.org/10.1017/S0008197306007082>.

and supranational level, the analysis here is not meant to be a comparative law study. It simply tries to illustrate with recent examples a theoretical problem that may arise in any jurisdiction invoking the traditional version of the principle of proportionality.

2. Framing the Problem

2.1 Limits of the Proportionality Principle under Factual Uncertainty

Despite nuances in different jurisdictions, there seems to be a general consensus on the four main steps that structure the principle of proportionality: (i) analysing the legitimacy of the aim pursued by public powers; (ii) confirming the rational link between the restriction of a right and the intended goal; (iii) exploring if other less restrictive means could achieve the same aim; and (iv) balancing the affected right and the collective interest protected by trying to weigh the costs and benefits of the adopted measure (sometimes known as proportionality *stricto sensu*).[10] This is the most widely used version of proportionality in European constitutional courts (originating from Germany),[11] the Court of Justice of the European Union (CJEU)[12] and the ECtHR,[13] especially in negative rights cases.[14]

The first question of the proportionality test is purely theoretical or intellective. Courts simply need to analyse constitutional provisions to confirm whether they expressly or implicitly entrust the protection of a collective interest or right to public authorities. This is a matter of plain legal interpretation that seldom raises concerns.[15] However, the three subsequent questions often rest upon a factual basis. It is true that the principle of proportionality is also applied to issues that are more normative than empirical, where necessity refers to 'moral necessity' and balancing includes goods and harms that are purely incommensurable (eg the 'need' and 'benefits' of prohibiting prostitution in order to protect public order).[16] Nevertheless, in many other cases these concepts are addressed as a technical issue depending on scientific and technical knowledge. One needs to know the specific effects of a particular measure to determine if it contributes to achieving the intended aim. Exploring alternative means to reach it and comparing their effectiveness with the restriction under

10. Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1986) 100ff; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 243-270; Mordechai Kremnitzer and others (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020).
11. Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *The University of Toronto Law Journal* 383, 384; Afroditi Marketou, *Local Meanings of Proportionality* (Cambridge University Press 2021).
12. Davor Šušnjar, *Proportionality, Fundamental Rights and Balance of Powers* (Brill Nijhoff 2010) 163ff; Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15(1) *Cambridge Yearbook of European Legal Studies* 439, 448; Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff 2015) 108ff.
13. Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 37ff; Adam Ramshaw, 'The case for replicable structured full proportionality analysis in all cases concerning fundamental rights' (2019) 39(1) *Legal Studies* 120 <https://doi.org/10.1017/lst.2018.18>.
14. Stephen Gardbaum 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 219, 221.
15. Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47(1) *Columbia Journal of Transnational Law* 72, 75; Martin Borowski, 'Absolute Rechte und Verhältnismäßkeit' in Stephan Kirste and others (eds), *Menschenwürde im 21. Jahrhundert* (Nomos 2018) 47, 54.
16. Kira Vrist Rønn and Kasper Lippert-Rasmussen, 'Out of Proportion? On Surveillance and the Proportionality Requirement' (2020) 23(1) *Ethical Theory and Moral Practice* 181 <https://doi.org/10.1007/s10677-019-10057-z>.

review also imply knowing what these effects are. Finally, comparing the costs and benefits of the measure requires again knowing what these costs and benefits will be, at least with a reasonable degree of precision.[17] After all, the benefits expected with the restriction of a right cannot be merely hypothetical or fictitious,[18] if we want the principle of proportionality to be a real check on public authorities and not just a logical or rhetorical tool, as some of its critics argue.[19]

The problem is that not all of these factual data are always available, especially in contexts with a high level of technical or scientific complexity. There are cases in which the most reliable means of evidence available only show that the facts are dubious, controversial, or even impossible to ascertain according to the current state of knowledge. In other cases, scientific or technical evidence is simply missing, due to the unprecedented nature of the events.[20] In all these cases, courts and public powers cannot rely on the proportionality principle to adopt or control restrictions of rights.

2.2. Recent Examples Related to COVID-19

The COVID-19 crisis offers perfect examples to illustrate the problem. Despite the quick and commendable scientific research carried out in relation to COVID-19, the lack of data at the beginning of the pandemic or related to each new variant of Sars-COV-2, together with partial disagreement within the scientific community make it a perfect case to verify the insufficiency of the proportionality principle as an instrument of constitutional control under factual uncertainty.[21] The fact that the legitimate aim pursued by public authorities is difficult to dispute – most constitutions mandate them to protect life, security, and public health – also facilitates our analysis.[22] Besides, the intensity and scope of the restrictions in most countries make it even more pressing and useful.[23] The examples addressed in the fol-

17. Carlos Bernal Pulido, 'The Rationality of Balancing' (2006) 92(2) *ARSP: Archiv für Rechts- und Sozialphilosophie* 195, 205; Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2013) 59(2) *The American Journal of Comparative Law* 463, 470; Martin Borowski, 'On Apples and Oranges. Comment on Niels Petersen' (2013) 14(8) *German Law Journal* 1409, 1415ff <https://doi.org/10.1017/S2071832200002327>; Raanan Sulitzeanu-Kenan and others, 'Facts, Preferences, and Doctrine: An Empirical Analysis of Proportionality Judgment' (2016) 50(2) *Law & Society Review* 348, 352 <https://doi.org/10.1111/lasr.12203>; Barak (n 10) 321.
18. For some scholars, the last part of the proportionality test only rests on normative premises. See eg Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 131, 137; Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2008) 14(8) *German Law Journal* 1387, 1392-1393 <https://doi.org/10.1017/S2071832200002315>.
19. Endicott (n 7); Francisco J Urbina, 'Incommensurability and Balancing' (2015) 35(3) *Oxford Journal of Legal Studies* 575, 604-605 <https://doi.org/10.1093/ojls/gqv015>.
20. Vern R Walker, 'The Siren Songs of Science: Toward a Taxonomy of Scientific Uncertainty for Decisionmakers' (1991) 23(1) *Connecticut Law Review* 567; Andrew Stirling, 'Risk precaution and science: towards a more constructive policy debate' (2007) 8(4) *Embo Reports* 309 <https://doi.org/10.1038/sj.embor.7400953>.
21. Harry Rutter and others, 'Managing uncertainty in the covid-19 era' (2020) 370(1) *BMJ* 1 <https://doi.org/10.1136/bmj.m3349>; Qingmei Han and others, 'Uncertainties About the Transmission Routes of 2019 Novel Coronavirus' (2020) 14(4) *Influenza Other Respir Viruses* 470 <https://doi.org/10.1111/irv.12735>; Nancy H L Leung and others, 'Respiratory virus shedding in exhaled breath and efficacy of face masks' (2020) 26(1) *Nature Medicine* 676 <https://doi.org/10.1038/s41591-020-0843-2>.
22. At European level, Articles 8 to 11 ECHR and Article 2 of Protocol no 4 to the ECHR (freedom of movement) also mention public health as one of the legitimate aims for the restriction of rights.
23. A good summary of the restrictions at the beginning of the pandemic can be found in Paul R Hunter and others, 'Impact of Non-Pharmaceutical Interventions against COVID-19 in Europe in 2020: a Quasi-Experimental Non-Equivalent Group and Time Series Design Study' (2021) 26(28) *Eurosurveillance* 2001401 <https:doi.org/10.2807/1560-7917.ES.2021.26.28.2001401>.

lowing are drawn from different jurisdictions, both at national and supranational level. As already stated, the research here is not meant to be a comparative law analysis. It just tries to illustrate with recent examples the theoretical problem raised before. In that sense, we will largely disregard the fact that COVID-19 measures were taken according to emergency provisions in many countries.[24] While this ensures that legislative and executive powers are larger than usual, often involving less consultation with experts and the public, and often in a less transparent way, this does not necessarily affect *per se* the problem raised herein – ie the impact of factual uncertainty on the proportionality analysis.

In relation to the rational link between the measures adopted by public authorities and the protection of life and public health, there is currently quasi-unanimous scientific consensus on the way the coronavirus spreads, mainly through droplets and small airborne particles breathed by people at close distance, in poorly ventilated or crowded indoor settings and, more rarely, when touching eyes, nose or mouth after being in contact with surfaces contaminated by the virus.[25] However, at the beginning of the pandemic, the modes of transmission of the coronavirus were not so well-known. For example, potential virus transmission from animal to human was then suspected, which motivated a recommendation to avoid 'wet' markets and contact with animals in China.[26] However, airborne transmission of the virus through microdroplets was hugely controversial within the scientific community, which did not prevent public authorities from approving indoor capacity limitations.[27] Similarly, the transmission of the virus through substances of human origin (known as SoHo, ie blood, tissues, cells or organs) was not excluded, which led to a widespread prohibition on donating these substances after suffering from COVID-19 or, a few months later, after being vaccinated, seemingly unjustified according to subsequent evidence.[28] In all of these cases, the crux of the matter is not whether the modes of transmission of SARS-COV-2 were (airborne) or were not (animal and SoHo) confirmed by *ex post facto* scientific evidence, but the difficulty of ensuring that a given restriction of rights effectively contributes to protecting public health, something scientific authorities cannot always confirm at the time the restriction is adopted. Public authorities themselves acknowledged that the available data were not conclusive, which did not prevent the adoption of restrictive measures.[29]

---

24. See further Joelle Grogan, 'States of Emergency' (2020) *European Journal of Law Reform* 338 <https:doi.org/10.5553/EJLR/138723702021022004002>.
25. World Health Organization, 'Coronavirus Disease (COVID-19): How is it Transmitted?' (23 December 2021) <www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted> accessed 31 December 2022. Unless otherwise stated, all subsequent URLs have been accessed on the same date (31 December 2022).
26. European Centre for Disease Prevention and Control, 'Risk assessment: Outbreak of acute respiratory syndrome associated with a novel coronavirus, Wuhan, China; first update' (22 January 2020) 5-8 <www.ecdc.europa.eu/sites/default/files/documents/Risk-assessment-pneumonia-Wuhan-China-22-Jan-2020.pdf>; European Centre for Disease Prevention and Control, 'Outbreak of acute respiratory syndrome associated with a novel coronavirus, China: first local transmission in the EU/EEA–third update' (31 January 2020) 6 <www.ecdc.europa.eu/sites/default/files/documents/novel-coronavirus-risk-assessment-china-31-january-2020_0.pdf>.
27. Nick Wilson and others, 'Airborne Transmission of Covid-19: Guidelines and Governments Must Acknowledge the Evidence and Take Steps to Protect the Public' (2020) 370(1) *BMJ* 1 <https://doi.org/10.1136/bmj.m3206>; Lidia Morawska and Donald K. Milton, 'It Is Time to Address Airborne Transmission of Coronavirus Disease 2019 (COVID-19)' (2020) 71(9) *Clinical Infectious Diseases* 2311 <https://doi.org/10.1093/cid/ciaa939>.
28. Jeremy W Jacobs and others, 'Refusing blood transfusions from COVID-19-vaccinated donors: are we repeating history?' (2021) 196(3) *British Journal of Haematology* 585 <https://doi.org/10.1111/bjh.17842>; European Centre for Disease Prevention and Control, 'Novel coronavirus disease 2019 (COVID-19) pandemic: increased transmission in the EU/EEA and the UK – sixth update' (12 March 2020) 19 <www.ecdc.europa.eu/sites/default/files/documents/RRA-sixth-update-Outbreak-of-novel-coronavirus-disease-2019-COVID-19.pdf>.
29. World Health Organization, 'Transmission of SARS-CoV-2: implications for infection prevention precautions' (9 July 2020) <https://apps.who.int/iris/bitstream/handle/10665/333114/WHO-2019-nCoV-Sci_Brief-Transmission_modes-2020.3-eng.pdf?sequence=1&isAllowed=y>.

Some of the measures adopted against COVID-19, such as curfews, were even later found to be counterproductive in some countries due to behavioural patterns of the population.[30] In this kind of scenario, the first part of the proportionality test simply cannot be completed when the restrictions are adopted, at least not with enough certainty.

Concerning the necessity of each restriction, at the beginning of the pandemic or with each new variant of the coronavirus it was not easy to determine if less restrictive measures could achieve the same result, as the degree of effectiveness of every single protective measure remained largely unknown.[31] In fact, scientific authorities could only provide different scenarios with risks ranging from small to the most extreme ones hypothetically requiring different measures in each case, but without knowing for sure the actual situation of every country or region (and the courts could know it even less when reviewing each measure).[32] A simple divergence between the scenario assumed by public authorities and the actual scenario could lead to measures stricter than needed at a given point in time. This was particularly the case with general lockdowns adopted by several countries, a measure never tested before, and the effectiveness of which in comparison to softer restrictions is still contested.[33] Similar concerns can be raised in relation to the varying physical distances imposed at different moments during the pandemic, directly impacting the maximum capacity of buildings or social and cultural venues (thus restricting freedom of enterprise or freedom of religion among other rights).[34] The general obligation to use face masks even in outdoor settings adopted by some countries also remains controversial.[35]

Finally, as far as balancing or proportionality *stricto sensu* is concerned, scientific uncertainty directly affected, for example, the partial or total closures of educational establishments, one of the most common restrictive measures adopted by more than 150 countries during the pandemic.[36] In this case, the contribution of the measure to public health protection was not and still is not clear at all, nor was the exact burden imposed, as the effects of school closures on children and adolescents' mental health, social and personal development or education continue to be analysed.[37] How, then, do we assess whether the beneficial

30. David García-García and others, 'Assessing the effect of non-pharmaceutical interventions on COVID-19 transmission in Spain, 30 August 2020 to 31 January 2021' (2022) 27(19) *Eurosurveillance* 2100869 <https://doi.org/10.2807/1560-7917.ES.2022.27.19.2100869>.
31. Hendrik M Wendland, 'When Good is not Good Enough: A Comparative Analysis of Underinclusiveness and the Principle of Coherence under Proportionality Review' (2018) 25(3) *Maastricht Journal of European and Comparative Law* 332, 353 <https://doi.org/10.1177/1023263X18769500>; Gloria Lopera Mesa, 'Principio de proporcionalidad y control constitucional de las leyes penales' in Miguel Carbonell (ed), *El principio de proporcionalidad y la argumentación constitucional* (Ministerio de Justicia y Derechos Humanos 2008) 269, 282.
32. European Centre for Disease Prevention and Control (n 28) 8ff.
33. Mario Coccia, 'The relation between length of lockdown, numbers of infected people and deaths of Covid-19, and economic growth of countries: Lessons learned to cope with future pandemics similar to Covid-19 and to constrain the deterioration of economic system' (2021) 775(1) *Science of the Total Environment* 1, 7-8 <https://doi.org/10.1016/j.scitotenv.2021.145801>.
34. The varying social distances established by different countries could even be arbitrary according to the current state of knowledge: see University of Cambridge, 'Two-metre COVID-19 rule is "arbitrary measurement" of safety' (23 November 2021) <www.cam.ac.uk/ research/news/two-metre-covid-19-rule-is-arbitrary-measurement-of-safety>.
35. World Health Organization, *Mask use in the context of COVID-19: Interim guidance* (1 December 2020) 10-11 <https://apps.who.int/iris/handle/10665/337199>.
36. UNICEF, 'COVID-19 and School Closures: One year of education disruption' (March 2021) 5 <https://data.unicef.org/resources/one-year-of-covid-19-and-school-closures/>.
37. Russell M Viner and others, 'School closure and management practices during coronavirus outbreaks including COVID-19: a rapid systematic review' (2020) 4(5) *Lancet Child & Adolescent Health* 397 <https://doi.org/10.1016/S2352-4642(20)30095-X>; Tone Bjordal Johansen and others, 'Infection prevention guidelines and considerations for paediatric risk groups when reopening primary schools during COVID-19 pandemic, Norway, April 2020' (2020) 25(22) *Euro Surveillance* 1, 5 <https://doi.org/10.2807/1560-7917.ES.2020.25.22.2000921>.

effects of this restriction outweigh the burden imposed, if both ends of the scales remain scientifically uncertain?[38]

This is not to say that all the aforementioned measures were not constitutionally valid under the exceptional circumstances that existed during the pandemic, especially if we consider that emergency law varies in each country. As explained in the introduction, the point is simply to show how the principle of proportionality may not be sufficient to control the restriction of rights under conditions of uncertainty. Even if it is a useful tool to structure legal reasoning in these cases and an effective check on certain measures (those that are clearly inappropriate, unnecessary or disproportionate), it cannot be the only check available on legislative and executive powers when exercising legal and constitutional review.

