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BETTER LAWS. BETTER GOVERNANCE

Mr Reejonia,
Deputy Secretary, Government of India,
Department of Justice, Ministry of Law & Justice,
Jaisalmer House, New Delhi – 110 011

August 18, 2017

Dear Sir,

Sub: Final Report on ‘Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India’ under File No. N-9/15/2015-NM

Please find enclosed the final report ‘Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India’ and a copy of the Utilisation Certificate of funds.

In accordance with your request in a letter dated July 18, 2017, reasons for delay in submitting this report have been detailed in paragraphs below.

Noting the lack of public debate around the issue of developing and enforcing performance standards to enhance the accountability of the higher judiciary in India even in the legal fraternity, we conducted a survey on attitudes relating to judicial performance evaluation and collated the survey results in an Interim Report submitted in October 2016.

In a letter dated February 28, 2017, we also made a request relating to a Round Table Conference on the issue of judicial performance evaluation as mentioned in the project documents. We requested that this round table requirement be waived in favour of us conducting private interviews with judges and legal professionals to elicit their views on the issue of judicial performance evaluation for the higher judiciary. Considering the delicate and controversial nature of the subject, we made this suggestion to conduct confidential interviews to ensure we solicit more open and honest opinions from senior lawyers, judges and jurists.

Following our meeting on March 23, 2017, we also incorporated detailed recommendations in the Draft Final Report. We submitted the revised Draft Final Report (without the Annexure on summary of interviews) on April 13, 2017 and also reiterated the request to conduct private interviews.

Once this request was accepted and the same communicated to us through a letter dated May 9, 2017, we approached twelve eminent senior lawyers and judges. Despite our best efforts and repeated follow-ups for over two months, of the six senior advocates and six retired and sitting judges we approached, only one senior lawyer and two retired judges, including a retired judge of the Supreme Court of India agreed to be interviewed and provided their inputs. Their responses have been summarised in Annexure II of the attached report. As the purpose of this study was to collaboratively explore feasible and implementable performance standards for the higher judiciary, we relentlessly pursued potential interviewees, but most declined comment. This resulted in considerable delay in completing this project. I believe these points offer sufficient clarification as to the delay in completion of this project.

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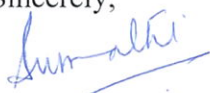
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In your most recent letter dated August 10, 2017, you had requested that we submit the report and the draft utilisation certificate by August 14. However, we only received this letter on August 17, 2017. If the attached utilisation certificate and changes in allocation are approved by the department, we will have the same audited and resubmit it to the Department.

To generate public debate on the issue we seek your kind permission to publicly disseminate the contents of the Final Report as well as other inputs into this report, particularly the results of a survey collated in the Interim Report. This public dissemination will be via our website, social media, and other platforms.

Sincerely,



Sumathi Chandrashekar

(Senior Resident Fellow, Vidhi Centre for Legal Policy)

Attached:

1. Final Report on "Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India".
2. Utilisation Certificate



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BETTER LAWS. BETTER GOVERNANCE

DEVELOPMENT AND ENFORCEMENT OF PERFORMANCE STANDARDS TO ENHANCE ACCOUNTABILITY OF THE HIGHER JUDICIARY IN INDIA

Medha Srivastava

Shalini Seetharam

Sumathi Chandrashekar

This Report is in pursuance of the project on ‘Development and Enforcement of Performance Standards to Enhance Accountability of the Higher Judiciary in India’, commissioned by the Department of Justice, Ministry of Law and Justice, Government of India. The authors would like to thank Vidhi Fellows Ritwika Sharma and Alok Prasanna Kumar for their inputs. We are also grateful to Nipasha Mahanta, Shilpa Prasad, Madhulika Reddy and Isha Jain for their research assistance for this project. Errors, if any, in the Report are the authors’ alone.

The Vidhi Centre for Legal Policy is an independent think-tank doing legal research and assisting government in making better laws.

For more information, see www.vidhilegalpolicy.in

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I. INTRODUCTION

The practice of evaluating judges to assess their quality and ability, most commonly known as Judicial Performance Evaluation (JPE), originated in the United States (US) as a process for determining questions of elevation in the judiciary. Since then, JPE has been adopted in several jurisdictions, in varying forms with differing degrees of complexity to achieve different objectives.

While some JPE programmes seek to promote transparency and accountability in the judiciary, others hope to drive efficiency in justice delivery (by assessing the performance of courts in their legal system), or create incentives for self-improvement in performance of individual judges. Different JPE programmes evaluate different aspects and metrics of judicial and/or court performance. The practice of evaluating the performance of judges and courts has thus evolved into a multi-faceted, complex idea, sometimes also serving larger purposes of influencing judicial behaviour and understanding the finer aspects of the working of court systems. In India, there is a system for evaluating the performance of the lower judiciary, wherein a system of Annual Confidential Reports (ACRs) is used to evaluate the performance of judges, based on various metrics. India, however, does not have a formal performance evaluation mechanism to assess the functioning of the higher judiciary.

Aimed at identifying parameters to develop a workable JPE programme for the higher judiciary in India, this report undertakes cross-jurisdictional, doctrinal research of existing systems of JPE to gauge, best practices and associated challenges. This report examines the conceptual framework and intricate working of JPE mechanisms by attempting to answer the following questions:

1. What is JPE?
2. Why are JPE programmes instituted?
3. How do different JPE programmes evaluate judicial performance?
4. When and how frequently are evaluations conducted in different JPE programmes?
5. Who conducts such evaluations?

The second chapter of this report deals with the genesis and evolution of JPE, providing a theoretical and practical background on JPE and how it is practiced across the world. The third chapter, "Need for JPE," elucidates reasons behind instituting JPE programmes, and clarifies who is tasked with the assessment and why. The fourth chapter examines different methods of assessing judicial performance, and the timing of evaluations in different JPE programmes. The final two chapters discuss the pressing need to introduce a JPE for the higher judiciary in India, maps past attempts to do so, and presents a JPE plan that can be deployed for individual judges and for courtrooms across India.

Understanding how JPE was conceived and mapping the different ways in which it has evolved in different jurisdictions is crucial. This has helped us in identifying how JPE programmes benefit legal

systems and what aspects of JPE programmes work well for different systems. Similarly, this has also helped understand the challenges that come with evaluating judges and court systems, and what can be done to tackle them.

To contextualise the need for JPE in India, Vidhi also conducted a survey as a part of this study, to understand the Indian legal community's considerations about the need, feasibility and ideal structure of a JPE for India. The survey results, published in an interim report, are also used in this report to appreciate the need and implications of a JPE in the Indian context. To supplement findings of this report with insights that are informed by practicalities of adjudication in India, Vidhi also interviewed sitting and retired judges, and senior legal practitioners on the complexities of evolving a JPE for India. A summary of responses from these interviews are attached as Annexure III.

II. GENESIS AND EVOLUTION OF JUDICIAL PERFORMANCE EVALUATION (JPE)

The earliest JPE programmes were codified and used in the US with the primary aim of providing voters information regarding judges, before voters decided to re-elect them to office or vote them off the bench (also known as 'retention elections').¹ Over time, multiple jurisdictions have adopted the concept of JPE, but with differing aims and approaches to appraise judges. Generally, JPE programmes are employed to increase accountability of the judges, increase transparency in justice systems, improve the overall working of a judiciary, determine the career paths of judges, or achieve a combination of all of these objectives.² The designs of specific JPE programmes are usually aligned with their objectives. In countries that evaluate the performance of individual judges, two primary objectives prevail: to educate voters and/or appointing authorities who are charged with the retention or re-appointment of judges, where applicable; and to seek improvement in the justice system by promoting transparency, accountability and better performance by judges.³ The use of JPE

¹ See Michael L. Rubenstein (1977), 'Alaska's Judicial Evaluation Programme: A Poll the Voters Rejected', *Judicature* 60, p. 478. See also J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' *Oñati Socio-legal Series* [online] 4 (5), 898-926, available at <<http://ssrn.com/abstract=2533854>> accessed on 21.04.2016.

² See J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis', *Oñati Socio-legal Series* [online] 4 (5), 898-926, p. 904, available at <<http://ssrn.com/abstract=2533854>> accessed on 21.04.2016. The need and purposes of JPE programmes across the world are further discussed in further detail in Chapter III of this Report. In the US, JPE programmes were developed with the aim of informing citizens who voted in retention elections about the judges. In the EU, the Justice Scoreboard evaluates the justice system of different member states of the EU to determine the ease of doing business, access to justice, trends in litigation etc. Additionally, performance evaluation has been used a tool to ensure more transparent judicial systems.

³ Kearney (1999), 'Judicial Performance Evaluation in the States', *Public Affairs Quarterly*, Winter 1999. Available at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.489.6551&rep=rep1&type=pdf>> accessed on 01.11.2016.

before retention elections was, and continues to be, a process unique to the US, as judges are elected and not appointed, as they are in most other legal systems.

JPE programmes have evolved from informal methods, and have gradually become codified and more organised. This Chapter explains this evolution in two sections: it offers an understanding of JPE, as originally formulated in the US; and it describes how JPE programmes, whether formal or implicit, have evolved in other jurisdictions.

A. JPE in the United States

1. Informal Assessment

The first state-sponsored JPE programme in the US began in 1978 in Alaska, and by 2000, at several states in the US had some JPE programme in place or under development.⁴ But even before JPE gained ground as an institutional process of performance evaluation in the US, evaluations often happened informally, mainly in the form of bar polls.⁵

Bar polls or bar association polls were informal evaluation models in which assessment of judicial performance was made solely on the opinion of attorneys. Judges were also evaluated informally through word-of-mouth discussions about the functioning of the courtroom, as well as media polls. The results of these bar and media polls were often made available to the public,⁶ and despite being anonymous, they gave the judges a fair idea of the bar's and the public's perception of their performance. One objective of bar polls was to allow judges to contemplate possibilities of self-improvement,⁷ and by extension, seek improvement in judicial performance.

Bar polls have since been institutionalised, and currently, many states in the US continue to use bar polls as a method to evaluate judicial performance.⁸ For example, in Nebraska, the JPE process is a biennial evaluation of the state's judges by lawyers in the state, coordinated by the Nebraska State

⁴ Kearney (1999), 'Judicial Performance Evaluation in the States', available at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.489.6551&rep=rep1&type=pdf>> accessed on 01.11.2016.

⁵ See the Interim Report, Chapter II: Methodology, p. 7.

⁶ See Richard J. Young, 'The New Jersey Judicial Performance Evaluation Programme: An Assessment of the Programme's Impact on Judicial Performance' [*Institute for Court Management, Court Executive Development Programme, Phase III Project* (May 1997)], available at <<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/43>> accessed on 01.11.2016.

⁷ Seth S. Andersen (2001), 'Judicial Retention Evaluation Programmes', *Loy. L.A. L. Rev.* 34, 1375, p. 1377, available at <<http://digitalcommons.lmu.edu/lr/vol34/iss4/7>> accessed on 01.11.2016.

⁸ For more details on the system of Bar Polls, see the Interim Report, Chapter II (Methodology), p. 7.

Bar Association.⁹ The Dallas Bar Association also conducts judicial evaluation polls every alternate (odd-numbered) year.¹⁰

Both bar and media polls, however, have several limitations, and polling cannot be a substitute for objective and systematic evaluation that fairly assesses a judge's performance.¹¹ Bar polls have low response rates and second, even information provided by those that respond might be unreliable¹² as the ratings given by respondent attorneys may be influenced by self-interest.¹³ The assessment of judges' performance based on these responses is often distorted as bar polls run the risk of "devolving into popularity contests or political gauntlets".¹⁴ More importantly, the survey methodology employed by bar polls does not account for alternate measurement of performance derived through case management statistics or other objective evaluation parameters.¹⁵ The use of survey methodology also gives rise to concerns about gender and racial biases that may play out while evaluating judges.¹⁶ Further, yearly fluctuations in the results of bar polls for the same judge show that that reliance on such polls should be limited.¹⁷ With concerns about transparency of the process and perceptions of fairness, these polls are largely considered unreliable, arbitrary and inconsistent. In this backdrop, alternate or additional methods began to be used to evaluate judicial performance, and performance evaluation programmes in the US began using other metrics and method of performance evaluation, in addition to bar polls.

⁹ See the website of the Nebraska State Bar Association, available at <<http://www.nebar.com/?page=JPEResults>> accessed on 01.11.2016. To see the result of the 2016 evaluation, see <http://c.ymcdn.com/sites/www.nebar.com/resource/resmgr/For_the_Public/2016_JudicialPoll_COMPLETE.pdf> accessed on 01.11.2016.

¹⁰ See the website of the Dallas Bar Association, available at <<http://www.dallasbar.org/general-election-polls>> accessed on 01.11.2016.

¹¹ Richard L. Aynes (1981), 'Evaluation of Judicial Performance: A Tool for Self-Improvement', *Pepp. L. Rev.* 8 (2), available at <<http://digitalcommons.pepperdine.edu/plr/vol8/iss2/1>> accessed on 03.11.2016.

¹² See Richard L. Aynes (1981), 'Evaluation of Judicial Performance: A Tool for Self-Improvement', *Pepp. L. Rev.* 8 (2), p. 269, available at <<http://digitalcommons.pepperdine.edu/plr/vol8/iss2/1>> accessed on 03.11.2016.

¹³ J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' *Oñati Socio-legal Series [online]* 4 (5), 898-926, available at <<http://ssrn.com/abstract=2533854>> accessed on 21.04.2016.

¹⁴ Rebecca Love Kourlis, Jordan M. Singer (2009), 'A Strategy for Judicial Performance Evaluation in New York' *Albany Law Review*, Vol. 72 p. 657 available at <http://www.albanylawreview.org/Articles/Vol72_3/72.3.0007%20Kourlis.pdf> accessed on 12.01.2017.

¹⁵ Elek, Rotterman (2013), 'Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods', *Court Review*, Vol. 49 p. 140, available at <<http://aja.ncsc.dni.us/publications/courtry/cr49-3/CR49-3Elek.pdf>> accessed on 15.11.2016.

¹⁶ McLellan and Ray, 'Misjudging the Judge—the Dallas Bar Poll' (Full Report), pp. 8-10, available at <<http://www.sallymontgomery.com/documents/MisjudgingTheJudgeReportFull.pdf>> accessed on 10.11.2016.

¹⁷ McLellan and Ray, 'Misjudging the Judge—the Dallas Bar Poll' (Full Report), pp. 3-5, available at <<http://www.sallymontgomery.com/documents/MisjudgingTheJudgeReportFull.pdf>> accessed on 10.11.2016.

2. Institutional Assessment

Currently, 17 states and the District of Columbia in the US have official JPE programmes.¹⁸ The first institutional, state-sponsored JPE programme, started in Alaska, and sought to provide more reliable and accurate information than bar and media polls, to aid decision-making in retention elections.¹⁹ Multiple states adopted JPE for purposes ranging from providing information to voters, to helping professional development of judges. Performance evaluation also came to be increasingly used as a managerial tool to gauge measurable and quantifiable indicators of court performance.²⁰ A key reason for this is the dramatic shift in public perception of the role of a judge - from being mere decision-makers, judges were increasingly being regarded as accountable figures, who provided a service to the public.²¹

States designed JPE models that were made compatible with the purpose they sought to achieve²² and administered JPE through judicial or evaluation councils. Some states have programmes focussed on providing information on judges for the purposes of retention elections, which are called 'judicial retention evaluation programmes.' Others have JPE programmes focused solely on judicial self-improvement, such as that of New Jersey.²³ In the states of Alaska, Arizona, Colorado, Missouri, Utah and New Mexico, performance evaluation results are provided as information to voters before retention elections. In Connecticut, the District of Columbia, New Jersey, Vermont and Virginia, the results of performance evaluation are provided to those responsible for reappointing judges. In Hawaii and New Hampshire, summary performance evaluation results (i.e., individual judges are not identified) are provided to the public to enhance confidence in the courts. In Florida, Idaho, Illinois,

¹⁸ See the 'Judicial Performance Evaluation in the States' on the website of the Institute for the Advancement of the American Legal System, available at <<http://iaals.du.edu/quality-judges/judicial-performance-evaluation-states>> accessed on 24.04.2017.

¹⁹ J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (*Oñati Socio-legal Series [online]* 4 (5), 898-926, available at: <http://ssrn.com/abstract=2533854>.

²⁰ J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (*Oñati Socio-legal Series [online]* 4 (5), 898-926, available at <<http://ssrn.com/abstract=2533854>> accessed on 6.05.2017.

