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International Bar Association Judicial Integrity Project

**Maintaining judicial integrity and ethical
standards in practice:**

A study of disciplinary and criminal processes and
sanctions for misconduct or corruption by judges

June 2021



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Foreword

Corruption has a devastating effect on the judiciary, corroding as it does the public trust and confidence that underpin the authority of an entire judicial system.

Today, one of the most urgent issues facing those tasked with upholding human rights is the need to combat corruption, particularly the damage it causes to the effective administration of justice and the rule of law. One key way to do this is by promoting a spirit of judicial integrity among the world's judges.

Formally established by the United Nations Office on Drugs and Crime in April 2018, the Global Judicial Integrity Network – which provides support in line with the measures imposed by Article 11 of the UN Convention against Corruption – has rapidly become the institution of reference for developing and strengthening global guidance on judicial integrity and independence.

Previously, in 2016, the International Association of Judges, an organisation spanning 92 countries worldwide (of which the European Association of Judges constitutes a regional group), included in its strategic plan a new pillar under the engaging title: 'Judges Against Corruption'.

This commitment to combatting judicial corruption was also powerfully adopted by the International Bar Association (IBA), which started its own Judicial Integrity Initiative (JII), launched in 2015 by former President David Rivkin.

Since then, the IBA has published a series of pioneering publications on these issues. In May 2016, the JII produced the report *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*, marking the end of Phase 1 of the JII. The present publication represents the results of Phase 2 of the initiative, which focuses on the concrete processes that are available to hold judges to account for their conduct.

The significance of this investigation, conducted in five countries with different juridical backgrounds, is immense. Having been involved in the production of the present report since its inception, I can testify personally to the rigorous assessment undertaken of the comprehensive information it contains, the merits of the strategies it suggests, which are based on solid field work with and among judges, and the beneficial implications of its conclusions and recommendations.

With this report, the IBA has provided a valuable tool that policymakers, members of the judiciary and academia can use to evaluate the success of existing efforts to combat judicial misconduct and corruption, and to help create and define effective policies for the future.

Lawyers are always on the frontline of protecting the rule of law: without it, those human rights that are enshrined in the law cannot be guaranteed. Therefore, for us as judges, a close and strong partnership with lawyers constitutes a decisive factor in enhancing the protection of the fundamental rights of our fellow citizens. In this context, the present report represents an outstanding example of our shared common values.

I strongly encourage all members of the judiciary to analyse its contents, digest its findings and to adopt its recommendations.

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Executive summary

1. Introduction

Corruption in the judiciary ‘erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system’.¹ States now have obligations under the United Nations Convention Against Corruption (UNCAC),² which includes obligations to implement ‘measures relating to the judiciary and prosecution services’ under Article 11. In addition, increased global awareness of the importance of judicial accountability has led to the adoption, promotion and support for the implementation of the Bangalore Principles of Judicial Conduct (the ‘Bangalore Principles’) by the UN.³

Against this background, the International Bar Association’s (IBA) Judicial Integrity Initiative (JII) aims to ‘combat judicial corruption where it exists by attempting to understand the types of corruption that affect the judicial system and focusing on the role of the various professionals who operate within judicial systems’.⁴ In May 2016, the publication of the report *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*⁵ marked the end of Phase 1 of the JII. The present paper reports on Phase 2 of the JII. This second phase is focused on the processes that are in place to hold judges to account for their conduct, whether misconduct warranting disciplinary action or corruption warranting criminal sanctions. The aims of this study are as follows:

1. develop a straightforward approach to the assessment of the judiciary’s compliance with the integrity benchmark as defined at the international level (eg, Bangalore Principles and Article 11 of the UNCAC);
2. analyse not only formal compliance with national legislation, but also practices that either enhance or hinder the accountability of judges for corruption through either disciplinary or criminal procedures; and
3. test the effectiveness of the questionnaire adopted to conduct this study in order to develop a tool that policy-makers, members of the judiciary, academia and experts could use to evaluate how misconduct or corruption by judges is investigated, prosecuted and sanctioned through internal disciplinary systems and under criminal law.

The report is divided into seven sections: (1) Introduction; (2) Context and concepts; (3) Methodology; (4) Mechanisms for investigation and sanctioning judicial corruption; (5) Disciplinary procedures; (6) Interrelationship between criminal and disciplinary procedures; and (7) Conclusions and recommendations.

1 UN General Assembly (UNGA), ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers: Report on Judicial Corruption and Combatting Corruption through the Judicial System’ (13 August 2012) UN Doc A/67/305 (2012).

2 UNGA Resolution 58/4 2003.

3 UN Office of Drugs and Crime (UNODC), ‘Commentary on the Bangalore Principles of Judicial Conduct’ (2007).

4 IBA, ‘The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption’ (2016), p 3.

5 See www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx accessed 22 December 2020.

2. Context and concepts

There are four key concepts that underpin this study: judicial independence, judicial accountability, judicial corruption and judicial integrity.

Judicial independence

Judicial independence refers to both the *institutional* or *external* independence of the judiciary and the *individual* or *internal* independence of judges. Institutional independence requires that the judiciary is independent of the executive and the legislature, and this is usually evident through, for example, institutional autonomy, security of tenure and an independent appointment process.⁶ Individual judicial independence is concerned with protecting the *impartiality* of judges from influence, whatever the source, whether from external pressures, including bribes and inducements, or internal pressures, such as from colleagues or individual biases.⁷

Judicial accountability

- Judicial accountability also refers to the individual accountability of judges, and the collective accountability of the judiciary as an institution. Individual accountability refers to judges' personal accountability for their conduct, or misconduct; their individual reasoned judgements; and for their personal views on the law as expressed in public lectures and interviews. Institutional or external accountability is the accountability of the institution: courts are accountable for how they operate. Many now publish annual reports and cases are heard in public. The appellate structure and rights of appeal are another means of judicial accountability.⁸ Both judicial independence and judicial accountability are essential to ensure an effective judiciary.⁹ The Bangalore Principles provide a guide to judges that enhances and protects the independence of individual judges, while also supporting judicial accountability. However, judicial accountability must not be achieved at the expense of judicial independence. The UN Special Rapporteur on the independence of judges and lawyers (UNSRIJL) has noted that: 'accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct'.¹⁰

Judicial corruption

There is no global consensus on the definition of corruption, or judicial corruption. However, it is agreed that corruption in the judiciary is a significant problem as it 'erodes the principles of independence, impartiality and integrity of the judiciary [...] and [...] undermines the credibility of the entire justice system'.¹¹ This study follows the approach taken in the UNCAC, which is to define

6 Peter H Russell, 'Towards a General Theory of Judicial Independence' in Peter H Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia 2001); Stephen Burbank and Barry Friedman, *Judicial Independence at the Crossroads: an interdisciplinary approach* (Sage Publications 2002); Anja Seibert-Fohr, *Judicial Independence in Transition* (Springer Berlin Heidelberg 2012).

7 UNGA, UN Basic Principles on the Independence of the Judiciary, endorsed by UNGA Resolution 40/32 of 29 November 1985 and UNGA Resolution 40/146 of 13 December 1985.

8 Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24 *Legal Studies* 73.

9 UNODC, UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers', Human Rights Council, 26th session (28 April 2014) A/HRC/26/31 (2014), para 23.

10 *Ibid*, para 77.

11 *Ibid*, para 109

corruption offences rather than give a broad and general definition of corruption. This study focuses on the offences of bribery, as set out in Article 15 of the UNCAC, and trading in influences, as set out in Article 18 of the UNCAC, and their prevalence and prevention in the judicial setting.

Judicial integrity

Judicial integrity is a term that has taken on great significance because of its use in Article 11 of the UNCAC, which requires states to ‘take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary’. As with corruption, there is no agreed definition of ‘judicial integrity’, but the scope and meaning are laid out in detail in the Bangalore Principles. It is ‘the attribute of rectitude and righteousness’, and the components of integrity are honesty and judicial morality’.¹² According to the Judicial Integrity Group, who drafted the Bangalore Principles, judicial integrity is ‘absolute. It is a necessity.’¹³ This study is concerned with understanding how states are implementing Article 11 of the UNCAC, both through their criminal justice systems and by way of disciplinary measures.

3. Methodology

This project was carried out over three years (beginning in early 2017 to the end of 2019) by the IBA Legal Policy and Research Unit (LPRU) in conjunction with the Research Institute in Judicial Systems of the National Research Council (Istituto di Ricerca sui Sistemi Giudiziari Consiglio Nazionale delle Ricerche or IRSIG-CNR) in Italy¹⁴ and the National Center for State Courts (NCSC) in the United States,¹⁵ along with colleagues and researchers in Ghana, the Philippines, Costa Rica, France and the United Kingdom. The project had four main phases:

1. design stage;
2. implementation stage;
3. review stage; and
4. final project report.

The current text is the final project report.

During the design stage, a questionnaire was developed that was used to direct research into country case studies. The initial case studies were Costa Rica, France, Ghana and the Philippines. They were selected based on their different legal traditions, geographical position, political and social environment and availability of researchers to carry out the research. The UK was included as an additional case study during the later stage of reporting activity following review, revision and restructuring of the case studies.

During the implementation stage, researchers carried out desk research on each case study, followed by empirical research, which included interviews, followed by a review by members of the team of the empirical analysis.

¹² UNODC, para 101.

¹³ *Ibid.*

¹⁴ See www.cnr.it/en/institute/129/institute-of-legal-informatics-and-judicial-systems-igsg accessed 22 December 2020.

¹⁵ See www.ncsc.org accessed 22 December 2020.

The review stage involved writing up the case studies and gathering feedback, followed by review, revision and restructuring. At this stage, it was decided that an additional country case study should be included to test some of the changes and modifications that were made to the questionnaire. Questions about criminal and disciplinary sanctions, and the relationship between domestic standards and international standards were added to the questionnaire. The questions were also grouped into subcategories in order to highlight the main issues to cover, and the structure and presentation of the case studies was amended to reflect these changes.

4. Key findings: mechanisms for investigation and sanctioning judicial corruption

- In all five countries in the study, bribery is criminalised. Therefore, these states meet their obligations under Article 15 of the UNCAC. In four out of the five countries, trading in influence is expressly criminalised, and these countries have therefore implemented Article 18 of the UNCAC, which is an optional rather than mandatory provision.¹⁶ The UK has not expressly criminalised trading in influence, but it has a number of laws that criminalise activity associated with trading in influence.¹⁷
- All judges are liable under criminal law, although, in Costa Rica, Supreme Court judges have a form of criminal immunity, which may be lifted.¹⁸
- In three out of the five countries – Costa Rica, France and Ghana – there are judge-specific corruption offences. See the text in section 4.2, and Table 3.
- In France and Costa Rica, the reason for committing corruption, for example, to benefit a person subject to criminal proceedings (France) or the offender has accepted an undue advantage in favour of a party to a trial (Costa Rica), will aggravate the offence and result in harsher sanctions. See the text in section 4.2, and Table 3.
- Article 13(2) of the UNCAC requires states to provide access to anti-corruption bodies for the purpose of reporting corruption by the public, ‘including anonymously’. Only one country in this study, the UK, allows anonymous reporting of corruption, and then, only in relation to serious offences that fall within the remit of the Serious Fraud Office.¹⁹ Other ways of reporting corruption are in person, online or in writing. See section 4.2.1 and Table 4.
- Limitation periods are not required under the UNCAC; however, where a state has limitation periods in place, they must be long (Article 29 of the UNCAC). Ghana and the UK have no limitation periods. Costa Rica, France and the Philippines have limitation periods, varying from three to 30 years (see section 4.2.2 and Table 5). Costa Rica and France have implemented optional provisions under Article 29 of the UNCAC in relation to hidden crimes and the suspension of limitation periods.

16 UNODC, ‘Legislative Guide for the Implementation of the United Nations Convention Against Corruption’ (2006) 1 www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf accessed 24 March 2021.

17 Discussed in Colin Nicholls, Timothy Daniel, Alan Bacarese, James Maton and John Hatchard (eds), *Corruption and Misuse of Public Office* (3rd edn, Oxford University Press 2017), 186.

18 Criminal Procedure Code, Arts 396, 397 and 398.

19 See www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption accessed 22 December 2020.

- Article 6 of the UNCAC requires states to ensure that they have a body or bodies responsible for the prevention of corruption. All five countries have an anti-corruption body of some kind.
- Article 36 of the UNCAC requires that states ensure the ‘existence of a body or bodies or persons specialized in combatting corruption through law enforcement’. This does not have to be a separate law enforcement anti-corruption body but specialised anti-corruption personnel can be within existing investigative or prosecutorial bodies.²⁰ In Costa Rica, Ghana, the Philippines and the UK, there are specialist anti-corruption investigative bodies (see section 4.3 and Table 6). In Costa Rica and the Philippines, there are specialist anti-corruption prosecutorial bodies. In the UK, the specialist investigative and prosecutorial body has a limited remit (see section 4.4 and Table 7).
- The main procedural safeguards highlighted in the case studies are appeals, open justice and rights of representation. On the face of it, all countries in this study meet the requirements of Article 11 of the Universal Declaration of Human Rights (UDHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) in criminal proceedings.
- All countries in this study have a range of sanctions for a range of corruption offences, which suggests that there is some adherence to the principle proportionate sanctions set out in Article 30(1) of the UNCAC. However, there is no detail as to how the gravity of offences is determined. See section 4.6 and Table 8.
- Four out of five of the countries in the study have implemented the optional provision under Article 30(7) of the UNCAC to disqualify individuals from public office following a conviction for a corruption offence. The UK has not. Conviction for an offence (which appears to include corruption offences) does not automatically disqualify a person from applying for or becoming a judge.²¹
- All five countries in this study have coordinated anti-corruption policies as required by Article 5(1) of the UNCAC. However, in general, all five states perform poorly in meeting the transparency requirements of the UNCAC. Case law and legal information is quite readily available in France and the UK, but accurate legal information is less accessible in Costa Rica and the Philippines, and Ghana performs worst on this issue (see the requirements under Article 10(1)(a) of the UNCAC). The same is the case with the requirement to provide ‘effective access to information’ – France and the UK perform best, accuracy is an issue in Costa Rica and the Philippines, and there is little information available in Ghana. See section 5.7.
- There is no clear information or data about judicial corruption cases in any of the five countries – all five fail to fully meet the requirements of Article 10(1)(c) to periodically report on the risks of corruption in the judiciary, or Article 13(1)(d) to publish and disseminate information about corruption in the judiciary. See section 5.7.

²⁰ UNODC, *Technical Guide to the United Nations Convention Against Corruption* (2009), 113–115.

²¹ Judicial Appointments Commission, ‘Good Character Guide’ (2018), paras 21–22; Judicial Appointments Board Scotland, ‘Criminal Conviction – Statement of Principles’ (2009); Northern Ireland Judicial Appointments Commission, ‘Character Guidance for Applicants’ (2018).

5. Key findings: disciplinary procedures

- All five countries in this study have taken some measures to ‘strengthen integrity and prevent corruption in the judiciary’ in line with Article 11 of the UNCAC. However, a number of practices undermine full compliance with this article. See the discussion in chapter 5 and conclusions in section 7.2.
- All five countries have codes of judicial conduct (Article 11(1) of the UNCAC), and it appears that disciplinary, removal and suspension decisions are made in accordance with those established standards of judicial conduct (Article 19 of the UN Basic Principles on the Independence of Judges (UNBPIJ)).
- ‘Serious misconduct’ as referred to in the Bangalore Principles – Implementation Measures (BP-IM) paragraph 15.1 is not universally defined, and while, on the face of it, the five countries meet this standard, there is a very broad range of activities that can constitute ‘serious misconduct’ in practice across the different systems. See section 5.4.1.
- Each of the five countries in this study has a body or bodies responsible for receiving complaints and judging whether there is a case for disciplinary action to refer to the disciplinary authority. They therefore meet the standard in the BP-IM paragraph 15.3. Each of the five countries also has an identifiable ‘disciplinary authority’ as envisaged by the BP-IM paragraph 15.3. See the discussion in section 5.2.1, and Table 10.
- The BP-IM paragraph 15.4 requires that the disciplinary authority should be independent of the executive and the legislature, and that it should be composed of members that are serving or retired judges, and may include non-judicial members who are not members of the executive or the legislature. Practices in France, England and Wales, and Ghana raise concerns about the independence of the disciplinary authority. See the discussion on ‘Issues with external independence’ in section 5.2.1 and Table 10.
- While Costa Rica and the Philippines meet the independence criteria set out in the BP-IM paragraph 15.4, practices in these two countries and the disciplinary powers of the Supreme Court raise concerns about the impact of disciplinary processes on the individual independence of judges. See the discussion on ‘Issues with internal independence’ in section 5.2.1.
- The BP-IM paragraph 16.2 recommends that, where the legislature has the power to remove a judge, that power should only be exercised on the recommendation of the disciplinary authority. This is not the case for superior court judges, including Supreme Court judges in the UK, or Supreme Court judges in the Philippines. These retain a political process for the removal of the most senior judges. See section 5.4.2.
- Two countries – Ghana and the Philippines – have no limitation periods for complaints of judicial misconduct. Otherwise, the limitation periods in disciplinary proceedings are significantly shorter than those in criminal proceedings, but there is very little guidance on this, except proceedings should be ‘expeditious and fair’ (BP-IM paragraph 15.2). See the discussion in section 5.3.2, and Table 12.

- There are no agreed standards on the standard or burden of proof in disciplinary proceedings. The standard of proof is on a sliding scale in Ghana (between balance of probabilities and beyond reasonable doubt), evidence that a ‘reasonable mind’ might accept in the Philippines and ‘the balance of probabilities’ in the UK. The burden of proof is on the inspection in Costa Rica, but the claimant in France. Practice in this area is inconsistent. See the discussion in section 5.4.3.
- The BP-IM states that all disciplinary proceedings should be determined in accordance with a procedure guaranteeing full rights of defence (paragraph 15.5). The UNSRIJL goes further and notes that fair trial rights should be guaranteed.²² All countries in this study have some rights of defence, and some fair trial rights, but they fall short of the full right to a fair trial as set out in Article 11 of the UDHR and Article 14 of the ICCPR. See the discussion in section 5.5.
- As in criminal proceedings, there are concerns about transparency in disciplinary processes in all five countries in this study, and they are the same concerns in relation to disciplinary proceedings as in criminal proceedings. See the discussion in section 5.7.

6. Key findings: interrelationship between criminal and disciplinary procedures

- There is no agreed or consistent practice relating to whether disciplinary and criminal processes should run parallel or consecutively. In Costa Rica and France, they can occur in parallel. In the Philippines, disciplinary proceedings are supposed to precede criminal ones, but they don’t. In Ghana and the UK, disciplinary proceedings are stopped as soon as there is any indication that a criminal offence might have been committed. The case studies offer no insight into whether disciplinary and criminal proceedings should run in parallel or consecutively, or in which order, nor is there any international guidance on this. However, parallel proceedings appear to create confusion.
- All five countries have opted to implement measures by which a public official accused of a corruption offence can be removed, suspended or reassigned, under Article 30(6) of the UNCAC. Costa Rica, France and the Philippines have opted to establish procedures to disqualify individuals from holding public office if convicted of a corruption offence, in line with Article 30(7) of the UNCAC. The UK has not, and it is not clear what the situation is in Ghana. See the discussion in section 6.2.
- Article 38 of the UNCAC requires cooperation between ‘public authorities’ and ‘public officials’ with ‘authorities responsible for prosecuting criminal offences’. This includes disciplinary bodies and their personnel, and public bodies and public officials, and as the UNSRIL notes, ‘[j]udges, prosecutors and the police need to cooperate with each other appropriately and transparently’.²³ Cooperation between public authorities and prosecuting authorities is a problem area for all five countries in this study, primarily because there is very little information about whether there is any cooperation, and if there is, how it is managed. See the discussion in section 6.3.

²² See n 1 above, para 80.

²³ *Ibid*, para 102.

- Article 38 of the UNCAC also requires information exchange between the different authorities, but again, there is very little indication as to whether, or how, this happens. Much more transparency is needed in this area of practice.

7. Conclusions and recommendations

The three objectives in this study each address a different aspect of implementing international standards: the first is the approach states might take to assessing compliance of their judicial institutions with international standards; the second concerns the effect of state practices on compliance with international standards; and the third is concerned with the effectiveness of the questionnaire and its use as a tool to evaluate how misconduct and corruption by judges is addressed in national systems.