3. Potential Solutions and their Shortcomings

3.1 Completing the Proportionality Test or the Weight Formula

Some suspect that the principle of proportionality conceals the subjective preferences of judges when addressing the balance of rights and interests, in line with the postulates of legal realism.[39] In cases of factual uncertainty, especially related to complex technical or scientific issues, the difficulty for the courts to understand the information at their disposal, or their reluctance to deal with great complexity, may lend credence to this suspicion.[40] During the pandemic, the urgency of the decisions and the limited time to hear third-party experts may have accentuated the problem.[41] However, if the principle of proportionality aspires to be a real and objective check on public authorities also under those circumstances, the problem identified in the previous section should be addressed in a timely manner. In the following, three potential solutions for this purpose are explored.

The first option to counter factual uncertainties when applying the principle of proportionality would be to complement the principle or to make it more accurate. Courts would continue to apply it but with certain changes. Robert Alexy, one of the leading scholars dealing with the principle of proportionality, is aware of its shortcomings under factual uncertainty. That is why he tried to supplement his 'first law of balancing' (or 'substantive law of balancing'), used by most constitutional courts to carry out the last step of the proportionality test,[42] in cases of 'empirical epistemic discretion'.[43] To this end he developed a 'second law of balancing' (or 'epistemic law of balancing') according to which 'the more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'.[44]

38. Balancing not only considers the abstract weight of rights and interests, but also their concrete weight depending on the specific circumstances at stake: Matthias Klatt, 'An egalitarian defense of proportionality-based balancing: A reply to Luc B. Tremblay' (2015) 12(4) *I•CON* 891 <https://doi.org/10.1093/icon/mou061>; Aleardo Zanghellini, 'Raz on Rights: Human Rights, Fundamental Rights, and Balancing' (2017) 30(1) *Ratio Juris* 25 <https://doi.org/10.1111/raju.12156>.
39. Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95(1) *Cornell Law Review* 106, 106-107; Kai Möller, 'Balancing and the structure of constitutional rights' (2007) 5(3) *I•CON* 453, 463-465 <https://doi.org/10.1093/icon/mom023>; Schlink (n 9) 299-301.
40. David L Faigman, 'Judges as "Amateur Scientists"' (2006) 86(1) *Boston University Law Review* 1207, 1225; Paola Monaco, 'Science at the Italian Bar: The Case of Hydroxychloroquine' (2021) 7(1) *The Italian Law Journal* 271, 281-282.
41. Lindsay F Wiley, 'Public health law and science in the community mitigation strategy for Covid-19' (2020) 7(1) *Journal of Law and the Biosciences* 1, 2 <https://doi.org/10.1093/jlb/lsaa019>.
42. Alexy (n 8) 573.
43. Robert Alexy, 'Formal principles: Some replies to critics' (2014) 12(3) *I•CON* 511, 519-520 <https://doi.org/10.1093/icon/mou051>.
44. In the weight formula proposed by Alexy, a reliability variable would be included to achieve a 'refined complete

This second law could result in a refined or more complete 'weigh formula', as developed by Alexy himself, or at least introduce an additional question into the proportionality test. The courts would ask themselves (before addressing the suitability, necessity and proportionality *stricto sensu* criteria) whether there exists sufficient empirical – and normative – reliability to justify restrictive measures so intense as those under review. This would attempt to strike a difficult balance. On the one hand, public powers sometimes need to restrict fundamental rights even when there is no complete certainty on the threat to collective interests. On the other hand, it is equally necessary to prevent potential excesses of public powers, which should not be allowed to restrict rights in the face of any kind of threat, no matter how light.[45]

The problem with Alexy's approach is that it fails to take into account potentially catastrophic risks whose scale and probability remain largely unknown but cannot be excluded (or even known low-probability risks with potentially catastrophic effects – the so-called 'black swans'). These risks would require highly anticipatory measures.[46] This is precisely what happened with COVID-19, where high-intensity early interventions saved large numbers of lives.[47] Such interventions would probably not meet the standard set by the epistemic law of balancing due to the low reliability of their premises and the large intensity of the restrictions, potentially hindering the much-needed early prevention of certain risks.

A similar option to that proposed by Alexy could focus on the probability and magnitude of the potential threat to a collective interest rather than on the intensity of the restriction. In that sense, the greater the probability of a risk, the extent of the expected damages and the reliability or likelihood of the premises, the lower the other two variables may be to allow the intervention of public authorities (ie to confirm the validity of the restriction of rights).[48] These variables could be supplemented by others, such as the proximity of the expected damages, assuming that the more imminent those damages are, the more justified the restriction of rights would be. That way, potentially catastrophic and highly probable events could be more easily prevented, even when there is low confidence in the empirical premises or a low reliability of their accuracy (such as COVID-19 when the impact of human-to-human transmission of the virus was still unknown and impossible to quantify).[49]

Once the possibility for public powers to intervene would be stated, the traditional first law of balancing could be applied to consider the abstract and concrete weights of the collid-

---

weight formula': ibid 514. This is analysed in Matthias Klatt and Johannes Schmidt, 'Epistemic discretion in constitutional law' (2012) 10(1) *I•CON* 69 <https://doi.org/10.1093/icon/mor056>; and Jorge Alexander Portocarrero Quispe, *La ponderación y la autoridad en el Derecho. El rol de los principios formales en la interpretación constitucional* (Marcial Pons 2016) 141ff.

45. The first option – insufficient intervention – would be typical from 19th-century liberal States and a strict application of the principle *in dubio pro libertate* (n 73). The second option – excessive intervention – would be reminiscent of what some scholars have called the 'State of Prevention 2.0 [*Prävention-II*]': see Erhard Denninger, 'Die Polizei im Verfassungsgefüge' in Hans Lisken and Erhard Denninger (eds), *Handbuch des Polizeirechts: Gefahrenabwehr, Strafverfolgung, Rechtsschutz* (5 ed, C H Beck 2012) 65-67.
46. Eliezer Yudkowsky, 'Cognitive Biases Potentially Affecting Judgment of Global Risks' in Nick Bostrom and Milan M Ćirković (eds), *Global Catastrophic Risks* (OUP 2008) 95.
47. Daniel K Goyal and others, 'Early Intervention Likely Improves Mortality in COVID-19 Infection' [2020] *Clinical Medicine* 248 <https://doi.org/10.7861/clinmed.2020-0214>; Marissa L Childs, 'The impact of long-term nonpharmaceutical interventions on COVID-19 epidemic dynamics and control: the value and limitations of early models' (2021) *Proceedings of the Royal Society: Biological Sciences* 1, 12 <https://doi.org/10.1098/rspb.2021.0811>.
48. Alexy (n 43) 515; Neil A Manson, 'Formulating the precautionary principle' (2002) *Environmental Ethics* 263, 267; Udo Di Fabio, *Risikoentscheidungen im Rechtsstaat* (J C B Mohr 1994) 159.
49. World Health Organization (n 29) 5.

ing principles.[50] In practice, this would mean that public authorities have the onus to prove that sufficient evidence exists for them to restrict certain rights, unless the expected damages, though uncertain, are so high and probable as to justify the shift of the burden of proof. Two examples can illustrate this solution:

(i) The complete lockdown imposed by several countries at the beginning of the pandemic (eg the case in Italy and Spain) may be considered legitimate given that the high initial uncertainty as to the premises (scenarios, existing cases, speed of transmission etc) was compensated by potentially catastrophic damages with a high probability if the premises were confirmed. Once considered legitimate, traditional balancing applied on the assumed premises would probably have validated the measure;[51]
(ii) Instead, despite its overall beneficial effects, a ban on smoking exclusively based on COVID-19 (such as the one imposed at the beginning of the pandemic in India or South Africa) would not be legitimate from the outset, since high scientific uncertainty on the effects of tobacco on Sars-COV-2 infections was coupled with a limited probability of preventing damages (the effects were worse on long-term smokers, a condition that cannot change with a provisional ban on smoking) and a smaller impact in terms of public health (being a smoker could increase the severity of the illness, but not the number of infections).[52] Thus, the 'first law of balancing' would not be applied because excessive uncertainty would have prevented public powers from acting.

3.2 Emphasising Judicial Deference

A second option to ameliorate the shortcomings of the proportionality principle as a constitutional standard under factual uncertainty is to grant legislative and executive powers some discretion to determine the conditions underlying each restrictive measure.[53] That is to say, they would be granted a margin of appreciation to assess the facts prior to the implementation of the principle, thus limiting the extent of judicial review. This solution could even be modulated depending on the level of factual, scientific or technical uncertainty: the higher the uncertainty surrounding the facts is, the greater judicial deference to other powers could be.[54] It can also be affected by emergency provisions that usually grant larger discretion to legislative and executive powers.

---

50. The impact of scientific uncertainty on the structure of balancing during the COVID-19 crisis is analysed in Fabrizio Cafaggi and Paola Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives' (2021) 12(4) *European Journal of Risk Regulation* 792, 807–816 <https://doi.org/10.1017/err.2021.47>.
51. Shuxian Zhang and others, 'COVID-19 containment: China provides important lessons for global response' (2020) 14(2) *Frontiers of Medicine* 215 <https://doi.org/10.1007/s11684-020-0766-9>; European Centre for Disease Prevention and Control (n 28) 7, 12ff.
52. Richard N van Zyl-Smit and others, 'Tobacco Smoking and COVID-19 Infection' (2020) 8(7) *Lancet Respiratory Medicine* 664 <https://doi.org/10.1016/S2213-2600(20)30239-3>; Emily J Grundy and others, 'Smoking, SARS-CoV-2 and COVID-19: A review of reviews considering implications for public health policy and practice' (2020) 18(1) *Tobacco Induced Diseases* 58 <https://doi.org/10.18332/tid/124788>. Smoking bans of different intensity were adopted in South Africa, India and Spain.
53. Caroline Henckels, 'Proportionality and the separation of powers in Constitutional Review: examining the role of judicial deference' (2017) 45(1) *Federal Law Review* 181, 192–193.
54. This is the solution traditionally accepted in Germany since 1979: see BVerfG 1 March 1979 1 BvR 532/77 [131]). Some scholars have proposed that the more intense a restriction of rights, the stricter judicial review should be, regardless of the degree of scientific uncertainty: see eg Rivers (n 9) 202–206. The German Federal Constitutional Court has recently combined both standards to uphold mandatory vaccination of health professionals. According to the court, the margin of appreciation granted to lawmakers should be lower if the restriction is more intense or affects certain fundamental rights, while being larger in case of factual complexity: see BVerfG 27 April 2022 1 BvR 2649/21 [187].

In fact, deference of the courts to parliaments, government or administrative bodies has been repeatedly invoked by apex courts during the pandemic, based on different legal foundations. They have sometimes resorted to direct democratic legitimation of lawmakers and regulators and their political discretion to justify a linked secondary power to assess factual issues (the level of risk for a protected interest, the economic and material capacity to fight it, feasibility of alternative measures, side effects and indirectly affected values).[55] Reference has also been made to the greater technical capacity of other powers to determine the facts underlying their decisions, ie their better means, preparation, advice and experience compared to the courts.[56] In a broader sense, courts have invoked the presumption of validity of laws, regulations and administrative measures to justify a greater degree of judicial deference in cases of factual, scientific or technical uncertainty.[57] Some scholars even refer to a 'presumption of proportionality'.[58] Finally, more recently, judicial deference has been strengthened on the basis of emergency constitutional states or regulations that would grant lawmakers and executive powers an even wider scope of action in comparison to ordinary times, including a wider margin of appreciation to establish the facts.[59]

However, this solution poses several problems. Firstly, despite their proclaimed deference to other powers, apex courts rarely stop there. They take deference as a starting point to apply the proportionality test later. That is why they have declared some regulations and measures void for being disproportionate in spite of acknowledging the existence of factual uncertainties concerning their adequacy or their necessity.[60] In that sense, it would be strange to replace the balancing of rights and interests carried out by legislative and executive powers – something controversial to review if we consider their direct democratic legitimacy and political discretion – while respecting their margin of appreciation concerning the facts – something the courts usually review outside the context of proportionality, even if to a limited extent.[61] To shift the burden of proof to those whose rights have been restricted

55. In the EU, see Case C-221/09 *AJD Tuna Ltd* [2011] ECR I-1655, paras 79-81. In Germany, directly related to COVID-19, see BVerfG 12 May 2020 1 BvR 1027/20 [5]; BVerfG 13 May 2020 1 BvR 1021/20 [10]; BVerfG 19 May 2020 2 BvR 483/20 [8]. In France, see Conseil Constitutionnel 2020-803 DC 9 July 2020 CSCL2017844S [13] and no. 2020-808 DC of 13 November 2020 CSCL2031201S [6]. In Spain, see Tribunal Constitucional 99/2019 18 July 2019 BOE-A-2019-11911 [6A] and 112/2021 of 13 May [8]. In the United States, this solution has also been applied by the Supreme Court (eg *Gonzales v Carhart*, 550 US 124 (2007) 33-36), though quite inconsistently: see Caitlin E Borgmann, 'Rethinking Judicial Deference to Legislation Fact-Finding' (2009) 84(1) *Indiana Law Journal* 1, 7ff.

56. In the EU, see Case T-74/00, *Artegodan GmbH v Commission* [2002] ECR II-494, paras 197-200 and Case T-392/02, *Solvay Pharmaceuticals BV v Council of the European Union* [2003] ECR II-04555, paras 125-126. It has been referred to as an administrative 'margin of appraisal': Silvère Lefèvre and Miro Prek, '"Administrative Discretion", "Power of Appraisal" and "Margin of Appraisal" in Judicial Review Proceedings before the General Court' (2019) 56(2) *Common Market Law Review* 339 <https://doi.org/10.54648/cola2019027>.

57. John Mark Keyes, 'Judicial Review of COVID-19 Legislation – How have the Courts Performed?', *Ottawa Faculty of Law Working Paper*, 2022-15, 8 <http://dx.doi.org/10.2139/ssrn.4170180>.

58. Laura Clérico, 'El principio de proporcionalidad: entre el por acción y la insuficiencia por omisión o defecto' in Miguel Carbonell (ed), *El principio de proporcionalidad y la argumentación constitucional* (Ministerio de Justicia y Derechos Humanos 2008) 153; Julian Rivers, 'The Presumption of Proportionality' (2014) 77(3) *The Modern Law Review* 409 <https://doi.org/10.1111/1468-2230.12072>. In Germany, BVerfG 12 May 2020 1 BvR 1027/20 [8].

59. Cafaggi and Iamiceli (n 50) 795; Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8(1-2) *The Theory and Practice of Legislation* 71, 81 <https://doi.org/10.1080/20508840.2020.1788232>; Gilad Abiri and Sebastián Guidi, 'The Pandemic Constitution' (2021) 60(1) *Columbia Journal of Transnational Law* 68. However, higher judicial deference did not entail a complete lack of judicial review: see Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19(5) *I•CON* 1498 <https://doi.org/10.1093/icon/moab059>.