²¹ See Menon (2008), 'Evaluating Judicial Performance: A Consumer Perspective', *Journal of the Indian Law Institute*, p. 468, available at <[http://14.139.60.114:8080/jspui/bitstream/123456789/12820/1/011_Evaluating%20Judicial%20Performance_A%20Consumer%20Perspectives%20\(468-477\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/12820/1/011_Evaluating%20Judicial%20Performance_A%20Consumer%20Perspectives%20(468-477).pdf)> accessed on 06.02.2017. See also Hanson, Roger (2002), 'The Changing Role of a Judge and Its Implications', *Court Review: The Journal of the American Judges Association*, Paper 165, available at <<http://digitalcommons.unl.edu/ajacourtreview/165>> accessed on 06.02.2017.

²² J. McIntyre (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (*Oñati Socio-legal Series [online]* 4 (5), 898-926, available at <<http://ssrn.com/abstract=2533854>> accessed on 12.04.2017.

²³ The New Jersey Supreme Court instituted one of the first judicial evaluation programmes in the nation in 1986 with the primary goal of judicial improvement. See Richard J. Young, 'The New Jersey Judicial Performance Evaluation Programme: An Assessment of the Programme's Impact on Judicial Performance' [*Institute For Court Management, Court Executive Development Programme, Phase III Project (May 1997)*], available at <<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/43>>. See <<http://www.judiciary.state.nj.us/education/>> for details on the origins of the programme in New Jersey. See also, Seth S. Andersen (2001), 'Judicial Retention Evaluation Programmes', *Loy. L.A. L. Rev.* 34, 1375, p. 1376, available at <<http://digitalcommons.lmu.edu/llr/vol34/iss4/7>> accessed on 01.11.2016.

Massachusetts and Rhode Island, performance evaluations are used by judges for self-improvement, and the results are shared only with individual judges.²⁴

Although each of these states use different methodologies, all of them administer their JPE programmes through evaluating bodies or commissions.²⁵ However, institutionalised JPE programmes are characterised by some common elements: they are official state-led programmes, information is collected from a large group on several parameters through survey mechanisms, and survey results and recommendations are widely disseminated to inform the public.²⁶

A large number of the existing JPE programmes in the US, whether official or unofficial, continue to rely on surveys distributed to attorneys and court staff - and in some instances to jurors, litigants, witnesses, court staff, police and probation officers, social service personnel and others - to measure judicial performance.²⁷ They attempt to assess a judge through the use of standardised surveys and performance indicators to minimise bias in evaluation.

B. JPE in Other Parts of the World

In the late 1990s, other countries started formulating their own formal programmes for evaluating judicial performance as part of a larger goal of judicial reforms. In addition to governments recognising the need for such judicial reforms, intergovernmental organisations as well as civil society organisations demanded such programmes for increasing transparency and accountability of judicial systems.²⁸

It is useful to recall that the judges in the United States are either elected or appointed and the results of JPE programmes are used accordingly in the US. But the manner of appointment of judges, and their continuation and promotion varies greatly across jurisdictions. Therefore, an attempt to understand the needs and ends of performance evaluation of different legal systems must only be made with context of these variances across jurisdictions.

²⁴ See 'Judicial Performance Evaluation in the States', on the official website of the Institute for the Advancement of the American Legal System, available at <<http://iaals.du.edu/quality-judges/judicial-performance-evaluation-states>> accessed on 07.07.2016.

²⁵ Penny J. White (2009), 'Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy', *Missouri Law Review* 74 (3), Art. 11, p. 654.

²⁶ Seth S. Andersen (2001), 'Judicial Retention Evaluation Programmes', *Loy. L.A. L. Rev.* 34, 1375, p. 1376, available at <<http://digitalcommons.lmu.edu/llr/vol34/iss4/7>> accessed on 01.11.2016.

²⁷ Elek, Rotterman (2013), 'Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods', available at <<http://aja.ncsc.dni.us/publications/courtrv/cr49-3/CR49-3Elek.pdf>> accessed on 15.11.2016.

²⁸ Dakolias, Maria (1999), 'Court Performance around the World: A Comparative Perspective', *Yale Human Rights and Development Journal*: 2 (1), Article 2, available at <<http://digitalcommons.law.yale.edu/yhrdlj/vol2/iss1/2>> accessed on 02.11.2016.

1. Civil Law Jurisdictions

In Europe, the practice of JPE differs across member states.²⁹ Generally, ministries of justice and judicial councils have introduced quality assessment mechanisms, complaint procedures, and other managerial methods to assess the performance of both judges and the courts in which they operate.³⁰ Even before JPE programmes became established in Europe, traditional quality control procedures existed, and were built into the institutional practices of courts and justice ministries.³¹ Additionally, New Public Management (NPM) tools, ordinarily used to hold governments more accountable, have also influenced the manner in which judicial performance is evaluated, and have been adapted to improve efficiency, quality of service delivery, and overall functioning of justice services.³² After the public became increasingly engaged in the evaluation/assessment process, there is evidence that the court and justice systems began to respond to public demands in the pursuit for judicial assessment and judicial reforms.³³

Countries such as Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Spain and Turkey that follow Civil Law have, over time, developed formal mechanisms for the evaluation of the professional performance of judges.³⁴ These mechanisms, often sanctioned by primary legislation³⁵ (e.g., France),³⁶ and further shaped by internal regulations of the respective judicial councils or ministries, vary in complexity. In Austria, judicial boards carry out the

²⁹ J. Wittrup, (2006) 'Analysis of the system for measuring and monitoring judicial performance in Romania', Part-1: Comparative Analysis, p. 15, available at <http://www.csm1909.ro/csm/linkuri/14_02_2011_39242_ro.pdf> accessed on 03.11.2016.

³⁰ Mohr, Contini (2007), 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries', *European Journal of Legal Studies* 1 (2), p. 254, available at <<http://www.ejls.eu/2/30UK.pdf>> accessed on 02.11.2016.

³¹ Mohr, Contini (2007), 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries', *European Journal of Legal Studies* 1 (2), p. 254, available at <<http://www.ejls.eu/2/30UK.pdf>> accessed on 02.11.2016.

³² See J. Wittrup, (2006) 'Analysis of the system for measuring and monitoring judicial performance in Romania', Part-1: Comparative Analysis, p. 15, available at <http://www.csm1909.ro/csm/linkuri/14_02_2011_39242_ro.pdf> accessed on 03.11.2016. See also Contini, Mohr (2007), 'Reconciling independence and accountability in judicial systems', *Utrecht Law Review* 3, 26, available at <<https://www.utrechtlawreview.org/article/download/46/46/>> accessed on 13.01.2017.

³³ Mohr, Contini (2007), 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries', *European Journal of Legal Studies* 1 (2), p. 255, available at <<http://www.ejls.eu/2/30UK.pdf>> accessed on 02.11.2016.

³⁴ 'Development of Minimal Judicial Standards: Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary', Report of the European Network of Councils for the Judiciary (ENCJ), 2012-13, p. 11-12, available at <<https://www.rechtspraak.nl/SiteCollectionDocuments/Development-of-Minimal-Judicial-Standards-III.pdf>> accessed on 10.11.2016.

³⁵ In France, the evaluation of judges takes place under "Statut des magistrats" (Art. 12-1).

³⁶ See Errera, 'The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France', Chapter 2 in 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe', Research project of Istituto Di Ricerca Sui Sistemi Giudiziari Consiglio Nazionale Delle Ricerche - Italy in partnership with Research Centre for Judicial Studies (CeSROG), University of Bologna, Italy, p. 61, available at <<http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>> accessed on 31.01.2017.

performance evaluation of judges. These performance evaluations often determine the promotion of judicial officers to the next professional level.³⁷

In Germany, the evaluation of judges is done at the stage of recruitment as well as to determine career progression. With the exception of the five federal supreme courts, court administration is the responsibility of the Laender (states). The Laender have established criteria for evaluation of judicial performance. These criteria cover a broad range of judicial capabilities. Some of these are: knowledge of the law, knowledge of technology, good applicability of the law, good judgment, impartiality, competence in conducting court proceedings and in imparting training to students, personal competence and administrative abilities.³⁸

The Republic of Croatia has strict criteria for the evaluation of judges. Judges are evaluated by a council after the second year of their judicial career.³⁹ The criteria used for evaluating judges are a mix of qualitative and quantitative parameters, such as, number of judgements delivered, compliance with deadlines, judgements which have been reversed.⁴⁰ The evaluation process also takes into consideration the work undertaken by the judges for her or his professional development. Apart from this, the evaluation also takes into account relationship with colleagues, compliance with priorities with respect to cases assigned to the judge. The scheme also provides for negative evaluation, for example, when targets are not met with regard to the number of judgments to be delivered. This is offset by reducing the value of the negative assessment, when, for example, the judge has an extremely difficult and complex caseload.⁴¹ Judges against whom disciplinary proceedings have been imposed or who have been found to violate judicial ethics are also negatively

³⁷ See Errera, 'The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France', Chapter 2 in 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe', Research project of Istituto Di Ricerca Sui Sistemi Giudiziari Consiglio Nazionale Delle Ricerche - Italy in partnership with Research Centre for Judicial Studies (CeSROG), University of Bologna, Italy, p. 15, available at <<http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>> accessed on 31.01.2017.

³⁸ See Riedel (2014), 'Individual Evaluation of Judges in Germany', *Oñati Socio-legal Series [online]* 4 (5), 974-992, p.978, available at <<http://ssrn.com/abstract=2533857>> accessed on 06.06.2017.

³⁹ See Article 1 of the 'Methodology for the Evaluation of Judges' (Established on 26th September, 2007 by the Council of Presidents of all Judges' Councils in the Republic of Croatia), available at <<http://pak.hr/cke/propisi,%20zakoni/en/MethodologyForEvaluationofJudges/Methodology.pdf>> accessed on 07.05.2017.

⁴⁰ See Article 3 of the 'Methodology for the Evaluation of Judges' (Established on 26th September, 2007 by the Council of Presidents of all Judges' Councils in the Republic of Croatia), available at <<http://pak.hr/cke/propisi,%20zakoni/en/MethodologyForEvaluationofJudges/Methodology.pdf>> accessed on 07.05.2017.

⁴¹ See Articles 4 and 5, of the 'Methodology for the Evaluation of Judges' (Established on 26th September, 2007 by the Council of Presidents of all Judges' Councils in the Republic of Croatia), available at <<http://pak.hr/cke/propisi,%20zakoni/en/MethodologyForEvaluationofJudges/Methodology.pdf>> accessed on 07.05.2017.

assessed.⁴² Judges of the higher courts (Courts of Appeal, High Courts and Supreme Courts) are assessed on their preceding judicial career when they apply against judicial vacancies.⁴³

In the Scandinavian countries, the method of performance evaluation is largely informal.⁴⁴ Some of the evaluation also includes dialogue between the judges and heads of courts, for setting specific performance targets.⁴⁵ In Sweden, heads of courts have informal dialogues with judges to set performance targets.⁴⁶ In Norway, the Court Administration, an authority that administers courts,⁴⁷ encourages self-evaluation amongst the judges themselves on conduct in court hearings.

In addition to these performance evaluation systems in individual countries, the European Commission for the Efficiency of Justice (CEPEJ) collects and analyses data from the member states in the EU to evaluate the functioning of judiciaries across the EU. The CEPEJ was set up by the Committee of Ministers in 2002. The organisation focuses on collecting qualitative as well as quantitative data on the functioning of European judicial systems to work towards the larger goal of judicial reforms in Europe.⁴⁸

Besides evaluation of individual judges' performance, some evaluation programmes were also developed as managerial tools to assess court systems. They serve as particularly effective tools in

⁴² See Article 16 of the 'Methodology for the Evaluation of Judges' (Established on 26th September, 2007 by the Council of Presidents of all Judges' Councils in the Republic of Croatia), available at <<http://pak.hr/cke/propisi,%20zakoni/en/MethodologyForEvaluationofJudges/Methodology.pdf>> accessed on 07.05.2017.

⁴³ Sessa (President of Association of Croatian Judges Justice of Supreme Court of Republic of Croatia), 'Evaluation of Judges Performance in Croatia- When, How and Why', available at <http://www.coe.int/t/DGHL/cooperation/ccje/Onenparle/Sessa_Association_swiss_judges.pdf> accessed on 07.05.2017.

⁴⁴ See 'Development of Minimal Judicial Standards: Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary', Report of the European Network of Councils for the Judiciary (ENCJ), 2012-13, p. 11, available at <<https://www.rechtspraak.nl/SiteCollectionDocuments/Development-of-Minimal-Judicial-Standards-III.pdf>> accessed on 10.11.2016.

⁴⁵ See 'Development of Minimal Judicial Standards: Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary', Report of the European Network of Councils for the Judiciary (ENCJ), 2012-13, p. 11, available at <<https://www.rechtspraak.nl/SiteCollectionDocuments/Development-of-Minimal-Judicial-Standards-III.pdf>> accessed on 10.11.2016.

⁴⁶ 'Development of Minimal Judicial Standards: Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary', Report of the European Network of Councils for the Judiciary (ENCJ), 2012-13, p. 11, available at <<https://www.rechtspraak.nl/SiteCollectionDocuments/Development-of-Minimal-Judicial-Standards-III.pdf>> accessed on 10.11.2016.

⁴⁷ The Norwegian Courts Administration (NCA) is an authority that administers ordinary courts and land consolidation courts in Norway. It provides administrative support to allow courts and judges to dispense justice efficiently. For more details see the website of NCA, available at <<https://www.domstol.no/en/Norwegian-Courts-Administration/>> accessed on 24.04.2017.

⁴⁸ See 'European judicial systems - Edition 2014 (2012 data): efficiency and quality of justice', CEPEJ Report, available at <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> accessed on 25.04.2017.

creating a framework for the internal management of court systems.⁴⁹ The EU periodically assesses the functioning of the court systems of its member states through a system called the “Justice Scoreboard”. This incorporates a wide variety of factors, including case disposals, an analysis of different areas of law in which litigation takes place, the time needed to resolve cases in different areas of law, judicial review in different areas of litigation and the use of alternate dispute resolution (ADR) mechanisms to resolve legal disputes.⁵⁰

In Brazil, a Public Justice Confidence Index is used to evaluate the performance of judges. The index evaluates seemingly objective parameters of “efficiency (speed), responsiveness (competence), accountability (impartiality), independence (from external political influence) and access (ease of use and costs)”.⁵¹ In the Philippines, a formal performance evaluation exists for judicial officers in the lower level of the judiciary on the basis of which promotions are made.⁵²

2. Common Law Jurisdictions

The UK does not have an evaluation mechanism for the higher judiciary, but demands for the performance evaluation of judges has risen in the past few years. In 2010, the Report of the Advisory Panel on Judicial Diversity said that judges must be assessed in order to identify talent and develop skills in the pool of judicial officers.⁵³ The Auld Review of the Criminal Courts of England and Wales, too, suggested a performance appraisal for judicial officers at the trial court level. Chapter 6 of the Report discussed why an appeal process was not sufficient to reflect the day-to-day working of the trial court judges, and made out a case for regular performance reviews of these judges.⁵⁴

⁴⁹ For instance, in the European Union (EU), there is a system of the “EU Justice Scoreboard”, where periodic evaluation of case disposals and other administrative factors relating to the court systems, is carried out to gauge how the courts are functioning, available at http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm accessed on 20.04.2016.

⁵⁰ See EU Justice Scoreboard, available at ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm accessed on 09.08.2016.

⁵¹ Cunha, Oliveira, Glezer (2014), ‘Brazilian Justice Confidence Index - Measuring Public Perception on Judicial Performance in Brazil’, available at <http://revistas.javeriana.edu.co/index.php/internationallaw/article/viewFile/13566/10901> accessed on 10.11.2016 .

⁵² See OCA Circular 140-2016, Amendment to the OCA Circular No. 71-2003, Guidelines in the Submission of Performance Rating for Lower Court Officials and Personnel (Document of the Office of the Court Administrator, Manila, Republic of Philippines Supreme Court, dated 27.06.2016, available at <http://oca.judiciary.gov.ph/wp-content/uploads/2016/06/OCA-Circular-No.-140-2016.pdf> accessed on 03.06.2017.

⁵³ See Report of the Advisory Panel on Judicial Diversity, available at https://www.ucl.ac.uk/laws/judicial-institute/files/Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf accessed on 01.06.2017.

⁵⁴ See Chapter 6 of the Auld Review of the Criminal Courts of England and Wales, available at <http://webarchive.nationalarchives.gov.uk/20090607141016/http://www.criminal-courts-review.org.uk/chpt6.pdf> accessed on 02.06.2017.