Approach to assessing compliance with international standards

There are two general conclusions in respect of the approach taken in this study to assessing compliance with integrity standards: first, this approach has allowed for a methodical analysis of whether the states in the case studies have met international standards; and second, this approach has highlighted that there are significant gaps in the normative standards and guidance on the implementation of the Bangalore Principles, as well as some gaps in guidance on the implementation of the UNCAC. These gaps are in relation to:

- defining ‘misconduct’;
- distinguishing between judicial corruption and judicial misconduct;
- reporting judicial corruption and misconduct;
- the disciplinary process and the individual independence of judges;
- limitation periods and time limits;
- burden and standard of proof in disciplinary proceedings;
- transparency; and
- the interrelation between criminal and disciplinary regimes.

The general conclusion in respect of these issues is that more discussion, and comprehensive guidance on these matters is needed.

Compliance and state practices

- Formal compliance with the UNCAC was reviewed, and all five countries in this study do not fully comply with Article 11 (strengthening judicial integrity and preventing opportunities for corruption in the judiciary); Articles 5, 7, 10 and 13 (transparency); or Article 38 (cooperation between authorities and information exchange).
- Optional provisions of the UNCAC that have been implemented are Article 18 (criminalising trading in influence), Article 29 (extension limitation periods) and Article 30(7) (disqualification from public office).

- Areas of practice that undermine compliance with Article 11 of the UNCAC are:
 - lack of independence of disciplinary proceedings;
 - less stringent process and procedural safeguards in disciplinary proceedings;
 - lack of transparency and certainty as to process; and
 - lack of clarity and transparency in respect of cooperation and exchange of information between criminal and judicial authorities.

Effectiveness of the questionnaire

The questionnaire provides a clear, structured approach to researching this area of practice. However, areas for improvement have been identified.

ADDITIONAL QUESTIONS CONCERNING CRIMINAL PROCEDURE

Additional questions concerning criminal procedure regard the following:

- the protection of reporting persons and whistleblower legislation as it applies in the judiciary;
- to reflect the requirements of Article 29 of the UNCAC in the extension/suspension of limitation periods where the offender has evaded justice or the crime is concealed;
- on which body is responsible for investigating judicial corruption and whether that body is independent;
- about whether prosecutors need the authority or consent of superiors in order to proceed; and
- about the rights of judges as defendants and compliance with Article 14 of the ICCPR.

ADDITIONAL QUESTIONS CONCERNING DISCIPLINARY PROCEDURE

Additional questions concerning disciplinary procedure regard the following:

- a refinement of the question(s) concerning responsibilities for judicial discipline to draw out the following issues:
 - overall responsibility (and therefore accountability) for judicial discipline, including making rules and regulations;
 - investigation;
 - conduct of proceedings;
 - adjudication; and
 - responsibility for sanctions;
- a specific question on how to make a valid complaint and the filtering process for complaints;
- an additional question about the independence of the investigative process;

- a question (or questions) about the detail of procedures for removing judges from office; and
- a question about jurisdiction and venue.

Recommendations

There are three general recommendations that arise from this report, with a number of specific recommendations associated with each general point.

RECOMMENDATION 1

Further research and collaboration among relevant stakeholders is needed to develop a more comprehensive guide to the implementation of the Bangalore Principles. In particular, in respect of the following:

- the distinction between ‘conduct that gives rise to a disciplinary sanction’ and a ‘failure to observe professional standards’, and the appropriate sanctions or disciplinary action in respect of each;
- what behaviour by judges should primarily be classed as criminal, and addressed by way of criminal sanctions, and what behaviour should be classed as misconduct warranting removal or other disciplinary action short of criminal sanctions;
- the protection of judges who report judicial corruption or misconduct, and the integration of appropriate safeguards for such judges into the investigative process;
- the potential impact of disciplinary measures on individual independence and safeguards to protect against disciplinary procedures undermining individual independence;
- the appropriate time limits for complaints, and the core rationale of such time limits in disciplinary processes and ways of balancing the need for both ‘expeditious’ and ‘fair’ proceedings;
- the appropriate standard of proof in disciplinary cases against judges; and
- minimum requirements in terms of transparency of rules, procedures and outcomes in relation to disciplinary procedures to ensure that both the transparency provisions and Article 11 of the UNCAC are met fully.

RECOMMENDATION 2

Further research and collaboration among relevant stakeholders is needed to develop guidelines on the interrelationship between the criminal and judicial authorities in addressing judicial corruption. In particular:

- the principles of cooperation that take account of confidentiality requirements, as well as the independence and autonomy of the relevant agencies;
- the most effective chronology for criminal and disciplinary proceedings; and
- the appropriate degree of information sharing between anti-corruption agencies and the judiciary and vice versa, taking account of the requirements of judicial independence.

RECOMMENDATION 3

The research questionnaire developed for this study should be revised to address the areas where there are gaps or a lack of clarity, and to develop some simple guidelines on using the questionnaire in full or selectively. In particular, questions on the following issues should be added to the questionnaire:

- the protection of reporting persons and whistleblower legislation as it applies in the judiciary;
- the requirements of Article 29 of the UNCAC in the extension/suspension of limitation periods where the offender has evaded justice or the crime is concealed;
- which body is responsible for investigating judicial corruption;
- whether the body investigating judicial corruption is independent;
- whether prosecutors need the authority or consent of superiors in order to proceed;
- the rights of judges as defendants and compliance with Article 14 of the ICCPR;
- a refinement of the question(s) concerning responsibilities for judicial discipline to draw out the following issues:
 - overall responsibility (and therefore accountability) for judicial discipline, including making rules and regulations;
 - responsibility for investigations in judicial discipline;
 - the conduct of disciplinary proceedings;
 - responsibility for adjudication in disciplinary proceedings; and
 - responsibility for imposing disciplinary sanctions;
- making a valid complaint about judicial conduct and the filtering process for complaints;
- the independence of the investigative process;
- procedures for removing judges from office;
- jurisdiction and venue; and
- the implementation of Article 19 of the UNCAC.

1. Introduction

Over the past two decades efforts to professionalise and harmonise standards of judicial conduct, address judicial corruption and enhance judicial integrity have gained momentum in judicial reform practice through international standards, intergovernmental cooperation and domestic judicial reforms across the globe. Two significant developments at the international level stand out: first, in 2005, the United Nations Convention Against Corruption (UNCAC), in which Article 11 sets out ‘measures relating to the judiciary and the prosecution services’, came into force;²⁴ and second, in 2006, the UN Economic and Social Council (‘ECOSOC’) adopted a resolution in which they invited ‘Member States [...] to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct [...] when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary’.²⁵

The Bangalore Principles of Judicial Conduct (the ‘Bangalore Principles’) are the product of many years of dedicated work by the Judicial Integrity Group (JIG), which started in 2000 with a meeting of chief justices and senior judges arranged by the UN Office on Drugs and Crime’s (UNODC’s) International Centre for Crime Prevention and Transparency International (TI) in Vienna.²⁶ The aim was to develop programmes for ‘strengthening judicial integrity institutions and systems’ as part of the UNODC’s efforts to ‘strengthen national integrity systems’ in ‘participating states and beyond’²⁷ and to tackle the persistent problem of perceptions of corruption in judicial systems around the world. This meeting was ‘the first occasion under the auspices of the UN that judges were invited to put their own house in order; to develop a concept of judicial accountability that would complement the principle of judicial independence, and thereby raise the level of public confidence in the rule of law’.²⁸ The UNODC already had a mandate, under ECOSOC Resolution 1989/60, to provide technical assistance to Member States ‘in setting up and strengthening independent and effective judicial systems’,²⁹ and the development of the Bangalore Principles over the next several years was a continuation of their work on judicial systems. The Bangalore Principles were endorsed by ECOSOC in 2006 by way of a resolution that invited Member States to ‘take account of the Principles when reviewing their rules and practices concerning judicial conduct and professional standards’.³⁰ Member States were also invited to comment and suggest amendments to the Principles,³¹ with the UNODC given the mandate to provide technical assistance for implementing and monitoring the principles in states.³² The Bangalore Principles were further endorsed by ECOSOC in 2007,³³ and the UNODC was given a ‘broad mandate [...] regarding technical assistance projects for the furtherance of the Bangalore Principles’.³⁴ The UNODC and the JIG developed the Commentary on the Bangalore Principles, which was adopted

24 See n 2 above. See also www.unodc.org/unodc/en/corruption/uncac.html accessed 22 December 2020.

25 UN Economic and Social Council Resolution 2006/23.

26 UNODC, ‘Report of the First Meeting of the Judicial Group on Strengthening Judicial Integrity’ (Vienna, Austria, 2000).

27 *Ibid*, para 1.

28 UNODC, ‘Commentary on the Bangalore Principles of Judicial Conduct’ (2007) 1.

29 UNODC, ‘Record of the Seventh Meeting of the Judicial Group on Strengthening Judicial Integrity’ (2012) 4.

30 ECOSOC Resolution 2006/23, para 1.

31 *Ibid*, para 8.

32 See n 29 above.

33 ECOSOC Resolution 2007/22: Strengthening basic principles of judicial conduct.

34 See n 29 above, 5.

by the group in 2007,³⁵ and which serves as an ‘explanatory memorandum’ and an ‘authoritative guide’ to the principles.³⁶ In 2010, the JIG adopted the Measures for the Effective Implementation of the Bangalore Principles.³⁷ These measures are ‘offered by the JIG as guidelines or benchmarks for the effective implementation of the Bangalore Principles’.³⁸ The principles have been relied upon and endorsed by a number of other UN bodies, most notably the UN Special Rapporteur on the independence of judges and lawyers (UNSRIJL) in reports to the UN Commission on Human Rights,³⁹ and adopted in states or used as a model for domestic codes of conduct.⁴⁰

The UNODC has also developed tools and guidance that complements the work of the JIG and draws together international standards and laws on corruption as they relate to the judiciary, as well as standards on judicial independence and conduct. The most relevant for the purposes of this study are the *UNCAC Implementation Guide and Evaluative Framework for Article 11* (2015), in conjunction with the *Technical Guide to the United Nations Convention Against Corruption* (2009); and the *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011).

Most recently, in April 2018, UNODC launched the Global Judicial Integrity Network as a platform to support judiciaries in the development and implementation of strategies, measures and systems to strengthen integrity and accountability in the justice system in line with the requirements of Article 11 of the United Nations Convention against Corruption and the Bangalore Principles of Judicial Conduct. The Network promotes networking and experience-sharing among judges and judiciaries, disseminates resources and knowledge, and assists in the identification and addressing of existing and emerging judicial integrity-related challenges. Among other work, the Network has developed knowledge products and tools on various judicial integrity-related challenges, including the Guidelines on the Use of Social Media by Judges,⁴¹ the Paper on Gender-Related Judicial Integrity Issues,⁴² the Guide on How to Develop Codes of Judicial Conduct⁴³ and the Judicial Ethics Training Package.⁴⁴ In its three years of existence, the Global Judicial Integrity Network has become a leading global platform on judicial integrity, a testament to which are also two high-level meetings of the Network convened in 2018 and 2020⁴⁵ that represent the largest gatherings of judges ever organised under the auspices of the United Nations.

Much work has also been done on judicial independence, accountability, integrity and corruption by different groups, including, the World Bank,⁴⁶ the World Justice Project (WJP),⁴⁷ TI,⁴⁸ the

35 UNODC, Record of the Fifth Meeting of the Judicial Group on Strengthening Judicial Integrity (2007).

36 *Ibid*, 16.

37 UNODC, Record of the Sixth Meeting of the Judicial Group on Strengthening Judicial Integrity (2010).

38 *Ibid*, 19.

39 UNCHR, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’, 59th session (13 January 2003) E/CN.4/2003/65/Add.2 (2003); UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (n 9).

40 UNODC, ‘Resource Guide on Strengthening Judicial Integrity and Capacity’ (2011) 127-131.

41 Available at www.unodc.org/ji/en/knowledge-products/social-media-use.html.

42 Available at www.unodc.org/ji/en/knowledge-products/gender-related-integrity-issues.html.

43 Available at www.unodc.org/ji/en/knowledge-products/drafting-codes-of-conduct.html.

44 Available at www.unodc.org/ji/en/judicial_ethics.html.

45 For more information please see www.unodc.org/ji/en/network_events.html.

46 See www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety accessed 22 December 2020.

47 See <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed 22 December 2020.

48 Transparency International (ed), *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007). See also www.transparency.org/topic/detail/judiciary accessed 22 December 2020.

International Commission of Jurists (ICJ),⁴⁹ the Organisation for Economic Co-operation and Development (OECD),⁵⁰ the European Network of Councils for the Judiciary (ENCJ)⁵¹ and the Consultative Council of European Judges (Conseil Consultatif de Juges Européens or CCJE) of the Council of Europe.⁵²

In December 2015, David Rivkin, then President of the International Bar Association (IBA), launched the IBA's Judicial Integrity Initiative (JII).⁵³ The aim was to 'combat judicial corruption where it exists by attempting to understand the types of corruption that affect the judicial system and focusing on the role of the various professionals who operate within judicial systems',⁵⁴ and to complement the existing developments in this field 'by drawing on the experience and expertise of those who work in judicial systems – specifically judges, lawyers, prosecutors and court personnel – through its legal professional network'.⁵⁵ The work of the JII began with two high-level meetings of the Expert Working Group, consisting of chief justices, judges, lawyers, judicial reform practitioners and academics. Phase I of the JII work flowed from those meetings, with research conducted to 'identify the patterns underlying corrupt behaviour across judicial systems'.⁵⁶ The goals of the research were to identify 'the most prevalent patterns (typologies) in which corruption manifests in judicial systems', 'corruption risks in the interactions among the actors in judicial systems' and 'the risks arising at different stages of a judicial process'.⁵⁷

The present study builds on the work done by the IBA, the Basel Institute on Governance⁵⁸ and a number of partner organisations in Phase I, the culmination of which was the report *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*, published in May 2016;⁵⁹ and represents Phase II of the JII. This study has been developed by the IBA Legal Policy and Research Unit (LPRU) in conjunction with the Research Institute in Judicial Systems of the National Research Council (Istituto di Ricerca sui Sistemi Giudiziari Consiglio Nazionale delle Ricerche or IRSIG-CNR) in Italy⁶⁰ and the National Center for State Courts (NCSS) in the United States,⁶¹ along with colleagues and researchers in Costa Rica, France, Ghana, the Philippines and the UK. The focus here is on one aspect of the complex framework within which issues of judicial corruption, judicial integrity and judicial conduct arise: the processes that are in place to hold judges to account for their conduct, whether misconduct warranting disciplinary action or corruption warranting criminal sanctions. The aims of this study are the following:

49 International Commission of Jurists, *Judicial Accountability: A Practitioner's Guide* (2016), and see further www.icj.org/icj-launches-new-practitioners-guide-on-judicial-accountability accessed 22 December 2020.

50 See www.oecd.org/corruption/ accessed 22 December 2020.

51 See www.encj.eu/articles/71 accessed 22 December 2020.

52 See www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta accessed 22 December 2020.

53 See n 5 above.

54 See n 4 above, 3.

55 *Ibid.*, 4.

56 *Ibid.*, 5.

57 *Ibid.*

58 See www.baselgovernance.org accessed 22 December 2020.

59 See n 5 above.

60 See n 14 above.

61 See n 15 above.

1. develop a straightforward approach to the assessment of the judiciary's compliance with the integrity benchmark as defined at the international level (eg, Bangalore Principles and Article 11 of the UNCAC);
2. analyse not only formal compliance with national legislation, but also practices that either enhance or hinder the accountability of judges for corruption through either disciplinary or criminal procedures; and
3. test the effectiveness of the questionnaire adopted to conduct this study in order to develop a tool that policy-makers, members of the judiciary, academia and experts could use to evaluate how misconduct or corruption by judges is investigated, prosecuted and sanctioned through internal disciplinary systems and under criminal law.

This report first sets out, in chapter 2, the broad context of the study: the concepts of judicial independence and judicial accountability, and the challenges of implementing broad standards in a variety of settings; the definitions and (disagreements about) corruption and misconduct; and the focus in judicial reform practice on strengthening judicial integrity. Chapter 3 explains the methodology used; chapters 4 and 5 set out the findings and analysis of the criminal and disciplinary procedures respectively, chapter 6 assesses the interrelationship between the criminal and disciplinary procedures used to address judicial corruption and misconduct; and chapter 7 sets out the conclusions and recommendations.

2. Context and concepts

Whenever there is any discussion about the role of the judiciary and the way in which judiciaries function, it is important to remember two significant and interconnected concepts: judicial independence and judicial accountability. In addition to that, the term ‘judicial integrity’ is widely used now to denote the requirement that judges conduct themselves with integrity not only in their professional lives, but also in their private lives as public figures to ensure that there is nothing that can undermine their probity and impartiality in their work. The means of promoting and securing judicial integrity span both the requirements of judicial independence and the requirements of judicial accountability.

2.1 Judicial independence

The value of judicial independence to democracy and the rule of law is almost universally accepted. Nevertheless, its precise content and scope continue to be analysed and debated by academics, lawyers, judges and judicial reformers across the globe. Some seek to define it as a normative principle that is universally applicable,⁶² while others take a more contextual, or functional approach.⁶³ This is not the place for an in-depth account of the scholarly arguments for either the universal or contextual approach. It is sufficient to note, for the purposes of this study, that there is broad agreement on the features and characteristics of an independent judiciary, and of the need for both the collective or institutional independence of the judiciary as a whole, as well as the individual independence of judges.⁶⁴ While this is reflected in international standards of judicial independence, contextualists argue that the international standards have to be understood in their local context. There has been a shift, both in academic thinking and international judicial reform practice, from the ‘model approach’ (that of highlighting best practice goals to strive for), to a more ‘normative but context-sensitive’ approach to judicial independence.⁶⁵ As Antoine Garapon argues, ‘there is not one model but several ways to translate common principles into reality’.⁶⁶ This shift is reflected in, for example, the UNODC *Resource Guide on Strengthening Judicial Integrity* (2011) of the UNCAC, which states that it ‘aspires to avoid a doctrinaire or monolithic approach to justice sector reform based on a single “best” model’.⁶⁷ The approach in this study is similar – the questionnaire is used to draw out the similarities and differences in the case studies, and to evaluate practices with reference to international standards. This approach was adopted with a view to drawing some general conclusions, where possible, about the domestic addressing of judicial corruption both in the criminal and disciplinary sphere, the challenges of coordinating the criminal and disciplinary processes in respect of judicial corruption, and the challenges of applying international standards on this issue in varied domestic settings. The questionnaire is intended to guide research and highlight gaps and areas of difference or similarity between case studies, and between national practice and international standards.

62 Shimon Shetreet and Jules Deschênes, *Judicial Independence: the contemporary debate* (M Nijhoff, 1985). See the discussion in Lorne Neudorf, *Judicial Independence in Context: a comparative study of Malaysia and Pakistan* (2015), ch 1.

63 Neudorf (see n 56 above), ch 1.

64 Russell (see n 6 above), 11.

65 This phrase is used by Neudorf to describe the approach advocated by Antoine Garapon.

66 Antoine Garapon, ‘A new approach for promoting judicial integrity’ in Randall Peerenboom (ed), *Judicial independence in China: Lessons For Global Rule Of Law Promotion* (Cambridge University Press, 2009), 51.

67 UNODC, ‘Strengthening Judicial Integrity’ (see n 40 above), 2.

While there is some disagreement as to whether or not there is or should be a universal theory of judicial independence,⁶⁸ international standards demonstrate a level of consensus about the features and characteristics of judicial systems that are independent. These international standards include: the New Delhi Minimum Standards on Judicial Independence 1982; the Montréal Universal Declaration on the Independence of Justice 1983; and the UN Basic Principles of Judicial Independence 1985; as well as several regional standards of judicial independence. The *Technical Guide to the United Nations Convention Against Corruption* (2009) identifies three essential conditions for judicial independence: security of tenure; financial security of judges ‘including the right to salary and pension which is established by law and which is not subject to arbitrary interference by the Executive in a manner that could affect judicial independence’; and institutional independence in matters of administration relating to the judicial function.⁶⁹

Judicial independence is considered a ‘critical component of the rule of law’⁷⁰ and ‘a competent, independent and impartial judiciary is [...] essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law’.⁷¹ The rationale of judicial independence has been described by Peter H Russell as follows:

‘We want judges to enjoy a high degree of autonomy so that, when disputes arise about our legal rights and duties to one another and in relation to public authorities and these disputes cannot be settled informally, we can submit them for resolution to judges whose autonomy or independence gives us reason to believe they will resolve the issues fairly, according to their understanding of the law, and not out of fear of recrimination or hope of reward.’⁷²

Kate Malleson has argued that the ‘essential distinction is between proper influence and improper interference’, and that improper influence ‘may come from a wide range of different sources, both internal and external to the judiciary; it may take the form of crude oppression or subtle cultural pressure. But the feature which is common to all improper interference is that, in contrast to proper influences, it threatens party impartiality in individual cases.’⁷³ Judicial independence, and the safeguards of judicial independence, serve to ensure party impartiality in individual cases, but should not preclude appropriate accountability of judges for their decisions and any improper conduct. Gabriela Knaul, the UNSRIJL, explained the connection between judicial independence and judicial accountability in the following terms:

‘... both independence and accountability are essential elements of an efficient judiciary. They must therefore operate in conjunction with each other. The central question is then how to approach demands for more judicial accountability while safeguarding the fundamental principle of judicial independence. Calls for accountability can often be mistakenly interpreted as a threat to judicial independence, but in democratic systems the approach has to be less absolute and more nuanced and leave room for the development of accountability mechanisms for the justice system.