60. For example, in Germany, BVerfG 26 February 2020 2 BvR 2347/15 [238] [256] [271], in relation to assisted suicide or, in the United States, *Stenberg v Carhart (Carhart I)* 530 US 914 [2000] 19, in relation to partial birth abortion and medical uncertainty.

61. Paul Daly, 'Facticity: Judicial Review of Factual Error in Comparative Perspective' in Peter Cane and others (eds),

does not seem convincing either, since it would entail a negative proof almost impossible to achieve. They would have to prove with enough certainty the disproportionate character of measures expressly adopted under uncertainty.[62]

Secondly, deference to legislative or executive powers to determine the facts would transform the principle of proportionality into a mandate for public powers instead of a judicial standard of control. The control of the adopted measures would turn into a reasonableness or non-arbitrariness standard, thus declaring void only those laws, regulations or measures that are manifestly inadequate, unnecessary or disproportionate.[63] This can lead to a distortion in cases where scientific or technical knowledge rapidly evolves. In such cases, the moment to apply the proportionality test would not be clear. On the one hand, it could be based on the knowledge existing when the measure under review was adopted, thus resembling a reasonableness standard of control as it would require public powers to adopt a justifiable decision based on the information available at the time. On the other hand, it could be based on the knowledge existing when the judicial review takes place, in which the evolution of science may have shown the inadequacy, lack of necessity or disproportionate character of the measures under review. This way, courts would prevent unconstitutional laws or measures remaining valid, even if their initial adoption could be deemed reasonable.[64] We believe this solution to be more accurate. However, deference to lawmakers, regulators or administrative agencies would be problematic in that scenario.

Finally, if judicial deference to parliaments, governments or the administration is based on their greater technical capacity to assess and determine the facts underlying a restriction of rights, we must ensure that this is truly the case in order to avoid a blind spot for judicial control.[65] This would require increased motivation, justification and transparency standards, together with deeper *ex ante* evaluations of any law, regulation or measure even in cases of emergency.[66] Suppressing or softening those requirements when urgent measures are needed, as has happened in many countries during the pandemic, while extending judicial deference may lead to arbitrary or ill-considered restrictions of rights devoid of effective control[67]. An example of good practice can be found in the famous *Cannabis* case before the

The Oxford Handbook of Comparative Administrative Law (OUP 2021) 901; Klaus Meßerschmidt, 'Evidence-based review of legislation in Germany' (2016) 4(2) *The Theory and Practice of Legislation* 209, 216 <https://doi.org/10.1080/20508840.2016.1249676>.

62. As stated in some cases by the German Federal Constitutional Court (eg in relation to assisted suicide or life imprisonment) or the French Council of State (eg in relation to visa suspension during the COVID-19 pandemic), factual uncertainty should not play against the affected rightholders: (BVerfG 21 June 1977 1 BvL 14/76 [174]; BVerfG 26 February 2020 2 BvR 2347/15 [238]; Conseil d'État 21 January 2021 no. 447878 ECLI:FR:CEORD:2021:447878.20210121 [18]).
63. See inter alia Filippo Borriello, 'Principle of Proportionality and The Principle of Reasonableness' (2020) 13(2) *Review of European Administrative Law* 155 <https://doi.org/10.7590/187479820X15930701852292>; Paul Craig, 'Reasonableness, Proportionality and General Grounds of Judicial Review: A Response' (2021) 2(1) *Keele Law Review* 1 <https://keelelawreview.com/volume-2>; Jud Mathews, 'Reasonableness and Proportionality' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2021) 917.
64. Barak (n 10) 346; BVerfG 27 April 2022 1 BvR 2649/21 [167] – [170].
65. Paul Horwitz, 'Three Facts of Deference' (2007) 83(3) *Notre Dame Law Review* 1061, 1085; John O McGinnis and Charles W Mulaney, 'Judging Facts Like Law' (2008) 25(1) *Constitutional Commentary* 69, 71.
66. For instance, this argument made the Austrian Constitutional Court annul some restrictions that had not been expressly justified in the regulatory dossier prior to their approval: see Verfassungsgerichtshof, 14 July 2020 V 411/2020-17 [78] – [80].
67. In Italy, for example, the Constitutional Court has established 'scientific reasonableness' (*ragionevolezza scientifica*) as an additional standard of judicial control over legislative discretion, obliging lawmakers to gather and analyse the available scientific data before passing some laws: Simone Penasa, 'Il dato scientifico nella giurisprudenza della Corte costituzionale: la ragionevolezza scientifica come sintesi tra dimensione scientifica e dimensione assiologica' (2015) 46(2) *Politica del Diritto* 271.

German Federal Constitutional Court in which the court reviewed the medical and scientific data considered by the legislature to sanction the possession of cannabis, but also updated them, to verify the existence of irreducible factual uncertainties and only then grant judicial deference to the parliamentary decision.[68]

3.3 Establishing Prior Rules to Decide which Information Shall Prevail

A third option to deal with factual uncertainties before applying the principle of proportionality is to adopt a prior decision on the information that public powers must include in the proportionality test. As explained in section 2, we do not refer to problems related to the standard of evidence applicable or the election between contradictory pieces of evidence. Such problems are relatively easy to solve by resorting to external experts and detailing the standards of proof applicable.[69] Courts can have recourse to leading expert bodies and agencies at the national level to assess certain facts, as has been the case during the pandemic in Germany with the Robert Koch Institute, or the creation of an *ad hoc* scientific committee by the Public Health Code in France.[70] Rather, the problem in focus here arises when those experts, or the available information obtained through other means, recognise their own limits. They cannot determine with full certainty or at least with a minimum degree of confidence what the facts are, or they offer contradictory conclusions that remain unresolved within the scientific community.

In those cases, one could think that the only rule available is to adopt the most probable alternative as the starting scenario to apply the proportionality test or the one that has a wider support within the scientific community, ie the more reliable information in comparison with alternatives according to the experts. However, it is not the only rule available. For example, one could prioritise the information that, if confirmed, would entail higher damages for legally protected interests, damages more difficult to reverse, or a more imminent threat (even if those scenarios were deemed less likely than others or depended upon less reliable information *a priori*). All these rules are content-based and depend on a political choice that can be made beforehand by lawmakers, regulators or the courts themselves. The decision to adopt one rule or another does not derive from a scientific decision.[71] Among these rules, two have continuously clashed over the past decades:

(i) A rule obliging public powers to include in the proportionality test the most optimistic information available so that the less restrictive measure is finally adopted. That means including the information that assumes the lowest level of risk to prioritise individual rights and liberties pending new or more reliable information, and

68. BVerfGE 9 March 1994 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92 [124], [143] – [153]. See further Klatt and Schmidt (n 44) 78ff; Alexy (n 43) 520ff.
69. In these cases, a non-expert judge settles the disagreement between the experts, following the expressive Latin aphorism related to scientific and technical evidence: *iudex peritus peritorum* (ie the judge is the expert on the experts).
70. In Germany, see eg BVerfG 1 May 2020 1 BvQ 42/20 [10]; BVerfG 9 June 2020 1 BvR 1230/20 [18]; BVerfG 28 September 2020 1 BvR 1948/20 [4]; BVerfG 16 November 2020 2 BvQ 87/20 [20] [61]. In France, see Conseil Constitutionnel 2020-849 QPC 17 June 2020 CSCX2015317S [23]-[24]; Conseil d'État 13 June 2020 no. 440846 (ECLI:FR:CEORD:2020:440846.20200613) [14]. These bodies are also designed to give advice to lawmakers and regulators, thus being an additional 'institutional check' in case of scientific uncertainty: BVerfG 19 November 2021 1 BvR 781/21 [191].
71. Michelle Emerson and Ellen Vos, 'The Scientification of Politics and the Politicisation of Science' in Michelle Emerson and Ellen Vos (eds), *Uncertain Risks Regulated* (Routledge 2009) 1; Sheila Jasanoff, *Science and Public Reason* (Routledge 2012).

(ii) A rule obliging public powers to include in the proportionality test the most pessimist information available, ie the information assuming the highest level of risk to anticipate public intervention, even when that entails an early restriction of individual rights.[72]

The former rule is inspired by the traditional principle of constitutional interpretation *in dubio pro libertate*.[73] The latter rule would be an expression of the more recent but well-established precautionary principle, especially in the European context, by which scientific uncertainty shall not prevent public powers from taking protective measures against certain risks.[74]

To illustrate the potential solution proposed in this section, again using an example related to COVID-19, scientific authorities could not ascertain at the beginning of the pandemic whether asymptomatic people could spread the virus. If they could, the risk of virus transmission was considered very high with major potential damages. In the event they could not, the risk of transmission was considered low to very low.[75] In view of this extreme uncertainty, impossible to resolve with the scientific knowledge existing at the time, the proportionality of restrictive measures on asymptomatic people or the general public would completely depend on the baseline information adopted, consisting of equally likely alternatives. If the most pessimistic scenario was prioritised, restrictive measures would surely be considered proportionate and thus constitutionally valid; instead, if the most optimistic scenario was adopted under the principle *in dubio pro libertate*, the same measures would be deemed void.

Taking a prior decision on this point by means of a clear and stable rule (eg a common rule for a whole sector, or when the same rights are at stake), instead of an *ad hoc* decision depending on particular circumstances, may favour a more effective application of the proportionality principle. It would also favour its consistency, avoiding disparate restrictions to prevent similar risks, or equivalent measures for substantially different situations. Finally, it would encourage legislatures to take this political decision, instead of leaving it to the executive power or to expert agencies, thus strengthening the democratic legitimacy of the decision as well as legal certainty and the rule of law.[76]

---

72. Klatt and Meister (n 6) 115.
73. Peter Schneider, 'In dubio pro libertate' in Ernst von Caemnerer and others (eds), *Hundert Jahre deutsches Rechtsleben: FS zum hundertjährigen Bestehen des Deutschen Juristentages 1860-1960*. Bd. 2 (Müller 1960) 263ff; Konrad Hesse, *Grundzüge des Verfassungsrechts des Bundesrepublik Deutschland* (20 ed, CF Müller 1999) 28; Friedrich Müller and Ralph Christensen, *Juristische Methodik* I (10 ed, Duncker & Humblot 2009) 416.
74. See inter alia Birger Arndt, *Das Vorsorgeprinzip im EU-Recht* (Mohr Siebeck 2009); Jonathan B Wiener and others (eds), *The Reality of Precaution. Comparing Risk Regulation in the United States and Europe* (Routledge 2010); Nicolas De Sadeleer, 'Le principe de précaution dans le droit de l'Union européenne' (2017) 33(6) *Revue française de droit administratif* 1025; Silvia Delgado del Saz, *Vorsorge als Verfassungsprinzip im europäischen Umweltverbund: Rechtsvergleichende Überlegungen am Beispiel der Risiken der Mobilfunkstrahlung* (Mohr Siebeck 2017); Borja Sánchez Barroso, *El principio de precaución en España* (Congreso de los Diputados 2021).
75. European Centre for Disease Prevention and Control, Outbreak of acute respiratory syndrome associated with a novel coronavirus, China: first local transmission in the EU/EEA – third update (31 January 2020) 4 <www.ecdc.europa.eu/sites/default/files/documents/novel-coronavirus-risk-assessment-china-31-january-2020_0.pdf>.
76. Gregor Kirchhof, 'The Generality of the Law' in Klaus Meßerschmidt and A Daniel Oliver-Lalana (eds), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 89, 92ff; Joelle Grogan and Julinda Beqiraj, 'The Rule of Law as the Perimeter of Legitimacy for COVID-19 Responses' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022) 201. The shift of parliamentary powers to the executives for the restriction of rights during the pandemic, especially in France and Italy but also in Germany and the United Kingdom, has been analysed in Angelo Golia and others, 'Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic' (2022) 81(1) *Heidelberg Journal of International Law* 147.

4. Additional Controls on Lawmakers and Regulators under Factual Uncertainty

The shortcomings of the principle of proportionality under factual uncertainty may be compensated by additional legal tools. This is at least if we assume that the principle's main objective is to develop a common methodological framework to foster deliberation and justification of public decisions, and if we want it to correct some of the dysfunctions of the democratic process (neglected minorities, the capture of the majority by spurious interests, inconsistent decision-making, excessive individual hardship provoked by the defence of collective interests, over-politicization and polarization, etc).[77] The duty of legislatures and executive powers to comply with the whole content of modern normative constitutions (and any other law or regulation for governments and administrative bodies) already entails, as is obvious, many other checks and controls besides the principle of proportionality (eg the principle of legality, the intrinsic nature of basic rights, formal procedures, etc). The following only addresses some potential controls specifically designed to counter factual uncertainty and complement the application of the principle of proportionality, thus facilitating the judicial review of any restriction of rights in that context.

First, the introduction of procedural controls prior to the decision of public authorities may increase their accountability and the subsequent control of their decisions under uncertainty. Many of them already exist in the case of singular administrative decisions as a direct influence of the precautionary principle, as interpreted by the CJEU. Indeed, although mostly criticised for its substantive content,[78] the precautionary principle has a procedural dimension that tries to structure and rationalise public decision-making under conditions of scientific uncertainty.[79] The procedural steps inspired by this principle could be adapted and extended to be applied to any situation of factual uncertainty, not necessarily of scientific or technical nature, as well as to any general provision established by lawmakers and regulators – not only administrative decisions – thereby complementing *ex ante* assessments in line with the principles for better regulation and a better legislative technique.[80]

---

77. See inter alia Jackson (n 1) 3142; Beatty (n 6) 167; Cohen-Eliya and Porat (n 17) 466ff; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 141 <https://doi.org/10.2202/1938-2545.1047>; Niels Petersen, *Proportionality and Judicial Activism* (Cambridge University Press 2017) 9-12; Matthias Klatt and Moritz Meister, 'Proportionality: a Benefit to Human Rights? Remarks on the I•CON Controversy' (2012) 10(3) *I•CON* 687 <https://doi.org/10.1093/icon/mos019>; Robert Alexy, 'The Absolute and the Relative Dimensions of Constitutional Rights' (2017) 37(1) *Oxford Journal of Legal Studies* 31, 39 <https://doi.org/10.1093/ojls/gqw013>.
78. Philippe Kourilsky and Geneviève Viney, *Le Principe de précaution: rapport au Premier ministre* (Odile Jacob 2000) 139; Giandomenico Majone, 'The Precautionary Principle and its Policy Implications' (2002) 40(1) *Journal of Common Market Studies* 89 <https://doi.org/10.1111/1468-5965.00345>; Gary E Marchant and Kenneth L Mossman, *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts* (The AEI Press 2004); Cass R Sunstein, *Laws of Fear: beyond the precautionary principle* (Cambridge University Press 2005) 115ff; Gérald Bronner and Étienne Géhin, *L'inquiétant principe de precaution* (Presses Universitaires de France 2010).
79. See eg Case T-13/99 *Pfizer Animal Health v Council*, judgment of 11 September 2002 (ECLI:EU:T:2002:209) paras 142ff; Case T-70/99, *Alpharma Inc. v Council*, judgment of 11 September 2002 (ECLI:EU:T:2002:210) paras 161ff; Case C-343/09, *Afton Chemical Limited v Secretary of State for Transport*, judgment of 28 August 2010 (ECLI:EU:C:2010:419) paras 60ff; Case C-282/15, *Queisser Pharma GmbH & Co. KG v Bundesrepublik Deutschland*, judgment of 19 January 2017 (ECLI:EU:C:2017:26) paras 55-66; Case T-584/13, *BASF Agro and others v European Commission*, judgment of 17 May 2018 (ECLI:EU:T:2018:279) paras 60ff; Case C-663/18, *B. S. and C. A.*, judgment of 19 November 2020 (ECLI:EU:C:2020:938) paras 90-92.
80. See eg Organisation for Economic Cooperation and Development (OECD), *OECD Guiding Principles for Regulatory Quality and Performance* (OECD 2005) 3-4; Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/1, 4ff; Bernardo Delogu, *Risk Analysis and Governance in EU Policy Making and Regulation: An Introductory Guide* (Springer 2016) 217ff; OECD, *OECD Regulatory Policy Outlook 2021* (OECD Publishing 2021) 49ff; European Commission, 'Better regulation: Joining forces to make better laws' COM(2021) 219 final 2-4, 13ff; European