The Lord Chief Justice's Report in 2015 put forth the idea of a Crown Court performance tool, where data can be used for improving court productivity and accountability in the justice system.⁵⁵ For instance, the Report stated that the performance of fast track courts could be assessed using the volumes of cases, timelines of hearings, settlement rates and enforcement statistics.⁵⁶

The UK has developed a set of indicators for assessing performance in magistrates in England and Wales. These indicators measure the relation between resources used and services delivered by magistrates and other persons in the court system. This is then represented in the form of "productivity" which is calculated by a mathematical formula that takes into account the services delivered and the resources used in a weighted manner. It is recognised though, that these variables may not always reflect the true condition of the working of the system; for instance, the resolution of a large number of cases may not necessarily mean that justice is being delivered fairly and efficiently.⁵⁷

In Australia, where judicial independence is guaranteed under the Constitution,⁵⁸ and no JPE programme exists, surveys and interviews as well as other empirical research have been carried out to understand the attitude of magistrates towards their work.⁵⁹ Further, studies have shown that an implicit evaluation of judicial performance also occurs as part of the workload or case allocation process.⁶⁰

An initiative led by the Australian Research Council, supported financially by the Australian Institute of Judicial Administration and the Queensland Magistrates Court, also works towards developing JPE programmes. The Queensland Magistrates' Judicial Development Project contemplates a system of performance evaluation for magistrates, led by the magistrates themselves. It is felt that such a

⁵⁵ The Lord Chief Justice's Report, 2015, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf> accessed on 01.06.2017.

⁵⁶ See The Lord Chief Justice's Report, 2015, p. 12, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf> accessed on 01.06.2017.

⁵⁷ See 'Judicial Indicators as Electronic Tools for Measuring the Efficiency of Justice in England and Wales, and Germany', available at <<http://www.csd.bg/fileSrc.php?id=20635>> accessed on 02.06.2017.

⁵⁸ See Wallace, Anleu, Mack (2015), 'Evaluating Judicial Performance for Caseload Allocation', *Monash University Law Review* 41(2), 445, p. 447, fn. 4, available at <https://www.monash.edu/_data/assets/pdf_file/0004/446179/Vol412_Wallace.pdf> accessed on 11.01.2017.

⁵⁹ Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary. The research has used interviews, surveys and observation studies to investigate the attitudes of magistrates and judges towards their work, their experiences of their everyday work and how matters are handled in court. See Wallace, Anleu, Mack (2015), 'Evaluating Judicial Performance for Caseload Allocation', *Monash University Law Review* 41(2), 445, p. 447, fn. 4, available at <https://www.monash.edu/_data/assets/pdf_file/0004/446179/Vol412_Wallace.pdf> accessed on 11.01.2017.

⁶⁰ See Wallace, Anleu, Mack (2015), 'Evaluating Judicial Performance for Caseload Allocation', *Monash University Law Review* 41(2), 445, p. 447, fn. 4, available at <https://www.monash.edu/_data/assets/pdf_file/0004/446179/Vol412_Wallace.pdf> accessed on 11.01.2017.

programme stemming from within the judiciary will help judges identify their strengths and weaknesses and contribute positively to their professional development.⁶¹ This programme also keeps concerns of judicial independence in mind and adopts processes which are internal and acceptable to the courts, and aimed mainly at promoting judicial self-improvement.⁶²

In New Zealand, the District Court Judiciary publishes Annual Reports with statistics relating to its working. The district courts follow the International Framework for Court Excellence, an initiative aimed at assisting courts over the world to improve their performance.⁶³ The district courts aim to increase access to justice for underrepresented litigants, encourage innovation in courts registries, timely resolution of cases, and improve the overall functioning of these court systems. Such performance evaluation of court systems has been viewed as an important way of ensuring accountability of the judiciary.⁶⁴

South Africa, too, has undertaken major judicial reforms in the past few years, a dimension of which deals with performance assessment of the judiciary. Under Section 165(6) of the Constitution of South Africa, the Chief Justice is responsible for the establishment and monitoring of norms and standards for exercise of judicial functions by all courts, and can issue protocols and directives for the same. In 2014, the South African government released a notice on “Norms and Standards for the Performance of Judicial Functions”, under the Department of Justice and Constitutional Development. This notice lays down certain practices that judges must adhere to for the efficient delivery of justice. Additionally, it places a duty on the judges to make an efficient use of resources, follow a transparent policy of communication, internally and externally; follow a high level of competence and excellence, amongst other similar goals.⁶⁵

In Canada, the idea of performance evaluation of judges first gained traction in the late 1980s.⁶⁶ In 2012, allegations of bias raised against a judge revived interest in the idea of performance evaluation

⁶¹ Stephen Colbran (2006), ‘A comparative analysis of judicial performance evaluation programmes’, *Journal of Commonwealth Law and Legal Education* 4(1).

⁶² Stephen Colbran (2006), ‘A comparative analysis of judicial performance evaluation programmes’, *Journal of Commonwealth Law and Legal Education* 4(1).

⁶³ See District Courts of New Zealand, Annual Report 2016, available at <<http://www.districtcourts.govt.nz/assets/Uploads/DCAnnualReport-2016.pdf>> accessed on 02.06.2017.

⁶⁴ See ‘Accountability for the Administration and Organisation of the Judiciary’ (A discussion by Judge Jan-Marie Doogue, Chief District Court Judge of New Zealand Judge Colin Doherty, Chair of the District Courts of New Zealand’s IFCE Committee Jeff Simpson, Legal Research Counsel to the Chief District Court Judge), available at <<http://myold.lawsociety.org.nz/in-practice/practising-law/litigation/accountability-for-the-administration-and-organisation-of-the-judiciary/Judicial-Accountability-Asia-Pacific-Conference-March-2013-FINAL.pdf>> accessed on 31.5.2017.

⁶⁵ See ‘Norms and Standards for the Performance of Judicial Functions’, Government Notice, Department of Justice and Constitutional Development, 28th February, 2014, available at <http://www.justice.gov.za/legislation/notices/2014/2014-02-28-gg37390_gon147-supcourts.pdf> accessed on 02.06.2017.

⁶⁶ Bear C (1986), ‘Judicial appointments and the quality of adjudication: The American experience’ *La Revue Juridique Themis* 24.

for judges. The idea of litigants and lawyers evaluating judges was thus put forth.⁶⁷ However, performance evaluation programmes have been met with criticism for interfering with judicial independence.⁶⁸ For example, a study on the performance evaluation of federally appointed judges in Nova Scotia showed that there were serious concerns that it was interfering with judicial independence.⁶⁹ This study argued that if conducted properly, a judicial performance evaluation programme would not undermine judicial independence. However, it was also stated that the opposition to JPE lies in the socio-political context in jurisdictions with parliamentary systems of government and no judicial elections. In contrast, the study found that the elected judiciary in the US and the civil service model of the judiciary in continental Europe follow patterns similar to the selection of bureaucrats and other governmental actors in these systems, which may make the case for the performance evaluation of the judiciary stronger.⁷⁰

With their changing socio-economic patterns, developing countries are also focussing on the performance of their court systems and judiciaries. For instance, Sri Lanka has put the issue of performance assessment on its agenda for improving the overall quality and efficiency of justice.⁷¹ This also came as a reaction to various issues with the court systems and judiciary, such as low judge strength, low productivity, loopholes in training in the judiciary, increasing caseloads and need for case management, amongst other concerns.⁷² There is, however, currently no formal procedure in

⁶⁷ See Michael McKiernan (2012), 'Judging the judges', *Canadian Lawyer (Online)*, available at <<http://www.canadianlawyermag.com/4030/judging-the-judges.html>> accessed on 02.06.2017.

⁶⁸ See Riddell, Hausegger, and Hennigar (2012), 'Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy', *Osgoode Hall Law Journal* 50(2), 403-427, p. 405-6, available at <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss2/3>> accessed on 29.12.2016.

⁶⁹ See Riddell, Hausegger, and Hennigar (2012), 'Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy', *Osgoode Hall Law Journal* 50(2), 403-427, p. 405-6, available at <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss2/3>> accessed on 29.12.2016.

⁷⁰ See Riddell, Hausegger, and Hennigar (2012), 'Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy', *Osgoode Hall Law Journal* 50(2), 403-427, p. 405-6, available at <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss2/3>> accessed on 29.12.2016.

⁷¹ See 'Sri Lanka Justice Sector Review', Report No. 77662-LK, Document of the World Bank (Poverty Reduction and Economic Management Sector Unit South Asia Region), available at <<http://documents.worldbank.org/curated/en/255751468164662812/pdf/776620LK0ESW0P00Box377382B00PUBLIC0.pdf>> accessed on 03.06.2017.

⁷² See 'Sri Lanka Justice Sector Review', Report No. 77662-LK, Document of the World Bank (Poverty Reduction and Economic Management Sector Unit South Asia Region), p. 6, available at <<http://documents.worldbank.org/curated/en/255751468164662812/pdf/776620LK0ESW0P00Box377382B00PUBLIC0.pdf>> accessed on 03.06.2017.

place for the evaluation of judges,⁷³ save for notices and guidelines relating to filling in quarterly reports relating to the judges' caseload, which may be used to determine their promotions.⁷⁴

In Pakistan, the Chief Justice of the Lahore High Court in 2016 made the case for determining transfers and promotions by a performance evaluation of judges.⁷⁵ Subsequently, studies are being conducted to develop a performance evaluation programme for the district judiciary.⁷⁶

With this background, the following Chapter examines the needs and purposes of JPE programmes, studying its variations across jurisdictions.

III. THE NEED FOR JPE

JPE programmes have most commonly been used to provide useful feedback to judges and the public, to increase transparency, consistency and accountability of the judicial system, to improve case and court management, and to promote greater public understanding of the courts. This Chapter examines why jurisdictions with JPE programmes have felt the need to evaluate performance of their judges. This will help in deliberating as to why a structured performance evaluation is needed for India's higher judiciary, and would further help in linking programme design (with regard to metrics and methodology), and the ends it would seek to achieve.

A. Transparency and Accountability

It is known that institutions and individuals who perform public functions fare better when they are subject to a system of periodic checks.⁷⁷ In the same way, JPE programmes may help promote judicial

⁷³ See 'Sri Lanka Justice Sector Review', Report No. 77662-LK, Document of the World Bank (Poverty Reduction and Economic Management Sector Unit South Asia Region), p. 17, available at <<http://documents.worldbank.org/curated/en/255751468164662812/pdf/776620LK0ESW0P00Box377382B00PUBLIC0.pdf>> accessed on 03.06.2017.

⁷⁴ See for instance Judicial Service Commission Circular no. 317, Quarterly Returns of Work (Civil and Criminal Courts), 20.10.2008, available at <http://www.jsc.gov.lk/web/upload/317_en.pdf> accessed on 03.06.2017.

⁷⁵ 'Performance of judicial officers to be evaluated, says LHC CJ' *International The News (Online)*, 3rd June 2016, available at <<https://www.thenews.com.pk/print/145651-Performance-of-judicial-officers-to-be-evaluated-says-LHC-CJ>> accessed on 03.06.2017.

⁷⁶ See Action Document for Performance Evaluation System for District Judiciary, available at <<http://kpja.edu.pk/sites/default/files/digitallibrary/Action%20document%20Evaluation%20System.pdf>> accessed on 03.06.2017.

⁷⁷ See Peter Cappelli and Anna Tavis, 'The Performance Management Revolution', available at <<https://hbr.org/2016/10/the-performance-management-revolution>> accessed on 11.01.2017.

accountability, leading to a more transparent and effective judiciary, and are often designed with increased accountability of judicial systems as one of the end purposes.⁷⁸

1. Accountability and Public Trust

In some democratic systems, the judicial branch is viewed as having been authorised by the people and must be accountable to them.⁷⁹ In some systems, public support and participation are considered essential for the judiciaries to maintain their legitimacy as institutions.⁸⁰ The accountability of the judiciary must be considered at both the institutional level as well as the level of the individual judge, and decision-making must be transparent to the public.⁸¹ In parts of the US, such as Colorado, JPE was introduced to make the judiciary more publicly accountable.⁸²

JPE programmes can promote accountability and instil public confidence in the judicial system in many ways.⁸³ The assessments made as part of JPE programmes inform citizens about the quality of the work of a judge, their knowledge of law, and their ability to apply the law objectively to a case at hand. This helps citizens gain valuable information about the state of functioning of the judiciary and of individual judges, and repose faith in the judicial system.⁸⁴ JPE programmes also ensure that judges are accountable to the judiciary as an institution. In fact, scholars have argued for the need

⁷⁸ See J. McIntyre, J. (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis', *Oñati Socio-legal Series [online]*, 4 (5), 898-926, 908. Available at <<http://ssrn.com/abstract=2533854>> accessed on 13.06.2017.

⁷⁹ Mohr, Contini (2007), 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries', *European Journal of Legal Studies* 1 (2), p. 282, available at <<http://www.ejls.eu/2/30UK.pdf>> accessed on 28.12.2016.

⁸⁰ See Penny White (2009), 'Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy', *Missouri Law Review*, 74(3), Art. 11, p. 636, available at <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3838&context=mlr>> last accessed on 12.01.2017. See also Brody (2008), 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust', *Denver University Law Review* 86(1).

⁸¹ 'Independence and Accountability of the Judiciary', ENCJ (European Network of Councils for the Judiciary), Report 2013-2014, available at <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf> accessed on 27.01.2016.

⁸² Jean Dubofsky, 'Judicial Performance Review: A Balance between Judicial Accountability and Judicial Independence', *Fordham Urb. L.J.* 34, 315 (2007).

⁸³ Kourlis, Gagel, Singer, Jamison, Danford, Seidman, 'Shared Expectations Judicial Accountability in Context', *Publication of The Institute for the Advancement of the American Legal System*, pp. 13-14, available at <iaals.du.edu/sites/.../shared_expectations_judicial_accountability_context2006.pdf>, accessed on 08.07.2016. See also Kourlis and Singer (2007), 'Using judicial performance evaluations to promote judicial accountability', *Judicature* 90(5) March-April, available at <http://iaals.du.edu/sites/default/files/documents/publications/using_jpe_to_promote_judicial_accountability2007.pdf>, accessed 28.12.2016.

⁸⁴ Stephen B Burbank (2007), 'Judicial Independence, Judicial Accountability and Interbranch Relations' *Georgetown Law Journal* 95(4), 909, pp. 911, 912. See also Penny White (2001), 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations', *Fordham Urban Law Journal*, 29(3), Article 11, p. 1060.

of performance evaluation as traditional forms of accountability, such as provisions for appeals mechanisms, may not be considered sufficient for assessing the performance of judges.⁸⁵

2. Managerial Accountability

Accountability must also be considered in terms of the overall working of court systems, i.e. a managerial form of accountability, which was also the basis of many JPE programmes as they evolved and developed.⁸⁶ Identifying issues with the functioning of court systems is the first step in ensuring better access to justice and public faith in these systems. For example, a common issue plaguing different justice systems is court delays and backlogs. Arguably, measures must be taken to tackle these inefficiencies and managerial issues in the court systems.⁸⁷ For this, systems need to be put in place that measure the quality and efficiency of justice in jurisdictions, such as the Justice Scoreboard.⁸⁸ Such measures can also be helpful in resource allocation and improving the management and efficiency of court systems. In some European countries, such as France and the Netherlands, statistical studies and programmes help understand caseloads and the numbers of judges needed in particular courts.⁸⁹ These programmes and studies also form the basis of resource allocation in these courts.

However, measures taken to increase transparency and accountability in judicial systems are often met with criticism regarding the underlying threat to judicial independence.⁹⁰ A key challenge faced by judicial administrators the world over is to ensure that expectations of accountability and efficiency remain consistent with ideals of judicial independence.⁹¹ Critics argue that judicial performance evaluation threatens judicial independence and creates opportunities for undue

⁸⁵ Stephen Colbran (2006), 'A comparative analysis of judicial performance evaluation programmes', *Journal of Commonwealth Law and Legal Education* 4(1).

⁸⁶ See J. McIntyre, J. (2014), 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis', *Oñati Socio-legal Series [online]*, 4 (5), 898-926, 904. Available at <<http://ssrn.com/abstract=2533854>> accessed on 13.06.2017.

⁸⁷ See EU Justice Scoreboard, available at <ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed on 09.08.2016.

⁸⁸ See EU Justice Scoreboard, available at <ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed on 09.08.2016.

⁸⁹ Mohr and Contini, 'Reconciling independence and accountability in judicial systems', available at <www.ejls.eu/2/30UK.pdf> accessed on 24.01.2017.

⁹⁰ Lienhard (2014), 'Performance Assessment in Courts - The Swiss Case - Constitutional Appraisal and Thoughts as To Its Organization', *International Journal for Court Administration* 6(2), December 2014, 26, p.31, available at <www.iaacjournal.org/articles/10.18352/ijca.145/galley/153/download/> accessed on 07.02.2017.