68 See, eg, Shetreet and Deschênes (see n 62 above); Seibert-Fohr (see n 6 above); Burbank and Friedman (see n 6 above); Russell (see n 6 above).

69 UNODC, ‘Technical Guide’ (see n 20 above), 48.

70 See, eg, Lord Hodge, ‘Preserving Judicial Independence in an Age of Populism’ (North Strathclyde Sheriffdo Conference, Paisley, 2018).

71 UNODC, ‘Bangalore Principles of Judicial Conduct’ (2002), Preamble.

72 See n 6 above, 10.

73 Kate Malleson, *The New Judiciary* (Routledge 1999), 74.

The requirement of independence and impartiality does not exist for the benefit of the judges and prosecutors themselves, but rather for court users as a part of their inalienable right to a fair trial. Thus, if guarantees of independence and impartiality are privileges granted to judges and prosecutors in order to benefit the public, it is logical that mechanisms should be put in place to verify that those privileges are used properly and that their purpose is not perverted.⁷⁴

The International Association of Judicial Independence and World Peace has set out five key elements of a system in which judicial independence exists and is respected: ‘The culture of judicial independence is created on five important and essential aspects: creating institutional structure, establishing constitutional infrastructures, introducing legislative provisions and constitutional safeguards, creating adjudicative arrangements and jurisprudence, and maintaining ethical traditions and code of judicial conduct.’⁷⁵

This picture of judicial independence incorporates both the *institutional* or *external* independence of the judiciary and the *individual* or *internal* independence of judges. Institutional independence requires that the judiciary is independent of the executive and the legislature, and this is usually evident through, for example, institutional autonomy, security of tenure and an independent appointment process.⁷⁶ Individual judicial independence is concerned with protecting the *impartiality* of judges from influence, whatever the source, whether from external pressures, including bribes and inducements, or internal pressures, such as from colleagues or individual biases.⁷⁷ This is the aspect of judicial independence that the present study is concerned with.

The Bangalore Principles, unique among international standards because it was written by judges, for judges, as opposed to being directed at states, set out six interconnected principles that enhance and protect the individual independence of judges:

1. *Independence*: Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
2. *Impartiality*: Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself, but also to the process by which the decision is made.
3. *Integrity*: Integrity is essential to the proper discharge of the judicial office.
4. *Propriety*: Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.
5. *Equality*: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
6. *Competence and diligence*: Competence and diligence are prerequisites to the due performance of judicial office.

74 See n 1 above, para 23.

75 International Association of Judicial Independence and World Peace, Mount Scopus International Standards of Judicial Independence (2008, amendment 2018), para 1.4.

76 See n 6 above.

77 See n 7 above.

It is these principles, and the way in which judges give effect to them, that are the subject of the codes of conduct that many judiciaries have adopted in line with the Bangalore Principles, and the disciplinary procedures associated with maintaining ethical and professional standards in judiciaries. It is evident from these standards that judicial independence is closely linked with judicial accountability and that accountability – judges being held to these standards – serves to ensure and promote judicial independence.

However, while judicial accountability is important, and it is recognised as such in international legal frameworks and domestic systems, it must not be at the expense of judicial independence. Efforts to bolster judicial accountability must ensure that independence is protected. This study concentrates on the accountability of judges for their conduct, specifically corruption, whether addressed through the criminal system or by way of judicial discipline. In the criminal context, judges ought to be afforded the same rights as any other person accused of a crime. In the disciplinary context, judges must be afforded sufficient procedural protections and rights, otherwise the system may be open to abuse, and would impinge on judicial perceptions of independence. This issue has come to light in recent decisions of the European Court of Human Rights (ECtHR) concerning Article 6. The ECtHR has, until recently, approached the requirement of an ‘independent and impartial tribunal’ from an institutional, separation of powers perspective. Since 2000, however, the ECtHR has implicitly recognised the concept of the internal independence of judges, which includes the independence of judges from pressure within the judiciary, and explicitly recognised it in 2009.⁷⁸ The court has, to date, found a violation of internal judicial independence in 14 cases.⁷⁹ Joost Sillen has distilled the case law of the ECtHR on internal independence into one ‘rule’: ‘internal judicial independence is breached if (1) a colleague (2) who can exert pressure on the judge (3) tries to influence the judge’s decision in a concrete case’.⁸⁰ There are a number of ways that pressure and influence can be exerted, most notably through the balance of power between judges and more senior colleagues in the disciplinary process, and in court administration. The recognition of this form of interference with the internal independence of judges is significant because the decisions of the ECtHR are binding on States Parties to the European Convention on Human Rights (ECHR).⁸¹ However, it is likely that judges in other states too might encounter similar circumstances and potential interference, which is why the administrative and disciplinary powers of senior judges must be exercised within the constraints of protecting individual judges. The case studies considered in this report suggest that there are situations in which individual judges might be susceptible to pressure and influence from colleagues to the extent that their independence is compromised (see the discussion in section 5.5), and this undermines efforts to improve accountability.

2.2 *Judicial accountability*

Historically, judges were reluctant to engage with the question of judicial accountability beyond the accountability that derives from cases being tried in open court, decisions being available to the public and decisions being subject to appeals. This was because more probing measures, and forms of accountability seen as ‘control’, were considered to undermine judicial independence, which is so important to the judicial function.⁸² Now, however, there is an understanding of the interconnectedness

78 Joost Sillen, ‘The Concept of “Internal Judicial Independence” in the Case Law of the European Court of Human Rights’ (2019) 15 *European Constitutional Law Review* 104.

79 *Ibid.* The ECtHR has found violations in cases against Croatia, Hungary, Lithuania, Romania, Russia, Slovakia and Ukraine.

80 *Ibid.*, 10.

81 ECHR, Art 46.

82 See n 8 above.

of judicial independence and accountability, and the challenge for states, judiciaries and judicial reformers is to find an appropriate balance between these two important principles.⁸³

Like judicial independence, judicial accountability requires the individual accountability of judges, and the collective accountability of the judiciary as an institution. Individual accountability refers to judges' personal accountability for their conduct, or misconduct; their individual reasoned judgments; and for their personal views on the law as expressed in public lectures and interviews. Institutional or external accountability is the accountability of the institution: courts are accountable for how they operate and many now publish annual reports. Cases are heard in public. The appellate structure and rights of appeal are other means of judicial accountability.⁸⁴ David Kosař, drawing on the work of Stefan Voigt, defines judicial accountability as 'a negative or positive consequence that an individual judge expects to face from one or more principals (from the executive and/or from the legislature and/or from court presidents and/or from other actors) in the event that his behaviour and/or decisions deviate too much from a generally recognised standard'.⁸⁵ Frans van Dijk and Geoffrey Vos consider the key aspects of institutional judicial accountability to be the allocation of cases, complaints procedure, periodic reporting by the judiciary, relations with the press and external review. The key aspects of individual judicial accountability, they say, are a code of judicial ethics, withdrawal and recusal, admissibility of external functions and disclosure of external functions and financial interests, and understandable procedures.⁸⁶

In a report on judicial accountability in 2014, the UNSRIJL examined judicial accountability mechanisms and proceedings. The UNSRIJL stated that accountability measures must respect general principles, and, '[t]o avoid being used as a means to interfere with the independence of the judiciary and the legal profession, accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct'.⁸⁷

National legislation should distinguish very clearly between disciplinary, civil and criminal liability, and prescribe the sanctions for each. The UNSRIJL defines these different forms of liability in the following way:

- *disciplinary liability*: the consequence of violating an administrative rule or regulation connected with conduct or ethics;
- *civil liability*: 'relates to the possibility of demanding that a justice operator who has caused injury by a particular course action or improper conduct repair the personal, property or financial damage he or she has caused'; and
- *criminal liability*: arises when a justice operator commits an illicit action or omission of a criminal nature. In that case, the individual should be submitted to a criminal investigation and possibly to prosecution, conviction and punishment.⁸⁸

83 As evidenced in the UNODC's guidance 'Strengthening Judicial Integrity' (see n 40 above), 'Technical Guide' (see n 20 above) and 'Legislative Guide' (see n 16 above); and in the reports of the UN Special Rapporteur on the Independence of Judges on judicial accountability and corruption, 'Report on the Independence of Judges and Lawyers' (2014) (see n 9 above) and UNGA, 'Report on Judicial Corruption and Combatting Corruption through the Judicial System' (2012) (see n 1 above); as well as work carried out by the International Commission of Jurists, 'Judicial Accountability: A Practitioner's Guide' (2016) (see n 49 above).

84 See n 8 above.

85 David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016), 57; see also Stefan Voigt, 'The Economic Effects of Judicial Accountability: Cross-country Evidence' (2008) 25 *European Journal of Law and Economics* 95.

86 Frans van Dijk and Geoffrey Vos, 'A Method for Assessment of the Independence and Accountability of the Judiciary' (2018) 9 *International Journal for Court Administration*.

87 UNGA, 'Report on the Independence of Judges and Lawyers' (2014) (see n 9 above), para 78.

88 *Ibid*, para 77.

As a means of ensuring and maintaining judicial integrity, judges should be subject to disciplinary liability, and accountability mechanisms ‘are justified because justice operators must behave with integrity and in line with their code of ethics and conduct’.⁸⁹ There is a general principle that judges should have immunity for civil liability in respect of conduct in the exercise of their judicial function.⁹⁰ However, judicial independence does not require immunity from criminal prosecution,⁹¹ and judges should be criminally liable and cannot ‘claim immunity from ordinary criminal process’⁹² (see section 4.2).

2.3 *Judicial corruption and judicial integrity*

2.3.1 JUDICIAL CORRUPTION

Corruption is a global problem, and there is wide agreement that it has a severe, negative and long-lasting impact in a number of areas. According to the OECD, corruption increases the cost of doing business; causes waste and inefficient use of public resources; excludes the poor from public services; and perpetuates poverty, corrodes public trust, undermines the rule of law and delegitimises the state.⁹³ Corruption also affects human rights, gender equality, global security and efforts to address climate change and environmental degradation.⁹⁴ In the judiciary, the effects of corruption are particularly troubling: ‘[j]udicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system’.⁹⁵

Despite a common understanding of the many concerns about corruption, there is little agreement as to its definition.⁹⁶ There is, however, a consensus as to the meaning of corruption and the kinds of behaviours that are ‘corrupt’. In its broadest sense it is ‘abuse of entrusted power for private gain’.⁹⁷ However, there are other ways of describing and examining corruption: with reference to the four components of types, activities, sectors and places (TASP);⁹⁸ or in terms of the ‘4 Ws’ – who, what, where and why.⁹⁹ However, the UNCAC takes a slightly different approach, and rather than trying to define corruption, it describes behaviours that States Parties must criminalise as corrupt, as well as identifying behaviours that States Parties should consider criminalising as corrupt.¹⁰⁰ The present study is concerned with ‘bribery’ as defined in Article 15 of the UNCAC, and ‘trading in influence’ as defined in Article 18 of the UNCAC. In respect of bribery, states must adopt measures to criminalise bribery as set out in Article 15. Trading in influence, by contrast, is something that states should ‘consider’ establishing as a criminal offence.

89 *Ibid.*

90 UNODC, ‘Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct’ adopted by the Judicial Integrity Group at its meeting held in Lusaka, Zambia on 21 and 22 January 2010 (2010) (‘BP-IM’).

91 UNGA, ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 52.

92 BP-IM (see n 90 above), para 9.1.

93 OECD, ‘Background Brief: The Rationale for Fighting Corruption’ (2013). www.oecd.org/cleangovbiz/49693613.pdf accessed 11 January 2021.

94 Gerry Ferguson, *Global Corruption: Law, Theory and Practice* (3rd edn, University of Victoria 2018). See ch 1 for discussion of the impact of corruption.

95 See n 1 above, para 109.

96 See n 94 above, 45.

97 This is the definition adopted by Transparency International. See Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007).

98 Adam Graycar and Tim Prenzler, *Understanding and Preventing Corruption* (Palgrave Macmillan 2013).

99 See n 94 above, 48.

100 *Ibid.* See ch 2 for a discussion of the ‘many faces of corruption’.

2.3.2 JUDICIAL INTEGRITY

The preamble to the Bangalore Principles states that ‘public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society’, and ‘it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system’. The value of ‘integrity’ is ‘essential to the proper discharge of the judicial office’, which means that a ‘judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer’ and the ‘behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.’¹⁰¹ The standard of integrity expected from judges is very high. The Commentary on the Bangalore Principles explains this as follows:

‘Integrity is the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity as so defined. Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity.’¹⁰²

However, the commentary avoids defining judicial integrity because it is ‘unwise’ to state the meaning of integrity in ‘specific terms’. Instead, the guidance given is that standards may vary according to place and time, and what is required is ‘consideration of how particular conduct would be perceived by reasonable, fair minded and informed members of the community, and whether that perception is likely to diminish the community’s respect for the judge or the judiciary as a whole. Conduct that is likely to diminish respect in the minds of such persons should be avoided.’¹⁰³ The commentary explains that high standards are required in both public and private life;¹⁰⁴ that ‘community standards’ should ‘ordinarily’ be respected,¹⁰⁵ but that there is ‘no uniform community standard’.¹⁰⁶

This all means that deciding whether conduct is ‘above reproach’ can be difficult, and the emphasis on high moral standards in both public and private life, with reference to community standards, has been challenged,¹⁰⁷ and the commentary acknowledges this by setting out an alternative test,¹⁰⁸ which is that in making a judgment on such a matter, six factors should be considered:

1. the public or private nature of the act and specifically, whether it is contrary to a law that is actually enforced;
2. the extent to which the conduct is protected as an individual right;
3. the degree of discretion and prudence exercised by the judge;

101 Bangalore Principles, Value 3.

102 UNODC, ‘Commentary on the Bangalore Principles’ (see n 3 above), para 101.

103 *Ibid*, para 102.

104 *Ibid*, para 103.

105 *Ibid*, para 104.

106 *Ibid*, para 105.

107 Jeffrey M Shaman, Steven Lubet and James J Alfani, *Judicial Conduct and Ethics* (3rd edn, The Michie Company 2000).

108 UNODC, ‘Commentary on the Bangalore Principles’ (see n 3 above), para 106.

4. whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;
5. the degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates; and
6. the degree to which the conduct is indicative of bias, prejudice or improper influence.

Conduct in court is relevant,¹⁰⁹ and ‘scrupulous respect for the law is required’.¹¹⁰ As for the second part of ‘integrity’, the ‘personal conduct of a judge affects the judicial system as a whole’¹¹¹ and justice ‘must be seen to be done’, which means that:

‘A judge has the duty not only to render a fair and impartial decision, but also to render it in such a manner as to be free from any suspicion as to its fairness and impartiality, and also as to the judge’s integrity. Therefore, while a judge should possess proficiency in law in order competently to interpret and apply the law, it is equally important that the judge acts and behaves in such a manner that the parties before the court are confident in his or her impartiality.’¹¹²

While the Bangalore Principles are primarily concerned with the core values of the judiciary, and the high standards of conduct and professionalism required of judges, the UNCAC, in Article 11, highlights the centrality of integrity in preventing corruption in judiciaries. Article 11 of the UNCAC states the following:

- ‘Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.’
- ‘Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.’

The UNODC *Implementation Guide and Evaluative Framework for Article 11* explains the details of Article 11 and its requirements. Article 11 requires states to ‘take measures to strengthen judicial integrity’ and to ‘prevent opportunities for corruption among members of the judiciary’. The term ‘judicial integrity’ is to be understood ‘as a holistic concept that refers to the ability of the judicial system or an individual member of the judiciary to resist corruption, while fully respecting the core values of independence, impartiality, personal integrity, propriety, equality, competence and diligence’.¹¹³ The *Technical Guide to the United Nations Convention Against Corruption* (2009) explains that ‘for the purpose of implementing’ Article 11, ‘the concept of judicial integrity may be defined broadly’ to include:

109 *Ibid*, para 107.

110 *Ibid*, para 108.

111 *Ibid*, para 109.

112 *Ibid*, para 110.

113 UNODC, ‘The United Nations Convention Against Corruption: Implementation Guide and Evaluative Framework for Article 11’ (2015), 11.

- the ability to act free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason;
- impartiality (ie, the ability to act without favour, bias or prejudice);
- personal conduct that is above reproach in the view of a reasonable observer;
- propriety and the appearance of propriety in the manner in which the member of the judiciary conducts his or her activities, both personal and professional;
- an awareness, understanding and recognition of diversity in society and respect for such diversity;
- competence; and
- diligence and discipline.¹¹⁴

Article 11 of the UNCAC, therefore, requires all judges to give effect to the core principles and values of the judicial function and judicial office contained in the Bangalore Principles. The ‘adoption of a code of judicial conduct is a crucial aspect of any effective approach to supporting judiciary integrity’ and this is evidenced by the fact that such action is recommended within the text of the article itself.¹¹⁵

At the same time, Article 11 requires states to implement measures to prevent opportunities for corruption. Again, the expectation is that states will take a holistic approach to this requirement by minimising both the opportunity and the inclination to resort to corruption.¹¹⁶ This can be done through taking measures to ‘establish, or to strengthen, the institutional integrity system of the judiciary’,¹¹⁷ and by judiciaries taking measures to ‘minimize both the opportunity and the inclination of members of the judiciary and court personnel to resort to corruption’.¹¹⁸

According to the *Implementation Guide and Evaluative Framework for Article 11*, the following measures are envisioned by Article 11:

Measures to strengthen integrity among members of the judiciary

These measures are:

- adopting a code of judicial conduct;
- disseminating the code of conduct;
- establishing mechanisms for the establishment and enforcement of the code of conduct;
- judicial training that includes training in judicial ethics;
- introducing measures to address conflicts of interest and require disclosure of financial interests and affiliations;
- ensuring security of tenure for judicial appointments;

114 UNODC, ‘Technical Guide’ (see n 20 above), 48.

115 UNODC, ‘UNCAC Implementation Guide for Article 11’ (see n 113 above), 14.

116 *Ibid.*, 24.

117 *Ibid.*

118 *Ibid.*, 41.

- ensuring financial security for judicial appointments, including a right to a salary and pension that cannot be subject to interference by the Executive; and
- ensuring institutional independence regarding the administration of the judicial system, including the management of funds allocated to the judiciary.

In conjunction with high levels of legal education and continuing professional development,¹¹⁹ the *Technical Guide to the United Nations Convention Against Corruption* identifies the introduction of a code of judicial conduct as a measure to ‘promote the integrity of the judicial process’.¹²⁰ The code should ‘at the least impose an obligation on all judges publicly to declare the assets and liabilities and those of their family members’; reflect the requirements of Article 8 of the UNCAC concerning general conflicts of interest; and declarations should be updated regularly and monitored. In addition, the guide notes that ‘a code of conduct will be effective only if its application is regularly monitored, and a credible mechanism is established, to receive, investigate and determine complaints against judges and court personnel, fairly and expeditiously’. Furthermore, it is important to ensure that a judge under investigation is afforded due process rights ‘bearing in mind the vulnerability of judges to false and malicious allegations of corruption by disappointed litigants and others’.¹²¹

Measures to minimise opportunities for corruption among members of the judiciary

Measures to strengthen institutional integrity of the judiciary

These measures include ‘the establishment of clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, disciplinary sanctions and dismissal of members of the judiciary. They also include measures to protect judges from any form of political influence in their decision-making’.¹²² Areas of focus are:

- appointments of judges;
- promotion;
- transfer;
- tenure of judges;
- judges on probation;
- remuneration;
- procedures for removal;
- judicial immunity from civil suit;
- security of judges;
- freedom of expression;

119 UNODC, ‘Technical Guide’ (see n 20 above), 51.

120 *Ibid.*

121 *Ibid.*

122 UNODC, ‘UNCAC Implementation Guide for Article 11’ (see n 113 above), 2.

- budget of the judiciary;
- guarantee of jurisdiction over judicial matters; and
- protection against interference from the executive and legislature.