In particular, some of the procedural checks that could be established before adopting any restriction of rights and applying the proportionality test under factual uncertainty would be the following:

(i) Express and detailed identification of the adverse effects the restriction of a right aims to prevent. This not only implies identifying the legitimate purpose of public authorities' intervention as part of the proportionality test (eg protection of public health or protection of life), but also detailing the exact threat existing against these collective interests.
(ii) In-depth assessment of the existing threat and the objective sought, trying to characterise and quantify them as much as possible. This also entails analysing potential side-effects (both in case of action – finally deciding to restrict a right – and in case of inaction). In the event of scientifically related risks, this assessment shall be conducted by scientific experts, whose participation in the law-making process is not always easy, contrary to individual administrative decisions. If the threat to a collective interest is not related to science, the duty to consult experts in other fields, to take into consideration their assessment and to expressly accept or reject it before the restriction of a right should still be imposed on public authorities. Courts could thus control, as they have done sometimes in highly complex contexts, if the advisory bodies are acting according to their own constituent rules. They could also assess if the conclusions they reach are duly justified and internally consistent.[81] Moreover, they could check if they take into account all the available evidence. Finally, they can also review if they respect certain principles traditionally associated with expert objectivity (eg excellence, independence and transparency).[82]
(iii) Explicit analysis of the expert assessment by public authorities in order to check that they have understood it correctly, that their decision is consistent with the available data, and that their political decision on the measures to be adopted and the necessary restriction of rights is not arbitrary or capricious, but evidence-based. This would be the equivalent in non-scientific contexts to the stage of 'risk-management' under the precautionary principle.[83]

Secondly, a new principle of temporariness could complement the current principle of proportionality in cases of factual uncertainty. Recently, apex courts have applied time as an internal factor of proportionality *stricto sensu*. The fact that restrictions of rights were declared to be provisional by the legislature or the executive powers during the pandemic led most apex courts to uphold them, considering they had a lower concrete weight in their balancing.[84] However, both issues should be conceptually separated.

Commission, 'Commission Staff Working Document: Better Regulation Guidelines' SWD (2021) 305 final; Kasey McCall-Smith, 'Good better best? Human rights impact assessment in crisis lawmaking' (2022) *The International Journal of Human Rights* 1 <https://doi.org/10.1080/13642987.2022.2057955>; Secretariat to the Parliamentary Business and Legislation (PBL) Cabinet Committee, *Guide to Making Legislation* (Cabinet Office 2022) 113-118.

81. *Solvay* (n 56) paras 162-163; *Artegodan* (n 56) para 200.
82. See Case T-475/07 *Dow AgroSciences Ltd and Others v European Commission* [2011] ECR-2011 II-05937 para 153; and Case T-257/07 *French Republic v European Commission*, judgment of 9 September 2011 (ECLI:EU:C:2013:46) paras 87–89.
83. *Pfizer* (n 79) paras 363, 410; *Alpharma* (n 79) paras 176, 323; *BASF Agro* (n 79) paras 74–75.
84. In Germany, see BVerfG 19 November 2021 (n 70) [233]; in France, see Conseil Constitutionnel 2020-800 DC 11 May 2020 CSCL2011683S [76]; in Italy, see Corte Costituzionale no. 213/2021 (ECLI:IT:COST:2021:213) [11.4] – [11-7]; in Spain, see Tribunal Constitucional 148/2021 14 July 2021 BOE-A-2021-13032 [9]. In the UK, temporariness was accepted by the High Court as an argument in favour of proportionality in *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin) [13], but it was rejected in *Reverend Dr William J U Philip* [2021] CSOH 32 [121]. See further Guy Baldwin, 'The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom' (2021) 26(4) *Judicial Review* 297, 311–314 <https://doi.org/10.1080/10854681.2021.2057719>.

On the one hand, though generally focusing on the reduction of the scope of application of a fundamental right's norm, the intensity of a restriction can indeed take time into account in three main ways: considering the duration of the restriction (the longer the restriction, the more intense it is), its imminence or speed (the quicker the restriction will be applied, the more difficult to react or adapt to it and thus the more intense it can be), and its frequency of application (the more it is implemented, the more intense a restriction should be considered).[85]

On the other hand, these variables do not answer every question related to time when restrictions are put in place. In particular, these variables do not address which duration, speed or frequency shall be considered reasonable or justified under the existing circumstances (eg it is not the same to ask whether a two-week curfew is 'light' enough in comparison to the number of lives it would save than to ask if a period of two weeks is an arbitrary duration or not). Nor do they address cases in which a provisional restriction, albeit short in time, could amount to a total loss (eg a ten-minute restriction on the fundamental right to private and family life, which includes informed consent,[86] by forcefully vaccinating someone, or on freedom of religion, by preventing a chaplain from assisting a dying person, may be considered a low-intensity restriction from a temporal point of view and eventually pass the proportionality test, and yet seems at least questionable).

Time variables included in the weight formula or the final balancing of the proportionality test fail to consider the main issue at stake in those cases, while a complementary principle of temporariness could do so. In fact, it would be closely related to the principles governing so-called sunset clauses and experimental legislation.[87] It may imply, for example, the possibility to introduce a duty to update the factual data available in fixed periods of time or as often as necessary depending on the case.[88] It may also lead to include *ex post* assessments in laws and regulations whose impact is currently dubious or partially unknown.[89] All of them would complement the principle of proportionality under conditions of factual uncertainty.

---

85. Jorge Silva Sampaio, 'Proportionality in Its Narrow Sense and Measuring the Intensity of Restrictions on Fundamental Rights' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 104.
86. Buelens Wannes and others, 'The view of the European Court of Human Rights on competent patients right of informed consent: research in the light of articles 3 and 8 of the European Convention on Human Rights' (2016) 23(5) *European Journal of Health Law* 481 <https://doi.org/10.1163/15718093-12341388>.
87. Rob van Gestel and Gijs van Dijck, 'Better Regulation through Experimental Legislation' (2011) 17(3) *European Public Law* 539 <https://doi.org/10.54648/euro2011037>; Sophia Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar 2014); Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses: An Historical and Normative analysis* (Routledge 2016); Ittai Bar-Siman-Tov, 'Temporary legislation, better regulation, and experimentalist governance: An empirical study' (2018) 12(2) *Regulation & Governance* 192 <https://doi.org/10.1111/rego.12148>.
88. See Case C-241/01 *National Farmers' Union v Secrétariat général du gouvernement*, Opinion of AG Mischo of 2 July 2002 (EU:C:2002:415) para 51; Julien Cazala, *Le principe de précaution en Droit international* (Anthemis 2006) 103-105; Case C-528/16 *Case Confédération paysanne and Others*, Opinion of AG Bobek of 2018 (ECLI:EU:C:2018:20) paras 139–141.
89. See Koen van Aeken, 'From Vision to Reality: Ex Post Evaluation of Legislation' (2011) 5(1) *Legisprudence* 41 <https://doi.org/10.5235/175214611796404859>; Paul Stephenson, 'Why Better Regulation Demands Better Scrutiny of Results' (2017) 19(1) *European Journal of Law Reform* 97 <https://doi.org/10.5553/EJLR/138723702017019102006>; Franklin De Vrieze and Philip Norton 'The significance of post-legislative scrutiny' (2020) 26(3) *The Journal of Legislative Studies* 349 <https://doi.org/10.1080/13572334.2020.1780008>; Irmgard Anglmayer and Amandine Scherrer, 'Ex-post evaluation in the European Parliament: an increasing influence on the policy cycle' (2020) 26(3) *The Journal of Legislative Studies* 405 <https://doi.org/10.1080/13572334.2020.1782057>.

These controls could be inspired, again, by the precautionary principle. As it is well known, this principle has been repeatedly invoked by EU and national institutions over the past decades to adopt restrictive measures against scientifically uncertain risks (eg mad cow disease, some GMOs, new chemical substances, food safety, etc). To do so, EU institutions and case law have developed several requirements that differ from the steps of the proportionality test and could supplement it – or maybe even substitute it. These requirements are: first, to give precedence to the protection of health or the environment over economic interests; second, to entrust scientific experts with the task of identifying potentially adverse effects and assigning, when possible, probabilities and magnitudes to it; and third, to update the available data and deal with them in an independent, objective and transparent manner, etc.[90] These requirements would be similar to the additional checks explained in this section.

5. Conclusion

The principle of proportionality is considered the key legal tool to control the restriction of individual rights and liberties for the protection of collective interests. However, as shown in this article with recent examples related to COVID-19, apart from the traditional objections against the proportionality principle, factual uncertainties pose new challenges for an effective and consistent application of the principle. This is especially the case in highly complex scientific or technical contexts. In such situations, where no sufficient data are available or the experts within the scientific community cannot agree on the facts, the proportionality test cannot be completed, at least with a sufficient degree of certainty. According to the state of knowledge, neither public authorities nor the courts can ascertain whether the restrictive measures adopted are adequate or not, if other less restrictive means are available to reach the aim pursued by public powers, or if the burden imposed compensates the expected benefits.

To address these limitations, the article has explored different potential solutions in order to strengthen the effectiveness of the principle of proportionality as a standard of constitutional review. The first option would require refining the proportionality test with a reliability variable following Alexy's proposals or including additional questions in the proportionality test: are the available data reliable enough to justify a restriction as intense as that under review? Or do the magnitude and probability of the potential threat against a collective interest make up for the low reliability of the available information?

The second option would emphasise judicial deference to the legislature, the government or administrative agencies, granting them not only political discretion on the applicable measures and balancing, but also a margin of appreciation on the facts underlying their decisions and limiting judicial control over matters of fact. This solution is not without its problems and should entail, above all, more stringent requirements as to justificatory reasoning and transparency by public authorities, as well as better technical tools to conduct *ex ante* factual assessments.

Finally, the third potential solution would be to adopt a prior decision on the information that shall prevail under uncertainty, depending on the sector or the rights at stake. This decision may not necessarily imply assuming the most likely information available. In fact,

90. Case T-584/13, *BASF Agro BV and Others* (n 79) paras 58-68; Klaus Meßerschmidt, 'COVID-19 legislation in the light of the precautionary principle' (2020) 8(3) *The Theory and Practice of Legislation* 267 <https://doi.org/10.1080/20508840.2020.1783627>.

the two main competing rules existing are content-based instead of focusing on formal reliability. One of them, inspired by the precautionary principle, would oblige public powers to adopt the most pessimistic information at their disposal. The other, in turn, would make them accept the most optimistic information available to adopt the least restrictive measures possible on the basis of the principle *in dubio pro libertate*.

Together with these potential solutions, other additional legal tools could help promote legal justification and judicial review of public powers' restrictions under conditions of factual uncertainty. In particular, procedural steps designed to apply the precautionary principle under scientific uncertainty could be adapted to apply the principle of proportionality under any kind of factual uncertainty. They could also improve law-making and regulatory procedures to take into account uncertainty as part of the requirements of better regulation and legislative technique. The implementation of a new principle of temporariness would also be useful to control the restriction of rights even when factual premises remain partial or totally unknown, or irremediably controversial.

Acknowledgements

I am especially grateful to Professor Javier Gómez Lanz (Universidad Pontificia Comillas) for his invaluable comments on previous versions of this article.

Oslo Law Review

Universitetsforlaget

RESEARCH PUBLICATION

Volume 9, No. 2-2022, p. 92–109
ISSN online: 2387-3299
DOI: https://doi.org/10.18261/olr.9.2.2

The Legitimacy of the European Systemic Risk Board in Respect of its Performance, Roles and Contributions to the Financial Regulatory System

Trude Myklebust
Post-doctoral research fellow, Department of Private Law, University of Oslo
trude.myklebust@jus.uio.no

Abstract
The European Systemic Risk Board (ESRB) is an institutional innovation within the European System for Financial Supervision that was put in place as a direct response to the Global Financial Crisis in 2007–2008. The ESRB is responsible for the macroprudential oversight, prevention and mitigation of systemic risk in support of financial stability. This article offers a structured discussion of legitimacy-related issues that arise with respect to the ESRB's performance, role and contribution to the financial regulatory system. In all three instances, a closer examination of the characteristics of the ESRB reveals that there exist factors that are conducive to its legitimacy, but also that there are circumstances that give grounds for concern. The article suggests that legitimacy-related questions are less frequently addressed in the literature on financial regulation than those discussing the effectiveness of various regulatory tools and approaches. Since the two aspects are closely related, important considerations might go amiss if prerequisites of legitimacy in regulatory arrangements are not properly accounted for in policymaking processes. The article recommends that questions of legitimacy be more clearly inserted into regulatory deliberations to ensure robust regulatory and supervisory systems capable of contributing meaningfully to the public good.

Keywords
Legitimacy, the European Systemic Risk Board, the European System for Financial Supervision, macroprudential policy, financial stability, price stability

1. Introduction

The European Systemic Risk Board (the ESRB) is a part of the European System for Financial Supervision (the ESFS) and is responsible for the macroprudential oversight, prevention and mitigation of systemic risk in support of financial stability. Macroprudential oversight means overseeing risks that develop at the systemic level – the type of risk that, once triggered, can propagate throughout the financial system, threaten the functionality of the system as a whole and, in the worst case scenario, lead to financial crisis.

In an earlier paper, I critically analysed the governing frameworks and institutional set-up of the ESRB in order to assess how institutional and organisational issues could affect its ability to achieve its mission and objectives.[1] In that paper, acknowledging the objectives

1. Trude Myklebust, 'Form and Function of the ESRB: A Critical Analysis' in Mads Andenas and Gudula Deipenbrock (eds), *Regulating and Supervising European Financial Markets: More Risks than Achievements* (Springer International Publishing 2016) 43–66.

that had motivated the creation of the ESRB and the importance of its mission, I identified several features that could play a role in undermining its effectiveness. Among these are that the ESRB lacks binding competencies. Furthermore, its decision-making procedures are cumbersome and long-winded. Moreover, the sheer size of the task conferred on it – ensuring financial stability at the macro level, across Europe – is massive, both in reach and in complexity.

This article raises a different question, though, and it is not so much about the ESRB's effectiveness as about its legitimacy. While these two aspects are clearly connected, a discussion of the legitimacy of the ESRB requires a broader approach and a different set of parameters by which to assess it.

In this article, there are two questions I try to answer. First, how should legitimacy be construed in the context of supranational institutions involved in the governance of financial systems? Second, how should the concept of legitimacy be applied in the case of the ESRB? In other words, what are the markers we must look for when evaluating the legitimacy of the ESRB?

To answer these questions, I proceed as follows. In section 2, I set the scene by providing some historical context to explain the ESRB's emergence and its mandate. In section 3, I situate the topic of ESRB's legitimacy in the academic landscape of financial regulation and governance, and highlight some core features of this regulatory area that are important to inform the ensuing discussion. Section 4 then addresses the first of the two main questions just presented about how legitimacy should be construed in the context of supranational institutions involved in the governance of financial systems. In section 5, I use the insights gained from the discussion of that question to discuss the legitimacy of the ESRB's performance, role and contributions to the financial regulatory system. This is a more applied exercise, taking note of the specific characteristics of the ESRB. Section 6 concludes.