⁹¹ Spiegelman (2002), 'Judicial accountability and performance indicators', *Civil Justice Quarterly*, p.18.

executive interference.⁹² Some opponents of judicial evaluation systems state that an evaluation system is a “disguised attack on the independence of the judiciary.”⁹³

3. Accountability and Judicial Independence

Often, the process of evaluating judges involves external individuals and/or bodies. For instance, in the US, the councils which are formed to carry out JPE contain judges as well as other individuals.⁹⁴ These councils seek inputs from external bodies whether it is the executive, public and/or the bar.⁹⁵ It is this involvement of external agencies in the process of evaluating judges that is viewed as a potential problem for their independence. Evaluation poses the risk of judges diverging from their individual objective opinions based on law, and giving decisions to impress legislators or any other body that are involved in their evaluation.⁹⁶ For example, judges may hesitate in expressing their objective opinion and assessment of matters when an individual evaluation has consequences for promotion, salary and pension, or may even lead to removal from office.⁹⁷ JPE initiated by the political branches of government—and particularly, JPE programmes that include indicators of substantive decision-making could also threaten judicial independence.⁹⁸

Evaluation programmes are sometimes opposed for precisely the reasons discussed in the previous paragraphs. For instance, there were protests against the introduction of managerial systems of

⁹² See ‘Challenges for judicial independence and impartiality in the member states of the Council of Europe’ (2016), Information Documents SG/Inf(2016)3rev, available at <[http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.pdf](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.pdf)> accessed on 20.12.2016. See also J. McIntyre (2014), ‘Evaluating Judicial Performance Evaluation: A Conceptual Analysis’, *Oñati Socio-legal Series [online]* 4 (5), 898-926, available at <<http://ssrn.com/abstract=2533854>> accessed on 20.12.2016.

⁹³ Kevin M. Esterling (1999), *Judicial Accountability the Right Way*, 82 *JUDICATURE* 206, 209 available at <www.americanbar.org/content/dam/aba/migrated/jd/.../Esterling_Judicature.pdf> accessed on 08.07.2016. (explaining that judicial performance evaluation commissions “are official state-sponsored independent agencies with either constitutional or statutory authority, and are funded by legislative appropriation”). See also Mohr, Contini, ‘Reconciling independence and accountability in judicial systems’, *Utrecht L. Rev.* 3, 26, available at <<https://www.utrechtlawreview.org/article/download/46/46/>> accessed on 13.01.2017.

⁹⁴ See Table 10 on Judicial Performance Evaluation in different states, on the website of the National Center for State Courts, available at <<http://ncsc.contentdm.oclc.org/cdm/ref/collection/judicial/id/218>> accessed on 01.02.2017.

⁹⁵ Penny White (2009), ‘Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy’, *Missouri Law Review*, 74(3), Art. 11, p. 656, available at <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3838&context=mlr>> last accessed on 12.01.2017

⁹⁶ See CCJE Opinion no. 17 of 2014, para C, available at <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true>> accessed on 23.02.2017. See also CCJE Opinion No. 1(2001), para 66, Recommendation CM/Rec(2010)12, paras. 22-25.

⁹⁷ See CCJE Opinion no. 17 of 2014, para C(6), available at <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2256555&Site=COE&direct=true>> accessed on 23.02.2017. See also CCJE Opinion No. 1(2001), para 66, Recommendation CM/Rec(2010)12, paras. 22-25.

⁹⁸ Ridell et al. (2012), ‘Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy’, *Osgoode Hall Law Journal* 50(2) (Winter 2012), Article 3, 403-427, p. 417, available at <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1025&context=ohlj>> accessed on 18.10.2016. (Hereinafter “Ridell et al”). See also Stephen Colbran (2006), ‘A Comparative Analysis of Judicial Performance Evaluation Programmes’ *J Commonwealth L & Legal Educ* 4(1), 35, p. 58.

judges and courts in Europe, as revealed by a research exercise carried out in nine countries. The opposition usually came from judges who said that the use of such systems would violate the principle of judicial independence.⁹⁹ But simply excluding external bodies does not necessarily mean the evaluation process will be free of bias.¹⁰⁰ At the same time, factoring in only the judiciary in the performance evaluation process has its own issues, such as bias within the judiciary. A balance may have to be struck by incorporating some independent entities, for example, by constituting impartial evaluation bodies.¹⁰¹

When evaluating judges, factors usually taken into account include integrity, freedom from impropriety and from the appearance of impropriety, knowledge and understanding of the law, fairness, preparedness and punctuality, diligence, communication skills, managerial skills, and public and professional service. Some of these factors help gauge the level of independence and impartiality with which judges perform their duties.¹⁰² As one commentator noted, “Judicial independence does not excuse the courts from compliance with appropriate standards of accountability, it merely helps define the standards of accountability that are appropriate.”¹⁰³ A study carried out by the European Network of Council for the Judiciary (ENCJ)¹⁰⁴ suggests that justice systems which comprise complaints procedures against judges and the courts in general, periodic reporting by the judiciary, relations between the judiciary and the press, and external review of the judiciary, indicate an independent *and* accountable judiciary.¹⁰⁵ Therefore, it is possible to establish judicial accountability without violating the judiciary’s independence. Sometimes, the statute governing performance

⁹⁹ Mohr, Contini (2007), ‘Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries’, *European Journal of Legal Studies* 1 (2), available at <<http://www.ejls.eu/2/30UK.pdf>> accessed on 28.12.2016.

¹⁰⁰ See the CCJE Opinion No. 1(2001), para 66, available at <https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%201_EN.pdf> last accessed on 19.12.2016. See also Recommendation CM/Rec(2010)12, paras 22-25, available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78> last accessed on 19.12.2016.

¹⁰¹ See CCJE Opinion No. 1 of 2001 on the ‘Standards concerning the independence of the judiciary and the irremovability of judges’, available at <<http://euromed-justice.eu/document/coe-2001-opinion-no-1-ccje-standards-concerning-independence-judiciary-and-irremovability>> accessed on 20.12.2016.

¹⁰² See Penny J. White (2001), ‘Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations’, *Fordham Urb. L.J.* 29, 1053, p. 1073, available at <<http://ir.lawnet.fordham.edu/ulj/vol29/iss3/11>> , accessed on 07.02.2017.

¹⁰³ Roger K. Warren (2006), ‘Judicial Accountability, Fairness, and Independence’, *CT. REV.* 42(4), 4. See also Bruce Fein & Burt Neuborne (2000), ‘Why Should We Care About Independent and Accountable Judges?’, *Judicature* 84, 58, p. 58.

¹⁰⁴ The ENCJ is a body which unites the national institutions of the member states of the EU which are independent of the executive and legislature, and work towards improving justice systems and supporting judiciaries in the member states. It was established in 2004 and functions as a non-for-profit organisation. For more information on the ENCJ, please see the official website, available at <https://www.encj.eu/index.php?option=com_content&view=article&id=81&Itemid=242> accessed on 01.05.2017.

¹⁰⁵ ‘Independence and Accountability of the Judiciary’, ENCJ (European Network of Councils for the Judiciary), Report 2013-2014, available at <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf> accessed on 27.01.2016.

evaluations clarifies concerns about judicial independence in the law itself - for instance, in Germany, judges are subject to service inspection only insofar as their independence remains unaffected.¹⁰⁶ However, ensuring the same is a challenge and implementation of JPE programmes without violating judicial independence is an exercise that will vary greatly across different judicial systems.

4. Judicial Accountability in India

A significant concern for India in the context of JPE is that India does not yet have a law relating to judicial accountability. Multiple attempts have been made to introduce a law on judicial standards and accountability, and to create a mechanism for inquiring into complaints against judges accused of misconduct. However, India continues largely to follow an informal mechanism for dealing with errant and controversial judges, such as by transferring them to different areas, or by the “minor measures” approach, where the judge is allowed to continue judicial duties even being investigated against.¹⁰⁷

The first Judicial Standards and Accountability Bill was introduced in 2010, and provided for an Oversight Committee to look into complaints against judges, which would then be referred to a Scrutiny Panel.¹⁰⁸ The 2010 Bill further laid down, in its Chapter II, standards which must be followed by judges, such as not having close association with members of the bar, not hearing matters involving personal interests or members of their family, not contest election to any office etc.¹⁰⁹

The 2010 Bill was criticised on several grounds, one of which was the potential threat that it posed to judicial independence, by allowing an inquiry to be initiated against a judge upon a complaint by a member of the public.¹¹⁰ Additionally, it was alleged that the presence of certain members, such as the Attorney General, on the Oversight Committee would inevitably lead to issues of conflict of

¹⁰⁶ See ‘The German Judiciary Act’, accessed at <http://www.wipo.int/edocs/lexdocs/laws/en/de/de199en.pdf> on 06.02.2017. Section 26 reads:

Supervision of service: (1) A judge shall be subject to supervision only in so far as there is no detracting from his independence.

(2) Subject to the provision in subsection (1), supervision shall also include the power to censure an improper mode of executing an official duty and to urge proper and prompt attention to official duties.

(3) Where a judge contends that a supervisory measure detracts from his independence a court shall, on application being made by the judge, give a ruling in compliance with this Act.

¹⁰⁷ Bhairav Acharya (2017), ‘The Evolution of Judicial Accountability in India’, *Journal of Public Affairs and Change* 1(1) Winter 2017, pp. 82-83.

¹⁰⁸ See Judicial Standards and Accountability Bill, 2010, sections 7, 8 and 9 which deal with making of a complaint. Chapter V of the Bill dealt with the constitution of the Scrutiny Panel, available at <http://www.prsindia.org/uploads/media/Judicial%20Standard/Judicial%20standard%20and%20accountability%20bill,%202010.pdf> accessed on 09.04.2017.

¹⁰⁹ See Section 3, Judicial Standards and Accountability Bill, 2010.

¹¹⁰ AP Shah, ‘Judicial Standards and Accountability Bill’, *The Hindu (Opinion) (Online)*, 29th March, 2011, available at <http://www.thehindu.com/opinion/lead/Judicial-Standards-amp-Accountability-Bill/article14966449.ece> accessed on 04.04.2017.

interest in some cases. It was also criticised for being limited to ethics and judicial misconduct.¹¹¹ The proposed law also lacked an appeal mechanism for the judge charged with misconduct.

Revised versions of the 2010 Bill also provided for representatives of the judiciary, the legislature and civil society, to be present on the National Judicial Oversight Committee.¹¹² The law's progress has been stalled since 2014, when the Law Ministry decided that it would proceed further only after the National Judicial Appointments Commission was notified.¹¹³ It must be kept in mind that any design of a JPE will also require reconsidering the core elements of the bill on judicial standards and accountability. It would indeed be a difficult exercise to develop a programme to evaluate judicial performance in the absence of any general standards of accountability and performance that judges must adhere to. This will be discussed further in Chapter VI of this report, which outlines recommendations for India.

B. Career Progression and Promotion

Judicial performance evaluations provide useful feedback about the performance and ability of judges and often determine their career paths. JPE results, in some cases, are also used to determine promotion of judges to advanced posts in the judiciary, or in places that conduct retention elections to ascertain if a judge's performance warrants reappointment. For instance, in Germany, where selection for judicial office or promotion is primarily made based on professional performance and competence, evaluation is very important.¹¹⁴ In other European countries, such as Austria, France and Italy, performance assessments and fulfilment of targets are relied upon when deciding matters of promotion or elevation to a higher court.¹¹⁵

¹¹¹ 'Government reworks bill on judicial accountability', *The Indian Express (Online)*, 17th July 2016, available at <<http://indianexpress.com/article/india/india-news-india/govt-reworks-bill-on-judges-accountability-2918999/>> accessed on 04.04.2017.

¹¹² 'Government reworks bill on judges' accountability', *Indian Express (Online)*, July 17, 2016, available at <<http://indianexpress.com/article/india/india-news-india/govt-reworks-bill-on-judges-accountability-2918999/>> accessed on 25.04.2017. See also The Judges' Standards and Accountability Bill, 2012 (Bill No. 136-C of 2010), as passed by Lok Sabha on 29th March, 2012, available at <<http://www.prindia.org/uploads/media/Judicial%20Standard/Judicial%20standard%20as%20passed%20by%20LS.pdf>> accessed on 25.04.2017.

¹¹³ 'Judicial accountability bill hits National Judicial Appointments Commission roadblock', *Times of India (Online)*, 21st February, 2015, available at <<http://timesofindia.indiatimes.com/india/Judicial-accountability-bill-hits-National-Judicial-Appointments-Commission-roadblock/articleshow/46319248.cms>> accessed on 04.04.2017.

¹¹⁴ Riedel, J. (2014), 'Individual Evaluation of Judges in Germany', *Oñati Socio-legal Series [online]* 4 (5), 974-992, p.983, available at <<http://ssrn.com/abstract=2533857>> accessed on 12.04.2017.

¹¹⁵ See Errera, 'The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France', Chapter 2 in 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe', Research project of Istituto Di Ricerca Sui Sistemi Giudiziari Consiglio Nazionale Delle Ricerche - Italy in partnership with Research Centre for Judicial Studies (CeSROG), University of Bologna, Italy, pg 61, available at <<http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>> accessed on 31.01.2017.

C. Judicial Behaviour and Self-improvement

Performance evaluation has shown beneficial effects across different sectors. It operates on the basic premise of improving human behaviour, that “desirable conduct should receive positive reinforcement and that areas for improvement should be identified so that the individual in question can improve performance.”¹¹⁶ Evaluating judicial performance periodically could thus have beneficial effects on judicial behaviour.

From early on, proponents of JPE programmes began to design so as to have a positive effect on judges’ performance, and motivated self-assessment and self-improvement.¹¹⁷ If judges are evaluated on a regular basis and are subject to assessment, it can potentially ensure higher standards of self-awareness and consciousness of their judicial behaviour and performance in the courtroom. This could also give them perspective on interpersonal performance and courtroom demeanour.¹¹⁸

In the US, ranking judges on the basis of their evaluation results has been shown to create incentives for judges and courts to perform better.¹¹⁹ This also has a bearing on judicial behaviour, motivating the judges and/or courts to work more efficiently if it leads to greater job security and possibly more resources. Performance evaluation could thus be used for the betterment of the judicial system by influencing the behaviour of the judges in a positive and constructive manner.¹²⁰

The likelihood of incentives driving better performance in the judiciary has not yet been tested in India. As discussed in the final recommendations in this Report, JPE programmes may go some distance to serve as a mechanism for self-check, where a judge is motivated to perform better on the bench knowing they would be subject to a performance evaluation process. However, a deeper understanding of the motivations and designs of JPE programmes needs to be developed before

¹¹⁶ Richard L. Aynes (1981), ‘Evaluation of Judicial Performance: A Tool for Self-Improvement’, *Pepp. L. Rev.* 8(2), p. 262, available at <<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2009&context=plr>> accessed on 08.02.2017.

¹¹⁷ Kearney (1999), ‘Judicial Performance Evaluation in the States’, p. 474 available at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.489.6551&rep=rep1&type=pdf>> accessed on 01.11.2016.

¹¹⁸ Kourlis, Gagel, Singer, Jamison, Danford, Seidman, ‘Shared Expectations Judicial Accountability in Context’, pp. 13-14, Publication of The Institute for the Advancement of the American Legal System.

¹¹⁹ “Often, states which use JPE results to inform personnel decisions also distribute results to judges to inform self-improvement and to the public in some capacity to promote transparency objectives.” See Elek, J.K., Rottman, D.B. (2014), ‘Methodologies for Measuring Judicial Performance: The Problem of Bias’, *Oñati Socio-legal Series [online]* 4 (5), 863-879, available at <<http://ssrn.com/abstract=2533937>> accessed on 14.06.2016.

¹²⁰ Baker, Fiebelman and Marshall, ‘The Continuing Search for a Meaningful Model of Judicial Rankings’, *Duke Law Journal* 58, p. 1645. See also Richard L. Aynes (1981) ‘Evaluation of Judicial Performance: A Tool for Self-Improvement’, *Pepp. L. Rev.* 8(2), available at <<http://digitalcommons.pepperdine.edu/plr/vol8/iss2/1>> accessed on 07.07.2016.

designing a JPE programme which also incorporates metrics to assess and influence behavioural factors.