Measures to minimise the opportunity and inclination for corruption

These are ‘measures that the judiciary is competent to initiate [...] Their implementation may require the support of the executive and legislative branches of government’.¹²³ Areas of focus are:

- integrity of court personnel;
- court administration;
- assignment of cases;
- maintenance of case records;
- case management;
- access to the justice system;
- transparency of the judicial process;
- measuring public confidence in the delivery of justice; and
- relations with the media.

The focus of this study is quite narrow: it concentrates on the first set of measures, those required to strengthen integrity among members of the judiciary (except for judicial education), and the mechanisms by which states address and sanction judicial corruption when it occurs.

¹²³ *Ibid*, 41. See also UNODC, ‘Technical Guide’ (see n 20 above), 49-52 for further detail.

3. Methodology

This project was carried out over four years (beginning in early 2017 to the end of 2020) by the IBA LPRU in conjunction with the IRSIG-CNR in Italy¹²⁴ and the NCSS in the US,¹²⁵ along with colleagues and researchers in Ghana, the Philippines, Costa Rica, France and the UK. In order to achieve the four objectives discussed in the introduction, the project had four main phases:

1. design stage;
2. implementation stage;
3. review stage; and
4. final project report.

3.1 Design

3.1.1 DESIGNING THE RESEARCH TOOL

Gap analysis was conducted by the IBA LPRU, reviewing existing checklists, resources and guidance on addressing corruption in judicial systems and strengthening judicial integrity and capacity.¹²⁶ The typologies and findings of the Phase I study were compared to existing statements, standards and guidance with a view to identifying gaps and developing a best practice compilation concentrating on an area where there are gaps in information and guidance. This moved the work of the IBA JII from the general – charting and identifying sources of judicial corruption in the wider judicial system, as in the Phase I report – to the specific. The gap analysis identified two areas for further consideration: the way in which different countries address corruption, and the ways in which different courts prevent judicial corruption. This led to the current pilot study, which focuses on how domestic criminal law addresses judicial corruption, and how complaints and disciplinary mechanisms within judiciaries address, and possibly prevent, misconduct and ultimately, corruption by judges.

A questionnaire in the form of a matrix (the ‘Original Questionnaire’)¹²⁷ was developed to reflect the main issues that arose out of the gap analysis by being divided into three areas of focus: (1) criminal procedures; (2) disciplinary procedures; and (3) the interrelation between criminal and disciplinary procedures.¹²⁸ This tool was designed to encourage a combination of legal analysis and empirical research. For this reason, each question in the matrix required two responses: the first was a description and analysis of the legal sources and framework; and the second was to set out responses gathered through field work and interviews. The questions and format of the questionnaire/matrix were reviewed and revised by the project team.

¹²⁴ See n 14 above.

¹²⁵ See n 15 above

¹²⁶ Organisation for Security and Cooperation in Europe (OSCE), ‘Best Practices in Combating Corruption’ (2004); TI, ‘Combating Corruption in Judicial Systems – Advocacy Toolkit’ (2007).

¹²⁷ See Appendix A.

¹²⁸ Note that, in this report, this questionnaire is referred to as the Original Questionnaire, as distinct from the Modified Questionnaire in which changes were made in response to issues raised during the writing up stage of the case studies and in response to feedback from discussions in a session of the UN Global Integrity Network Meeting in May 2018.

Once the text of the questions and the format of the Original Questionnaire were agreed, case study countries were selected to carry out a pilot study to test the application of the tool and to analyse whether it was a suitable instrument for use in a variety of different national systems and contexts. The selected countries were Costa Rica, France, Ghana and the Philippines.¹²⁹ These countries were selected based on their different legal traditions, geographical position, political and social environment and availability of researchers to carry out the research.

Table 1 Initial case study countries

Country	Region	Judicial system
Costa Rica	Latin America	Civil law
France	Europe	Civil law
Ghana	Africa	Common law
The Philippines	Asia	Hybrid

The structure for writing up the country reports was then agreed, and research for each country was assigned to a member of the project team.

3.1.2 DEFINITIONS

With such diversity across legal and judicial systems, it is important to define the key terms used in this study:

Definition of corruption

This study defines corruption to include both bribery and trading in influence (eg, bribery involving a third-party intermediary). The definitions of the UNCAC have been used as reference for this study.

Bribery is defined as:

‘(a) The [intentional] promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The [intentional] solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.’¹³⁰

Trading in influence is defined as:

‘(a) The [intentional] promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State [...] an undue advantage for the original instigator of the act or for any other person;

¹²⁹ Note that the UK was added as a case study during the later stage of reporting activity following review, revision and restructuring of the case studies and matrix (see further below).

¹³⁰ UNCAC, Art 15 www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf accessed 11 January 2021.

(b) The [intentional] solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State [...] an undue advantage.¹³¹

Definition of 'judges'

This study is limited to judges. In the Phase I report on *Judicial Systems and Corruption*, JII adopted a wider definition of judiciary and judicial corruption than is used here. 'Judicial corruption' was defined as 'all forms of inappropriate influence that may damage the impartiality of justice and may involve any actor within the justice system, including, but not limited to, judges, lawyers, administrative Court support staff, parties and public servants'.¹³² And 'judiciary' was defined as 'the institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behaviour; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions'. Building on this, 'judicial system' means the system of law courts that administer justice and the judicial professionals involved in it.

'Judiciary' and 'judicial corruption' as defined in the Phase I report, encompass a broad range of actors. This study goes from that general consideration of the broader 'judiciary' to an analysis of the processes and practices that are particular to judges alone – those individuals 'exercising judicial power, however designated'.¹³³ Note, however, that in some civil jurisdictions, the professions are structured such that both judges and prosecutors are trained in the same way, and are covered by the same disciplinary rules, as in France. Where this is the case, the study necessarily includes prosecutors.

3.2 Implementation

A three-step approach to conducting the case study research was adopted:

1. desk analysis;
 - (i) *legal analysis*: for each case study researchers completed the questionnaire with reference to primary and secondary legal sources, concentrating on describing the legal framework in each jurisdiction;
 - (ii) *data analysis*: where possible, researchers gathered and collated data related to both criminal and disciplinary proceedings and outcomes during the past three years (if possible; otherwise, the past year); and
 - (iii) *review and revision*: the results of the desk analysis were cross-reviewed by members of the team, and revisions made where necessary;

131 UNCAC, Art 18 www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf accessed 11 January 2021.

132 Siri Gloppen, 'Courts, Corruption and Judicial Independence' in Soreide T and Williams A (eds), *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing 2014).

133 Definition of 'judge' used in the Bangalore Principles.

2. empirical analysis;
 - (i) interviews were conducted with relevant stakeholders. These were done in a number of ways: in person, by email and over the telephone. The aim of the interviews was to check the validity of the material obtained through the desk research and to gather further information about the law in action, and the practices in each country when dealing with judicial corruption-related cases; and
3. review;
 - (i) the results of the empirical analysis were then cross-reviewed by members of the project team.

3.3 Review

3.3.1 WRITING UP AND FEEDBACK

Case study reports summarising the results of both the desk and empirical research were drafted for the four case studies: France, Ghana, Philippines and Costa Rica. These case study reports were then reviewed by team members, and edited and cross-checked.

3.3.2 REVIEW, REVISION AND RESTRUCTURING

In May 2018, a report on the progress of the project was presented in one of the thematic breakout sessions of the 2018 launch event of the Global Judicial Integrity Network.¹³⁴ This produced useful feedback for the project team. In addition, the process of writing, checking and editing the case studies highlighted difficult aspects of the country research process: (1) practical challenges for researchers during the desk research phase, especially the difficulty in some countries with respect to the accuracy of available legal sources; (2) challenges around access to current and accurate data about judicial corruption; and (3) areas of research that could be further improved with more detailed guidance and questions in the questionnaire.

Therefore, following feedback from session participants and from country case study researchers, the following adaptations were made:

- The questionnaire was further refined and adapted to include additional questions, in particular questions about criminal and disciplinary sanctions and the relationship between domestic standards and international standards. Questions were also grouped into subcategories in order to more readily highlight the main issues to cover. The revised questionnaire is referred to as the 'Modified Questionnaire'.¹³⁵
- The presentation of the case study reports was restructured to reflect these changes.
- One additional case study, the UK (covering the three jurisdictions of England and Wales, Scotland and Northern Ireland), was undertaken following these changes as a way of further testing the research process using the tool and the case study structure.

¹³⁴ See www.unodc.org/ji/en/restricted/network-launch.html accessed 11 January 2021.

¹³⁵ See Appendix B.

Table 2 Final case study countries

Country	Region	Judicial system
Costa Rica	Latin America	Civil law
France	Europe	Civil law
Ghana	Africa	Common law
The Philippines	Asia	Hybrid
UK	Europe	Common law

The categories and key areas of focus in both the questionnaire and the case study report are as follows:

A. Criminal proceedings concerning corruption by judges

1. *Scope and definition of judicial corruption:* Describe the scope and definition of corruption as it relates to judges: are there crimes specific to judges, or are judges included within the scope of corruption by public officials?
2. *Reporting judicial corruption:* Who can report corruption by judges? How and to whom may reports of judicial corruption be made? Is there a limitation period for reporting judicial corruption?
3. *Investigating judicial corruption:* Is there a specific body responsible for investigating allegations of judicial corruption? What are their powers and limitations?
4. *Prosecuting judicial corruption:* Who is responsible for prosecuting judicial corruption and is prosecution mandatory or discretionary?
5. *Procedural safeguards:* What procedural safeguards, such as rights of defence and appeal, are in place?
6. *Sanctions for judicial corruption:* What criminal sanctions may be imposed for judicial corruption?
7. *Transparency:* How transparent is the process, and how much information is available about investigations, prosecutions and outcomes?

B. Disciplinary procedures and practices concerning judicial conduct

1. *Scope and definition of judicial misconduct:* Are there codified rules of judicial conduct? What behaviour and conduct are subject to disciplinary action?
2. *Reporting judicial misconduct:* Who can make a complaint about judicial conduct? Is there a limitation period for reporting judicial misconduct?
3. *Investigating judicial misconduct:* Who investigates complaints against judges? Is there a specified procedure for investigating complaints against judges? Is the procedure the same for all judges and all types of misconduct?
4. *Procedural safeguards:* What procedural safeguards, such as rights of defence and appeal, are in place?
5. *Sanctions:* What are the sanctions for judicial misconduct? Who decides the sanction?
6. *Transparency:* How transparent is the process, and how much information is available about investigations, prosecutions and outcomes?

- C. The interrelationship between the criminal and disciplinary processes as they relate to judges
1. *Effect of criminal charge or conviction on disciplinary process:* Are there disciplinary consequences if a judge is or has been investigated, charged or convicted of judicial corruption?
 2. *Interrelation of criminal and disciplinary proceedings:* What is the order in which disciplinary and criminal proceedings occur? What is the impact of a disciplinary outcome on a criminal investigation, and vice versa?
 3. *Information sharing:* Is there a sharing of information between the authorities responsible for the two proceedings?

As well as the text of the case study reports, a summary table for each case study was produced, highlighting the key characteristics in the main categories.¹³⁶ This helped to identify what the main issues were, and how they might be compared.

3.4 Final report

Once the case studies were complete, an external consultant joined the team to complete the final report and in particular to:

- identify trends across the case studies with respect to how misconduct or corruption by judges is investigated and sanctioned through internal disciplinary systems and under criminal law; how the two systems (disciplinary and criminal) interact, and whether the interconnection, or otherwise, of criminal law and internal disciplinary mechanisms either enhance or undermine efforts to combat judicial corruption in domestic systems;
- assess, throughout the case studies, the judiciary’s compliance with the integrity benchmark, as defined at the international level; and
- analyse the application of the tool, considering its strengths and weaknesses, both in terms of its applicability as a research tool, and its value with respect to considering whether, and how, international standards on corruption and judicial conduct (in particular, the UNCAC and Bangalore Principles) are being implemented in domestic settings and how they can be improved. This further serves to test the questionnaire as a tool for individual country studies and comparative studies, allowing for exchanges in experiences and practices when implementing international standards.

The analysis is structured with reference to the categories of questions in the questionnaire (see the table below).

Criminal process	Disciplinary process	Interaction between them
Scope and definition of judicial corruption	Scope and definition of judicial misconduct	Effect of criminal charge or conviction on disciplinary process
Reporting judicial corruption	Reporting judicial misconduct	Interrelation of criminal and disciplinary proceedings

¹³⁶ *Ibid.*

Investigating judicial corruption	Investigating judicial misconduct	Information sharing
Prosecuting judicial corruption	Procedural safeguards	
Procedural safeguards	Sanctions for judicial misconduct	
Sanctions for judicial corruption	Transparency	
Transparency		

Within each section, the relevant international standards are set out, followed by an overview of the results of the case studies; then an evaluation of the results against international standards; and finally an analysis of methodological issues and the application of the questionnaire to that section.

4. Mechanisms for investigating and sanctioning judicial corruption

4.1 International standards concerning judicial corruption

The aim of the UNCAC is to ‘promote and strengthen measures to prevent and combat corruption more efficiently and effectively’.¹³⁷ In respect of the judiciary, this has to be done in a way that not only prevents corruption efficiently and effectively, but also maintains the independence and integrity of the judicial institution.¹³⁸ The Measures for the Effective Implementation of the Bangalore Principles set out guidelines on the implementation of the Bangalore Principles, which includes guidelines on the criminal liability of judges. Taking these together with UNCAC, the *Legislative Guide for the Implementation of the UN Convention against Corruption* (2006) (the ‘*Legislative Guide*’),¹³⁹ the *Technical Guide to the United Nations Convention Against Corruption* (2009) (the ‘*Technical Guide*’)¹⁴⁰ and the definitions of corruption adopted in this study, we can begin to frame some principles for addressing judicial corruption through criminal law.

A. CRIMINAL LIABILITY OF JUDGES

1. A judge ‘should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function’.¹⁴¹
2. However, a judge ‘should be criminally liable under the general law for an offence of general application committed by him or her and cannot therefore claim immunity from ordinary criminal process’.¹⁴²

B. INVESTIGATION AND PROSECUTION

1. States must ‘in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement’.¹⁴³
2. Such body or bodies or persons must be independent and ‘able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks’.¹⁴⁴
3. There must be ‘a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention’.¹⁴⁵
4. States should ‘establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice’.¹⁴⁶

137 UNCAC, Art 1 (a).

138 *Ibid*, Art 11.

139 UNODC, ‘Legislative Guide’ (see n 16 above).

140 UNODC, ‘Technical Guide’ (see n 20 above).

141 UNGA, ‘UN Basic Principles on the Independence of the Judiciary’, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, UNGA Resolution 40/31 (29 November 1985) and Resolution 40/146 (13 December 1985) (1985) (‘UNBP Judiciary’), para 16.

142 BP-IM (see n 90 above), para 9.1..

143 UNCAC, Art 36.

144 *Ibid*.

145 *Ibid*, Art 29.

146 *Ibid*, Art 9.

C. RIGHTS OF THE JUDGE

1. As with any other accused person in criminal proceedings, judges have the right to a fair trial.¹⁴⁷
2. A judge should be presumed innocent until proven guilty.¹⁴⁸
3. A judge has, as any accused person, the right to legal assistance and representation by a lawyer or (in disciplinary proceedings, possibly another judge), and adequate time to prepare the defence.¹⁴⁹
4. A judge has the right not to be compelled to testify against himself or herself, or to confess guilt.¹⁵⁰
5. These rights would be applicable in disciplinary or administrative proceedings as well.

D. SANCTIONS

1. In accordance with Article 30 of the UNCAC, State Parties agree to ‘make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence’.¹⁵¹
2. In addition, under Article 30 of the UNCAC, states agree to ‘consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence’.¹⁵²
3. In addition, states ‘consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from: (a) Holding public office; and (b) Holding office in an enterprise owned in whole or in part by the State’.¹⁵³
4. A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.¹⁵⁴

E. INSTITUTIONAL SETTING

1. States must ‘endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest’.¹⁵⁵
2. States are also required under Article 10 of the UNCAC to take measures to adopt or simplify procedures that allow the public access to legal information and decision-making and therefore ‘enhance transparency in its public administration, including with regard to its organization,

147 Universal Declaration of Human Rights (UDHR), Art 10; International Convention on Civil and Political Rights (ICCPR), Art 14; ECHR, Art 6; UNBP Judiciary, Art 17.

148 UDHR, Art 11.

149 ICJ, ‘Judicial Accountability’ (see n 49 above), 64.

150 *Ibid*, 65.

151 UNCAC, Art 30(1).

152 *Ibid*, Art 30(6).

153 *Ibid*, Art 30(7).

154 BP-IM, para 16.1.

155 UNCAC, Art 7(4).

functioning and decision-making processes, where appropriate'. The relevant information to be accessible to the public includes policies and codes of conduct, which states are required to implement as per other sections in chapter 2 of the UNCAC.

F. RIGHTS OF INDIVIDUALS REPORTING CORRUPTION

1. States should consider establishing 'appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention'.¹⁵⁶
2. States shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.¹⁵⁷

The five case studies offer an insight into the various ways in which states address judicial corruption. There are some similarities, and some differences. For each aspect of investigating judicial corruption, relevant international standards are set out; followed by case study comparisons; then an evaluation of the case studies against international standards; and finally, methodological issues are considered, including the applicability of the questionnaire and any strengths or shortcomings of the questions in relation to each issue.

4.2 Scope and definition of corruption

RELEVANT INTERNATIONAL STANDARDS

UN Basic Principles on the Independence of the Judiciary

Art 1	The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.	<i>Judicial independence to be guaranteed</i>
Art 2	The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.	
Art 6	The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.	
Art 16	Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.	

¹⁵⁶ *Ibid*, Art 33.

¹⁵⁷ *Ibid*, Art 8(4).

Art 2(a)(i)	Public official – means ‘any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority’ [emphasis author’s own].	<i>Public official includes judicial official</i>
Art 8(1)	Codes of conduct for public officials – In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.	<i>Mandatory to promote these values</i>
Art 11(1)	Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.	<i>No requirement to criminalise specific behaviour by judges</i>
Art 15	Bribery – Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The [intentional] promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The [intentional] solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties’ [emphasis author’s own].	<i>Mandatory provision – must criminalise bribery</i>
Art 18	Trading in influence – Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The [intentional] promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State [...] an undue advantage for the original instigator of the act or for any other person; (b) The [intentional] solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State [...] an undue advantage.	<i>Must consider criminalising trading in influence</i>
Art 30(2)	Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.	
Art 30(9)	Prosecution, adjudication and sanctions – Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.	<i>Description of offences is reserved to domestic law¹⁵⁸</i>

158 UNODC, ‘Legislative Guide’ (see n 16 above), 9.

Art 65	Implementation of the Convention – (1) Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention. (2) Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.	<i>Mandatory; measures to conform with own legal principles</i> ¹⁵⁹
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Bangalore Principles – Implementation Measures

Para 9.1	A judge should be criminally liable under the general law for an offence of general application committed by him or her and cannot therefore claim immunity from ordinary criminal process.	Not immune from criminal law
Para 9.2	A judge should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function.	Civil immunity

COMMENTARY AND COMPARISON

Criminal liability of judges

It is clear from the international standards that there is consensus that judges may be criminally liable, and therefore should be liable for soliciting or accepting bribes just as any other public official.¹⁶⁰ According to the CCJE, ‘criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions’,¹⁶¹ and, ‘with respect to civil, criminal and disciplinary liability ([...] “punitive accountability”), the [...] principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges’ accountability in respect of criminal, civil and disciplinary liability’.¹⁶²

Judicial independence does not require judicial immunity, ‘except to the extent that a judge may enjoy personal immunity from civil suits for alleged improper acts or omissions in the exercise of judicial functions’.¹⁶³ In many countries, judges have no immunity from criminal prosecution; however, some countries do afford judges immunity from prosecution. The *Technical Guide to the United Nations Convention Against Corruption* (2009) explains that: ‘... the preferred approach, in order to limit the potential for judges to avoid prosecution for corruption and so as not to undermine the credibility of the judiciary, is a “functional” approach, so that judges are only immune from prosecution for offences that take place in the course of carrying out their judicial duties’.¹⁶⁴

In addition, where such immunity exists, it is necessary to ensure that there is a ‘process for lifting the immunity in appropriate circumstances, along with safeguards for ensuring that the process is transparent, fair and consistently applied’.¹⁶⁵

¹⁵⁹ *Ibid.*

¹⁶⁰ CCJE, ‘Opinion No. 21: Preventing Corruption Among Judges’ (2018), paras 11-12.