2. Background and Context

The ESRB emerged from the ashes of the Global Financial Crisis in 2007–2008. This event is central to understanding how and why the ESRB came into being.[2] The propensity for bank failures to develop and, through contagion, to become systemic, has long been an acknowledged feature of the financial sector.[3] The risk of widespread financial failure manifested itself with particular force during the 1929 financial crash. This incident played an instrumental role in subverting the then dominant laissez-faire attitude with regards to financial regulation.[4]

A period of relative calm prevailed in the tightly regulated financial environment that followed. There were few failures or crises in the decades after the end of the Second World War. But with the liberalisation of the financial sector in the 1980s and 1990s, bank failures and financial crises made a solid comeback.[5] They proved to be a difficult challenge for policymakers. In 1998, the famous economist and regulatory theorist Charles Goodhart conducted a survey that found that significant bank failures or crises, most of them requiring

2. ibid 44.
3. The literature on systemic risk in the financial sector is vast. See eg Sylvain Benoit and others, 'Where the Risks Lie: A Survey on Systemic Risk' (2017) 21(1) *Review of Finance* 109 <https://doi.org/10.1093/rof/rfw026> for an extensive literature review.
4. John Armour and others, *Principles of Financial Regulation* (Oxford University Press 2016) 4.
5. Tommaso Padoa-Schioppa, *Regulating Finance: Balancing Freedom and Risk* (Oxford University Press 2004) vii.

difficult and costly government intervention, had occurred in 140 countries across the world in the years between 1980 and 1996.[6]

However, the acknowledgement among regulators that financial market activities entailed risks that could become systemic (and potentially culminate in financial crises) was not enough to avert the build-up and unleashing of the 2007–2008 Global Financial Crisis. It became apparent that systemic risk had been accruing in the financial sector without central policymakers being able to foresee or forestall it.[7] Only by expending exorbitant amounts of money and effort were they able to dampen the escalation of the crisis and restore a semblance of normality.[8] With its colossal magnitude, global reach and devastating consequences, this crisis is counted among the most severe in the history of finance.[9]

In 2008, the then Governor of the European Central Bank, Jean-Claude Trichet, remarked:

> We knew that a storm was brewing but, admittedly, we did not know exactly where. Neither did we know what would trigger it, or when it would come.[10]

This was obviously a very uncomfortable position for policymakers and regulators to find themselves in, being the ones in charge of ensuring a well-functioning and stable financial system. As a logical consequence, a long line of reports and inquiries followed the financial crisis. These publications critically examined its causes and found that a wide array of factors had contributed to the demise.[11]

One important factor highlighted in various subsequent investigations was the role played by financial policymaking and regulation. Indeed, a consensus emerged among policymakers as well as academics that the then regulatory approach to ensuring financial stability was flawed on several counts.[12] An ill-adapted understanding of the phenomenon of systemic risk was identified as pivotal. Financial regulation and supervision had been based on too narrow an understanding of systemic risk. More specifically, it had insufficiently taken into account the systemic risk that could arise at the macro-level, even if each institution seemed financially sound at the micro-level.[13] The prevailing microprudential regulatory focus on

6. Charles Goodhart and others, *Financial Regulation: Why, How and Where Now?* (1st edn, Routledge 1998) 16ff.
7. Myklebust (n 1) 44.
8. See eg Armour and others (n 4) 3.
9. See eg Mads Andenas and Iris HY Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility* (1st edn, Routledge 2013) 3 and Armour and others (n 4) 3. For comprehensive discussions and comparisons between this and previous financial crises, see among others Carmen M Reinhardt and Kenneth S Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009).
10. Jean-Claude Trichet, 'Undervalued Risk and Uncertainty', Speech at the Fifth ECB Central Banking Conference Frankfurt am Main, 13 November 2008.
11. See among others Norway's Finanskriseutvalg, 'NOU 2011: 1 Bedre rustet mot finanskriser' (2011) <https://www.regjeringen.no/contentassets/49ec0c14a20a40288332054176b26a1a/no/pdfs/nou201120110001000dddpdfs.pdf>; UK Financial Services Authority (FSA), 'The Turner Review: A Regulatory Response to the Global Financial Crisis' (2009) <https://webarchive.nationalarchives.gov.uk/ukgwa/20090320232241mp_/http://www.fsa.gov.uk/pubs/other/turner_review.pdf>; US Financial Crisis Inquiry Commission, 'The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States' (2011) <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.
12. See eg Jacques de Larosière and others, 'Report by the High-Level Group on Financial Supervision in the EU' (Brussels 25 February 2009) and the Turner Review (n 11) 83. In scholarly contributions, comprehensive accounts are found in Armour and others (n 4) 3 and 409 ff and Andenas and Chiu (n 9) Part IV. See also Andrew Baker, 'The New Political Economy of the Macroprudential Ideational Shift' (2013) 18(1) *New Political Economy* 112 <https://doi.org/10.1080/13563467.2012.662952>.
13. Armour and others (n 4) 412.

the solidity and soundness of financial institutions at the individual level[14] was inadequate to prevent the build-up of risks and imbalances at the systemic level.[15]

This could be seen as a serious case of missing the forest for the trees. In the 2009 Turner Review, which was the key British report on the matter, the problem was described as follows:

> Because of these specific characteristics many of the most important challenges in banking regulation are systemic rather than idiosyncratic. One of the key deficiencies problems [sic] of the past approach, not only in the UK but in many other countries, was that it did not reflect this reality. There was inadequate focus on the analysis of systemic risk and of the sustainability of whole business models: and a failure to design regulatory tools to respond to emerging systemic risks.[16]

This misconception of the basic features of the financial systems' properties and behaviour lead to widespread recognition among policymakers that the then predominantly microprudential regulatory strategies needed to be shored up by a layer of regulation targeting the systemic level, namely, *macroprudential* regulation.[17] In Europe, the influential de Larosière report from 2009[18] laid important groundwork for the ensuing regulatory reforms.

Although a macroprudential perspective was not entirely new at that point in time,[19] it nonetheless marked a turning point in international policymaking.[20] The macroprudential turn had several consequences, among which a large number of new legislative measures aiming to strengthen financial stability at the systemic level.[21] Another consequence was rapid institutional development. New agencies were established and tasked with following up on the new macroprudential policy initiatives. The ESRB was one such agency.[22]

As this brief historical account indicates, the ESRB's area of responsibility is of utmost importance because consequences of policy failures in this field are potentially devastating, not only for actors in the financial markets, but also for ordinary citizens and the public interest more generally.[23] Taxpayers and governments are arguably the ultimate underwriters of the financial risk that amasses because of decisions taken by financial actors.[24]

14. ibid 409.
15. See discussion in Kern Alexander, *Principles of Banking Regulation* (Cambridge University Press 2019) 396ff.
16. Turner Review (n 11) 53.
17. Emilios Avgouleas, *Governance of Financial Markets: The Law, the Economics, the Politics* (Cambridge University Press 2012) 267–68.
18. de Larosière and others (n 12).
19. See eg Claudio Borio, 'Towards a macroprudential framework for financial supervision and regulation?' (2003) BIS Working Papers No 128, February 2003.
20. Robert Hockett, 'The Macroprudential Turn: From Institutional "Safety and Soundness" to Systematic "Financial Stability" in Financial Supervision' (2015) 9 *Virginia Law & Business Review* 201.
21. Alexander (n 15) 398–99.
22. Other agencies include the G20 Financial Stability Board (FSB), the UK Financial Policy Committee (FPC) and the US Financial Stability Oversight Council (FSOC). See Armour and others (n 4) 425ff and Myklebust (n 1) 44–45.
23. Avgouleas (n 17) 6.
24. See discussion in David A Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Harvard University Press 2002) chapter 4.

3. Situating the ESRB in the Regulatory Landscape

The topic of this article belongs within the field of law commonly referred to as 'financial regulation'.[25] The core of this regulatory area is the activities taking place in the financial system, comprising the main business sectors of banking, insurance and the securities market.[26] Financial regulation is predominantly an area of public law, but includes elements of private law.[27]

Financial regulation is mainly concerned with the rules that target the functionality of the financial system[28] and aims to promote the twin overarching goals of well-functioning markets and financial stability.[29] A high level of trust and confidence in the system and its functions is an essential prerequisite to ensure both a well-functioning and stable financial system, and is therefore an important aim underpinning many sets of rules.[30]

The goal of financial stability, of central importance in the context of the ESRB, is pursued by a series of rules that aim to hinder the build-up of systemic risk. These rules seek, among others, to dampen excessive risk-taking by financial actors,[31] and to prevent the transmission of financial problems within the system through contagion.[32]

Financial regulation is arguably a particularly complex field of law, exhibiting extraordinary levels of volume and detail.[33] It is strongly influenced by a number of supranational regulatory bodies.[34] Furthermore, it is characterised by policymakers' propensity for enrolling non-public actors in standard-setting, supervision and compliance, in a context of hybrid governance.[35] As pointed out by Andenas and Chiu,[36] financial regulation can thus be characterised as a *decentred regulatory space* – or, similarly, what Black describes as *a polycentric field of regulation*.[37]

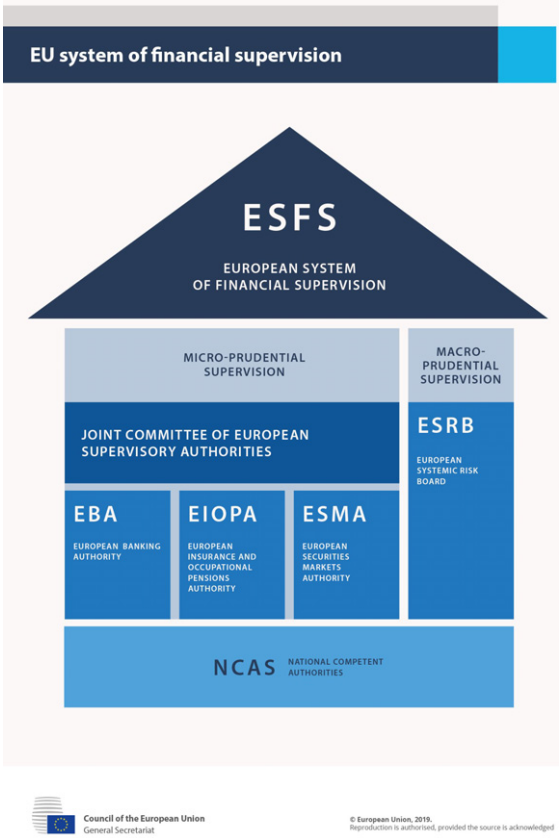
Notwithstanding the complexities just described, financial regulatory systems across the globe commonly share the same architecture, consisting of two main elements: first, the body of regulation – the laws and rules that are adopted by legislators or other rule-makers to gov-

25. Niamh Moloney, Eilís Ferran and Jennifer Payne, 'Introduction' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press 2015) 2.
26. This classification is also reflected in the literature, see for instance Moloney and others (n 25) which follows this main outline.
27. Rüdiger Veil (ed), *European Capital Markets Law* (Rebecca Schweiger tr, 2nd edn, Hart Publishing 2017) 90.
28. Armour and others (n 4) 51. See also Andenas and Chiu (n 9) 5.
29. For a comprehensive discussion of the goals and aims of financial regulation including how they translate into more specific legal objectives, see Armour and others (n 4) chapter 3. See also Trude Myklebust, *Innføring i Finansmarkedsrett* (Fagbokforlaget 2011) chapter 3.1 for a version in Norwegian.
30. See eg Frank Partnoy, 'Financial Systems, Crises, and Regulation' in Moloney and others (n 25) 69.
31. See eg Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press 2005) 24.
32. Systemic risk in financial systems arises from several context-specific characteristics pertaining to the financial system and its actors. This includes the incentive structures in the financial markets. Faulty incentive structures can drive the level of total risk in the system higher than is desirable from a societal point of view. In combination with amplification mechanisms and a propensity for contagion between financial institutions through various transmission channels, these inherent traits can lead to the development of financial crisis. See eg Benoit and others (n 3).
33. Both the complexity and the volume of regulation have steadily grown over the years, driven by increased levels of activity and the increased complexity of the activities taking place in the financial system. Several commentators are critical of these developments. See as examples Andrew Haldane, 'The Dog and the Frisbee', Speech at the Federal Reserve Bank of Kansas City's 36th Economic Policy Symposium, 'The Changing Policy Landscape', Jackson Hole Wyoming, 31 August 2012, and Dan Awrey and Kathryn Judge, 'Why Financial Regulation Keeps Falling Short' (European Corporate Governance Institute 2020) ECGI Law Working Paper 494/2020.
34. Christoffer Brummer, 'How International Financial Law Works (and How it Doesn't)' (2011) 99 *The Georgetown Law Journal* 71.
35. Andenas and Chiu (n 9) 73.
36. Andenas and Chiu (n 9) 73.
37. Julia Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 *Journal of Corporate Law Studies* 253.

ern the institutions and activities of the financial sector; and second, a system of financial supervision, which is a set of structures and institutions put in place to provide regulated subjects with guidance and ensure that the rules in the regulatory framework are obeyed.[38] Supervisors monitor performance, enforce compliance with the rules, and sanction breaches.

There is no sharp divide between the territories of regulation and supervision. Supervisors often have powers to issue supplementary rules or provide binding interpretations of rules. As has been pointed out, regulation and supervision are complementary in their contribution to the final objective[39] of maintaining a sound financial system, which means a financial system that functions as intended and in which financial stability is preserved.[40]

Within the overarching categorisation just described, the ESRB belongs within the realm of financial supervision, as such forming a part of The European System of Financial Supervision (the ESFS). The figure below shows a stylised figure of the architecture of the ESFS, instituted in accordance with Article 114 of the Treaty on the Functioning of the European Union.



Council of the European Union, General Secretariat (2019). Infographic – EU system of financial supervision.

38. On these two components, see eg Veil (n 27) 42. See also Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press 2014) 446.
39. Marc Quintyn and Donato Masciandaro, 'The Evolution of Financial Supervision: The Continuing Search for the Holy Grail' in Morten Balling and Ernest Gnan (eds), *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013) 263.
40. There is no universally agreed definition of financial stability. The European Central Bank has adopted the following definition: 'Financial stability can be defined as a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances.' This definition is functionally oriented as it proceeds to state: 'This mitigates the prospect of disruptions in the financial intermediation process that are severe enough to adversely affect real economic activity'. See <https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html>.

This figure illustrates the organisational divide between microprudential and macroprudential supervision touched upon earlier. Again, microprudential supervision focuses on the soundness of the individual institutions and actors in the financial system. For the microprudential side of this structure, the responsibilities of the three operative agencies – EBA, EIOPA and ESMA (or jointly 'the ESAs') – are allocated in accordance with the traditional divide in financial regulation between the business areas of banking, securities markets and insurance services.[41]

Responsibility for macroprudential supervision is, as we can see, conferred on the ESRB, at the right-hand side of the figure.[42] The ESRB covers all the business sectors under the ESA's responsibility. The actors in the ESFS are subject to detailed regulation as regards their governance, activities and powers.[43] For the ESRB, the central legal act regulating its organisation and activities is the ESRB Regulation.[44]

The last thing to note here is the layer beneath the level of the European supervisory authorities, which consists of each state's National Competent Authorities. These national supervisory authorities cooperate with the European level through various mechanisms.[45]

4. The Concept of Legitimacy

4.1 Introduction

Colloquially, the term legitimacy is often used in written or spoken language without clarifying exactly what we mean by it. We presuppose that we have a shared understanding of its meaning that is sufficiently clear for it to be useful as a common point of reference in our everyday discussions. To be useful to an academic inquiry, however, the concept of legitimacy must be clarified and interpreted. Accordingly, this section addresses how the concept of legitimacy should be understood in this instance.