D. Management and Administration

Performance assessment has become a fixed practice in many areas of public administration and is a crucial element in ensuring better quality of justice.¹²¹ Performance evaluation techniques can also be utilised as methods of internal management of judicial activity as well as administrative facets of a court system. In Australia, two of the statutory tribunals responsible for the determination of judicial salaries have referred expressly to the possibility of pursuing inquiries into court “productivity” for the purpose of “linking” aspects of performance to judicial salaries.¹²²

Performance evaluation techniques for individual judges can also translate into better understanding of particular court systems (like a particular District Court), inter-personal relations between different members of the judiciary, the interaction between the bar and bench, and so on. Further, it could provide insights into the disposal rate in that court system, which is an indicator of the efficiency of that system.¹²³

A relevant case in point is the Justice Scoreboard in the EU, which publishes data relating to case timelines and other information in different areas of litigation. Also used in the US is CourTools - a system used to measure the success of district courts, which provides multi-factor assessment tools developed by the National Centre for State Courts.¹²⁴ It evaluates the performance of trial as well as appellate courts. The performance of these courts is assessed on six factors namely, reliability and integrity of case files, quality of services, court employee satisfaction, time for case dispositions, clearance rates, and age of active pending caseload. The evaluation is based on selecting random samples of cases (or case files) and measuring them against the factors which are part of the evaluation process. For instance, for measuring the reliability and integrity of the case files, three factors are studied based on a random sample of case files - availability, reliability and integrity. For availability, it is seen how long it took to retrieve each of the case files in the selected samples. For

¹²¹ Lienhard (2014), ‘Performance Assessment in Courts - The Swiss Case - Constitutional Appraisal and Thoughts as To Its Organization’, *International Journal for Court Administration* 6(2), December 2014, available at <www.iacajournal.org/articles/10.18352/ijca.145/galley/153/download/> accessed on 07.02.2017.

¹²² Spiegelman (2002), ‘Judicial accountability and performance indicators’, *Civil Justice Quarterly*, p.18., fn. 8. See also Commonwealth Remuneration Tribunal, Statement on 2000 Review of Judicial and Related Officers Remuneration, p. 4; Judges (Salaries and Allowances) Act 1967 Report by the Queensland Salaries and Allowances Tribunal (March 15, 2001), paras. 56-57.

¹²³ Susan Keilitz & Judith White McBride (1992), ‘Judicial Performance Evaluation Come of Age’, *State Court J.*, Winter 1992, p. 4. “During 15 years of development, judicial performance programmes have demonstrated usefulness as a means of examining the performance of individual judges and the judicial system... Programmes provide meaningful feedback on fundamental aspects of judicial performance that can be used to identify ways of improving individual and institutional judicial performance.”

¹²⁴ See website of CourTools, available at <<http://www.courtools.org/Trial-Court-Performance-Measures.aspx>> accessed on 04.04.2017.

reliability, the information pertaining to the court's case management systems and the content in the actual file are compared, for each file in the random sample.¹²⁵ Further, CourTools also publishes analysis of the data (for instance, analysis of case processing performance).¹²⁶

A system for analysing court performance across the higher judiciary would be a very useful form of performance evaluation for India. In this regard, databases and digital platforms can be used to collect, collate and analyse data relating to court performance. Factors to be studied can be drawn from best practices, particularly from jurisdictions that already use evaluation of court systems as managerial tools. Currently in India, data relating to case disposals and pendency for the High Courts and Supreme Court is published in the form of their respective annual reports¹²⁷ and in the Supreme Court's quarterly publication, Court News, which also details the sanctioned and existing judge strength across High Courts in the country, and provides information on important judgments delivered by the Supreme Court.¹²⁸ However, a more detailed study of the timelines of cases across different areas of litigation would serve the purpose better in understanding the working of court systems. Additionally, as elaborated in the recommendations, the courts in the higher judiciary can collect and collate this data through computerised tools and publish the same periodically.

IV. METHODS OF JPE

Methods of measuring judicial performance differ depending on the purpose behind assessing judges and courts in a particular system. Court administrators and scholars have proposed a variety of quantitative measures of judicial productivity - from case processing rates, to the number of cases decided, to the length of judicial opinions.¹²⁹

This Chapter identifies different tools of evaluation and the parameters used to assess judicial performance. The first part focuses on the different methodologies used to assess judicial

¹²⁵ See 'Reliability and Integrity of Case Files', website of CourTools, available at <http://www.courtools.org/~media/Microsites/Files/CourTools/Appellate%20CourTools/measures-PDF/courtools_appellate_measure6_Reliability_And_Integrity_Of_Case_Files.ashx> accessed on 05.04.2017.

¹²⁶ See, for instance, 'Analysis of Case Processing Performance in the Court of Appeals', September Term, 2013, available at <<http://www.courtools.org/~media/Microsites/Files/CourTools/Appellate%20CourTools/Reports%20from%20courts/Maryland%20Court%20of%20Appeals%20Caseflow%20Assessment%20Report%202013%20Term.a shx>> accessed on 05.04.2017.

¹²⁷ See for instance, 'Indian Judiciary: Annual Report, 2015-16', available at <<http://www.supremecourtindia.nic.in/annualreport/annualreport2015-16.pdf>> accessed on 05.04.2017.

¹²⁸ See for instance, Court News (January-March 2016), Vol. XI Issue No. 1, available at <http://www.sci.gov.in/pdf/CourtNews/2016_issue_1.pdf> accessed on 08.06.2017.

¹²⁹ Reddick (2014), 'Evaluating the Written Opinions of Appellate Judges: Toward a Qualitative Measure of Judicial Productivity', *New Eng. L. Rev.* 48, 547.

performance, whereas the second part clarifies what factors are considered while designing JPE programmes, and what aspects of the judges' performance are assessed.

A. Tools to Measure Judicial Performance

1. Courtroom Observation Programmes and Narrative Feedback

Some judicial evaluation programmes began as simple courtroom observations, where citizens would be sent to observe court proceedings and make assessments on the judges' performance.¹³⁰ These methods utilised the public's perception of judges and courts to evaluate their performance. Though not the sole determinant of the performance of a judge, these courtroom observation programmes form an essential part of the evaluation process. A qualitative method of performance evaluation is through narrative feedback, which involves asking respondents open-ended questions to solicit written comments about the judge's performance. Sometimes, such narrative feedback on the performance of a judge is obtained through confidential written submissions or solicited at public hearings.¹³¹

Citizen organizations train volunteers to conduct courtroom monitoring as outsiders to the legal system; these organizations further publicise their reports and recommendations to the public and the court system.¹³² These programmes are a requirement for judges seeking reappointment and retired judges wishing to serve as senior judges. The candidates for reappointment are evaluated on their work product, legal scholarship, dedication, efficiency and demeanour. Retired judges seeking senior status are evaluated on their physical and mental fitness, and the ability to perform judicial duties.¹³³

These traditional narrative methods, however, fall prey to bias and suffer from various other shortcomings. For instance, recent performance appraisal studies have shown "systematic differences in the content of written feedback about women and minority group employees compared with their male majority counterparts."¹³⁴ Although courtroom observation programmes are a good

¹³⁰ For example, see the JPE programme of Utah, the most important component of which is courtroom observation programmes. See Woolf and Yim, 'The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission', 84 *Court Review* 47, available at <<http://aja.ncsc.dni.us/pdfs/CourtReview/CR%2047-4Woolf.pdf>> accessed on 29.04.2017.

¹³¹ Elek, J.K., Rottman, D.B. (2014) 'Methodologies for Measuring Judicial Performance: The Problem of Bias', *Oñati Socio-legal Series [online]* 4 (5), 863-879, available at <<http://ssrn.com/abstract=2533937>> accessed on 14.06.2016.

¹³² See Nicholas H. Woolf & Jennifer MJ Yim, 'The Courtroom-Observation Programme of the Utah Judicial Performance Evaluation Commission', available at <aja.ncsc.dni.us/pdfs/CourtReview/CR%2047-4Woolf.pdf> accessed on 07.07.2016.

¹³³ See the website of the Commission on Judicial Disabilities and Tenure, available at <<http://cjdtdc.gov/>> accessed on 07.07.2016.

¹³⁴ Elek, J.K., Rottman, D.B. (2014) 'Methodologies for Measuring Judicial Performance: The Problem of Bias', *Oñati Socio-legal Series [online]* 4 (5), 863-879, available at <<http://ssrn.com/abstract=2533937>> accessed on 14.06.2016.

way of gauging the public's opinion and perceptions of judges, they may also raise concerns relating to judicial independence. For instance, as mentioned before, judges may become conscious of their public image and consider giving decisions to win public favour.

2. Evaluating Judges/court Systems Through Statistics

Using statistical data and indicators to study judicial performance is now a familiar practice in some systems.¹³⁵ The Justice Scoreboard, for instance, helps gauge the health of the court systems in the member states of the EU through the collection of empirical data. Populating the Scoreboard is an extremely complex exercise involving intensive data collection of publicly available data from all the member states on various aspects of their courts' functioning.¹³⁶

The data collected takes into account a wide variety of factors, including case disposal, the types of cases dealt with by the court, the average time taken for proceedings for different categories of cases, accessibility of justice for the public, the time required for disposal of different kinds of cases, participation of judges in judicial training, and other similar parameters.¹³⁷ The Scoreboard pays great attention to detail, in that it collects information mentioned above for a variety of cases being litigated, such as civil, administrative, and trademark infringement cases, and cases of judicial review of decisions of competition authorities. It also studies trends in gender diversity on the bench for different member states.¹³⁸ In 2016, the fourth edition of the Scoreboard saw introduction of new quality indicators, such as, standards, training, surveys and legal aid; more detailed indicators on independence, including new Eurobarometer surveys; and deeper insight into certain areas such as electronic communication.¹³⁹

While the Scoreboard is still in nascent stages of development, it has already proven beneficial in many ways. Collecting and analysing data to understand the health of the legal system across the EU has become a tool for good governance.¹⁴⁰ Based on published reports, feedback is provided to the

¹³⁵ See Adriani Dori (2015), 'The EU Justice Scoreboard - Judicial Evaluation as a New Governance Tool', MPILux Working Paper 2 (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series), available at <[http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/The_EU_Justice_Scoreboard - Judicial_Evaluation_as_a_New_Governance_Tool.pdf](http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool.pdf)> accessed on 15.02.2017.

¹³⁶ See 'Study on the functioning of judicial systems in the EU Member States Facts and figures from the CEPEJ questionnaires 2010-2012-2013- 2014', Study prepared under the authority of the Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL) for the attention of the European Commission (Directorate General Justice), available at <http://ec.europa.eu/justice/newsroom/effective-justice/news/160411_en.htm> accessed on 07.07.2016. See also for details, the follow-up analysis, news-reports and country wise data available at <http://ec.europa.eu/justice/newsroom/effective-justice/news/160411_en.htm> accessed on 07.07.2016.

¹³⁷ For details on the EU Justice Scoreboard see <http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed on 25.04.2016.

¹³⁸ The 2016 EU Justice Scoreboard, available at <http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed on 07.07.2016.

¹³⁹ The 2016 EU Justice Scoreboard, available at <http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm> accessed on 07.07.2016.

¹⁴⁰ Adriana Dori (2015), 'The EU Justice Scoreboard - Judicial Evaluation as a New Governance Tool', MPILux Working Paper 2 (Max Planck Institute Luxembourg for International, European and Regulatory Procedural

member states on recommendations to improve access to justice and justice delivery.¹⁴¹ However, there are some criticisms against the Scoreboard - first, that it is not a binding instrument, and second, that it places disproportionate emphasis on “the economic value of justice”, focusing only on parameters relevant to business and investment decisions, and excludes criminal cases entirely.¹⁴² However, in 2017, the Scoreboard examined an even broader range of factors, including, for the first time, length of criminal court proceedings relating to money laundering offences.¹⁴³

3. Indices to Measure Judicial and/or Court Performance

Indices comprising different and complex variables are also becoming a popular method of understanding court performance. This practice is followed on a country-wise, as well as a cross-country scale. An example of the latter is the World Justice Project (WJP), which uses an index to compare the performance of justice systems across countries. It comprises nine factors, which are further disaggregated into 47 sub-factors.¹⁴⁴ This index portrays the strength of the rule of law in each country by providing scores and rankings on the following factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. Informal justice is also a parameter measured by the index, but is not included in the final scores and rankings.¹⁴⁵ These factors are measured through a system of expert surveys in the countries being studied. The countries studied are also ranked according to their performance, for the individual parameters studied as well as on the basis of the combined index.

Another example is that of the Justice Confidence Index in Brazil, which is used to measure the performance of judges. It creates an index based on five variables, namely, “judicial independence (which refers both to insulation from undue political influence and to the judge’s ability of impartial

Law Working Paper Series), available at http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool.pdf accessed on 15.02.2017.

¹⁴¹ The Scoreboard’s findings resulted in recommendations being addressed to twelve Member States in 2014, and to four Member States in 2015, while the Commission is monitoring efforts to improve the effectiveness of the justice systems in 10 other Member States. See Adriana Dori (2015) p.18.

¹⁴² Adriani Dori (2015), ‘The EU Justice Scoreboard - Judicial Evaluation as a New Governance Tool’, MPILux Working Paper 2 (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series), p. 24, available at http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool.pdf accessed on 15.02.2017.

¹⁴³ See ‘Communication from the Commission to the European parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions’, at p.18, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-167-F1-EN-MAIN-PART-1.PDF> accessed on 01.05.2017.

¹⁴⁴ See ‘World Justice Project: Rule of Law Index, 2016’, p. 10, available at http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf accessed on 29.12.2016.

¹⁴⁵ See ‘World Justice Project: Rule of Law Index, 2016’ (See Executive Summary at p. 4), available at http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf accessed on 29.12.2016.

decision-making in individual cases), efficiency (the judicial system's ability to process cases without excessive delays), access (the availability of equitable access to care for all citizens), effectiveness (the ability to enforce civil liberties and human rights, considering the availability of viable enforcement mechanism of censoring and penalties), and accountability (the subjection of the judiciary to the rule of law and transparency of its actions, including the perception on honesty of judicial system, and performance of Supreme Court justices and trial courts judges).¹⁴⁶ The objective of this index is to gain insight into the public perception of the judiciary's performance and also gauge how much faith the public has in the judiciary, by studying, for example, what proportion of the public considers the judiciary to be the best institution they can rely on for conflict resolution.¹⁴⁷

Using indices to measure court performance would mean embarking on an extremely difficult and cumbersome exercise. This is because there are many players and resources in any justice system, and assigning weight and numerical value to the variables used would also have to be carefully considered. However, as evidenced from the aforementioned practices, it is being used as a way to evaluate court as well as judicial performance, and may prove useful in understanding issues such as resource utilisation in justice systems.

B. Parameters for Assessing Judicial Performance

One of the major challenges in designing a programme to evaluate judicial performance is determining what standards, criteria, or indicators should be utilised.¹⁴⁸ There are different guidelines and recommendations which delineate parameters to be used to evaluate court or judicial performance. The Organization for Security and Co-operation in Europe (OSCE)/ Office for Democratic Institutions and Human Rights (ODIHR) Kyiv Recommendations,¹⁴⁹ for example, point out that qualitative factors must be taken into account when conducting performance evaluation of judges, focusing on whether the individual has the skills necessary to be a judge.¹⁵⁰ This should include factors that directly impact judicial function, such as "professional competence, which

¹⁴⁶ Cunha, Luciana Gross; Oliveira, Fabiana Luci de & Glezer, Rubens Eduardo (2014), 'Brazilian Justice Confidence Index - Measuring Public Perception on Judicial Performance in Brazil', *International Law* 25, 445-472, p.450, available at <<http://dx.doi.org/10.11144/Javeriana.il14-25.bjci>> accessed on 16.02.2017.

¹⁴⁷ Cunha, Luciana Gross; Oliveira, Fabiana Luci de & Glezer, Rubens Eduardo (2014), 'Brazilian Justice Confidence Index - Measuring Public Perception on Judicial Performance in Brazil', *International Law* 25, 445-472, p.450, available at <<http://dx.doi.org/10.11144/Javeriana.il14-25.bjci>> accessed on 16.02.2017.

¹⁴⁸ Richard L. Aynes (1981), 'Evaluation of Judicial Performance: A Tool for Self-Improvement', *Pepp. L. Rev.* 8 (2), p. 274, available at <<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2009&context=plr>> accessed on 19.01.2017.

¹⁴⁹ 'Judicial Independence in Eastern Europe, South Caucasus and Central Asia Challenges, Reforms and Way Forward', Meeting Report of the Expert meeting in Kyiv 23-25 June 2010, available at <<http://www.osce.org/odihr/71178?download=true>> accessed on 02.01.2017.