¹⁶¹ CCJE, ‘Opinion No. 3 on the Ethics and Responsibility of Judges’ (2002), para 75.

¹⁶² CCJE, ‘Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy’ (2015), para 37.

¹⁶³ UNODC, ‘Technical Guide’ (see n 20 above), 49.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* See also UNODC, ‘Legislative Guide’ (see n 16 above), 35.

Judicial immunity, especially from civil suit for conduct in the exercise of the judicial function, is an important aspect of judicial independence and the protection of judges, however: ‘...it is important to balance the concepts of judicial immunity, one of the guarantees of judicial independence, and accountability [...] Judicial immunity needs to be limited and serves its purpose of protecting the independence of justice operators; total immunity would only nourish distrust among the public towards the justice system as a whole.’¹⁶⁶

Where judges do enjoy criminal liability, the expectation under international law is that such immunity will be lifted in cases of corruption and serious crimes.¹⁶⁷ Procedures for lifting judicial immunity should ‘aim at reinforcing the independence of the judiciary’, be ‘legislated in great detail’ and be permitted ‘only with the authorisation of an appropriate judicial authority’.¹⁶⁸

In all the countries in this study, judges may be criminally liable (Bangalore Principles – Implementation Measures (BP-IM) paragraph 9(1)) for corruption offences by ‘public officials’ as envisioned by the UNCAC (Article 2), and bribery, by public officials, has been criminalised. However, in Costa Rica, Supreme Court judges have criminal immunity (*derecho antijudicio* or privilege), but this can be lifted with the authorisation of the Legislative Assembly and a vote of the Supreme Court (see the further discussion in section 4.3).¹⁶⁹ In four out of the five countries, trading in influence by public officials has also been specifically criminalised. While the UK has not adopted a specific offence of trading in influence, offences under the Bribery Act 2010 are considered to cover the relevant behaviour.¹⁷⁰

Protection from vexatious litigation

The CCJE also maintains that where prosecutions can be initiated by individuals, there should be a mechanism for stopping proceedings where they are clearly vexatious and there is no evidence of criminal behaviour.¹⁷¹

This was not an issue that was specifically addressed in the case studies in relation to criminal proceedings; however, it is addressed in some of the case studies in relation to disciplinary proceedings (see section 4.2.1).

Scope and meaning of judicial corruption

In each country, researchers considered the definition and scope of judicial corruption, in particular, whether domestic corruption offences are general in nature, specific to ‘public officials’ or specific to judges. Of the five case studies, France, Costa Rica and Ghana have corruption offences, as defined in this study, that are specific to judges in addition to the broader crimes of corruption by public officials. However, in the Philippines, a group of offences relating to ‘dereliction of duty by a judge’

166 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 52. See also ICJ (see n 49 above), 27-30 and 76-79; and UNODC, ‘Legislative Guide’ (see n 16 above), paras 104-105.

167 ICJ (see n 49 above), 29; and UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), paras 52 and 91.

168 ICJ (see n 49 above), 76-77.

169 See n 17 above.

170 UN, ‘Conference of the State Parties to the United Nations Convention Against Corruption, Implementation Review Group, Fourth Session’ (2013). Discussed in Nicholls and others (see n 17 above), 186.

171 CCJE, ‘Opinion No. 3’ (see n 161 above), para 54.

complements the range of corruption offences by public officials.¹⁷² Although these offences may not necessarily be connected with corruption, they may also be committed in conjunction with crimes of corruption and serve to target judicial behaviour that was identified in the JII Phase 1 study as being suggestive of corruption, such as unexplained delays.¹⁷³ In Scotland, in the UK, a historic common law crime of bribing a judge has been replaced by statutory bribery offences of general application.¹⁷⁴ It appears, therefore, that neither the UK nor the Philippines has opted to adopt what might be considered ‘more severe measures’ under Article 65(2) of the UNCAC in relation to judicial corruption. The other four countries have created crimes that specifically address judicial corruption. Two countries, France and Costa Rica, have gone further still by creating aggravated judicial corruption offences, where the sanctions are more severe if there is an intention to influence the outcome of a case.¹⁷⁵

In France, corruption by magistrates is criminalised under the Criminal Code separately from corruption offences that relate to public officials generally. Under Article 434-9 and Article 434-9-1 of the Criminal Code, it is an offence for a judge, prosecutor, court clerk, judicial expert, court appointed mediator or arbitrator to engage in active and passive bribery, and active and passive trading-in-influence.¹⁷⁶ In addition, active and passive bribery will be aggravated where the offence is ‘committed by a magistrate for the benefit or detriment of a person subject to criminal proceedings’.¹⁷⁷ These aggravating circumstances will lead to a longer limitation period and higher sanctions (see the discussion on sanctions below). In addition, if a magistrate is convicted of a corruption offence, he or she will be ineligible to hold public office.¹⁷⁸ In Costa Rica, while bribery offences apply to public officials generally under the Criminal Code, when such an offence is committed by a judge or an arbitrator, and he or she has accepted an undue advantage in order to favour or prejudice a party in a trial, he or she will be subject to harsher penalties.¹⁷⁹ In Ghana, corruption by judges is specifically criminalised under section 253 of the Criminal Code, 1960. A judge or juror is guilty of a misdemeanour if, in the execution of his or her duties, he or she ‘makes or offers to make any agreement with any person as to the judgment or verdict which he will or will not give as a judicial officer or juror in any pending or future proceeding’.¹⁸⁰ In addition, a public officer will be guilty of corruption if he or she directly or indirectly agrees or offers to permit his or her conduct to be influenced by the gift, promise or prospect of any valuable consideration to be received by him or her, or by any other person, from any person.¹⁸¹ In the Philippines, anti-corruption laws that apply to all public officials criminalise the giving and receiving of bribes,

172 Revised Penal Code (1960) (the Philippines), s 204 (knowingly rendering an unjust judgment); s 205 (knowingly rendering an unjust interlocutory order) and s 206 (maliciously delaying the administration of justice).

173 See n 4 above, 32.

174 *The Laws of Scotland: Stair Memorial Encyclopaedia* (LexisNexis (Reissue) 2002), para 603.

175 Criminal Code (Costa Rica), Art 351; Criminal Code (France), Art 434-9.

176 Criminal Code (France), Art 434-9.

177 *Ibid.*

178 Criminal Code (France), Art 131-26(2).

179 Ley No 8204/2001 sobre Estupefacentes, Sustancias Psicotrópicas, Drogas de Uso no Autorizado, Actividades Conexas, Legitimación de Capitales y Financiamiento de Terrorismo, Art 62.

180 Criminal Code 1960 (Ghana), s 253.

181 *Ibid* s 252. ‘Valuable consideration’ is defined in s 261.

extortion, abuse of office, conflicts of interests for public officials and plunder.¹⁸² In the UK, while there are no judge-specific offences any more, sentencing guidelines in England and Wales indicate that the seriousness of the offence is taken into account by prosecutors when deciding on the mode of trial and which sentence to seek.¹⁸³ It may be, therefore, that a judge taking a bribe to favour or prejudice a party in proceedings would result in harsher penalties, but there are no examples of this.

Table 3 Overview of judicial corruption offences

	Philippines	France	Ghana	Costa Rica	UK
Bribery by public officials a specific offence?	Yes	Yes	Yes	Yes	Yes
Trading in influence by public officials a specific offence?	Yes	Yes	Yes	Yes	No
Corruption or related offences specific to judges?	No	Yes	Yes	Yes	No
Reasons for corruption result in more severe sanctions?	No	Yes	No	Yes	Maybe

Some, such as the CCJE and ICJ, argue that judicial corruption goes beyond the taking and receiving of bribes (more in line with the broad definition of corruption adopted by TI).¹⁸⁴ The UNCAC also recognises this, as is evident in chapter 3 which lists a range of broader offences that embody corruption. The CCJE considers that the ‘corruption of judges must be understood in a broader sense. The reason for this is the very important role a judge plays as an independent and objective arbitrator in the cases brought to his/her court [...] judicial corruption comprises dishonest, fraudulent or unethical conduct by a judge in order to acquire personal benefit or benefit for third parties’.¹⁸⁵ The ICJ goes further and lists a number of activities, including conflict of interest, nepotism and favouritism, as ‘judicial corruption’.¹⁸⁶ Article 19 of the UNCAC invites states to consider making ‘abuse of functions’ a crime. However, for the purposes of this study, the focus, with respect to the criminal procedures, is on Articles 15 (bribery) and 18 (trading in influence). In the case studies, many of these broader categories of ‘judicial corruption’ are addressed through disciplinary procedures rather than by criminal law.

182 Republic Act No 3019 (1960) (‘Anti-Graft and Corrupt Practices Act’) (the Philippines), ss 3 and 8; Revised Penal Code (1960) (the Philippines), s 210 (direct bribery), s 211 (indirect bribery) and s 211A (qualified bribery). ‘Public officers’ is defined under s 203 as ‘any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches’ public duties as an employee, agent or subordinate official, of any rank or class’, and s 212; Republic Act No 7080 (1991) ‘An Act Defining and Penalising the Crime of Plunder’ (‘Plunder Act’) (the Philippines) s 2 (cf s 1 (d)).

183 Sentencing Council, ‘Fraud, Bribery and Money Laundering Offences: Definitive Guideline’ www.sentencingcouncil.org.uk accessed 22 December 2020.

184 The TI definition is ‘abuse of entrusted power for private gain’. See TI (see n 97 above).

185 CCJE, ‘Opinion No. 21’ (see n 160 above), para 9.

186 ICJ (see n 49 above), 12.

Research challenges

Case study authors in Costa Rica, Ghana and the Philippines faced a considerable challenge during the desk research phase in finding up-to-date and accurate legal materials. This may be attributed to a relative lack of access to online legal materials for these countries. In addition, changes to the law are not always reflected in the available online materials. This is a general issue, but is relevant to establishing the scope and definition of corruption because what might appear to be a straightforward task, in fact, involved checking and cross-checking to ensure that the most up-to-date versions of the relevant laws were referred to. Government websites did not always have the relevant information, and other sites were not all up to date, or provided only incomplete materials.

Application of the questionnaire

The scope and definition of corruption is covered by the following questions in the two versions of the questionnaire:

Original Questionnaire

Q A(1)	Is there in your legal system legislation specific to judicial corruption or the legislation applied is the general one on corruption in the public sector?
Q A(2)	What is criminalized as judicial corruption (please, list the most relevant categories of crime punished as corrupt activities in your legal system)?

Modified Questionnaire

Q A(1)(a)	Are there anti-corruption laws of general application, or are there some laws that apply only to public officials?
Q A(1)(b)	If there are anti-corruption laws that apply to public officials, are there also specific crimes that relate to judges alone, or are judges included in the category of public official?
Q A(1)(c)	How is corruption defined in the domestic legal framework?
Q A(1)(d)	How does the domestic definition of corruption compare to the UNCAC definition? Is it broader or narrower?
Q A(1)(e)	How, if there are specific categories relating to judges, is corruption by or in relation to judges defined?

The focus, in both versions of the questionnaire, was on determining the scope of corruption offences as they relate to judges, and whether corruption by judges is specifically identified as a crime or captured by anti-corruption laws as they relate to public officials generally (as envisioned by the UNCAC). The second version of the questionnaire attempted to tease out some more detail on this issue, and this was informed by feedback on the methodology suggesting tying the analysis to international standards, and on the process of researching, drafting and structuring the case studies.

Perhaps due to the adoption of the definitions given in Articles 15 and 18 of the UNCAC, the case studies did not all consistently elaborate on the precise content of anti-corruption offences as they apply to public officials. Instead, the approach was simply to confirm whether bribery and trading

in influence is criminalised without delving into how closely or otherwise domestic laws apply the specific elements of the UNCAC definitions. However, consistently with the focus of this study, where there were specific crimes of judicial corruption, the content of these offences was elaborated in a little more detail. No analysis as to how domestic laws compare to the definitions in the UNCAC (Q A(1)(d) in the modified questionnaire) has been carried out in the text of the case studies as they are primarily descriptive.

4.2.1 REPORTING CORRUPTION

Relevant international standards

UN Convention Against Corruption

Art 8(4)	Codes of conduct for public officials – Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.	Must consider measures on reporting by public officials
Art 13(2)	Participation of society – Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention	Must ensure access to anti-corruption bodies; allow anonymous reporting ¹⁸⁷
Art 32(1)	Protection of witnesses, experts and victims – Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.	Mandatory (without prejudice to defendant and due process: Arts 32(2)–(5))
Art 33	Protection of reporting persons – Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.	Must consider protection for reporting persons
Art 37	Cooperation with law enforcement authorities – Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.	Mandatory to encourage cooperation by defendants

¹⁸⁷ UNODC, 'Legislative Guide' (see n 16 above), 23.

Art 38	Cooperation with national authorities – Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.	Mandatory to take measures to encourage cooperation between authorities
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Commentary and comparison

Preventive measures

The UNCAC requires states to consider taking measures to ‘protect witnesses, experts, victims and cooperating offenders insofar as they are witnesses in a criminal proceeding on the one hand (articles 32 and 37)’ and ‘measures for reporting persons more generally on the other (article 33)’.¹⁸⁸ The convention distinguishes between individuals who are involved in the investigation and prosecution and ‘reporting persons’ – those who ‘may possess information that is not sufficiently detailed to constitute evidence in the legal sense of the word’. States must consider mechanisms for protecting both categories.

Protecting reporting persons

Article 33 of the UNCAC requires States Parties to consider protection for ‘any person, whether a citizen, a service user, a customer or an employee, etc. What kind of protection a person may require can depend on many factors, such as the type of information reported, the position of the person and the level of threat the person faces due to the report’.¹⁸⁹ In addition, according to Article 13(2), states must provide access to anti-corruption bodies for the purpose of reporting corruption by the public, ‘including anonymously’. The guidance on anonymous reporting is somewhat unclear, however, the *Technical Guide* to UNCAC notes that: ‘States Parties bear in mind the importance of promoting the willingness of the public to report on corruption. Therefore, they may wish to consider the experience of those States which do not only protect public officials, or employees of legal entities, but any person who reports a suspicion of corruption, irrespective of their status.’¹⁹⁰

In addition, states ‘should ensure that [...] those who distrust the established channels of reporting or fear the possibility of identification or retaliation are able to report’¹⁹¹ to anti-corruption bodies. The emphasis, therefore, is on ensuring that members of the public can, and do, report corruption, and allowing anonymous reporting may encourage this.

There is ‘extensive research’ showing that ‘information provided by individuals is one of the most common ways – if not the most common way – in which fraud, corruption and other forms of wrongdoing are identified’.¹⁹² Research in Australia has also shown that, in the public sector, employee whistleblowing is the ‘single most important way in which wrongdoing was brought to

188 UNODC, ‘The United Nations Convention Against Corruption: Resource Guide on Good Practices in the Protection of reporting Persons’ (2015), 6. See also discussion in UNODC, ‘Technical Guide’ (see n 20 above), 105-109.

189 *Ibid.*

190 UNODC, ‘Technical Guide’ (see n 20 above), 64.

191 *Ibid.*

192 UNODC, ‘Resource Guide on the Protection of Reporting Persons’ (n 188), 3.

light in public sector organisations'.¹⁹³ A number of countries have adopted anonymous reporting procedures for corruption in order to encourage reporting.¹⁹⁴ A 2010 study of an anonymous online reporting process to the Kenya Anti-Corruption Authority indicates that the quality of the report is better than in person, or named, reports. However the study notes that: '... the legal, cultural, economic and institutional factors that impact the effectiveness of online reporting should not be underestimated. As with any IT intervention, the usefulness of the system depends on access, interest, and buy-in from all relevant actors.'¹⁹⁵

In all the case studies, a crime can be reported directly to the police or to other individuals or bodies. In both the Philippines and the UK, reports of corruption may be made online as well as in person. In the Philippines, 'any aggrieved party' or their representative may file a complaint using an online form to the Ombudsman of the Philippines (the 'Ombudsman').¹⁹⁶ However, concerns have been raised by interviewees about the lack of protection for whistleblowers in the Philippines. While a Whistleblower Protection Bill was put before the Senate in 2017, at the time of writing, the bill is still at the committee stage.¹⁹⁷ Some have called for specific whistleblower protection in the Philippines judiciary,¹⁹⁸ but again, at the time of writing, no legislation has been passed on this issue. In the UK, individuals may report a crime to the Serious Fraud Office (SFO) using an online form,¹⁹⁹ but the SFO will only investigate where there is 'actual or intended harm that may be caused' to the public, the 'reputation and integrity of the UK as an international financial centre' or the 'economy and prosperity of the UK'.²⁰⁰ Individuals are asked to consider whether the crime they are reporting meets these criteria before they complete the form. Individuals, other than victims of a crime, wishing to report a crime anonymously may also do so through the charity Crimestoppers. Victims of a crime must report directly to the police.²⁰¹ In Ghana, as well as being able to report a crime directly to the Ghana police service, 'any person' who believes 'from a reasonable and probable cause that an offence has been committed by any other person' can make a complaint to a district court judge.²⁰² The complaint can only be made to a district court judge who has jurisdiction to try or inquire into the alleged offence.²⁰³ Complaints made to a district court judge may be made orally or in writing, but if they are made orally, the judge must put the complaint into writing and it must be signed by both the complainant and the judge.²⁰⁴ Apparently, however, this formal mechanism of crime reporting is rarely used.²⁰⁵ In France, a crime can also be reported to the public prosecutor by writing to the public prosecutor in the area where the crime was committed or the public prosecutor where the offender resides.²⁰⁶ In addition, in Costa Rica, a distinction is made between ordinary judges and

193 *Ibid.*, 3.

194 *Ibid.*

195 Jessica Shultz, Opimbi Osore and Thomas Vennen, 'Reducing Risks of Reporting Corruption: Lessons from an online complaints system in Kenya' (U4 Anti-Corruption Resource Centre, 2010).

196 See 'Filing of New Complaint' online by Office of the Ombudsman www.ombudsman.gov.ph/key-services/filing-of-complaint accessed 15 December 2019.

197 See www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-1415 accessed 15 December 2019.

198 J Art D Brion, 'Time for a Whistleblower Protection Policy for the Judiciary?' *Manila Bulletin* (Manila, 6 February 2019).

199 See n 18 above.

200 See www.sfo.gov.uk/about-us accessed 15 December 2019.

201 See <https://crimestoppers-uk.org> accessed 15 December 2019.

202 Criminal and Other Offences (Procedure) Act 1960 (COOP Act) (Ghana).

203 *Ibid.*, s 61(1).

204 *Ibid.*, s 61(2).

205 According to an interviewee.

206 See https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FR-maximiseMS-en.do?clang=en&idSubpage=1&member=1#n01 accessed 15 December 2019.

Supreme Court judges when it comes to reporting allegations of corruption. There are three bodies that may receive allegations against ordinary judges: the public prosecutor, who may investigate on the basis of a complaint by a private citizen or by its own initiative;²⁰⁷ the Attorney General’s Office, who also may investigate on the basis of a complaint by a private citizen²⁰⁸ or by its own initiative;²⁰⁹ and the general Comptroller’s Office, which may proceed on the basis of a complaint by a private citizen.²¹⁰ Where an allegation is made against a Supreme Court judge, any criminal action must be initiated by the Public Prosecutor’s Office.²¹¹

Table 4 Reporting allegations of corruption

	Philippines	France	Ghana	Costa Rica	UK
Directly to the police	Yes	Yes	Yes	Yes	Yes
To a body other than police	Yes	Yes	Yes	Yes	Yes
Online	Yes	No	No	No	Yes
Anonymously	No	No	No	No	Yes
Different when reporting against a judge?	No	No	No	Yes	No
Different according to status of accused?	No	No	No	Yes	No

Given the sensitivity and probable reluctance of those who have encountered corruption to come forward, it is perhaps surprising to see that only one out of the five countries allows anonymous reporting in line with Article 13(2), and even then, that is only in relation to crimes that fall within the jurisdiction of the SFO. There are no specific protections evident for individuals who report judicial corruption; this is an issue that is being publicly debated in the Philippines.²¹² It must be noted, however, that case study researchers were not specifically asked to investigate whistleblower legislation (which would cover the requirements under Article 33 of the UNCAC) for the purposes of this study. Therefore there may be greater protections for reporting persons generally than is evident in these studies.