In what follows, I show that 'legitimacy' is a concept that has multiple meanings and interpretations depending on the context and the theoretical field. Building on scholarly contributions from different fields of literature, I highlight a set of criteria that seem most pertinent to a discussion of the legitimacy of the ESRB.

In the history of political thought, the concept of legitimacy has long been an important focal point for famous thinkers. As divine authority and natural law gave way as the per-

41. As described above in this section.
42. The perspective of the ESRB ties in with that of other agencies established after the Global Financial Crisis to strengthen the oversight of risks that, on an aggregate basis, could become systemic and threaten the stability of the financial system. See n 22 above.
43. The operations of the three ESAs are regulated by separate legal acts: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L 331/12; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L 331/48; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L 331/84.
44. Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1 (ESRB Regulation) amended by Regulation (EU) 2019/2176 of The European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L334/146. A closer description of the content of the regulation is found in Myklebust (n 1).
45. For a description of the relationship between the National Competent Authorities and the European Supervisory Authorities, see Brigitte Haar, 'Organizing Regional Systems: The EU Example' in Moloney and others (n 25) chapter IV.

ceived sources of legal authority and legitimacy, ideas about voluntary consent emerged as replacements. The Enlightenment era philosopher John Locke's interpretation of legitimacy was based on the idea of voluntary consent, while other philosophers – David Hume and Jeremy Bentham, for example – suggested that authority could be justified by the shared beneficial consequences that arose from a political regime.[46]

Skipping forward a couple of centuries, the sociologist Max Weber stated that the legitimacy of a political regime depended on its participants holding certain beliefs or faith towards it – called 'Legitimitätsglaube' – which gave the regime authority and prestige and instilled in the participants a willingness to obey.[47] While Weber's interpretation was descriptive, others, including John Rawls, have viewed legitimacy from a normative perspective, asking, for instance, how a state's coercive powers are justified.[48] Even this brief historical overture shows that legitimacy is closely tied up with concepts of power, trust, perceptions and beliefs, fairness, effectiveness and consent – though these concepts too are elusive and their meaning hard to pin down with precision.

For legal scholars it is important to note, as pointed out by Nicolas de Chamfort, that there is no one-to-one relationship between what is legal and what is legitimate.[49] Legitimacy is not a necessary prerequisite to govern, as governing capacity can be obtained by other means (for example, military force or coercion). Neither does the lack of a legal basis bar a governing arrangement from being legitimate. This means that the answer to what is legitimate cannot be found through an examination of black letter law or a doctrinal legal enquiry alone (although such enquiry can certainly play an important role).

4.2 Legitimacy – an 'essentially contested concept' in a multidisciplinary field of study

Legitimacy is debated in a number of disciplines other than law, and none of them seems able to provide a universally accepted definition. Writers within political science have labelled legitimacy as 'an essentially contested concept',[50] whereas Jeremy Waldron points out that '"Legitimacy" has a rather loose meaning in political philosophy'.[51] He goes on to state that '…its meaning can veer between the normative and the empirical, and between the basis of a state's right to govern and the sentiment among its subjects that they have an obligation to obey'.[52] Other scholars have referred to the concept as 'mercurial' and, in the

46. For a brief account of influential early philosophers' view on legitimacy, see Fabienne Peters, 'Political Legitimacy' (2017) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/legitimacy/#DesNorConLeg>.
47. Max Weber, 'Economy and Society' [1921–1922], ed. G Roth and C Wittich (University of California Press 2013). See also Pedro T Magalhães, 'Charisma and Democracy: Max Weber on the Riddle of Political Change in Modern Societies' (2022) 41 *Topoi* 69, 71 <https://doi.org/10.1007/s11245-021-09761-2>.
48. For a comprehensive discussion of Rawls views, see Silje A Langvatn, 'Legitimate, but unjust; just, but illegitimate: Rawls on political legitimacy' (2016) 42 *Philosophy and Social Criticism* 132 <https://doi.org/10.1177/0191453715615386>.
49. Nicolas de Chamfort (1795): 'It is easier to make certain things legal than to make them legitimate'. Cited in Christopher A Thomas 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729, 729 <https://doi.org/10.1093/ojls/gqu008>.
50. Achim Hurrelmann, Steffen Schneider, Jens Steffek, 'Conclusion: Legitimacy — Making Sense of an Essentially Contested Concept' in Achim Hurrelmann, Steffen Schneider, Jens Steffek (eds), *Legitimacy in an Age of Global Politics (Transformations of the State)* (Palgrave Macmillan 2007) 229. See also Christoforos Ioannidis, 'Legitimacy: An Essentially Contested Concept', doctoral thesis (2019) <https://kclpure.kcl.ac.uk/portal/files/134009100/2020_Ioannidis_Christoforos_0752187_ethesis.pdf>.
51. Jeremy Waldron, 'The Conditions of Legitimacy: A Response to James Weinstein' (2017) *Constitutional Commentary* 697, 698 <https://scholarship.law.umn.edu/concomm/483>.
52. ibid.

context of international law and international institutions, have lamented that the concept has remained under-scrutinised, leading to confusion and misuse.[53]

These fleeting conceptions of legitimacy, and the strong connection to people's beliefs and perceptions, show us that what is legitimate cannot be determined once and for all. As Julia Black has pointed out, 'legitimacy can differ significantly across time and space, and between actors, systems and contexts'.[54] She stresses: 'Legitimacy thus lies as much in the values, interests, expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself'.[55]

The variability here emphasised by Black is underlined by the connection she makes between perception and acceptance. This perspective is also present in several of the much-cited definitions of legitimacy within political science, as for instance is Lipset's. In his view, legitimacy involves 'the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society'.[56]

If we look at legitimacy through this lens – as the capacity of a system, which depends on the beliefs of those observing it, to engender acceptance and a willingness to submit to its powers – we can surmise that legitimacy is not necessarily an enduring quality. If the expectations of a constituency are disappointed, or the results promised by an authority do not materialise, legitimacy can arguably be lost far more quickly than the time it took to build it. Indeed, the political scientist Robert A Dahl has likened legitimacy to a water reservoir.[57] As long as the water is at a given level, political stability is maintained; if it falls below a certain level, political legitimacy is endangered. This would suggest that legitimacy might remain resilient against transgressions and disappointments, as long as it stays above a certain threshold level. However, it also implies that the gradual erosion of qualities of importance for how an authority is perceived can surreptitiously bring the level dangerously close to the threshold, perhaps resulting in a swift change in sentiment as the last – but perhaps not the most important – factor is added to the heap of previous disappointments. In sum, legitimacy, particularly in the empirical sense, relates not just to the constituting factors of a certain regime or arrangement, but also to its ability to maintain a relationship with the legitimacy community on which it depends, through its ongoing performance, actions and communication.[58]

4.3 Assessing the legitimacy in financial regulatory regimes

Scratching the surface of a huge legitimacy-related literature with traditions reaching back hundreds of years, the discussion has so far considered the concept of legitimacy from several angles, focusing on establishing some core characteristics from an overarching per-

53. Christopher A Thomas, 'The Concept of Legitimacy and International Law' (2013) *LSE Law, Society and Economy Working Papers* 12/2013 1 <WPS 12-2013 The Concept of Legitimacy and International Law by Thomas (lse.ac.uk)>.
54. Julia Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes', (2008) 2 *Regulation & Governance* 137, 144 <https://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2008.00034.x>.
55. ibid 145.
56. Seymour Martin Lipset, 'Social Conflict, Legitimacy, and Democracy' in Jean Blondel (ed), *Comparative Government* (Palgrave 1969) chapter 7 <https://doi.org/10.1007/978-1-349-15318-3_7>. Cf Koop and Reh, stating: 'We use the term "legitimacy" in its broadest, empirical meaning: "acceptance", understood as the latent or manifest support that citizens grant a political order and the power it exerts.' Christel Koop and Christine Reh, 'Europe's bank and Europe's citizens: Accountability, transparency – legitimacy?'(2019) 26 *Maastricht Journal of European and Comparative Law* 63, 65 <https://doi.org/10.1177/1023263X19827906>.
57. Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971) 124ff.
58. For a discussion based on a distinction between the strategies for gaining, maintaining and repairing legitimacy, see Mark S Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *The Academy of Management Review* 571.

spective. However, to discuss the legitimacy of the ESRB's performance, role and regulatory contributions more specifically, we will need a set of assessment criteria that permit more targeted discussion based on the context and main characteristics of its institutional features, purpose and mandate.

Much of the legitimacy-related scholarly contributions discuss issues within their specific fields, ranging from the judicial system to systems for taxation, from international humanitarian law to marriage law – and a wide range of subjects in between. We have already established that legitimacy is a contextual phenomenon, hence, the markers of legitimacy will differ depending on whether the task is to analyse a regime of criminal law or a means of economic governance.

As previously explained, the ESRB is situated in the decentred space of financial regulation. This means that regulatory powers are distributed between national and supranational public entities and non-public actors who partake in governance through self-governance, standard-setting bodies etc.[59] Unelected powers, with various degrees of detachment from democratic control, play an important role in the overall governing structure of finance.[60] One particularly vivid example is central banks, which are commonly granted a high degree of autonomy in modern economies.[61] But other governing institutions, too, may have been given various degrees of independence in their charters. This is true of the ESRB. According to the ESRB regulation, the members of its General Board and Steering Committee must perform their duties impartially and solely in the interest of the Union as a whole.[62] They are not to seek or take instructions from any government, the Union institutions, or any other public or private body.[63]

As pointed out by Eriksen, unelected institutions wield political power, while their connections to parliaments, legislatures and elected executives are unclear.[64] It is possible, then, that their claim to legitimacy may be grounded in factors other than those that are important for institutions where democratic control and accountability are more apparent. Scholarly contributions within governance literature and political science, for example, suggest that the legitimacy of such institutions may depend on their credibility in terms of expertise, due process and the ability to produce desirable outcomes.[65] Willke and Willke posit that this type of 'out-put' oriented legitimacy changes the quality of democracy from formal equality stemming from participation, representation and equality of impact, to results-oriented evaluation of outcomes.[66] From this it can be inferred that legitimacy in such contexts may hinge on the extent to which there exists a perceived congruence between the mission and the capacity of the institution to fulfil that mission.

---

59. As discussed above in section 3.
60. Andenas and Chiu (n 9) 73.
61. For a comprehensive discussion on this topic, see Paul Tucker, *Unelected Powers: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2019).
62. ESRB Regulation Article 7(1).
63. ibid.
64. Erik O Eriksen, 'Introduction. Making the unelected safe for democracy' in Erik O Eriksen (ed), *The Accountability of Expertise: Making the Un-Elected Safe for Democracy* (Routledge 2021) 5 with further references.
65. For instance, Julia Black explains how functional or performance-based legitimacy depends on outcomes and consequences of the organisation (for example efficiency, expertise or effectiveness), and the extent to which it operates in conformance with professional or scientific norms: see Black (n 54) 146. See also Anat Keller, stressing the role of 'input legitimacy' and 'throughput legitimacy' in macroprudential authorities, encompassing institutional and governance structures, and the quality of governance processes: Anat Keller, *Legal Foundations of Macroprudential Policy: An Interdisciplinary Approach* (Cambridge University Press 2020) 191.
66. Helmut Willke and Gerhard Willke, *Political Governance of Capitalism: A Reassessment Beyond the Global Crises* (Edward Elgar 2012) 130.

However, some fields of governance are so complex and complicated that it seems impossible for outsiders to have much insight into desired results and so to evaluate the various policies and decisions. In such cases, de facto or perceived legitimacy will arguably depend on a more generalised sense of trust. That is, people need to *feel* that the entity is pursuing desirable goals, has the necessary expertise, follows due process and is accountable to sufficient control mechanisms.[67] In such instances, how the institution communicates with its constituency to instil trust and legitimacy becomes particularly important.[68] Black has shown that legitimacy must be constructed and claimed, and that various authorities and entities in a governing structure may compete with each other for what she describes as 'regulatory share'.[69] Such claims can be pursued in a variety of ways, for instance by professional communication strategies or reputational management. These efforts may enhance – or at least maintain – legitimacy, even if the institution's output is less than impressive.[70]

5. The Legitimacy of the ESRB – Discussion

Drawing on the discussion so far, I now turn to the final part of the article, where I discuss the legitimacy of the role, performance and regulatory contributions of the ESRB more specifically.

5.1 The role of the ESRB

Black has explained that legitimacy is closely associated with the role that is being performed.[71] An organisation can, for instance, have role legitimacy in taking on certain tasks, while that legitimacy is absent with regard to other tasks. As an example, she mentions that an NGO can be legitimate in the role of lobbyist, and yet not legitimate as a regulator.[72]

Another side of role legitimacy pertains to the organisational set-up of an institution and the structure in which it is embedded. Drawing on the discussion in the previous section, this can be understood as a question about whether there is congruence between the role and responsibilities that are conferred on an organisation, and the resources, tools and measures that are available to it. One should also consider whether the organisation has sufficient independence such that its integrity and the effective execution of its mission are not hampered by conflicts of interest. Furthermore, one should assess whether appropriate mechanisms for accountability and measurement of performance exist.[73] Finally, as the perception of these issues matters for the question of legitimacy, one should also consider whether the organisational and procedural arrangements are transparent and open to inspection by others.[74]

---

67. See eg Suchman (n 58) 578–79 (explaining how generalised perceptions of organisational legitimacy may arise from the constituents' positive (although sociologically naïve) evaluation of the acts of an organisation as ones that '"have our best interests at heart," that "share our values," or that are "honest," "trustworthy," "decent," and "wise."').
68. ibid 586.
69. Julia Black, 'Legitimacy and the Competition for Regulatory Share' (2009) *LSE Law, Society and Economy Working Papers* 14/2009 <http://eprints.lse.ac.uk/24559/>.
70. See eg Suchman (n 58) 596 (describing how organisations may 'stockpile' goodwill and support (such as trust and esteem) among the population as a form of capital reserve that can protect against a depletion of legitimacy in cases of deviation from social norms).
71. Julia Black (n 54) 145, with further references.
72. ibid.
73. ibid 150. For a discussion of accountability and transparency in relation to the legitimacy of the European Central Bank, see Koop and Reh (n 56).
74. See among others Martin Lodge 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds), *Politics of Regulation* (Edward Elgar 2004) ch 6.

For the ESRB, its responsibilities are listed in the ESRB Regulation. According to Article 3(1) of the Regulation, the ESRB is responsible for macroprudential oversight of the financial system within the European Union, in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system. The Regulation defines systemic risk as 'a risk of disruption in the financial system with the potential to have serious negative consequences for the real economy of the Union or of one or more of its Member States and for the functioning of the internal market' (Article 2(c)). The goal of the ESRB's activities is stated as avoiding periods of widespread financial distress (Article 3(1)). The ESRB must promote the smooth functioning of the internal market and so ensure that the financial sector is able to contribute to furthering economic growth (Article 3(1)).

It should be obvious from the outset that this is a task of extraordinary size and complexity. The concept of systemic risk, and uncertainties as to how it emerges and develops, is under constant discussion in academic circles.[75] Even if a legal definition of systemic risk is provided in the ESRB Regulation, this is by no means a guarantee that it will be easy to identify or possible to say beforehand when a disruption will be triggered. The perimeter of the area of responsibility is wide in that it encompasses all types of financial intermediaries, markets and infrastructures (see Article 2(c) ESRB Regulation) and even includes monitoring macroeconomic developments (Article 3(1) ESRB Regulation). In assessing the congruence between the ESRB's responsibilities and organisational role and the ESRB's capacities, it is clear that the ESRB's mandate places very high demands on the organisation's expertise, capacity and timeliness.