¹⁵⁰ Assessment of the Performance Evaluation of Judges in Moldova (2014), Document of the Office for Democratic Institutions and Human Rights, p. 11, available at <<http://www.osce.org/odihr/120213?download=true>> last accessed on 02.01.2017.

assesses knowledge of both procedural, substantive and evidentiary law, the ability to conduct trials, and the capacity to write reasoned decisions; personal competence, referring to a judge's ability to cope with workload, the ability to decide cases, and an openness to using new technologies in their function; and social competence, which assesses judges' ability to mediate and show respect for parties".¹⁵¹ The Kyiv Recommendations also advise a cautionary approach towards quantitative criterion for assessing judicial performance. This is because relying on quantitative factors could lead to bypassing quality in favour of quantity and productivity.¹⁵²

Writings on factors assessing judicial performance tend to suggest that quantitative measurement is objective and value free. Qualitative assessment is seen to be subjective and based on a value-judgment.¹⁵³ However, there is criticism about the issue of the number of judgments evaluated. One view states that it would be nothing short of treacherous to evaluate the number of judgments which have been delivered by a judge.¹⁵⁴ This is because the speed of justice delivery is not only a narrow, but often misleading criterion when evaluating judicial performance. There is a fair amount of criticism about whether the aforementioned criteria (i.e. quantitative assessment such as number of judgments rendered) are actually valid indicators of performance.¹⁵⁵

As a further example, some evaluation programmes may include looking at the reversal rate of the judge i.e. the frequency with which the decisions given by a lower court judge are reversed at the appellate level. On the face of it, one may think that those judges whose decisions are reversed more often are not as good as those whose decisions were subject to appeal less often. This raw statistic, however, could obviously be misleading. In some cases, it may be that there is no statute or case law directly on point when a given issue must be decided, which may lead to decisions based on public policy or analogous statutes. In such a case, differing opinions of higher courts will decide whether one judge's opinion is "right" or "wrong". This could be a misleading and highly subjective form of assessment.¹⁵⁶

¹⁵¹ Assessment of the Performance Evaluation of Judges in Moldova (2014), Document of the Office for Democratic Institutions and Human Rights, p. 11, available at <<http://www.osce.org/odihr/120213?download=true>> last accessed on 02.01.2017.

¹⁵² 'Joint Opinion on the Draft Law Amending and Supplementing the Judicial Code (Evaluation System for Judges) of Armenia', para. 12, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)007-e)> accessed on 02.01.2017.

¹⁵³ See Spiegelman (2002), 'Judicial Accountability and Performance Indicators', *Civil Justice Quarterly* 18, p. 25.

¹⁵⁴ See Spiegelman (2002), 'Judicial Accountability and Performance Indicators', *Civil Justice Quarterly* 18, p. 25.

¹⁵⁵ Goelzhauser (2012), 'Accountability and Judicial Performance: Evidence from Case Dispositions', *The Justice System Journal*, 33(3).

¹⁵⁶ See Richard Aynes (1981), 'Evaluation of Judicial Performance: A Tool for Self-Improvement', *Pepp. L. Rev.* 8 (2), p. 290, available at <<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2009&context=plr>> accessed on 19.01.2017.

Several JPE programmes list the factors to be taken into account in the process of evaluating judges. In the US, states follow the guidelines of the American Bar Association (ABA), which state the objectives of JPE, and provide the purposes sought to be achieved by JPE programmes. For instance, they include objectives such as continuing education for the bench.¹⁵⁷ The factors that should be evaluated, according to the ABA guidelines, include the judge's legal abilities, knowledge of substantive law and procedure, treatment of people fairly and with dignity and respect, ability to make difficult or unpopular decisions, clarity in the decisions, leadership qualities, and ability to inspire public confidence in courts, amongst others.¹⁵⁸

Temperament has also been used as a criterion for measuring judicial performance. This is based on the premise that the "manner in which judges conduct themselves is an essential component of justice".¹⁵⁹ Increasingly, importance is also being ascribed to personality and judicial temperament of the judge in question.¹⁶⁰ JPE programmes may also assess this in specific ways, for instance, by having attorneys rate judges on factors such as "judicial courtesy, freedom from arrogance, human understanding and compassion, and ability to control the courtroom".¹⁶¹

When designing a performance evaluation for the higher judiciary in India, it must be carefully considered who the evaluating authority should be. Usually, the task of performance appraisal rests with a judge of a higher court. Without doubt, performance evaluations tend to be accepted better if they come from within the judiciary itself.¹⁶² One of the ways in which this can be done is a system

¹⁵⁷ Guideline 2-2 in the ABA Black Letter Guidelines states as follows:

Guideline 2-2. Additional uses that may be considered include the effective assignment of judges within the judiciary and the improved design of continuing education programmes.

Commentary: In some jurisdictions, judges with administrative responsibilities and/or court administrators are charged with assigning judges to either the trial or appellate level, civil or criminal cases, or courts with general or specialized jurisdiction. The information obtained through judicial evaluation programmes will aid those responsible for making such assignments. Evaluations of judicial performance will also allow those who design continuing education programmes to identify and target resources to areas where increased education would be most beneficial.

¹⁵⁸ See Chapter V: Criteria of the ABA Guidelines for the Evaluation of Judicial Performance with Commentary (February, 2005), available at <http://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe_wcom.authcheckdam.pdf> accessed on 11.04.2017.

¹⁵⁹ Colbran (2002), 'Temperament as a Criterion for Judicial Performance Evaluation', available at <<http://www.austlii.edu.au/au/journals/UTasLawRw/2002/4.pdf>> accessed on 14.02.2017.

¹⁶⁰ M Rosenberg (1966), 'The Qualities of Justice: Are They Strainable?', *Texas Law Review* 44, 1063. See also R Watson and R Downing (1969), 'The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Non-Partisan Court Plan', 293.

¹⁶¹ For instance, "The Alaskan programme measures judicial temperament by having attorneys rate judicial courtesy, freedom from arrogance, human understanding and compassion, and ability to control the courtroom.", from Colbran (2002), 'Temperament as a Criterion for Judicial Performance Evaluation', p. 64, available at <<http://www.austlii.edu.au/au/journals/UTasLawRw/2002/4.pdf>> accessed on 14.02.2017.

¹⁶² See Chapter II of this Report, at pages 11, 12. Performance evaluations contemplated in Australia encourage a system for the magistrates and by the magistrates as this does not directly pose an issue vis-à-vis judicial independence.

of self-appraisal, where a fixed questionnaire is given to the judges to assess their performance, periodically. This will be discussed in detail on the Chapter outlining our recommendations.

V. JPE IN INDIA

The quality and ability of judges in India has attracted much criticism over the years and the need for transparency, independence and accountability in the judiciary has been repeatedly emphasised. Despite this, the practice of systematically and periodically evaluating judges, especially judges of the higher judiciary, seems not to have evolved much in the Indian context. This Chapter will provide an overview of the existing systems of evaluation and attempt to identify gaps, with the aim of making recommendations about a workable JPE programme for India.

A. Evaluation of Judges in the Higher Judiciary

The introduction of performance evaluation to assess competence of members of the higher judiciary has faced severe resistance in India. The Judicial Standards and Accountability Bill has lapsed twice in the Parliament and the Memoranda of Procedure on appointments to the higher judiciary was stalled as the government and collegium could not agree on a clause relating to performance evaluation.¹⁶³ Currently, no internal mechanism to subject performance of judges to scrutiny exists for the higher judiciary in India, even though performance evaluation of judges is a common practice internationally, and in subordinate courts in India. The only method of ousting under-performing judges in the higher judiciary is by impeachment, but this is very rarely, if ever, resorted to.¹⁶⁴

The effects of not evaluating judges periodically are also exaggerated by the way appointments to the higher judiciary are decided in India. In the appointment of judges to the higher judiciary, and in particular, the Chief Justices, seniority is followed as convention instead of a merit-based system of judicial appointments.¹⁶⁵ Implicit merit-based evaluation, perhaps, happen before names of judges are recommended for elevation, but this process and the parameters for evaluation, if it exists, is opaque. Further, a significant number of Supreme Court and High Court judges are also direct

¹⁶³ Utkarsh Anand, 'NJAC case: Factor in merit, integrity in choosing judges, Government tells Supreme Court', *Indian Express*, 7th March 2016, available at <<http://indianexpress.com/article/india/india-news-india/njac-case-factor-in-merit-integrity-in-choosing-judges-government-tells-supreme-court/>> accessed on 11.04.2017.

¹⁶⁴ Damayanti Datta, 'Who will judge the judges?', *India Today (Opinion) (Online)*, 20th August 2011, available at <<http://indiatoday.intoday.in/story/judicial-system-in-india/1/148572.html>> accessed on 11.04.2017.

¹⁶⁵ Sengupta, 'Rethinking the seniority convention', *Live Mint (Online)*, 27th January, 2017, available at <<http://www.livemint.com/Opinion/C5oLZEveyduf7P36ykDsml/Rethinking-the-seniority-convention.html>> accessed on 04.05.2017.

appointees from the bar, whose ability to effectively adjudicate has previously not been considered.¹⁶⁶

Against this background, the higher judiciary in India needs a more concrete, and systemic judicial performance evaluation programme to periodically and effectively assess judges, decide promotions and improve overall functioning of the judiciary.

B. Evaluation of Judges in the Subordinate Judiciary

The Indian Constitution vests with the High Courts the power of administrative superintendence and disciplinary control of subordinate judiciary.¹⁶⁷ Exercising this power, High Courts assess the state of functioning of the subordinate judiciary under their administrative jurisdiction. High Courts mandate and supervise the recording of Annual Confidential Reports (ACRs) of judicial officers in the subordinate judiciary.¹⁶⁸

ACRs are annual performance appraisal reports that record balanced information of a judicial officer's performance in the evaluation period, to periodically judge the work, conduct, integrity and capabilities of the officer.¹⁶⁹

1. Structure of ACRs

High Courts or state judicial services have evolved their own ACR templates and the process of recording assessments is not uniform across states.¹⁷⁰ However, all ACRs for judicial officers appear to have three distinctive assessment methods that are employed collectively:

- i. self-assessment by judicial officers,
- ii. assessment by a reporting authority, and
- iii. supervisory remarks by the accepting authority.

Self-assessment reports ensure transparency regarding parameters for assessment of judges being evaluated, and has been recommended for adoption in all ACRs by the Supreme Court.¹⁷¹ Even if the self-assessment form is not recorded by the judicial officer, the reporting authority is required to record assessments of an officer's integrity, work performance, conduct and attitude towards

¹⁶⁶ Khaitan and Seetharam (2016), 'We the people: reimagining judicial reform', *Economic and Political Weekly* 51(51).

¹⁶⁷ Bishwanath Prasad Singh Vs. State of Bihar and Others, (2001) 2 SCC 305.

¹⁶⁸ Chandra Singh Vs. State of Rajasthan, (2003) 6 SCC 545.

¹⁶⁹ Report on Annual Confidential Reports, National Judicial Academy (2015), available at <<http://www.nja.nic.in/Interns%20Report%202015-16/ANNUAL%20CONFIDENTIAL%20REPORTS%20-Surbhi%2024-11-15.pdf>> accessed on 11.04.2017. See also High Court of Punjab & Haryana Vs. Ishwar Chand Jain, (1999) 4 SCC 579.

¹⁷⁰ See Annexure I. See also, 'Proposal to make judges' appraisal more scientific', *Times of India (Report) (Online)* 24th December 2013, available at <<http://timesofindia.indiatimes.com/india/Proposal-to-make-judges-appraisal-more-scientific/articleshow/27810981.cms>> accessed on 04.04.2017.

¹⁷¹ All India Judges Association & Ors. v. Union of India & Ors, (1991) 4 SCC 247.

superiors, subordinates and members of the bar.¹⁷² Reporting authorities (sometimes termed initiating authorities) are generally subordinate investigating judges or district judges who are required to have experienced at least 3 months of the judicial officer's work.¹⁷³ The entries of the reporting authority are further inspected by the accepting authority who is usually a judge of the concerned High Court.

This levelled assessment mechanism through which a subordinate judicial officer is evaluated appears to have been evolved to avoid or minimise the error of subjectivity before the final report is accepted. Some states like Tripura have introduced additional levels of assessment called vigilance authorities whose role is to verify the disposal statement and note disciplinary proceedings against the officer concerned.¹⁷⁴

ACRs record assessments on a variety of subjective and objective criteria, ranging from relationship shared by the officer with seniors, subordinates, bar members and court staff to rate of disposal and quality of judgments passed. This assessment of merit seems to determine the officer's career advancement.

2. Purpose Behind Recording ACRs

ACRs form an integral part of an officer's service records as assessments recorded in ACRs are used for multiple purposes and influence matters of confirmation, grant of benefits, promotion and continuation in service.

(a) To aid professional development of judicial officers

The inspection of subordinate courts and assessment of work done by judicial officers seems to be done to augment judicial efficiency by:

- i. helping subordinate judges identify deficiencies and shortcomings in their work, and
- ii. motivating, encouraging and recognising well-performing judicial officers.¹⁷⁵

Commenting on the object and purpose of recording ACRs, the Supreme Court has also noted that assessment of performance of judicial officers should be accompanied by attempts to guide them in improving their performance and undertaking remedial measures.¹⁷⁶ In fact, all ACR templates explicitly note that the process of recording entries in confidential rolls is meant to be a developmental process and not a fault-finding one.¹⁷⁷

¹⁷² Shakthi Kumar Gupta v. State of Jammu and Kashmir, AIR 2016 SC. 832.

¹⁷³ In case of ACR documentation of officers of higher subordinate judiciary, only a zonal judge or district judge acts as the reporting authority.

¹⁷⁴ See Tripura ACR template, available at <<http://thc.nic.in/form.html>> accessed on 04.04.2017.

¹⁷⁵ High Court of Punjab & Haryana Vs. Ishwar Chand Jain, (1999) 4 SCC 579.

¹⁷⁶ Bishwanath Prasad Singh vs State Of Bihar & Ors, 1994 Supp (3) SCC 97.

¹⁷⁷ See ACR template, High Court of Calcutta, available at <<http://ecourts.gov.in/sites/default/files/REVISED%20ACR%20Booklet.pdf>> accessed on 04.04.2017.

(b) Determination of merit for the purposes of promotion

While considering an officer for promotion to a higher post or any other service-related matter, the assessment in their ACRs are primarily relied on. Observations and grading made in the ACRs form the basis of determination of comparative merit of an officer and heavily influence matters of career advancement. To ensure fairness, ACRs ideally have to record objective assessment of the officer, made through a continuous year-long process to assess his/her work,¹⁷⁸ and not merely a casual inspection.¹⁷⁹

(c) Determination of eligibility to continue in service

The screening of judicial officers and assessment of their performance prior to them attaining 58 years of age, to determine their eligibility to continue in service till their superannuation age of 60 years, has been mandated by the Supreme Court.¹⁸⁰ If judicial officers are found incompetent to continue based on all ACRs and overall assessment of service record, they are compulsorily retired in public interest. Although compulsory retirement is not considered to be punitive action against a judicial officer,¹⁸¹ retirement based on performance and continued utility in administration of justice will ensure that only the best performing judicial officers are retained. For instance, the Gujarat High Court¹⁸² and Allahabad High Court¹⁸³ recently ordered compulsory retirement of over 15 judicial officers whose performance was adjudged as poor.

3. Criticism of ACRs as a Method of Evaluation of Judicial Performance

While assessments based on ACRs are the only institutional form of JPE programme to be administered in India, there are several challenges to and issues with its implementation.

(a) Variance in ACR documentation and usage across High Courts

¹⁷⁸ Bishwanath Prasad Singh vs State Of Bihar & Ors, 1994 Supp (3) SCC 97.

¹⁷⁹ High Court of Punjab & Haryana Vs. Ishwar Chand Jain, (1999) 4 SCC 579.

¹⁸⁰ All India Judges' Association and Others vs Union of India and Others, (1993) 4 SCC 288.

¹⁸¹ Bishwanath Prasad Singh vs State Of Bihar & Ors, 1994 Supp (3) SCC 97.

¹⁸² 'Gujarat HC gives compulsory retirement to 18 underperforming judicial officers', *Hindustan Times (Report) (Online)*, 19th July, 2016, available at <<http://www.hindustantimes.com/india-news/gujarat-hc-gives-compulsory-retirement-to-18-underperforming-judicial-officers/story-mhHHg3AvAmsA5HxmbiGLjN.html>> accessed on 04.04.2017.

¹⁸³ '15 judicial officers in U.P. given compulsory retirement by HC', *The Hindu (Report) (Online)*, 19th April, 2016, available at <<http://www.thehindu.com/news/national/other-states/15-judicial-officers-in-up-given-compulsory-retirement-by-hc/article8491336.ece>> accessed on 04.04.2017. See also, 'State Judiciary Cracks Whip on Inefficient Judges', *Ahmedabad Mirror (Report) (Online)*, 2nd October, 2016, available at <http://ahmedabadmiraor.indiatimes.com/ahmedabad/others/State-judiciary-cracks-whip-on-inefficient-judges/articleshow/54633146.cms>> accessed on 04.04.2017.