Responsibility of judges

Judges are responsible for their own conduct, and for upholding the integrity of the judiciary as a whole.²¹³ The CCJE, in Opinion No 21 of 2018, notes that the effectiveness of a code of ethics and an ethical framework depends on the ‘willingness of each judge to apply them in their every-day work’.²¹⁴ The CCJE also notes that ‘as holders of public office, have an obligation to report to the competent judicial authorities offences they discover in the performance of their duties, in particular, acts of

207 Criminal Procedure Code of Costa Rica, Art 16.

208 Ley de Creación de la Procuraduría de la Ética Pública www.pgr.go.cr/servicios/procuraduria-de-la-etica-publica-pep and Ley No 8242 de 9 de abril del 2002.

209 Criminal Procedure Code, Art 16, s 2.

210 GGR ‘Denuncia Electronica’ <https://cgrw01.cgr.go.cr/apex/?p=233:9> accessed 8 December 2020.

211 Criminal Procedure Code, Art 392.

212 The Whistleblower Protection Act of 2019 has been introduced in the Congress of the Philippines and approval is pending. See http://legacy.senate.gov.ph/lis/leg_sys.aspx?congress=18&type=bill&p=, accessed 8 December 2020.

213 CCJE, ‘Opinion No. 21’ (see n 160 above), paras 45-47.

214 CCJE, ‘Opinion No. 21’ (see n 160 above), para 45.

corruption committed by colleagues’. Under Article 8(4) of the UNCAC, states ‘should consider’ measures to facilitate reporting by public officials of acts of corruption. However, it is important to consider the circumstances in which reporting occurs and, the UNSRIJL has cautioned that systems that are established to facilitate the reporting of corruption by public officials ‘must be accompanied by measures of protection for ‘whistleblowers’.²¹⁵ There is a balance to be struck here between judicial independence and judicial accountability, and judges who do report misconduct or corruption, ‘... should not be questioned as to their loyalty in their future career, regardless of whether their concerns in the final analysis were proven to be well-founded or not. At the same time, the authorities, to whose attention such cases are brought, should always be careful when investigating such allegations’.²¹⁶

It is not clear from the case studies that such measures have been put in place by any of the five countries in respect of the judiciary.

Methodological issues

Original Questionnaire

Q A(5)(a)	Who can initiate complaints for judicial corruption against judges/prosecutors? (eg, citizens, public prosecutors, police, etc)
Q A(5)(c)	Does the status of the complainant (eg, individual or public body) affect the application of the ‘mandatory/discretionary prosecution rule’?

Modified Questionnaire

Q A(2)(a)	Who can report corruption by judges? (eg, citizens, judges)
Q A(2)(b)	How is corruption by judges generally reported? (eg, directly to police; prosecuting agency, or through anonymous means, such as a hotline)
Q A(2)(c)	To whom is corruption by judges reported? (eg, police, judicial leader(s), prosecuting authority, anti-corruption body)

There does not appear to be an answer to Q (5) (c) of the Original Questionnaire in the case studies. It is not clear whether this is because of a lack of information, or because the status of the complainant is irrelevant.

The inclusion of Q A(2) (c) in the Modified Questionnaire may contribute to greater detail about the specifics of reporting judicial corruption being revealed, as with the distinction between lower-level and Supreme Court judges in Costa Rica, where allegations of corruption against lower-level judges should be reported to one set of bodies, whereas allegations of corruption against Supreme Court judges must be made to the Public Prosecutor’s Office.

The Original Questionnaire focused on who could report allegations of judicial corruption and whether their status would affect the discretion of prosecutors to prosecute. This would not necessarily give rise to an account of the provisions for protecting reporting persons and whistleblowers. The Modified Questionnaire, referred to by researchers during the review and cross-check phase of the case study reports, asks the question of how reports may be made, but does not

²¹⁵ See n 1 above, para 90.

²¹⁶ CCJE, ‘Opinion No. 21’ (see n 160 above), para 47.

specifically require a consideration of protections for reporting persons. As protection for reporting persons has been found to be very significant in bringing corrupt behaviour to light, there should be an additional question about protection for reporting persons and whistleblowers.

4.2.2 LIMITATION PERIODS

Relevant international standards

UN Convention Against Corruption

Art 29	Statute of limitations – Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice	<i>Mandatory to establish long limitation periods</i>
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Commentary and context

It should be noted that while Article 29 of the UNCAC requires states to establish long limitation periods, this is only in states where they have limitation periods. Article 29 doesn't require states without limitation periods to introduce them.²¹⁷ The UNODC *Legislative Guide* explains the rationale for long limitation periods:

‘Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases, to take into account the rights of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, all of which may contribute to some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation varies considerably from State to State. Nevertheless, serious offences must not go unpunished, even if it takes a longer period of time to bring offenders to justice. This is particularly important in the case of fugitives, as the delay of instituting proceedings is beyond the control of authorities. Corruption cases may take a long time to be detected and even longer for the facts to be established.’²¹⁸

There is also a variation between states as to when the limitation period begins, and how it is counted.²¹⁹ For example, in some states, time limits do not run until the commission of the offence becomes known (eg, when a complaint is made or the offence is discovered or reported) or when the accused has been arrested or extradited and can be compelled to appear for trial.²²⁰ The main purpose of statutes of limitations is to discourage delays. However, the requirement to have long limitation periods allows for a balance to be struck between the need for timely prosecutions and the reality and complexity of corruption cases.²²¹

217 UNODC, ‘Legislative Guide’ (see n 16 above), 129.

218 *Ibid.*

219 *Ibid.*, 128.

220 *Ibid.*

221 *Ibid.*

Of the five case studies, two – Ghana and the UK – have no limitation period during which an allegation of corruption must be reported and prosecuted. In England and Wales, the time limit for presenting a case to the court is determined by the seriousness of the offence and whether it is triable ‘summarily’ in the magistrates’ court, or ‘on indictment’ in the higher courts.²²² A limit of six months applies to summary-only cases tried in the magistrates’ court.²²³ Bribery is triable either way, which means that it can be tried either summarily or by indictment, so the six-month limit does not apply.²²⁴ In the Philippines, France and Costa Rica, limitation periods are determined by either the category of the crime or, in the case of Costa Rica, the maximum sentence available for the crime. In the Philippines, there is no general statute of limitations and the limitation period for a crime depends on the statute, ranging from five years for ‘arresto mayor’ crimes (crimes carrying a sentence of between one month and a day to six months)²²⁵ to 20 years for offences under the Act Defining and Penalising the Crime of Plunder.²²⁶ In France, crimes are classified as either *délit* or *crime*. The limitation period for *délit* crimes is six years from the day the offence was committed²²⁷ and the limitation period for *crime* crimes is 20 years from the day the offence was committed.²²⁸ The limitation period is extended where the crime is considered to be hidden²²⁹ or concealed, in which case the limitation period runs from the date of discovery of the offence, and in the case of *délit* cannot exceed 12 years from the day the offence was committed or, for *crimes* 30 years.²³⁰ In Costa Rica, limitation periods are tied to the maximum length of imprisonment available for the offence, the minimum being three years and the maximum limitation period being ten years.²³¹ This applies to all cases of judicial corruption including those concerning Supreme Court judges.²³² When the offence is committed by a public official in the exercise of his/her duty, the limitation period is suspended as long as they continue to perform the public function and a criminal proceeding has not been initiated against him/her.²³³

Table 5 Time limits

	Philippines	France	Ghana	Costa Rica	UK
Time limit for reporting and prosecuting corruption?	Yes	Yes	No	Yes	No
How is the limit determined?	Relevant statute	Category of crime	N/A	Length of sentence	N/A
Length of limitation period(s)	5–20 years	6–30 years	N/A	3–10 years	N/A

It is clear that limitation periods vary greatly; there appears to be a difference between common law systems and civil law systems. However, there is no general international guidance on what constitutes

222 Magistrates’ Courts Act 1980 (England and Wales), s 127.

223 *Ibid.*

224 Sentencing Council (see n 183 above), 41.

225 Revised Penal Code (1960) (the Philippines), s 90.

226 Plunder Act (the Philippines) (see n 182 above), s 6. However, there is no limitation on the time for which the state may recover properties unlawfully acquired by public officers from the state or their nominees or transferees.

227 Criminal Procedure Code (France), Art 8.

228 *Ibid.*

229 Justine Cheyton, ‘Statute of Limitation Reform in Criminal Matters’ (Soulier AARPI, 2017) www.soulier-avocats.com/en/statute-of-limitation-reform-in-criminal-matters/#_ftnref2 accessed 28 August 2019.

230 Criminal Procedure Code (France), Art 9-1.

231 Criminal Procedure Code (Costa Rica), Art 31.

232 *Ibid.*

233 *Ibid.*, Art 34.

a ‘long’ limitation period. Where the limitation period applies to the prosecution of offences, any delays in investigation and prosecution will have an impact on the effectiveness of the legal framework for addressing corruption.

None of the three countries with limitation periods (France, the Philippines and Costa Rica) have precisely met the Article 29 of the UNCAC requirement to have ‘longer statute of limitation periods [...] where the alleged offender has evaded justice’, or the option to ‘provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice’.²³⁴ However, in France, adjustments are made to the length of the limitation period to accommodate ‘hidden crimes’,²³⁵ and in Costa Rica, the limitation period is suspended for as long as the public official continues to perform the public function and criminal proceedings have not been instituted against them.²³⁶

The UNODC *Legislative Guide* notes that there are variations among states that have limitation periods as to ‘when the time starts and how the time is counted’.²³⁷ In France, the limitation period runs from the day the offence was committed, unless the crimes are hidden or concealed, in which case, the time runs from the date of discovery of the offence.²³⁸ Less precise detail is given in the cases of the Philippines and Costa Rica as to when the limitation period begins and how the time is counted.

Methodological issues

Original Questionnaire

Q A(1)(a)	Is the statute of limitations that applies to corrupt conduct by judges and prosecutors different from corrupt conduct carried out by other public officials?
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Modified Questionnaire

Q A(2)(d)	Is there a limitation period for reporting crimes of corruption by judges?
Q A(2)(e)	From when does the limitation period begin?
Q A(2)(f)	Is there a limitation period within which prosecution of reported crimes of corruption by judges must be initiated?

The Modified Questionnaire aims to identify ‘when the time starts and how the time is counted’. The additional questions in the Modified Questionnaire may help to draw out those details in any future application of the questionnaire. It may also be useful to add a question specifically relating to the suspension of limitation periods where the offender has evaded justice,²³⁹ or where the crimes are hidden or concealed.

²³⁴ See discussion in UNODC, ‘Legislative Guide’ (see n 16 above), 128-129.

²³⁵ See Cheytion, ‘Statute of Limitation Reform in Criminal Matters’ (see n 229 above); and Criminal Procedure Code (France) Art 9-1.

²³⁶ Criminal Procedure Code (Costa Rica), Art 34.

²³⁷ UNODC, ‘Legislative Guide’ (see n 16 above), 128.

²³⁸ Criminal Procedure Code (France), Art 9-1.

²³⁹ UNCAC, Art 29.

4.3 Investigating judicial corruption

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

<p>Art 5</p>	<p>1. Each State Party <i>shall</i>, in accordance with the fundamental principles of its legal system, <i>develop and implement or maintain effective, coordinated anti-corruption policies</i> that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.</p> <p>2. Each State Party <i>shall endeavour</i> to establish and promote effective practices aimed at the prevention of corruption.</p> <p>3. Each State Party <i>shall endeavour</i> to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.</p> <p>4. States Parties <i>shall, as appropriate</i> and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.</p>	<p><i>Mandatory to commit to maintaining and developing anti-corruption policies</i>²⁴⁰</p>
<p>Art 6</p>	<p>1. Each State Party <i>shall</i>, in accordance with the fundamental principles of its legal system, <i>ensure the existence of a body or bodies, as appropriate, that prevent corruption</i> by such means as: (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; (b) Increasing and disseminating knowledge about the prevention of corruption.</p> <p>2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.</p> <p>3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.</p>	<p><i>Mandatory to establish or maintain body or bodies that prevent corruption; no requirement for more than one such body</i>²⁴¹</p>

²⁴⁰ UNODC, 'Legislative Guide' (see n 16 above), 19.

²⁴¹ *Ibid*, 20–21.

Art 36	Each State Party <i>shall</i> , in accordance with the fundamental principles of its legal system, <i>ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement</i> . Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.	<i>Mandatory; may be the same body as referred to in Art 6²⁴²</i>
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COMMENTARY AND COMPARISON

Specialist anti-corruption body or bodies

The UNCAC requires that states have a body or bodies that ‘prevent corruption’²⁴³ through policy and dissemination of information, and a body or bodies that are ‘specialised in combatting corruption through law enforcement’,²⁴⁴ and these two functions can be carried out by one or more bodies.²⁴⁵ However, whether one or more anti-corruption bodies exist, they must be independent and able to carry out their functions without undue influence and staff must have adequate resources and training.²⁴⁶

Arrangements for anti-corruption investigations in the five case study countries represent a mixture of wholly separate anti-corruption bodies, and specialised agencies created within existing law enforcement investigative agencies. Four of the countries in this study have separate specialised agencies or bodies responsible for investigating corruption, including judicial corruption. In France, the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 (SAPIN II) was passed in response to criticisms from international and national bodies of its legislative framework on anti-corruption.²⁴⁷ Among other things, the new law established the French Anti-Corruption Agency (Agence française anticorruption or AFA), whose mandate is ‘to assist the competent authorities and persons involved in preventing and detecting acts of corruption, influence peddling, misappropriation of public funds and favouritism’.²⁴⁸ Notably, ‘[t]he AFA intervenes only as a preventive measure. Although it can detect offences, it is not a judicial authority and is therefore not required by law to investigate, record or prosecute criminal offences’.²⁴⁹ The focus of the AFA is therefore on preventive measures, rather than having an explicit law enforcement function. Specialisation is subsumed into the four levels of specialisation of investigative judges, the final tier or specialisation being complex fraud and financial crime, which is handled by the French National Financial Prosecution Office (NFP).²⁵⁰ The investigation and prosecution of offences therefore falls to the ordinary investigative and prosecutorial bodies. Allegations of corruption by a magistrate will automatically be referred by the public prosecutor to an investigative judge if it is classified as a *crime*, but may be referred if it is a *délit*.²⁵¹

242 *Ibid.*, 21; and see discussion in UNODC, ‘Technical Guide’ (see n 20 above), 113-117.

243 UNCAC, Art 6.

244 UNCAC, Art 36.

245 UNODC, Legislative Guide for the Implementation of the United Nations Convention Against Corruption, para 54.

246 UNCAC, Arts 6(2) and 36.

247 See French Anti-Corruption Agency, ‘Annual Report 2017’ (2017), 10; and European Commission, ‘Annex: France’ in ‘Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report’ (2014), 10-11.

248 Law No 93-122, 29 January 1993, on the ‘Prevention of Corruption and Transparency in Economic Life and Public Procedures (Sapin II Act) (France), Art 1.

249 French Anti-Corruption Agency (see n 247 above), 11.

250 ‘Missions Du PNF’ (Tribunal de Paris, 2019) www.tribunal-de-paris.justice.fr/75/missions-du-pnf accessed 30 August 2019.

251 Criminal Procedure Code (France), Art 79.

Interviews have indicated that in practice, all allegations of judicial corruption will be referred to an investigating judge for the following reasons: the complexity of corruption cases; to prevent the risk of perceived corporatism; to prevent the risk of perceived attacks on the independence of the judiciary; and to protect the rights of the defendant. The French system has four levels of investigative judge going from the simplest case investigated by an individual judge, to investigations by the French NFP for the most complex cases involving financial and cross-border crime.²⁵² However, evidence from interviews indicates that past cases of corruption by magistrates have been handled by the lowest level of investigative judge because they involve relatively low amounts of money, but have nevertheless been referred to an investigative judge because of the involvement of a magistrate. In the period between 2015 and 2017 only one case of corruption by a magistrate was handled by the French NFP – the highest tier of investigative judge, and therefore the most specialised.²⁵³

In the Philippines, Ghana, Costa Rica and the UK, separate specialist agencies or bodies investigate corruption and therefore investigate judicial corruption. In the Philippines, the Ombudsman has primary jurisdiction over cases that may be heard by the Sandiganbayan (anti-corruption court).²⁵⁴ The Ombudsman is an independent body with the power to investigate and prosecute crimes committed by public officials.²⁵⁵ The Office of the Special Prosecutor (OSP) may also conduct preliminary investigations of criminal offences under the authority of the Ombudsman. It has the jurisdiction to investigate ‘any act or omission of a public officer where it appears to be illegal, unjust, improper or inefficient’.²⁵⁶ Allegations of corruption can also be investigated by the National Bureau of Investigation which is a specialist investigative body within the Department of Justice.²⁵⁷ The OSP can take over investigation from any agency of government, as well as having the power to investigate in the first instance and the National Bureau of Investigation can also pass cases onto the Ombudsman.²⁵⁸

In Ghana, there is a formal process for reporting crimes to the relevant district judge,²⁵⁹ but the Ghana Police Service is responsible for investigating allegations of judicial corruption in the same way as it would corruption by any other public official.²⁶⁰ The relationship between the district court judge to whom a crime is reported and the Ghana police service is apparently unclear. However, as noted above, interviews indicate that the common practice is to report crimes to the police rather than to use the formal process contained in the Criminal and Other Offences (Procedure) Act of 1960. In addition to the police, the Commission on Human Rights and the Administration of Justice also has the power to investigate complaints of ‘violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties as well as all instances of alleged or suspected corruption and the misappropriation of public monies

252 See the Judiciary in France, Ministère de la Justice (September 2008) www.justice.gouv.fr/art_pix/plaquette_justiceenfrance_angl.pdf, p 17 accessed 5 September 2019; ‘Juridictions Inter-Régionales Spécialisées’ (justice.gouv.fr; 2014) www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/les-juridictions-interregionales-specialisees-13836.html accessed 29 September 2019; and see ‘Missions Du PNF’ (see n 250 above).

253 Confirmed by a Deputy Prosecutor of the NFP.

254 The Constitution of the Republic of the Philippines 1987, Art XI, s 13(1); and Republic Act No 6770 (1989) (‘Ombudsman Act 1989’) (the Philippines), s 15(1).

255 Ombudsman Act 1989 (the Philippines), s 13. See also the Constitution (the Philippines), Art XI, s 12.

256 Ombudsman Act 1989 (the Philippines), ss 11(4)(a) and 15.

257 Republic Act No 157 (1947) ‘An Act creating a Bureau of Investigation, providing funds therefor, and for other purposes’, ss 1(a) and (b).

258 *Ibid.*

259 *Ibid.*, s 61(1).

260 Police Service Act 1990 (Ghana), s 1. The police are charged with investigating crimes generally, and as corruption charges are criminal, they fall under the investigation mandate of the GPS.

by officials'.²⁶¹ However, while the Ghana case study shows that there have been a number of allegations of judicial corruption, there have been no criminal prosecutions of judges for corruption in Ghana, and the Commission on Human Rights, to date, has only investigated political corruption.²⁶²

In Costa Rica the Anti-Corruption Unit of the Public Prosecutor's Office is responsible for investigating crimes allegedly committed by a public official, including a judge.²⁶³ Its objective is to 'promote transparency, integrity, and good practice within the public prosecutor's office, carry out the regime for disciplinary misconduct and promote the criminal prosecution of crimes of corruption'.²⁶⁴ The Anti-Corruption Unit, therefore, has a dual function of investigating crime, and also investigating and sanctioning misconduct through disciplinary measures (discussed later in the report). As with the reporting of an allegation of judicial corruption, the investigation of allegations against Supreme Court judges is different²⁶⁵ and is conducted by the Attorney General of the Public Prosecutor Office personally.²⁶⁶

In the UK, corruption cases are investigated either by the SFO or National Crime Agency (NCA). The SFO is a 'specialised independent body responsible for investigating the most serious or complex fraud, bribery and corruption'.²⁶⁷ In deciding whether to investigate, the Director of the SFO will consider whether there is 'actual or intended harm that may be caused' to 'the public', the 'reputation and integrity of the UK as an international financial centre' or the 'economy and prosperity of the UK'.²⁶⁸ The SFO works in England, Wales and Northern Ireland, but not Scotland. Similar to the Ombudsman in the Philippines, the SFO can both investigate and prosecute.²⁶⁹ The NCA is responsible for investigating serious and organised crime including bribery and corruption.²⁷⁰ The NCA works with other authorities and the police across the UK.²⁷¹

Table 6 Investigating allegations of corruption

	Philippines	France	Ghana	Costa Rica	UK
Is there a specialised agency/body that can investigate corruption?	Yes	Yes	Yes	Yes	Yes
Is there a difference between investigation of public officials in general and judges in particular?	No	No	No	Yes (Supreme Court only)	No
Is there a difference between investigation of lower court judges and superior court judges?	No	No	No	Yes	No

261 *Ibid*, s 61(1).