Turning to organisational matters, the ESRB is established as an independent organisation without legal personality.[76] Its governing structure consists of the General Board, a Steering Committee, an Advisory Scientific Committee and an Advisory Technical Committee (Article 4(1) ESRB Regulation). The President of the European Central Bank (ECB) chairs the General Board (Article 5(1) ESRB Regulation). The General Board counts a large number of members, divided into voting and non-voting members (Article 6). The voting members are the President and the Vice-President of the ECB; the Governors of the national central banks; a member of the Commission; the chairperson of each of the ESAs, and high-level representatives from the advisory committees (Article 6(1)). The non-voting members comprise one high-level representative per Member State of the competent national supervisory authorities and the President of the Economic and Financial Committee (EFC) (Article 6(2)).

The ESRB's Secretariat is staffed by the ECB, in accordance with a separate regulation.[77] The Secretariat's role is to provide analytical, statistical, logistical and administrative support to the ESRB.[78]

The ESRB's areas of responsibility combined with its organisational set-up and applicable measures invite certain comments from a role legitimacy perspective. First, being an institution that operates as an independent expert organ, it scores well on access to expertise because leading officials from all member countries are represented in its governing body. Simultaneously, this ensures representativeness and participation by the member states, so strengthening the legitimacy of the ESRB from their perspective.

---

75. See above in section 3.
76. For an in-depth account of the organisation and structure of the ESRB, see Myklebust (n 1) section 5.
77. Council Regulation (EU) No 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board [2010] OJ L 331/162. Hereinafter the 'Council Regulation'.
78. Article 2 Council Regulation.

However, the size of the General Board, in combination with its high-level members, suggests that it is not the most nimble and agile of decision-making bodies. This could hamper the efficiency of the ESRB's performance, and thereby its legitimacy.[79]

It is also worth highlighting the close proximity between the ESRB and the ECB. Indeed, there is an affinity between the ESRB and the sphere of the central banks in general, given that the ECB Chair doubles as the Chair of the ESRB, and that the voting members of the General Board are, for the most part, national central bank governors. In addition, the secretariat is supplied by the ECB. This feature could pose a challenge in terms of the independence of the ESRB, and is far more than a cosmetic problem.[80]

Even though the ECB's mandate includes financial stability, a core objective is to maintain price stability. Ensuring price stability involves measures that, under some circumstances, can be counterproductive in terms of safeguarding systemic risk. For example, keeping interest rates very low over time or continued quantitative easing may eventually lead to a rise in debt and asset prices and thus raise concerns from a systemic risk perspective.

One striking example of the challenges central banks may be confronted with when pursing their various objectives materialised in the UK in the autumn of 2022. After market turmoil erupted as result of the British government tabling economic plans involving large unfunded tax cuts, the Bank of England had to set in motion a swift market intervention, purchasing British government bonds (gilt) to halt the ongoing rapid price depreciation with ensuing risks to financial stability.[81] This emergency operation contrasted with the Bank of England's already adopted program of selling gilt previously acquired under quantitative easing mechanisms put in place after the Global Financial Crisis.[82] The prime minister resigned soon after and the proposed tax cuts were abandoned. In a letter to Parliament, the Bank of England states that the gilt purchase operations were carried out under its statutory financial stability objective, and as such, they should not shift the underlying monetary trends in the economy and were not monetary policy operations.[83]

One observation to be made is that even though the Bank of England stressed that the financial-stability-induced operations should not be seen as monetary policy operations, in this case, they were enacted through the bond market, which is also a channel for executing monetary policy. This shows that the same type of instrument may be employed based on different motivations – financial stability and monetary policy – that may be difficult to disentangle for the public. Under given circumstances, the same might be the case for the ECB. The intermingling of objectives and instruments used to obtain them could potentially have detrimental effects on perceptions of transparency and accountability, and through that, on the legitimacy of a central bank. The close association between the ECB and the ESRB could challenge the legitimacy of the latter insofar as doubts are cast on its ability to enact its financial-stability-related mandate independently of monetary policy considerations.

---

79. This aspect has been pointed out by several writers. See among others Myklebust (n1) with further references, and Brigitte Haar (n 45) 177–78.
80. Avgouleas (n 17) 320; Willem Buiter, Written evidence included as annex to The Committee's Opinion on proposals for European financial supervision, House of Commons Treasury Committee (Sixteenth Report of session 2008–09); Myklebust (n 1) 56 and 65.
81. Tommy Stubbington, 'Bank of England says £65bn gilt intervention staved off UK financial "spiral"', *Financial Times* (London, 6 October 2022) <https://www.ft.com/content/09c43669-18a9-4476-9a95-044a2448d400> accessed 16 December 2022.
82. See letter 5 October 2022 from the Deputy Governor of the Bank of England, Jon Cunliffe, to the Chair of the Treasury Committee of the House of Commons, Mel Stride 10. <https://committees.parliament.uk/publications/30136/documents/174584/default/>.
83. ibid.

In this regard, the ESRB's organisational connection with the ECB might suggest inherent biases and possible conflicts of interest embedded in the relationship leading to compromised credibility among observers.[84] The fact that the General Board members from the national supervisory authorities do not have voting rights could also weaken the legitimacy of the ESRB from their perspective, particularly given that these agencies do not pursue price stability as part of their mandates and therefore do not suffer from the same potential conflict of interest as the voting members from the central bank sphere.

The next point to examine is the impact of the ESRB's role legitimacy given the tools and measures at its disposal.[85] The tools and measures available to the ESRB fall into the following main categories:[86] the gathering and exchange of information,[87] identifying and prioritising systemic risk, and issuing warnings and recommendations as necessary.[88] Warnings or recommendations issued by the ESRB may be general or specific in nature and are addressed in particular to the Union, to Member States, to the ESAs, or to national supervisory authorities.[89]

The ESRB is only mandated to issue warnings and recommendations when significant risks to financial stability are identified[90] – in other words, in serious cases.[91] Warnings and recommendations are confidential.[92] However, the ESRB can decide to make a warning or recommendation public on strict conditions.[93] In emergency situations, the ESRB may issue a confidential warning to the Council.[94] However, the ESRB has no legally binding powers.[95] The follow-up procedures in place concerning the warnings and recommendations are based on an act-or-explain approach.[96]

Arguably, role legitimacy will be dependent on there being a reasonable degree of correspondence between an agency's mission and the tools at its disposal. Several scholars have argued that the lack of binding powers may diminish the credibility of the ESRB.[97] Willke and others reiterate a view that the ESRB has 'no teeth' and consequently limited ability to pursue its mandate.[98] On the other hand, as Avgouleas points out, the 'close ties of co-opera-

84. Avgouleas (n 17) 320.
85. For more comprehensive accounts of the tools and measures, see Myklebust (n 1) section 6. See also Avgouleas (n 17) 304 ff.
86. Article 3(2) ESRB Regulation.
87. Article 15 ESRB Regulation. On data collection, see particularly Anat Keller, 'Collecting Data: How will the ESRB Overcome the First Hurdle towards Effective Macro-prudential Supervision?' (2013) 24 *European Business Law Review* 487.
88. Article 16 ESRB Regulation.
89. Article 16(2) ESRB Regulation.
90. Article 16(1) ESRB Regulation.
91. A *General Warning* was published 22 September 2022, warning against severe risks to financial stability due to geopolitical developments, the situation in the energy markets, higher than expected inflation and rising mortgage rates, among others. The identification of the heightened risks is accompanied by several recommendations to private sector institutions, market participants and relevant authorities. ESRB, 'Warning of the European Systemic Risk Board of 22 September 2022 on vulnerabilities in the Union financial system (ESRB/2022/7) <https://www.esrb.europa.eu/pub/pdf/warnings/esrb.warning220929_on_vulnerabilities_union_financial_system~6ae5572939.en.pdf>.
92. Article 16(2) ESRB Regulation.
93. Article 18 ESRB Regulation. See discussion of the conditions for such decisions in Myklebust (n 1) 60. The General Warning mentioned in fn 89 above was made public.
94. Article 3(2)(e) ESRB Regulation.
95. Eilish Ferran and Kern Alexander, 'Can soft law bodies be effective? The special case of the European systemic risk board' (2010) 35(6) *European Law Review* 751; Myklebust (n 1) 59.
96. Recital 20 ESRB Regulation.
97. Comprehensively discussed in Ferran and Alexander (n 95).
98. Helmut Willke, Eva Becker and Carla Rostásy, *Systemic Risk: The Myth of Rational Finance and the Crises of Democracy* (2013 Campus Verlag) 204.

tion with the ESAs, the EU Commission and the Council, the national central banks and national supervisors, give a distinct hard law edge to its warnings and recommendations.'[99] In any case, should a situation arise where a warning or recommendation is not followed up – for instance because the member state concerned disagrees or does not wish to comply – this could certainly undermine the role legitimacy of the ESRB. Speculations among stakeholders that non-compliance with ESRB decisions might be a plausible outcome because of the lack of binding powers, could in and by themselves undermine the credibility of the ESRB.

The last point to touch on here is the relationship between the ESRB's role and its leeway for communication.[100] As is the case with many organisations in the financial sector, both private and public, the ESRB and its personnel are bound by strict rules on professional secrecy.[101] Furthermore, as mentioned, warnings and recommendations are not made public without a prior decision under strict conditions. This is to be expected, since communication about systemic risk could be very sensitive. If the ESRB voices concern, this may be met by market reactions in anticipation of stricter operating conditions. In certain stages of the financial cycle, this can be perceived as undesirable from the perspective of policymakers because swift adjustments in market actors' behaviour can, in and by themselves, contribute to instability.[102] The cautious communication strategy required of the ESRB may make it difficult for the Board to showcase its work or portfolio of cases to demonstrate its expertise and thereby build credibility in a claim for legitimacy.

5.2 Performance and contributions to the financial regulatory system

Turning to the legitimacy of the ESRB in terms of its performance, an initial question is how this should be assessed? Should the assessment be based on the Board's actual output in the form of for instance the warnings or reports it produces, or, by looking at its contribution towards its end-goals – that is, the existence or absence of a financial crises at any given time?

I start by looking at the actual output of the ESRB so far. The ESRB publishes much information on its website[103] relating to its different tasks. There is a plethora of documents and contributions reflecting its work in the areas of information-gathering and the prioritising of systemic risk; ESRB policies; and policies regarding the individual member states. The warnings and recommendations that have been made public are also published there.[104]

The format of this article does not allow an in-depth assessment of the numerous publications that make up the tangible and observable output of the ESRB's work. However, drawing on the previous discussions of how legitimacy might be assessed with respect to unelected governing bodies, I would argue that the published material as a whole supports the ESRB's claim to legitimacy. The documents overall seem to be of high technical quality, demonstrating the apt use of the expertise that is available to the ESRB. The content of the documents is congruent with the ESRB's mission, reflecting the tasks it has been given in its mandate. As such, they are comprehensible, not in the sense that they are easy to under-

99. Avgouleas (n 17) 305.
100. The importance of communication as a means to garner and maintain legitimacy is discussed above in section 4.3.
101. Article 8 ESRB Regulation.
102. For instance, in emergency cases where the ESRB has decided to inform the Council in accordance with Article 3(2)(e) ESRB Regulation, Recital 22 of the same regulation stresses that 'during that process, due protection of confidentiality is of outmost importance.'
103. <https://www.esrb.europa.eu/home/html/index.en.html>.
104. These are assembled under the heading of ESRB Policy: <https://www.esrb.europa.eu/mppa/html/index.en.html>.

stand, but in the sense that the choice of focal areas seems logical and appropriate given the Board's role and mission. This contributes to the perception that due process is being followed, strengthening its legitimacy. Conversely, it would suggest that the Board's remit is not subject to 'mission creep', which might otherwise diminish its legitimacy.

One particular aspect of the ESRB's activities that deserves attention pertains to the legitimacy of its contributions to regulatory development. The ESRB contributes to regulatory development in various ways. In terms of the macroprudential legal framework, it contributes by interpreting and giving guidance on the implementation of the various rules through its practice.[105] Furthermore, it is active as an expert body participating in law-making procedures, for instance by answering consultations and assisting in working groups that develop new legislation.[106] Lastly, it plays a role in the development of the regulatory field within its area of responsibility by developing measures and tools that further the understanding of the concept of systemic risk.[107] Even though there now exists a legal definition of systemic risk, our fragile understanding of the phenomenon and how it should be tackled by regulation leaves plenty of room for further investigation.[108]

The legitimacy-related questions that may arise with regards to the ESRB's contribution to regulatory development are first and foremost associated with its role as an unelected body and its consequent lack of democratic accountability.[109] That means that legitimacy must be drawn from other characteristics of the ESRB, where its expertise and understanding play a more significant role. Its expertise makes it a useful participant in regulatory processes. However, there is a danger that it might be too focused on its own mandate, preventing it from taking a broader perspective. Although preventing systemic risk is arguably a very important aim of financial regulation, the focus must be balanced against other relevant concerns – consumer protection, for instance.[110] When involving the ESRB in regulatory developments, it is therefore important that those responsible for the process make sure that its contributions be sufficiently calibrated against the interests of other stakeholders to maintain the legitimacy of the regulatory process as a whole.

The final test of the ESRB's performance would be to determine whether it succeeds in its ultimate goal of avoiding widespread financial distress. However, it would be notoriously difficult to assess the ESRB's contribution to whether or not financial distress erupts.[111] Research on systemic risk and financial crises shows that such events can be caused by a wide range of different factors.[112] Moreover, these factors interact with each other, making

105. See as example Atanos Pekanov and Frank Dierick, 'Implementation of the countercyclical capital buffer regime in the European Union,' ESRB Macro-prudential Commentaries, Issue No 8, December 2016 <https://www.esrb.europa.eu/pub/pdf/commentaries/ESRB_commentary_1612.en.pdf?4b9a070a60468fc95e34fd85ec80d62b>.
106. See eg ESRB, 'Macro-prudential Aspects of the Reform of Benchmark Indices, in response to a consultation by the European Commission on a possible framework for the regulation of the production and use of indices serving as benchmarks in financial and other contracts' (14 November 2012).
107. Important here is ESRB, Recommendation of the European Systemic Risk Board of 4 April 2013 on intermediate objectives and instruments of macro-prudential policy (ESRB/2013/1) [2013] OJ L 170/1. Another important development is the Risk Dashboard, which is a set of quantitative and qualitative indicators of systemic risk in the EU financial system that is published quarterly: <https://www.esrb.europa.eu/pub/rd/html/index.en.html>.
108. As discussed above in 3.
109. Andenas and Chiu point out that even though the ESRB is accountable to the EU Parliament and the Council and is required to present its annual report to both institutions, its accountability channel is confined to the EU level and must seem remote to the public: Andenas and Chiu (n 9) 450.
110. Inherent goal conflicts in financial regulation have been pointed out by several writers: see eg Armour and others (n 4) chapter 3 for a comprehensive discussion.
111. See Keller (n 65) 191.
112. As demonstrated among others in the investigative reports mentioned in n 11 above.

it incredibly difficult to assign probabilities because the uncertainty cannot be quantified.[113] We can draw an analogy here to public health authorities whose responsibilities include pandemic preparedness. If a pandemic does not occur in a specific year, that does not necessarily imply that the health authorities have done a particularly good job. Conversely, if a pandemic does occur in a specific year, that does not automatically imply that the authorities have done a particularly bad job. A pandemic can be caused by events that are beyond the authority's control. For instance, a pandemic might originate in a geographic area that is outside of the authority's remit or might emerge from a hitherto unknown pathogen. However, as discussed in section 4.3 above, in complex areas of governance, the perception of legitimacy might be influenced by negative events, even if an institution's actual ability to impact on the outcomes were limited.