Individual High Courts have independent ACR templates to record assessments of judicial officers serving in their respective subordinate judiciary. As a result, parameters on which judges are assessed vary across the country, and lack of uniformity in evaluation is a cause for concern.¹⁸⁴

(b) Bias and subjectivity hampering evaluation

An oft-quoted problem with ACRs is their lack of objectivity. Judicial officers frequently state that their grading is based on their likeability among bar association leaders who can pressurise the supervising judge and adversely affect entries in ACRs.¹⁸⁵ Supervising judges functioning as reporting authorities who record assessments have also been accused of falsifying ACR documentation to further their vested interests. In 2011, 17 judges of the Chhattisgarh subordinate judiciary belonging to Scheduled Castes and Scheduled Tribes, who were compulsorily retired, alleged caste-based discrimination by supervising higher-caste judges in the recording of their ACRs.¹⁸⁶

(c) Negligence in timely recording of ACR entries

Elaborate and timely recording of ACRs is necessary and mandatory to ensure that grading is accurate and fair¹⁸⁷ but ACRs are frequently recorded or graded by judges in a hurried and chaotic manner, sometimes well after the expiry of the evaluation period.¹⁸⁸ Sometimes, ACRs are not even recorded. This is severely problematic as non-recording of ACRs is unfair to a judicial officer¹⁸⁹ and indicates an unhealthy state of functioning of the state judicial service.¹⁹⁰ Sometimes, entries in the ACR are not communicated to the judicial officer within a reasonable time, robbing the judicial officer an opportunity to make a representation for upgrading the entry to ensure due process and fairness.¹⁹¹ The Supreme Court has noted that there is an urgent need to reform ACRs to ensure uniformity, objectivity and standardisation in the process,¹⁹² so as to leave little room for bias or mismanagement.

Although more accurate, objective, and scientific methods are yet to evolve to assess judges in the lower judiciary, ACRs have managed to set measurable performance standards in the lower judiciary.

¹⁸⁴ See Annexure II.

¹⁸⁵ Dhananjay Mahapatra, 'Can judges strike work over woes?' *The Economic Times (Report) (Online)*, 4th July, 2016, available at <<http://economictimes.indiatimes.com/news/politics-and-nation/can-judges-strike-work-over-woes/articleshow/53042580.cms>> accessed on 04.04.2017.

¹⁸⁶ Baba Umar, '17 judges sacked. Was it because of their caste?', *Tehelka Maganize (Online)*, 28th May, 2011, available at <http://archive.tehelka.com/story_main49.asp?filename=Ne280511JUDGES.asp> accessed on 04.04.2017.

¹⁸⁷ *Kazia Mohammed Muzzammil Vs. State of Karnataka*, (2010) 8 SCC 155.

¹⁸⁸ *Registrar General, Patna High Court vs. Pandey Gajendra Prasad & Ors*, 2012(6) SCC 357.

¹⁸⁹ *Kazia Mohammed Muzzammil Vs. State of Karnataka*, (2010) 8 SCC 155.

¹⁹⁰ *Kazia Mohammed Muzzammil Vs. State of Karnataka*, (2010) 8 SCC 155.

¹⁹¹ *Dev Dutt vs Union Of India & Ors*, AIR 2008 SC 2513.

¹⁹² *Registrar General, Patna High Court vs. Pandey Gajendra Prasad & Ors*, 2012(6) SCC 357

When it comes to performance evaluation of judges, the higher judiciary in India must do away with its reluctance to evaluate its own and evolve a JPE mechanism.

C. Interim Report Survey Results

To study the perceptions on JPE in the Indian legal community, we formulated a questionnaire covering various aspects of JPE. This questionnaire was circulated amongst various members of the legal community, such as lawyers, judges, law students, academics and research professionals to gauge their opinions on the issue. The results of the questionnaire were published in an Interim Report titled “Judicial Performance Evaluation in India” (Interim Report) in October 2016. The questionnaire first asked the respondents whether judges should be evaluated. If they answered in the affirmative, the respondents were asked to respond to questions relating to how JPE should be conducted, who should evaluate judges, how often should judges be evaluated, and other such details. The answers from this survey were expected to be instrumental in understanding how to formulate a JPE programme, and what challenges would arise in the process.

As studied, judges in the US were evaluated largely through bar polls, when JPE programmes were beginning to develop. As performance evaluation programmes developed and became more popular, states in the US began constituting councils under their constitutions to carry out performance evaluations. Throughout the world, it is either lawyers or judges that are most active in the process of evaluating the judiciary or court systems. Additionally, public authorities may be involved in the process of evaluating legal systems, as in the EU Justice Scoreboard (where statistics relating to the member states’ court systems are collected by their court authorities etc. and then compiled). It is for this reason that we made efforts to include different categories of individuals from the legal community in the survey. A large number of respondents were legal practitioners/advocates.¹⁹³ The responses by this category of individuals were extremely relevant, as they appeared in courts and other fora frequently, and had insights into the workings of the judges in these fora.¹⁹⁴

Despite their familiarity with courts and the judiciary, a significant percentage (76%) of the respondents was not aware of any system of performance evaluation in the judiciary.¹⁹⁵ One of the reasons for this could be that ACRs which are filled for judicial officers in the subordinate judiciary are confidential.

¹⁹³ See Chapter III: Survey Results, ‘A. Profile summary of the individuals who responded’, Figure 1, pg. 11 (Interim Report).

¹⁹⁴ See Chapter III: Survey Results, ‘A. Profile summary of the individuals who responded’, Figure 1, pg. 11 (Interim Report). See also Figure 2 in Chapter III, on pg. 12.

¹⁹⁵ See Chapter III: Survey Results, ‘A. Profile summary of the individuals who responded’, pg. 12 (Interim Report).

Almost all the respondents felt that judges should be evaluated. Through the survey, we also found that respondents felt that judges should be evaluated at all levels of the judiciary, as well as in tribunals and quasi-judicial fora.¹⁹⁶

The results of the survey also gave useful insights into the different issues that require consideration while framing a JPE programme for judges in India. For instance, in one question, the respondents were given multiple choice answers to understand what they felt would be the purpose of the JPE programme. A negligible number of individuals felt that JPE would serve no purpose: only 5 out of 212 respondents felt that judge should not be evaluated.¹⁹⁷ The rest of the respondents stated that it would serve either one or more of the following three purposes - facilitate taking decisions about promotions in the judiciary, help judges understand how they can improve their individual performance, and make the judicial system more transparent to the public.¹⁹⁸ The respondents were also given the option to state their own opinions on what the purpose of a JPE programme could be. The responses in this criterion also reflected that a JPE programme would help increase transparency and accountability of the judiciary, and also help judges perform better if their career paths were dependent on the evaluation.¹⁹⁹

One of the questions posed to the respondents was regarding the criteria that should be used to evaluate judges. The options posed to the respondents included several qualitative as well as quantitative criteria. It included number of judgments overturned by the higher courts, punctuality of the judges, administrative abilities, etc. The respondents were asked to rate these factors on the following scale: essential, relevant and not relevant. The factors that the respondents believed were most important when evaluating judges were preparation, attentiveness and control of court proceedings. This shows that, perhaps, the legal community feels that administrative control over courts is important when assessing the performance of judges.

The importance given to these factors is also, perhaps, indicative of the problem areas that exist in the judiciary that require reform in the opinion of the legal community. The top three criteria that emerged from the answers were related to the administrative abilities of the judges. In addition, a high level of importance was given to strictures/adverse comments by higher courts and quality of judgments. This reflects importance given to the quality of judgements, knowledge and application of law by the judge.

In addition, some respondents stated that judges should not be evaluated. Some of the respondents felt that the process of performance evaluation would become too subjective an exercise, while some felt that it would be more useful to evaluate judgments rather than individual judges. One of the

¹⁹⁶ See Figure 3 in Chapter III: Survey Results, 'D. Responses on how JPE should be conducted', on pg. 15 (Interim Report).

¹⁹⁷ See Interim Report, Chapter III: Survey Results, at p. 13.

¹⁹⁸ See Figure 4 in Chapter III: Survey Results, 'D. Responses on how JPE should be conducted', on pg. 16 (Interim Report).

¹⁹⁹ See Chapter III: Survey Results, 'D. Responses on how JPE should be conducted', pg. 16 (Interim Report).

significant concerns expressed by the respondents was that evaluation would interfere with the independence of the judges, echoing global concerns.²⁰⁰ When asked who should evaluate the judges, respondents voted largely (159 of 207 respondents) in favour of an independent entity.²⁰¹

The survey revealed that a majority of respondents believed that judges should be evaluated since it would lead to greater transparency and accountability of the judiciary.²⁰² The apprehensions with a JPE related mostly to preserving the independence of the judiciary and keeping the process as bias-free as possible. Taking a cue from these findings, and from our study of the systems across different jurisdictions, the final section of this Report offers suggestions for a system of JPE for the higher judiciary in India.

VI. RECOMMENDATIONS FOR A JPE IN INDIA

For any judicial system to continuously evolve and ensure effective delivery of justice to litigants, it is crucial to build monitoring and evaluation systems that will identify opportunities for change and areas for improvement, both at the institutional level and at the level of individual judges. Performance evaluation has become ubiquitous in advanced judiciaries the world over, and it is undeniable that higher judiciary in India requires a uniform mechanism for judicial performance evaluation. In addition, the system of performance evaluation for judges in the subordinate judiciary must also be drastically reformed to ensure better quality of justice at all levels.

In developing a performance evaluation programme for India, there must be a two-pronged approach: the evaluation of the individual judges, as well as the evaluation of court functioning. The following sections detail a workable JPE model for India, elucidating on the object of evaluation, detailing performance metrics that will be employed to assess judge or court performance, and the manner in which this evaluation should be conducted. Finally, the specific risks of the proposed model of evaluation of judicial performance in India will be identified and dealt with.

A. Objectives

As elucidated in preceding Chapters, JPE programmes across the world serve various purposes ranging from promotion of judges, influencing judicial behaviour, increased transparency in working of courts, to removal or demotion of judges for poor performance. It is imperative to define the purpose that a programme for evaluation of judges and courts in India would fulfil. Accounting for the

²⁰⁰ See Chapter III: Survey Results, 'D. Responses on how JPE should be conducted', pg. 14 (Interim Report).

²⁰¹ See Chapter III: Survey results. 'D. Responses on how JPE should be conducted', pg. 17 (Interim Report).

²⁰² See Chapter III: Survey results. 'D. Responses on how JPE should be conducted', pg. 16 (Interim Report).

resistance that is likely to be faced by a JPE programme designed for India and considering our unique constitutional structure, the following aims are suggested as ideal for a JPE in the Indian context.

1. Transparency and Accountability

As observed in the course of our research, most JPE programmes, whether formal or informal, seek to provide information on the performance of judges to litigants and policy makers, and ensure judges are publicly accountable for their performance in the field of justice delivery. Considering the distance that exists between the common person and the judiciary, performance evaluation would help in increased public faith in the transparency of the judiciary.

2. Self-assessment and Specialisation

A system of self-appraisals by the judges can help individual judges identify their strengths and weaknesses, such as areas of specialisation which can also help in deciding caseload allocation. This can further help in better internal administration of individual courts. Additionally, performance reviews can also motivate judicial officers to identify new and innovative methods of case management and how to handle the courtroom and litigants.

It must be noted that in India, the removal of underperforming judges on the basis of performance evaluation might not be a viable solution, because some minimum judge strength will be required in courts across all levels to ensure that the justice system functions smoothly, considering the sheer volume of cases in the courts in India. Therefore, efforts must be made to ensure that judges are constantly learning and actively improving in identified areas, on the basis of their performance evaluation.

3. Court Performance and Access to Justice

It would be prudent to create a system of performance evaluation that also addresses the persistent and growing problem of backlogs and delays in India's legal system, which directly impacts litigants' access to justice. A good practice in this regard, observed in the course of our research, is that followed in the EU, i.e. the Justice Scoreboard. The Scoreboard portrays the working and health of the justice system as a whole. It covers different areas of litigation, studies delays, timelines of cases and various other factors to improve court systems and make them more citizen and business-friendly.²⁰³

²⁰³ See 'Chapter 1: Introduction, The 2016 EU Justice Scoreboard', Luxembourg: Publications Office of the European Union, 2016, available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf> accessed on 29.03.2017. See also Brody, David (2008), 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust', *Denver University Law Review* 86(1), p. 11.

Evaluating the performance of court systems would also provide the public information relating to the functioning of courts and dispensation of justice in the legal system. As with the Justice Scoreboard in the EU, and the CourTools (used for district as well as appellate courts in the US), public dissemination of the information can provide useful insight into the working of the justice system. While there are statistics published relating to judge strengths and delays across courts, there must be greater attention devoted to identifying deeper issues in the court systems, for instance, systemic causes for delays. This will also ensure that the public is informed about how efficient or inefficient their justice system is, thereby also assisting individuals and businesses take informed decisions before approaching courts of law for dispute resolution.

B. Metrics and Methods

To capture different facets of performance, a JPE must ideally evaluate a mix of objective as well as subjective metrics related to the performance of judges and court systems. The following tables summarise a list of objective and subjective metrics for evaluating the performance of judges as well as courts.

1. For Individual Judges

Metrics	Nature of metric (whether subjective or objective)	Who will evaluate	Method of evaluation
Number of days for which the judge has worked	Objective	Registry	Automated system. This will require a digital “check-in” by the judge on every working day.
Number of days when a judge was not present (number of leaves taken)	Objective	Registry	Automated system. (see above)
Involvement in Lok Adalats and legal aid programmes	Objective	Registry	Automated system can calculate the number of hours spent on these initiatives.
Quantum of cases decided	Objective	Registry	Calculated through an automated system, by the

			Registry of the Court.
Nature of cases	Objective	Registry	Use of digital databases which prepare a list/table according to case type, decided by the judge (per annum).
Stricture and adverse comments by a higher court of law	Objective	Registry	Use of digital databases maintained by the Registry of the Court, which prepares a list/table of the cases overruled by a higher court.
Knowledge of law and procedure	Subjective/Objective	Registry	Number of judgments of the judicial officer that have been upheld or reversed in a given period by an appellate court can be an indicator of this.
Brevity in judgments	Subjective/Objective	Registry	Language and length of judgments of the judicial officers can be tested digitally.
Honesty, integrity, and impartiality	Subjective/Objective	Peer review and/or bar polls	<p>Judges can evaluate their peers, periodically. The factors on the basis of which peer reviews can be conducted can include honesty, integrity, impartiality, courtroom demeanour.</p> <p>Lawyers may also be considered, as a part of the performance evaluation process. They can be asked to fill confidential questionnaires. This can be done through digital platforms developed and run by an external</p>

			<p>manager. Strict provisions must be made for confidentiality when conducting bar polls. Additionally, since there are internal politics and issues with bar associations in India- therefore, using bar polls must be deliberated carefully before embarking on the exercise.</p>
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As our research and practice demonstrate, performance evaluation must contain balanced metrics of subjective as well as objective factors. Using purely objective factors poses the danger of misrepresenting judges' abilities, and can turn into an exercise where judges hurry to dispose larger numbers of cases for the sake of getting better results in their performance appraisals. However, objective factors such as punctuality, volume of judicial and administrative work done, the number of judgments overturned by a higher court or forum etc., do reflect the abilities of a judge, and once measured through non-human interfaces, can be accurate and have minimal error.

The Registry would be the best authority to collate and curate the data, and publish it (wherever suitable) for public dissemination. Entrusting sitting judges with such administrative tasks would put unnecessary pressure on them, possibly interfering with their judicial abilities. The Registry can collaborate with an external body (a third party) as well, to organise, manage and analyse the collected data. This will ensure that the exercise is free from bias. For instance, certain metrics that will be evaluated could potentially be subject to bias from the side of the bar. Using a third-party data manager will neutralise any possibility of bias from the side of bar etc. (perceptions of individual lawyers of the bar) and also help reduce the margin of error in the collection of data.

It has been stressed on various occasions that while assessing a judge's performance, care must be taken that the process evaluates their professional performance and not the judge in her/his personal capacity. In this regard, it is suggested that some factors may be excluded when evaluating the performance of judges, including (but not limited to) the following - the judge's moral standing and public perception of the same, the judge's past history or personal views on the subject-matter of discussion in a case being heard, any past political inclinations that he/she may have expressed publicly. The past assessment of a judge by any other method should not have a bearing on present and future assessments.

The dialogue around judicial performance evaluation and possible development of a programme must necessarily start from within the judiciary. It could be in the form of an initiative taken by the senior-

most judges of the court, who can internally deliberate on a performance assessment mechanism for all the judges of the court. Additionally, the Supreme Court can, in consultation with the Chief Justices of the High Courts, help form guidelines for the performance evaluation of High Court judges. Subsequently, the roles and duties of other actors in the process can be deliberated and set out in the relevant rules and/or guidelines to be followed.