262 Ghana Judicial Service, 'Ghana Judicial Service Annual Report 2017-2018' [http://judicial.gov.gh/jsfiles/annualrep 20172018.pdf](http://judicial.gov.gh/jsfiles/annualrep%20172018.pdf) accessed 22 December 2020.

263 See www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2013-August-26-28/Responses_NV/CostaRica_SP.pdf accessed 22 December 2020. See also OECD Working Group on Bribery, 'Phase 1 Report on the OECD anti-bribery convention in Costa Rica' (OECD, June 2017).

264 See https://ministeriopublico.poder-judicial.go.cr/documentos/Documentos_2018/Circulares/PPP/03-PPP-2010.pdf - Circular 03-PPP 2010, 'Fiscalía General de la República, Circular Administrativa' accessed 22 December 2020.

265 Criminal Procedure Code (Costa Rica), Art 392 and ch V. And for confirmation that SC judges are Supreme Power members see 'Los salaríes de los miembros de los supremos poderes' *La Nación* (Buenos Aires, 15 May 2010) [www.nacion.com/archivo/los-salarios-de-los-miembros-de-los-supremos-poderes/ MRBMRV2GOFBQZGLGO6N7UJ3NTM/story](http://www.nacion.com/archivo/los-salarios-de-los-miembros-de-los-supremos-poderes/MRBMRV2GOFBQZGLGO6N7UJ3NTM/story) accessed 22 December 2020.

266 Art 25(j) Ley Orgánica del Ministerio Público; and Criminal Procedure Code, Art 394.

267 See www.sfo.gov.uk/about-us accessed 22 December 2020.

268 *Ibid*.

269 *Ibid*.

270 See www.nationalcrimeagency.gov.uk/who-we-are/our-mission accessed 22 December 2020.

271 Nicholls (see n 17 above), 206, para 7.22 and see n 32 above.

Effective anti-corruption policies

Article 5 of the UNCAC requires states to ‘develop and implement or maintain effective, coordinated anti-corruption policies’. This requires a ‘comprehensive and coordinated approach’.²⁷² In a report to the UN General Assembly in 2012, the UNSRIJL identified important features of criminal procedure that are essential to combating corruption through the judicial system: cooperation and competence of investigatory services, security and protection of judges, specialised units or courts, removal of special guarantees and equality before the courts. Each of these may be considered in turn.

- *Cooperation and competence of the investigatory services:*²⁷³ The UNSRIJL noted that, of course, judges cannot sanction judicial corruption if prosecutors do not present cases with sufficient evidence to convict, and therefore it is important to strengthen the prosecution services at the same time as strengthening the integrity of the judiciary. Ultimately, ‘[j]udges, prosecutors and the police need to cooperate with each other appropriately and transparently’. However, there is no further guidance on what is appropriate.
- The UNSRIJL focused here on the need to support and strengthen the integrity of the prosecution services to enhance cooperation and competence. As the focus of this study is on judges, this aspect cannot be evaluated in this report, although the question of cooperation and sharing of information is addressed in the section on the ‘Interrelationship between criminal and disciplinary procedures’.
- *Security and protection of judges:*²⁷⁴ The security of judges, prosecutors and lawyers is important to protect them from being ‘pressured or coerced into becoming involved in corruption’. This is necessary, even when they are apparently incorruptible, and sources of pressure or coercion might include ‘organised criminal groups, senior officials or other powerful and well-resourced interests’.²⁷⁵

The security of judges is very important. However, very few studies or reports into judicial corruption have covered this issue. The questionnaire used in this study did not specifically request information about the security of judges, so there is no data to evaluate. See ‘Methodological issues’ below for a consideration of how this issue could be covered in the questionnaire.

- *Specialised units or courts:*²⁷⁶ The UNSRIJL considered the creation of specialised units or courts to be another way of improving the investigation of corruption. She argued that modern information technology and adequate working conditions would enable these units ‘to accelerate investigations and obtain the evidence necessary to prove corruption and obtain convictions, as well as facilitating cooperation among national and international institutions’. However, the CCJE sounds a word of caution about specialised courts, and notes that while it might be necessary to have specialist investigators and prosecutors, ‘it should be possible to introduce specialised courts only under exceptional circumstances, when necessary because of the complexity of the problem and thus for the proper administration of justice’.²⁷⁷

The UNCAC clearly requires states to have one or more specialist anti-corruption bodies, and

272 See UNODC, ‘Technical Guide’ (see n 20 above), 4; and UNODC, ‘Legislative Guide’ (see n 16 above), 20.

273 Report on Judicial Corruption and Combating Corruption through the Judicial System’ (2012) (see n 1 above), para 102.

274 *Ibid.*, para 103.

275 *Ibid.*

276 *Ibid.*, para 104.

277 CCJE, ‘Opinion No. 21’ (see n 160 above), para 50.

Article 6 requires that states ‘ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement’. In each of the five case studies, there are specialised bodies involved in the investigation of corruption. However, France is the only country in this study where the specialist anti-corruption agency is not directly responsible for investigating and/or prosecuting crimes of corruption, but instead supports other agencies in their work.²⁷⁸ The Philippines, by contrast, is the only country in this study with a specialised anti-corruption court: the Sandiganbayan. The specialist investigative and prosecutorial body, the Ombudsman, has primary authority to investigate cases that fall within the jurisdiction of the Sandiganbayan.²⁷⁹ The CCJE raises concerns about the potential for judges in specialist courts to be seen as different from the judiciary as whole, and specialist judges must, first and foremost be ‘specialists at judging’, be afforded the same safeguards and independence as other judges, and form part of the ‘single judicial body as whole’.²⁸⁰ The case studies do not look in detail at court governance or the judicial culture. The Sandiganbayan has original jurisdiction over cases involving ‘high-ranking officials’.²⁸¹ Municipal trial court judges are considered low-ranking officials, and would therefore be tried in the ordinary courts. One advantage of the specialist court, in terms of access to information and data, is that all the decisions, resolutions and statistics of the court are published and accessible on their website.²⁸²

- *Removal of special guarantees:*²⁸³ The UNSRIJL stressed the problem of ‘special guarantees’ that exist in some states protecting certain state agents. She argued that, where they exist, states should ‘consider abolishing them’. The existence of these guarantees can create problems. One issue is lengthy discussions and disagreements about who should investigate or which courts should preside over cases involving special guarantees, and this can be ‘used as a means for delaying due process’.²⁸⁴ Another issue is the damaging effect that special guarantees have on public perceptions about the accountability of public officials because special guarantees ‘foster the perception of impunity for such public officials, which in turn encourages further corruption and ultimately leads to a more generalised sense of institutionalised impunity that dangerously undermines the credibility of the judicial system’.²⁸⁵

Of the five case studies, only judges in Costa Rica have immunity from prosecution. Supreme Court judges, along with other public officials who are members of the ‘Supreme Powers’ have *derecho de antejuicio*, the ‘right of prejudice’, which protects them from automatic criminal liability in the face of allegations of criminal conduct.²⁸⁶ The *derecho de antejuicio* entitles such public officials, including Supreme Court judges, to a specific pre-trial investigation conducted by the Attorney-General, who must then present the findings to the Supreme Court.²⁸⁷

278 See p 61 above.

279 Ombudsman Act 1989 (the Philippines), s 15(1). See also Office of the Ombudsman, Power Functions and Duties www.ombudsman.gov.ph/about-us/powers-functions-and-duties accessed 22 December 2020.

280 CCJE, ‘Opinion No. 15 on the Specialisation of Judges’ (2012).

281 Emil P Bolongaita, ‘An exception to the rule? Why Indonesia’s Anti-corruption commission succeeds where others don’t – a comparison with the Philippines’ Ombudsman’ (U4 Issue 4, 2010) 9, see n 11 above; Eric Batalla et al, ‘Chapter 10: The Judiciary Under Threat’ in Mark Thompson, Eric Batalla (eds) *Routledge Handbook of the Contemporary Philippines* (Routledge 2018), Table 10.3.

282 See <http://sb.judiciary.gov.ph/index.html> accessed 22 December 2020.

283 See n 1 above, paras 105 and 107.

284 *Ibid*, para 105.

285 *Ibid*, para 107.

286 Ley Orgánica del Ministerio Público, Art 24(j); and Criminal Procedure Code (Costa Rica), Arts 391–401.

287 Criminal Procedure Code (Costa Rica), Arts 394 and 395.

The Supreme Court then considers whether the evidence presented amounts to a crime, and if not, the application will be dismissed.²⁸⁸ Alternatively, if the Supreme Court finds that the accused is not protected by *derecho de antejuicio*, the Supreme Court will dismiss the application,²⁸⁹ and presumably the prosecution would continue as under the ordinary criminal procedure.²⁹⁰ If the Supreme Court considers there is sufficient evidence, the case is then transferred to the Legislative Assembly, which in turn has to approve prosecution of the accused.²⁹¹ Once approved by the Legislative Assembly, the case is returned to the Supreme Court for consideration by the Criminal Chamber.²⁹² The UNSRIJL argued that the procedures for determining and lifting immunity can cause delay, and the existence of such measures can ‘foster perceptions of impunity’.²⁹³ The case study for Costa Rica indicates that there is little data on this issue, or on the prosecution of judges for corruption, and this is because the notion of judicial integrity is relatively new in Costa Rica, and had not been pursued in the past. The case study refers to one case in which a superior court judge (not a member of the Supreme Powers) was prosecuted for ‘questionable rulings’ and interfering in cases concerning drug traffickers.²⁹⁴ The judge was convicted and sentenced to 14 years’ imprisonment.²⁹⁵ This, according to the case study, is the exception. The reality is that the lack of funding and resources severely impedes anti-corruption efforts.²⁹⁶ As for the impact of the special guarantees afforded to members of the Supreme Power, the case of former Supreme Court President Carlos Chinchilla appears to confirm the concerns of the UNSRIJL. Justice Chinchilla and other judges were investigated for corruption.²⁹⁷ Four judges were sanctioned for ‘serious misconduct’ by way of disciplinary proceedings before 12 former and serving judges in the Supreme Court.²⁹⁸ Justice Chinchilla resigned following the outcome of the disciplinary proceedings, and was not prosecuted under criminal law.²⁹⁹ Such failure to follow through with criminal prosecution when crimes have been found to have been committed will damage the reputation of the justice system. While Ghana does not have judicial immunity from criminal liability, a number of interviewees speculated that the authority of the Commission on Human Rights and the Administration of Justice would not extend to investigating superior court judges, as they are subject to the specific removal provisions prescribed in section 146 of the Constitution. While this section is an important safeguard for judicial independence, and the tenure of senior judges, there appears to be a lack of clarity as to how the constitutionally prescribed process relates to the criminal process.

288 *Ibid*, Art 395.

289 *Ibid*.

290 *Ibid*, Arts 380–390.

291 *Ibid*, Arts 395 and 396.

292 *Ibid*, Arts 397–401.

293 See n 1 above, para 107.

294 Matthew Boddiger, ‘Top Limón judge arrested on suspicion of collaborating with drug traffickers’ (Tico Times, 16 May 2014) <https://tico-times.net/2014/05/16/top-limon-judge-arrested-on-suspicion-of-collaborating-with-drug-traffickers> accessed 22 December 2020.

295 *Ibid*.

296 Burce M Wilson, ‘Costa Rica’s Anti-Corruption Trajectory: Strengths and Limitations’ in *Anti-Corruption Policies Revisited* of GIGA German Institute of Global and Area Studies (December 2013).

297 ‘Supreme Court President Steps Down Amid Corruption Scandal’ (Tico Times, 16 July 2018) <https://ticotimes.net/2018/07/16/supreme-court-president-resigns-over-corruption-scandal> accessed 22 December 2020.

298 *Ibid*.

299 La Nación (31 July 2018) <https://advance.lexis.com/document/?pdmfid=1000516&crd=72867196-a85b-4a97-96ce-7d4a79fd473&pdodocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5T1F-37S1-JBJH-J1X2-00000-00&pdodocid=urn%3AcontentItem%3A5T1F-37S1-JBJH-J1X2-00000-00&pdcontentcomponentid=323559&pdteaserkey=sr22&pditab=allpods&comp=1yearLk&earg=sr22&prid=4ddda4af-05b2-4142-93fd-ae2f2f17510f> accessed 22 December 2020.

- *Equality for all before the courts*.³⁰⁰ One final point that the UNSRIJL considers is the important principle of equality before the law, which ‘should prevail based on the fact that anyone who commits a crime should be investigated, prosecuted and punished regardless of any differences, and specifically for public officials who hold decision-making powers in relation to the use of public resource’.³⁰¹ This issue of failures to investigate or prosecute is also highlighted by the CCJE in Opinion No 21, and creates a problem which the CCJE refers to as ‘de facto immunity’, that is, that ‘the higher-ranking, the cleverer and the better defended an allegedly corrupt public official is’ the more likely he or she is to evade investigation or prosecution, and thereby benefit from de facto immunity.³⁰² It is important, therefore, that all allegations of corruption are investigated and crimes prosecuted, whoever is accused or charged, in order to uphold the principle of equality before the law.

In order to give effect to that principle, and to enhance confidence in the judiciary and the justice system, there must be consequences for criminal behaviour. However, the case studies indicate that in three countries there is an apparent unwillingness to prosecute, in conjunction with (or perhaps because of) a lack of resources and capacity to do so. Instead judges are sanctioned through disciplinary mechanisms, or retire and avoid sanctions. We have seen above the example of Justice Chinchilla in Costa Rica. Similar examples are evident in Ghana, where an investigative journalist uncovered evidence of corruption among a number of judges, and while the evidence that the Anas investigation presented has resulted in a number of disciplinary sanctions and a recommendation by the Judicial Council (which, among other things, serves to advise the Chief Justice) that criminal charges should be brought, no prosecutions have been initiated.³⁰³ This was a widely reported, high-profile expose by an award-winning journalist. The failure to follow through with prosecutions might well leave Ghanaians to perceive that judges are protected by what the CCJE terms ‘de facto immunity’ – the protection of high ranking public officials from being held accountable for their actions. In the Philippines, published cases indicate that judges are being prosecuted and sanctioned for crimes of corruption,³⁰⁴ as are judges in France (although in France the information is collated by TI France).³⁰⁵ In the UK, there have been no cases of judges being prosecuted under the Bribery Act 2010, but there are historical examples of judges being prosecuted for the common law offence of misconduct in public office (in England).³⁰⁶ The first person to be prosecuted under the Bribery Act 2010 was a magistrates’ court clerk, who although not a judge, was nevertheless part of the criminal justice system. There are also examples, in the UK, of judges being prosecuted when they commit other crimes, for example, lying to the police.³⁰⁷

300 See n 1 above, para 106.

301 *Ibid.*

302 CCJE, ‘Opinion No. 21’ (see n 160 above), para 50.

303 Based on evidence from interviewees. See also www.bbc.co.uk/news/world-africa-34452768 accessed 22 December 2020.

304 See *People of the Philippines v Henry L Domingo*, Criminal Case No 27773; *People of the Philippines v Judge Proceso Sidro*, Criminal Case Number 17567 and *People of the Philippines v Judge Ramon B Reyes*, Criminal Case Number 24357.

305 See www.visualiserlacorruption.fr accessed 22 December 2020.

306 See *R v Borron* (1820) 3 B & Ald 432 (a magistrate); *R v Llewellyn-Jones* [1968] 1 QBD 429 (County Court Registrar, now known as a district judge).

307 See www.theguardian.com/books/2014/may/01/judge-constance-briscoe-guilty-lying-police accessed 22 December 2020.

Research challenges

The challenge for researchers trying to establish the effectiveness of investigations (and prosecutions) is the lack of information, especially a lack of information specifically about investigations and prosecutions into judicial corruption, rather than just corruption by public officials. While in the Philippines, the Sandiganbayan publishes its decisions, it is a court with jurisdiction over a range of public officials, and there are no readily available statistics about judicial corruption. In France, as in the UK and Ghana, a search of published court decisions is needed to identify cases of judicial corruption in particular. However, as noted above, TI France hosts a searchable database of corruption convictions,³⁰⁸ and the Central Service for the Prevention of Corruption (CSPS) in the Ministry of Justice (MoJ), publishes data about conviction rates for ‘probity offences’, including bribery and trading in influence, but they are not disaggregated by defendant occupation or function.³⁰⁹ In the UK and Ghana, by contrast, statistics are not available for specific corruption offences.

Application of the questionnaire

Original Questionnaire

Q A(1)(b)	Is there a specific unit responsible for investigating allegations of corruption against judges and prosecutors?
Q A(1)(c)	Are the powers of the investigating body in a case of judicial corruption any different from other corruption cases?

Modified Questionnaire

Q A(1)(a)	Is there a specific body or unit responsible for investigating allegations of corruption against judges?
Q A(1)(b)	If there is a specific body or unit responsible for investigating corruption by judges, how does it relate to other criminal justice bodies and prosecuting authorities? Is it independent?
Q A(1)(c)	If there is a specific body responsible for investigating judicial corruption, how does it hear of/receive allegations against judges? (eg, directly and/or from the police, or an anonymous hotline)
Q A(1)(d)	Are the powers available to the body investigating allegations of corruption against judges (whether unique to judicial corruption or not), different from the powers available to investigate corruption by others?

Overall, researching which body or bodies are responsible for investigating judicial corruption was straightforward. The additional questions in the Modified Questionnaire addressed some of the specific requirements of the UNCAC: the existence of a specialist body to investigate corruption (also covered in the Original Questionnaire); cooperation between the different agencies and bodies responsible for investigating crime and corruption; and reporting of alleged corruption. Both the Original and Modified Questionnaires sought to identify whether there are any differences in the way that corruption by public officials generally, and corruption by judges in particular, is dealt with. As can be seen from the example of Costa Rica, this is a question that is worth asking. In Costa Rica, the powers to investigate are the same whether the accused is a lower court judge or a Supreme Court judge; however, in the case of Supreme Court judges, the Attorney-General must investigate, and

308 See www.visualiserlacorruption.fr accessed 22 December 2020.

309 See <https://casier-judiciaire.justice.gouv.fr/pages/accueil.xhtml> accessed 22 December 2020.

the decision to press charges/prosecute is constrained by the requirement of consent from both the Supreme Court and Parliament (see below).

It would perhaps be helpful to separate the two questions in Q A(1)(b), with the question of the independence of the body as an additional question, reflecting the requirement of independence under Article 6(2) of the UNCAC. It might also be helpful to specify a question about national anti-corruption policies as they relate to the judiciary.

4.4 Prosecuting judicial corruption

4.4.1 RESPONSIBLE BODY AND DECISION TO PROSECUTE

Relevant international standards

UN Convention Against Corruption

Art 30(3)	Each State Party <i>shall endeavour</i> to ensure that any <i>discretionary legal powers</i> under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are <i>exercised to maximize the effectiveness of law enforcement measures</i> in respect of those offences and with due regard to the need to deter the commission of such offences.	<i>Discretionary powers used to maximise effectiveness</i>
Art 30(9)	Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.	<i>Description of offences is reserved to domestic law³¹⁰</i>
Art 36	Each State Party <i>shall</i> , in accordance with the fundamental principles of its legal system, <i>ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement</i> . Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.	<i>Mandatory; may be the same body as referred to in Art 6³¹¹</i>

Commentary and comparison

Body responsible for prosecuting corruption

Article 36 of the UNCAC requires that states ‘ensure’ they have ‘a body or bodies or persons specialised in combatting corruption through law enforcement’. States have a choice as to whether they create a separate, independent, anti-corruption authority with the necessary investigative

³¹⁰ UNODC, ‘Legislative Guide’ (see n 16 above), 9.