This reasoning gives rise to two observations. The first is that if one is within a policy area that deals with high-impact events, where uncertainty makes it difficult to assess the probability of the event, one should operate with a margin of error that reflects the uncertainty associated with the efficacy of an intervention.[114] The second observation has to do with the consequences of financial turbulence, in spite of the ESRB's efforts. For stakeholders that rely on the ESRB to ensure that financial distress is kept at bay, seeing the Board fail to fulfil this mission may lead them to lose faith in the organisation as such, whether or not the Board actually 'failed' in any real sense.[115] In turn, this could negatively impact the legitimacy of the ESRB. Given the need for trust and confidence in financial policymaking to ensure financial stability,[116] such a scenario could have ramifications that extend beyond the Board itself, questioning the legitimacy of the financial governing systems more broadly.

6. Conclusions

Financial crises have the potential to cause severe and long-lasting damage to the economy and society at large. It is therefore of utmost importance that the governing system and institutions set up in support of financial stability succeed in their mission. The ESRB forms an important element of this system in the European context.

The success of governing institutions depends on many factors. Questions of legitimacy play a crucial role in this regard. This is especially the case in the financial sector, where maintaining trust and confidence is one of the core objectives of financial regulation.

This article has discussed the legitimacy of the ESRB in respect of its role, its performance and its contribution to regulatory development. In all three instances, a closer examination of the characteristics of the ESRB has revealed that there exist factors that are conducive to its legitimacy, but also that there are circumstances giving grounds for concern.

The research questions of this article demanded a targeted discussion of the legitimacy of the ESRB. In the literature on financial regulation, legitimacy-related questions are less frequently addressed than those discussing the effectiveness of various regulatory tools and approaches. However, as the findings in this article show, the two aspects are closely

113. See eg Willke and others (n 98) 9.
114. This would be in line with the theoretical framework on 'normal accidents' developed by the renowned sociologist Charles Perrow. Charles Perrow, *Normal Accidents: Living with High Risk Technologies* (Princeton University Press 1999).
115. See related argument in Avgouleas (n 17) 320 noting that flawed actions by implementers of its warnings and recommendations could lead to the ESRB losing its credibility.
116. See eg Partnoy (n 30) 69.

related, and important considerations might go amiss if prerequisites of legitimacy in regulatory arrangements are not properly accounted for in policymaking processes. These findings might also be of broader interest in assessing financial regulation and supervision at large. Are such systems furthering the overarching objective of ensuring well-functioning and stable financial systems, and so contributing meaningfully to the public good? Inserting questions of legitimacy more clearly into regulatory deliberations might provide important insights into how such a question should be answered.

Oslo Law Review

Universitetsforlaget

RESEARCH PUBLICATION

Volume 9, No. 2-2022, p. 110–148
ISSN online: 2387-3299
DOI: https://doi.org/10.18261/olr.9.2.3

Conceptualising Judicial Independence and Accountability from a Regulatory Perspective

Shivaraj S Huchhanavar
Assistant Professor of Law at O.P. Jindal Global University, India; PhD research fellow, School of Law, Durham University, United Kingdom
shivaraj.huchhanavar@jgu.edu.in shivaraj.s.huchhanavar@durham.ac.uk

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.

---

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]

---

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]

---

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]

---

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

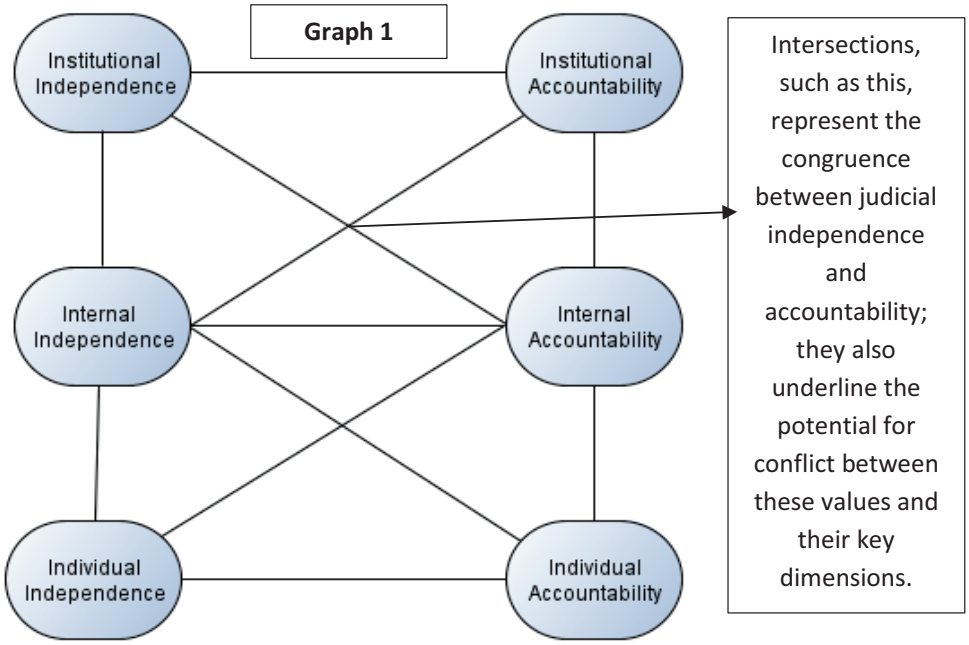
Institutional judicial accountability is the responsibility of complying with voluntary, conventional, professional or legal obligations that are required or expected of the judiciary as a public institution. The judiciary, as an institution, must be open to external scrutiny, for example, by media,[225] 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.

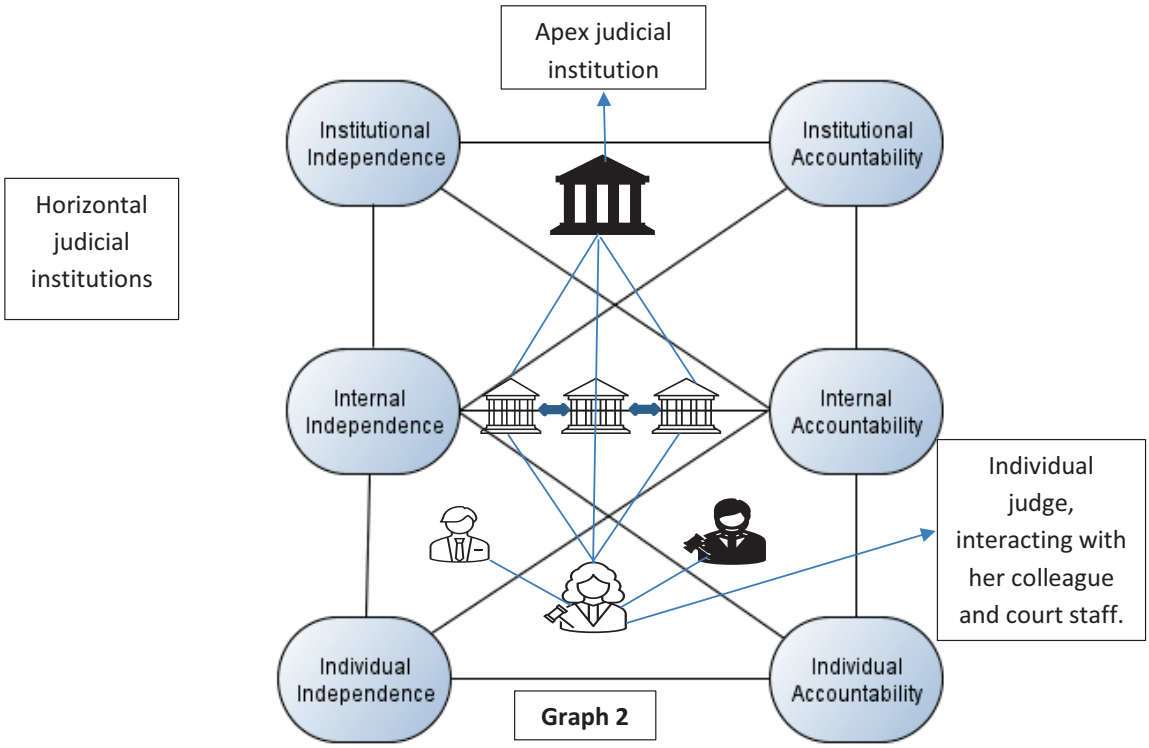
4.5 The congruence and potential conflicting dimensions of judicial independence and accountability

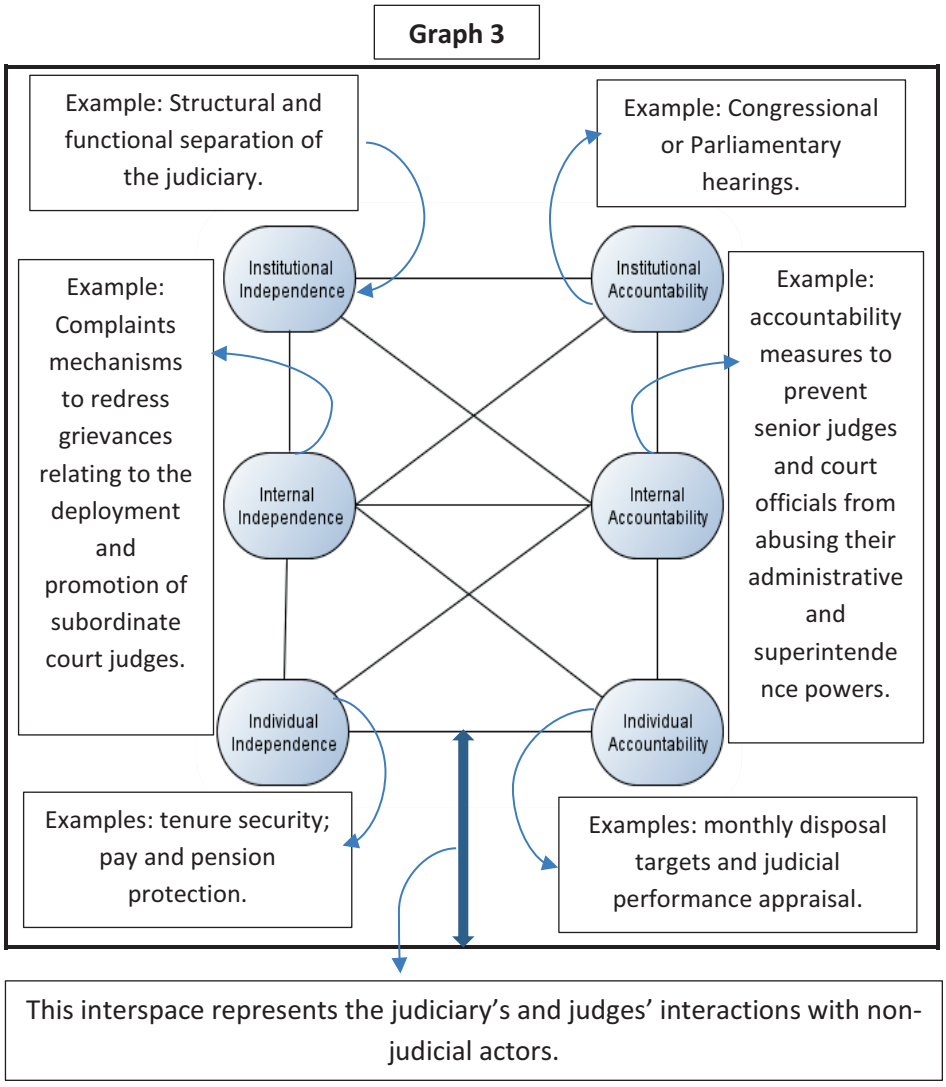
As this article briefly outlines, there are three key aspects of judicial independence and accountability. These three aspects synchronously interact with each other, mirroring the functioning of a judge, court or judiciary, respectively. The bipartite graph (see Graph 1) attempts to depict bidirectional 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.



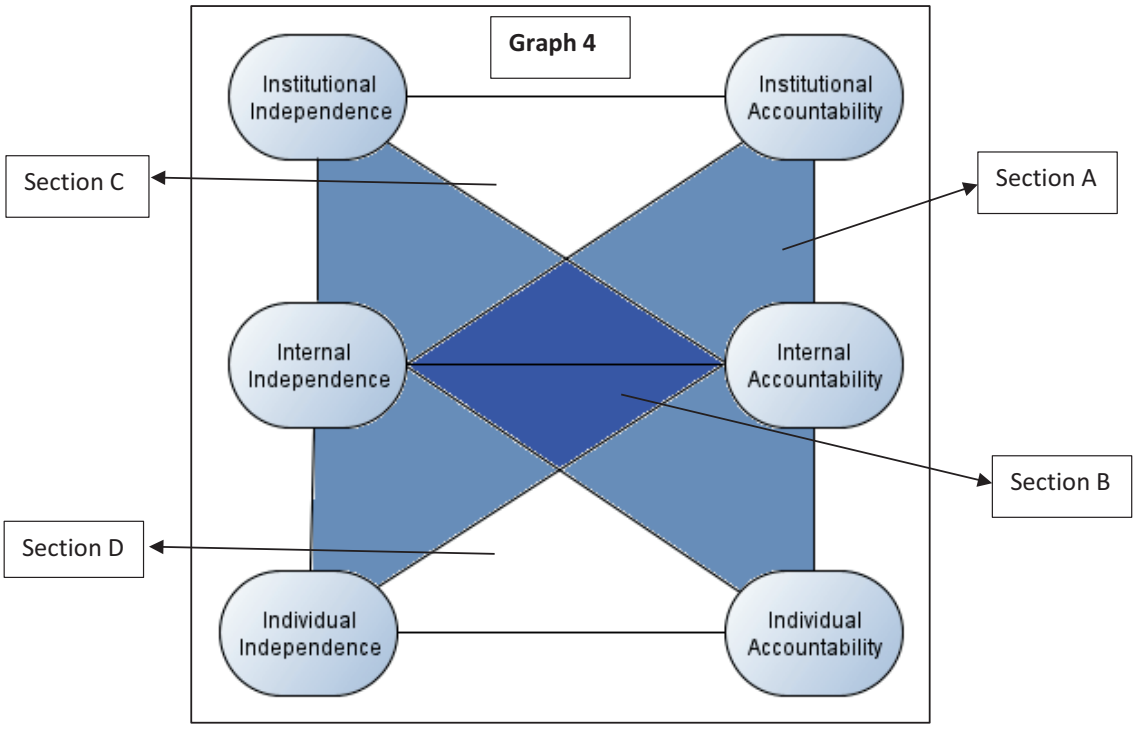
Myriad vertical and horizontal interactions between individual judges, court staff and judicial institutions significantly widen the extent of congruence with respect to the potential for conflict. Graph 2 below attempts to illustrate the complex interplay of judicial interactions vertically and horizontally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

---

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.

Acknowledgements

I thank my PhD supervisors, Professor Roger Masterman and Dr Se-shauna Wheatle, for their comments that greatly improved the manuscript. Many thanks to Dr Syed Shariq Husain, Assistant Professor, Jindal School of Government and Public Policy, for his assistance with the presentation of bipartite graphs. The author also appreciates the reviewers and editors, Professor Lee Andrew Bygrave and Professor Alla Pozdnakova, for their valuable comments and suggestions that improved the presentation, structure and quality of the article. All remaining errors are my own.