2. Court Performance

Metrics	Nature of metric (whether subjective or objective)	Who will evaluate	Method of evaluation
Ease of filing cases in the court (case filing fees, litigant demographics)	Objective	Automated system run by the registry of the court, in collaboration with an external data management agency.	Survey conducted on litigant demographic by an external agency, which will compile and analyse the data.
Efficiency of the registry: case management, digital enablement	Objective	Automated system run by the registry of the court, in collaboration with an external data management agency.	External agency, which will collect and analyse the data.

The objective criteria to assess court functioning can be collated and analysed through non-human interfaces. A digitised mechanism must be set-up and used to study certain aspects of the working of individual judges that figure in their performance appraisal reports, for instance, punctuality, court attendance, delays in giving judgments, etc. Additionally, for individual judges, self-appraisal or some form of an internal review mechanism would have to be planned and executed within the court system(s), for which resources would require to be allocated and accounted for in the courts' budgets.

Ensuring that appraisal exercise, whether for judges or courts, is carried out efficiently and regularly, will also pose challenges. As we have seen, regular filling of ACRs is an issue that has been pointed out by the Supreme Court with reference to the performance appraisal mechanisms in the subordinate judiciary. Therefore, at the very outset, a time period must be fixed providing for the frequency with which these evaluations can take place, which must be adhered to strictly.

3. Timeline

The following is a tentative timeline for conducting an annual performance evaluation programme, for judges and courts that will run through the year:

- (a) **Stage I:** Self appraisal and survey (Bar polls, if necessary, and peer review from the bench).
- (b) **Stage II:** Collation of data, i.e. the access to justice review, volume of cases filed, registry data (information on pendency across case types, life-cycle of cases), and the surveys relating to the performance of judges (i.e. bar polls as well as peer reviews).
- (c) **Stage III:** Publication of data in the form of a public document. The individual performance appraisal of judges may be kept confidential.

C. Challenges

While there are several reasons why a JPE programme would be beneficial to the judiciary, performance evaluation of judges is fraught with several issues. JPE programmes across the world have been criticised for being biased, opaque or impinging on judicial independence. Additionally, there are challenges associated with the process of implementing a new JPE programme relating to the parameters that will be used, deciding how frequently the programme will be conducted, ensuring that there are no clashes with the present existing system of appointment of judges and other such concerns. These are discussed in detail below.

1. Judicial Independence

Deep-seated resistance to evaluation of judicial institutions and independent judges across the world has stemmed from the fear of the threat posed to judicial independence, a cornerstone of any democracy. In India, too, legislative attempts to define judicial standards has been criticised for impinging on judicial independence. Several jurisdictions, however, have managed to introduce JPE programmes without compromising judicial independence and integrity. However, the judicial system in India has a unique manner of selection and appointments, and it is crucial to keep concerns of judicial independence in mind before assessment of the higher judiciary can become a reality.

The judiciary may be more welcoming to a system of performance review mechanism if it comes from within themselves. Therefore, an internal mechanism can be devised for performance evaluation of individual judges. Additionally, the results of JPE programmes can be shared in a limited manner, ideally limited to the judges being evaluated. In fact, in some court systems, the results of judicial evaluation are released only to the judge being evaluated.²⁰⁴ When evaluating court systems,

²⁰⁴ See 'International Consortium for Court Excellence Newsletter Issue 5 - October 2015', p.8, available at <http://www.courtexcellence.com/~media/Microsites/Files/ICCE/ICCE%20Newsletter%20-%20No%205%20-%20V1%20-%20Oct%202015.ashx> accessed on 29.03.2017.

however, it may be better to make the information publicly available, for citizens to understand better the working of the courts in their jurisdiction.

2. Bias

Some subjective factors are especially vulnerable to criticism, as they may be open to bias. This has already been seen when results of ACRs in the subordinate judiciary are challenged in the courts.²⁰⁵ Additionally, factors such as quality of judgments and behaviour in the courtroom are largely dependent on the perception of an individual. In a performance evaluation, these factors may have adverse consequences for one judge, and have no consequence for another, merely by virtue of different perceptions of whoever is evaluating them. Keeping this in mind, a performance evaluation programme must be wary of making the process subjective, and incorporate a balanced mix of qualitative and quantitative factors to accurately assess the quality of a judge's performance.

When designing and implementing a performance evaluation process, care must be taken in assigning the role of supervisory functions to authorities, for different steps and aspects of the process. For a majority of the factors, for both judges and courts, the supervision of data collection, analysis and publication should be done by the registry and an external data manager. The latter will be particularly helpful when collecting and analysing data relating to performance of the court systems. As mentioned before, this will remove bias and error as far as possible.

Caution must be exercised when using bar polls in India as a part of the performance evaluation process for judges. This is because there are internal issues and politics which plague bar associations in India. Further, members of the bar may be hesitant to evaluate the performance of judges owing to concerns of confidentiality. Further, making the results of the performance evaluation public can lead to prejudices developing in the minds of the public who are litigants in courts, with regard to the judges. In fact, it has been argued even in the US (where bar polls continue to form a component of performance evaluation programmes) that for JPE programmes to be effective, they must be run by the courts rather than the bar.²⁰⁶ Therefore, there must be clear provisions for confidentiality for the members of the bar involved to reduce apprehensions for bias and adverse consequences on the lawyers' appearances in courts before the judges.

3. Conflict with Existing Systems

Creating a system of performance evaluation for the higher judiciary in India is bound to create conflicts with the existing systems of promotion and transfers that exist for the higher judiciary in India. Additionally, consequences of performance evaluation that reflects that a judge has performed

²⁰⁵ See Chapter V, Section B "Evaluation of Judges in the Subordinate Judiciary" at p.31 of the present report.

²⁰⁶ D. Farthing-Capowich (1984), 'Evaluating Judicial Performance: Developing Court-sponsored Programs' *State court Journal (Summer)*, p. 27. The leadership of the Chief Justice and Superior Court is essential.

poorly, must be thought about carefully, so that they do not conflict with currently existing mechanisms in place for dealing with errant judges, and are harmonised with the current system.

The promotion of judges in India to the higher judiciary happens in two ways, either, practitioners with a fixed period of practice are promoted to the High Court, or judges from the lower ranks are promoted after a fixed number of years in service. Promotions to the Supreme Court happen on the basis of the decisions of the collegium, which consists of the Chief Justice of India and the four senior-most judges of the Supreme Court. Additionally, appointments can be made directly from the bar, where senior advocates are appointed as Supreme Court or High Court judges. There is, therefore, no formal performance assessment involved in the promotion of judges to the higher judiciary in India. Transfers of judges in the higher judiciary are governed by Article 222 of the Indian Constitution, where the President in consultation with the Chief Justice of India may transfer a judge in a High Court to another High Court.²⁰⁷

Therefore, in India, determining the promotion of judges through performance evaluation would pose the risk of the process coming into conflict with the existing constitutional provisions for promotion, elevation and transfer of judges. Using JPE results to determine transfer and promotions would therefore, perhaps, be unrealistic and even problematic for India.

4. Lack of Clear Standards for Judicial Accountability

It must be kept in mind that India does not yet have a law on or mechanisms to ensure judicial accountability. A performance evaluation mechanism in the absence of accountability measures would not serve its purpose. Lack of accountability measures would also lead to questions about the consequences of poor evaluation results and thus, there would be no tangible difference that the evaluation would make. In the past, several attempts at introducing accountability mechanisms in India have failed.²⁰⁸ The absence of clear standards for judicial standards and accountability has led to an absence of groundwork on which metrics and methods for performance evaluation can be developed.

These concerns must be addressed before and while designing a JPE programme for India. The best way to initiate a discussion on JPE would be from within the judiciary itself, which is more acceptable, evidenced by other jurisdictions that have embarked on the path of developing JPE programmes. Further, the resulting performance evaluation process needs to be harmonised with the present methods in place for removal of errant judges at the level of the higher judiciary. This could also mean a re-look at the process of removal of judges. There are, thus, many areas relating to the functioning of the judiciary that may need reconsideration before India embarks on the path of developing JPE programmes for its higher judiciary.

²⁰⁷ Article 222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

²⁰⁸ See Chapter III (A) of this Report.

ANNEXURE I: CRITERION FOR EVALUATING THE PERFORMANCE OF JUDGES IN ACRS

<u>Sl. No.</u>	<u>Self-assessment criterion</u>	<u>Assessment by reporting authority</u>	<u>Comments by accepting authority</u>
1	Duties and responsibilities	Quality of judgments/ orders based on language, clarity and reasoning	Comments on assessment/grading by reporting authority. Reasons for disagreement if any
2	Quantum and nature of cases assigned	Knowledge of law and procedure	Assessment of fitness for promotion to higher grade. Reasons, if officer is assessed unfit for promotion
3	Statement of achievement	Promptitude in disposal of cases	-
4	Shortfalls in achievement with reasons	Supervision and control of subordinate judges, assessment of appraising ability	-
5	Period of absence and reasons	Interpersonal relationships with court staff, superiors and members of the bar	-
6	Involvement in implementation of Lok Adalats and legal aid programmes	Assessment of reputation (honesty, integrity, impartiality)	-
		Complaints received against the officer.	-

ANNEXURE II: TEMPLATE ACRs OR RULES RELATING TO ACR USE FOR EVALUATION OF SUBORDINATE JUDGES

Sl. No.	States whose ACR template or procedure followed is available	Additional parameters unique to individual ACRs
1	Bihar	-
2	Chhattisgarh	Has an additional level of compliance check in the form of a reviewing authority who is generally a High Court judge assigned to supervise the reporting authority defined in a Schedule in the rules
3	Jammu and Kashmir	Monthly work turn-out to be recorded In case of probationer, ACRs to be prepared for every period of four months of service till he/she is confirmed. Special Confidential Record (SCR) is prepared by Administrative Judge whenever called for by the High Court to assess the suitability of any Member of the Service for confirmation or promotion
4	Jharkhand	In addition to initiating officer and reviewing authorities, Jharkhand has an additional level of scrutiny of ACRs termed 'vigilance' authority. This vigilance authority (Registrar) will be the custodian of all the ACRs and is responsible for communicating adverse entries to judicial officers. The Registrar (Vigilance) also receives representations against adverse entries, made by officers
5	Maharashtra	In considering promotion of Civil Judges to the post of Senior Civil judges or Senior Civil Judges to District Judges, ACRs of the judge have weightage of 20%.
6	Meghalaya	-
7	Mizoram	Where the duties of the officer are such that he meets members of the public, reporting officer assesses and records observations in the 'public relations' column
8	Punjab and Haryana	Provides for the safekeeping of ACRs with the District judge and their destruction after five years.
9	Rajasthan	-
10	Tamil Nadu	Special Confidential Record (SCR) is prepared by Administrative Judge whenever called for by the High Court to assess the suitability of any Member of the Service for confirmation or promotion
11	Tripura	Registrar (Vigilance) opinion's also form a part of ACR Breakdown of points to be awarded for performance under each parameter has been defined to leave little scope for partiality and bias in recording
12	Uttar Pradesh	First ACR of a newly appointed Addl. Civil Judge shall be written by the Director of the Institute of the Judicial Training Research, Lucknow after assessing the performance during training period
12	West Bengal	State of health of the judicial officer is also recorded

ANNEXURE III: CONFIDENTIAL INTERVIEWS WITH SITTING/RETIRED JUDGES AND SENIOR PRACTITIONERS

To gain insight into the attitudes towards performance evaluation of the higher judiciary, we had conducted a survey on JPE and compiled the findings in an Interim Report. While the survey was circulated to different categories of members of the legal community, almost all the respondents were junior lawyers, academicians or researchers, and did not include senior practitioners or judges. To fill this gap and gauge attitudes of senior practitioners and judges towards JPE in the higher judiciary, we conducted several private interviews with this demographic to solicit their true opinions on this controversial issue. Considering the nature of subject, some lawyers and judges we approached declines comments, and all our interviewees requested that their responses be anonymised.

Broadly, the following questions were put forth to interviewees:

1. Whether they think judges in the higher judiciary should be evaluated. If yes, why?
2. What aspects of a judge's performance should be evaluated?
3. If the performance of individual judges should be evaluated, how should such evaluations be used?
4. Who should be part of the evaluation process?
5. What are the challenges that India will face when evaluating judges?

From the interview responses, it was evident that the support for JPE in the higher judiciary seemed to stem from the fact that currently, judges in the higher levels of the judiciary in India are not subject to any performance evaluation and therefore, lack a formal system of checks and balances. One interviewee opined that a JPE model would ascribe more transparency to the currently opaque system of elevations. For these broad reasons of increased transparency and accountability, all interviewees suggested that performance evaluation will be useful for the higher judiciary in India and preferred that a balanced JPE model be evolved.

As regards parameters that judges must be measured against, respondents stated that a mix of "personal and professional parameters" must be used for assessment. Personal factors must include work ethic, interpersonal relations, demeanour towards court staff and lawyers. Professional parameters, according to the interviewees, should include knowledge of law and procedure, ability to grasp the facts and essence of cases, sound application of legal principles and so on. This supported the responses we received from the questionnaire circulated as part of the Interim Report, wherein the respondents expressed that there must be a mix of subjective and objective factors to evaluate the performance of judges. These subjective factors included similar parameters as were included in the "personal" parameters, and the objective factors were partially analogous to the "professional factors".

Interviewees expressed concerns about specific parameters often used in the design of a JPE programs. One interviewee who is a sitting High Court judge mentioned that evaluating performance on the basis of number of judgments delivered can be problematic and cited instances he witnessed of subordinate court judges misrepresenting the number of judgments delivered by them or rushing through cases to be able to deliver a greater number of judgements. This focus and importance placed on tracking number of judgments delivered in most performance evaluation plan needs balancing, he stated.

Other strong reservations were also expressed about the idea of evolving a performance evaluation for the higher judiciary, particularly for a country like India. The interviewees expressed concerns that evaluation by any external body or individuals would face stiff resistance from the judiciary, and stated that a JPE plan that imagines an external body would not be a feasible model. All interviewees but one, independently and unequivocally, opined that a performance evaluation system would be most acceptable if it stemmed from within the judiciary itself. Noting that bar associations across the country are quite powerful and may improperly influence evaluations, interviewees also vehemently opposed even the slightest involvement of the bar, including in the form of bar polls, in evaluating judicial performance.

One interviewee, however, stated that a JPE program would entirely fail to achieve any purpose in India. He opined that as judges are elevated or appointed after a fixed number of years of experience, they may not be amicable to being subject to a further process of scrutiny. According to him, most judges fail to see how performance evaluation can aid their professional development. Further, considering the sheer numbers of judges required in the courts across India, removal of judges based on poor performance evaluations was strongly discouraged. One interviewee also suggested that in India, reform aimed at securing better quality of judges must begin at appointments stage and not at performance evaluation stage.

Additionally, interviewees expressed that there are already several practical concerns regarding performance assessment of judges in the subordinate judiciary. For example, several issues exist relating to bias in filling the ACRs and the process lacks objectivity. Often, this process of performance evaluation has been criticised for being used to fulfil personal vendettas against judicial officers, to create hurdles in their promotions and professional development. These issues need to be addressed before embarking on the path of developing a JPE programme for the higher judiciary, they held.

Therefore, while there was strong support for a performance evaluation for the higher judiciary in India, the possibility of such a process interfering with judicial independence was referenced multiple times by all interviewees. For this reason, the interviewees were in support of an internal performance evaluation mechanism that takes into account subjective and objective parameters, evolved and administered wholly by the judiciary.



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Utilisation Certificate

S. No.	Budget Head	Budget	Actual
1	PERSONNEL		
1.1	Senior Resident Fellow	500,000.00	530,000.00
1.2	Research Fellow	600,000.00	630,000.00
1.3	Non Resident Experts	250,000.00	270,000.00
1.4	Interns	200,000.00	214,500.00
	Total	1,550,000.00	1,644,500.00
2	Establishment Cost (incl Rent)		
2.1	Establishment Cost (incl Rent)	90,000.00	121,128.40
	Total	90,000.00	121,128.40
3	Promotional Events		
3.1	Discussion /Round Table	120,000.00	*
	Total	120,000.00	-
4	Travel and Conveyance & other Expenses		
4.1	Flight Tickets	45,000.00	*
4.2	Local Conveyance	5,000.00	3,564.66
4.3	Accommodation and meals	45,000.00	*
4.4	Printing , Stationary & other expenses	50,000.00	87,760.60
	Total	145,000.00	91,325.26
GRAND TOTAL		1,905,000.00	1,856,953.66

** Note: Buget Line item for Round Table, Flight tickets and Accommodation amounting to Rs.2,10,000 have been reallocated to other line items as required in reference to letter no. 9/15/2015-NM dated 10.08.2017*