³¹¹ *Ibid*, 21; and see discussion in UNODC, ‘Technical Guide’ (see n 20 above), 113-117.

prosecutorial powers, or provide for specialised expertise within their existing bodies.³¹² France and Ghana are the only countries in this case study where there is no specialised body, agency or unit responsible for *prosecuting* cases of corruption.³¹³ In France, proceedings may be initiated by the public prosecutor or by an aggrieved party exercising their right to be a civil party to the proceedings.³¹⁴ In addition, an organisation that lists one of its missions as the fight against corruption and has existed for at least five years may initiate a criminal proceeding as a ‘civil party’ for corruption proceedings.³¹⁵ The public prosecutor has the discretion to decide whether or not to pursue a case,³¹⁶ but if he or she decides not to prosecute, he or she has to provide justification as to the legality of that decision.³¹⁷ A decision not to prosecute is not absolute and may be overturned by the chief prosecutor of the relevant *cour d’appel*.³¹⁸ In Ghana, as in the UK, a distinction is made between cases with reference to where they may be tried. Allegations of corruption in Ghana are triable as either an indictable (more serious offences, tried in the higher courts) or a summary offence (less serious offences, tried in the lower courts).³¹⁹ Indictable corruption offences must be instituted by or on behalf of the Attorney-General,³²⁰ and while the investigation of the case is carried out by the Ghana Police Service, the Attorney-General advises as to whether or not to prosecute.³²¹ Where the Attorney-General recommends prosecution, the case is sent to the Police Prosecutor for summary offences in the lower courts, or is prosecuted by the Attorney-General where it is an indictable offence.³²² In addition, the Attorney-General has the power, at any stage before the verdict or judgment or in preliminary proceedings before the district court, whether the accused has or has not been committed for trial, to enter an order for *nolle prosequi* to voluntarily discontinue the prosecution.³²³ It is not clear what the criteria for such an intervention are.

In the other three countries, crimes of corruption may be prosecuted by the ordinary prosecutorial body or they may be prosecuted by a specialist body. In the Philippines, the Office of Special Prosecutor acting under the authority of the Ombudsman is responsible not only for investigating crimes of corruption, but also for prosecuting public officials accused of crimes of graft and corruption.³²⁴ In order to proceed to the anti-corruption court, the Sandiganbayan, the Chief Special Prosecutor must prove the existence of probable cause.³²⁵ There is no discretion to prosecute once it is decided that a case has merit – prosecution is mandatory.³²⁶ However, interviews indicate that the Ombudsman’s record in prosecuting cases of judicial corruption is poor, and this poor performance

312 UNODC, ‘Technical Guide’ (see n 20 above), 113-115.

313 Note that in France, the AFA is not required to ‘investigate, record or prosecute criminal offences’ (see n 249 above). Also, note that in Ghana the Commission on Human Rights and Administration of Justice is an investigative body, not a prosecutorial body. The Commission’s functions are codified in Commission on *Human Rights and Administrative Justice Act 1993*.

314 Criminal Procedure Code (France), Art 1.

315 *Ibid*, Art 2-23 (added by Law 2013-1117 of 6 December 2013, relating to the fight against tax fraud and serious economic and financial crimes, hereinafter ‘Law 2013-1117’).

316 Criminal Procedure Code (France), Art 40-1.

317 *Ibid*, Art 40-2.

318 *Ibid*, Art 40-3.

319 The Courts Act 1993 (Ghana), ss 15(1), 43 and 48.

320 *Ibid*, ss 2(3), 2(4) and 58.

321 COOP Act (Ghana), ss 2(3), 2(4) and 58.

322 Information based on an interview.

323 COOP Act (Ghana), s 54.

324 The Constitution (the Philippines), Art XI s 13(1); the Ombudsman Act 1989 (the Philippines), s 15(1).

325 Presidential Decree No 1606 (as amended by Republic Acts No 7975 and 8249) (the Philippines), s 11. R 115 of the Revised Rules of Criminal Procedure (the Philippines) outlines a defendant’s rights in criminal trials.

326 *Ibid*.

is attributed to three factors: limited investigative power; limited capacity to prosecute; and operational shortcomings, such as the allocation of human resources. But the Ombudsman is not the only body responsible for prosecuting corruption cases in the Philippines. The National Prosecution Service ('NAPROSS'), which is part of the Department of Justice, may also prosecute cases of judicial corruption.³²⁷ As there is a specialist anti-corruption court in the Philippines, it is possible to look at prosecution rates for that particular court. The case study indicates that the Sandiganbayan is the slowest of all the collegiate courts in the Philippines, and that the average time it takes to resolve a criminal case rose from 6.6 years in 2003 to 9.1 years in 2012.³²⁸ These figures are attributed to a number of factors, including the court rules and procedures, the limited financial resources of the court and the significant numbers of judicial vacancies.³²⁹ In addition, interviews indicate that the court consistently grants continuances to the Ombudsman, which, observers say, tends to occur because the Ombudsman is disorganised and unprepared.

In Costa Rica, the Public Prosecutor's Office is responsible for prosecuting all crimes. However, the Anti-Corruption Unit of the Public Prosecutor's Office is responsible for prosecuting allegations of corruption against public officials, including judges generally and Supreme Court judges.³³⁰ The Attorney-General must present evidence of the allegations to the Supreme Court to either press charges or request dismissal.³³¹ In order to prosecute members of the Supreme Powers, including Supreme Court judges, *derecho de antejuicio* (immunity 'right to prejudice') must be lifted in a process that involves both the Supreme Court and Legislative Assembly.³³² Prosecution cannot proceed without confirmation by the Supreme Court that the allegations constitute a crime, and authorisation from the Legislative Assembly.³³³ Once that process is complete, the Third Chamber of the Supreme Court (also known as the Criminal Chamber of the Supreme Court) will instruct one of its judges to perform further investigative actions that must be carried out before the trial is held.³³⁴

In the UK, the SFO has jurisdiction to investigate and prosecute serious crimes in England and Wales, and Northern Ireland. In England and Wales, the Crown Prosecution Service prosecutes crimes.³³⁵ In Scotland, the Crown Office and Office of the Procurator Fiscal have this responsibility,³³⁶ and in Northern Ireland it is the responsibility of the Public Prosecution Service of Northern Ireland.³³⁷ In England and Wales, prosecutors can only proceed when they are 'satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge' and that a 'prosecution is required in the public interest'.³³⁸ In addition, offences under the Bribery Act 2010 cannot be prosecuted without the personal consent of the Director of Public Prosecutions or the Director of the SFO.³³⁹ Consent is also required by the equivalent individuals in Northern Ireland in order

327 Republic Act No 10071 (2010) ('Prosecution Service Act of 2010') (the Philippines), s 3.

328 Batalla (see n 281 above).

329 *Ibid.*

330 See n 263 above.

331 Ley Orgánica del Ministerio Público, Art 25(j); and Criminal Procedure Code, Art 394.

332 Criminal Procedure Code (Costa Rica), Art 395.

333 Criminal Procedure Code (Costa Rica), Arts 396, 397 and 398.

334 Criminal Procedure Code (Costa Rica), Arts 397 and 398.

335 Established by the Prosecution of Offences Act 1985 (England and Wales).

336 See www.copfs.gov.uk/about-us/about-us accessed 22 December 2020.

337 See www.ppsni.gov.uk/about-pps accessed 22 December 2020.

338 Code for Crown Prosecutors (England and Wales), para 4.2.

339 Bribery Act 2010 (the UK), s 10.

to prosecute under the Bribery Act, and the decision to prosecute must also be based on the ‘Test for Prosecution’: whether on the evidence there is a reasonable prospect of conviction, and whether it is in the public interest.³⁴⁰ In Scotland, the Procurator Fiscal must decide ‘whether the conduct complained of constitutes a crime known to the law of Scotland and whether there is any legal impediment to prosecution’.³⁴¹ There is no need for consent to prosecute under the Bribery Act 2010 in Scotland.³⁴²

Table 7 Prosecuting judicial corruption

	Philippines	France	Ghana	Costa Rica	UK
Public prosecutor has jurisdiction over corruption cases	Yes	Yes	Yes	Yes	Yes
Specialist body/agency for corruption cases?	Yes	No	Yes	Yes	Yes
Specialist body/agency for judicial corruption cases?	No	No	No	No	No
Discretion to prosecute?	?	Yes	Yes	?	Yes
Other relevant factors?	Delays in anti-corruption court	N/A	N/A	Lack of specialised expertise; inexpedient process; questionable procedure	Need for consent to prosecute bribery in England and Wales causes delays

Decision to prosecute

Through the UNCAC, states must ‘endeavour’ to ensure that discretionary legal powers, most notably discretion to prosecute, must be exercised to ‘maximise the effectiveness of law enforcement measures’. The *Technical Guide to the United Nations Convention Against Corruption* (2009) encourages states to ‘advise their law enforcement authorities that the investigation and prosecution of corruption offences are the norm, while the dismissal of proceedings are an exception to be justified’.³⁴³ However, they acknowledge that resources may well be a consideration, in which case ‘countries with limited resources may wish to focus on major cases, for example those with the involvement of high-level public officials’.³⁴⁴ The guide goes on to say that ‘[s]tates may wish to take note’ of the fact that some states have experienced ‘undue political interference by superior authorities’ where there is an obligation on the prosecutor to report to a superior authority before starting an investigation or a prosecution.³⁴⁵ The guide advises that states should ‘evaluate whether there is a necessity to provide for such prerequisites and conditions for investigation and adjudication or even consider their removal for all cases where such authority is not legislatively defined’.³⁴⁶ Where states retain such conditions, they should require that such

³⁴⁰ Public Prosecution Service (Northern Ireland), Code for Prosecutors (2016), 12.

³⁴¹ See www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf accessed 22 December 2020.

³⁴² See www.copfs.gov.uk/publications/bribery-act accessed 22 December 2020.

³⁴³ UNODC, ‘Technical Guide’ (see n 20 above), 87.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*, 88.

³⁴⁶ *Ibid.*

requests and instructions are made in writing, allowing for public access to the record to ensure transparency and the possibility of judicial review of these decisions.³⁴⁷

Prosecution, the decision to prosecute and the process for prosecuting appear to be where delays are most likely, or where there are significant challenges in developing cases to completion. In both the Philippines and Costa Rica, it is not clear whether the decision to prosecute is, in general, discretionary. However, in Costa Rica, the decision to prosecute Supreme Court judges is not – it requires the confirmation and approval of the Supreme Court and Legislative Assembly, respectively.³⁴⁸ In the Philippines, the Office of the Public Prosecutor must prove probable cause, after which prosecution is mandatory.³⁴⁹ In France, Ghana and the UK, prosecutors do have considerable discretion. In line with the guidance set out in the *Technical Guide to the United Nations Convention Against Corruption* (2009), prosecutors in France must provide legal justification for their decision to prosecute, and that decision may be overturned by the *cour d’appel*.³⁵⁰ The UK process is also in line with the guide, in that there are published criteria by which a decision to prosecute is made. However, the requirement under the Bribery Act 2010 for the personal consent of the Director of Public Prosecutions or the Director of the SFO³⁵¹ in England and Wales, and their Northern Ireland counterparts, is problematic. Concerns have been raised that the requirement for consent from a director is too high (in previous anti-corruption legislation, the consent of the Attorney-General was required) and gives the impression that the act is to be used ‘only at the highest echelons’ and therefore restricts its application.³⁵² The requirement of the personal, written consent of a director can also cause delays.³⁵³

Methodological issues

Original Questionnaire

Q A(1)(d)	Who is responsible for prosecuting allegations of corruption in the judiciary/public prosecution service?
Q A(4)	Is the prosecution of judicial corruption any different from the general ‘mandatory/discretionary prosecution rule’ into force in the legal system of the country?

Modified Questionnaire

Q A(4) (b)	Who is responsible for prosecuting allegations of corruption by judges?
Q A(4) (c)	Do prosecutors have any discretion when deciding what crimes to prosecute in general?
Q A(4) (d)	Do prosecutors have any discretion in prosecuting corruption by judges, or is prosecution mandatory?
Q A(4) (e)	Does the status of the complainant (eg, individual or public body) determine whether prosecution is discretionary or mandatory?

While both the Original and Modified Questionnaires address the issue of prosecutorial discretion, there is no direct question about the potential need for prosecutors to seek authority or consent from their superiors. This aspect of the decision to prosecute has been explored in the case studies in any case, but it would be helpful to include a specific question on this point, given the potential political influence that the guide has identified.

³⁴⁷ *Ibid.*

³⁴⁸ Criminal Procedure Code (Costa Rica), Arts 392, 395 and 396–398.

³⁴⁹ Presidential Decree No 1606 (as amended by Republic Acts No 7975 and 8249) (the Philippines), s 11.

³⁵⁰ Criminal Procedure Code (France), Art 40-3.

³⁵¹ Bribery Act 2010 (the UK), s 10.

³⁵² House of Lords Select Committee on the Bribery Act 2010, *Report of Session 2017-2019*; The Bribery Act 2010: Post-Legislative Scrutiny (HL Paper 303, 2019), para 97.

³⁵³ *Ibid.*, para 75.

4.4.2 BURDEN AND STANDARD OF PROOF

Relevant international standards

Universal Declaration of Human Rights

Art 11(1)	Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.	
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International Covenant on Civil and Political Rights

Art 14(2)	Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.	
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Commentary and comparison

As might be expected, in line with accepted international standards, in all countries in this study, the burden of proof in bribery and trading in influence cases lies with the prosecution. In Costa Rica, where there is uncertainty as to the interpretation of factual matters, the principle is that the most favourable scenario for the accused person is followed.³⁵⁴ In all the other countries, the standard of proof is ‘beyond reasonable doubt’.³⁵⁵

Methodological issues

Original Questionnaire

Q A(3)	Is the burden of proof in criminal proceedings involving judges or prosecutors any different from other cases?
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Modified Questionnaire

Q A(5)(a)	What is the burden of proof? Is the burden of proof in offences of corruption by judges different from other cases?
Q A(5)(b)	What is the standard of proof in cases of corruption by judges?

The addition, in the Modified Questionnaire, of the question on the standards of proof was simply to acknowledge that there are two aspects to proving criminal liability.

³⁵⁴ Criminal Procedure Code (Costa Rica), Art 9.

³⁵⁵ France: Criminal Procedure Code Preliminary, Art and French MoJ, The French Legal System, 10 www.justice.gouv.fr/art_pix/french_legal_system.pdf accessed 22 December 2020; Philippines: Rules of Court, r 133, s 2; Ghana: Evidence Act 1975, ss 11, 13(1) and 15(1). UK: Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2010), 26.

Relevant international standards

There are no specific international standards or guidelines on venue or mode of trial for corruption cases. However, see the discussion above about the use of specialised courts (section 5.4). Also, safeguards against bias or presumption of bias would be relevant, for example, changing venue to avoid a judge being tried in his or her own courts (see ‘Procedural safeguards’ below).

Commentary and comparison

In both common law countries in this study, Ghana and the UK, there is no special procedure for changing venue if a judge is being tried on a corruption charge. In Ghana, the general provisions regulating jurisdiction in criminal cases apply to cases of judicial corruption as well.³⁵⁶ If the offence is charged summarily, the circuit court has original jurisdiction,³⁵⁷ and if the offence is indictable, the High Court has original jurisdiction.³⁵⁸ In the UK, bribery offences under the Bribery Act 2010 are triable either way,³⁵⁹ whereas the offence of misconduct in public office is an indictable offence.³⁶⁰ This means that, in England and Wales, bribery offences may be tried either summarily in the magistrates’ courts or on indictment in the High Court.³⁶¹ A defendant may elect for a trial by jury, and the case will be heard in the High Court.³⁶² In England and Wales, and Northern Ireland, the charge of misconduct in public office will be heard in the Crown Court.³⁶³ In Scotland, bribery offences will either be heard by way of summary procedure before a justice of the peace or sheriff court, or will be heard under the solemn procedure before a sheriff court or the High Court of Justiciary.³⁶⁴

In France, subject matter jurisdiction and venue are determined by the category of the crime. *Delits* are tried in the *tribunal correctionnel*,³⁶⁵ and *crimes* are tried in *la cour d’assises*.³⁶⁶ However, complex cases may be assigned to a special jurisdiction.³⁶⁷ Offences of bribery or trading in influence by a judge may be sufficiently complex to warrant being assigned to this special jurisdiction, but interviews suggest that in practice, cases of corruption involving magistrates would not be sufficiently complex to be transferred.³⁶⁸ There are general provisions regarding changing venue that would apply to a judge charged with corruption as they would anyone else.³⁶⁹

356 Courts Act 1993 (Ghana).

357 Courts Act 1993 (Ghana), s 43; for removal of doubt, s 48(3) of the Courts Act 1993 prohibits the District Court from having original jurisdiction under s 48(1)(b) to hear cases in relation to an offence under s 239 of the Criminal Code 1960 because the minimum penalty prescribed for an offence under that section by s 296(5) of the COOP Act exceeds the penalty permitted to be imposed by a District Court under s 48(2) of the Courts Act 1993.

358 Courts Act 1993 (Ghana), s 15(1).

359 Bribery Act 2010 (the UK), s 11.

360 CPS, ‘Misconduct in Public Office: Legal Guidance’ www.cps.gov.uk/legal-guidance/misconduct-public-office accessed 22 December 2020.

361 See www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery accessed 22 December 2020.

362 Magistrates’ Court Act 1980 (England and Wales), s 20.

363 *Halsbury’s Laws of England* (LexisNexis), para 311.

364 Book of Regulations (Scotland), ch 6 and ch 7.

365 Criminal Procedure Code (France), Arts 381 and 704.

366 Criminal Procedure Code (France), Art 231.

367 Criminal Procedure Code (France), Art 704 and Art 705. See also www.tribunal-de-paris.justice.fr/75/le-pnf accessed 22 December 2020.

368 *Ibid.*

369 *Ibid.*, Art 662.

In both the Philippines and Costa Rica, there is a different process for ordinary judges and superior court or Supreme Court judges. In the Philippines, a distinction is made between lower-ranking public officials, which includes judges of the Municipal Circuit Trial Court, and all other judges, who are ‘high-ranking officials’.³⁷⁰ Prosecution of high-ranking officials for corruption falls within the exclusive jurisdiction of the Sandiganbayan.³⁷¹ The Supreme Court may order a change of venue to ‘avoid a miscarriage of justice’.³⁷² In Costa Rica, a distinction is made between ordinary judges and Supreme Court judges. The Criminal Tribunal and Criminal Court have jurisdiction over crimes performed in public office.³⁷³ The preparatory and intermediate phases of criminal proceedings take place in the Criminal Tribunal before going to the Criminal Court.³⁷⁴ One significant obstacle identified in the case study is that the venue for such cases is restricted to the Criminal Tribunal and Criminal Court, both of which are located in San Jose, and are therefore inaccessible to many, and the requirement to travel to these courts causes delays.³⁷⁵ In addition, unlike the anti-corruption court in the Philippines, the Criminal Tribunal and Criminal Court in Costa Rica are not specialist courts, but they do have jurisdiction over crimes committed in public office.³⁷⁶ Criminal charges against a Supreme Court judge would be heard by the criminal chamber of the Supreme Court,³⁷⁷ but it is unclear how the bench would be constituted, and interviewees have expressed concerns about the process in which a judge is to be judged by his or her peers. Whether or not recusal of close colleagues would suffice is unclear, although it is unlikely to address the problem as there are a limited number of Supreme Court judges, and they work closely together.

Evaluation against international standards

See the discussion in section 4.3 about specialist courts, and on procedural safeguards below.

Methodological issues

Original Questionnaire

Q A(6)	Are there specific rules for the venue for criminal proceedings involving judges and prosecutors charged with corruption (eg, change of venue when a case involves a judge, to avoid having the case before their colleagues in the same court)?
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Modified Questionnaire

Q A(6)(f)	Are there specific rules about the venue of criminal proceedings involving judges (eg, change of venue when a case involves a judge, to avoid having the case heard before colleagues in the same court)?
Q A(6)(g)	Are there rules as to mode of trial for corruption by judges (eg, summary trial for offences carrying lesser sentences; trial on indictment for offences carrying longer sentences)?

³⁷⁰ See n 281 above.

³⁷¹ Presidential Decree No 1606 as amended by Republic Act No 8249 (the Philippines), s 4(a) (3). The offences under the Revised Penal Code (1960) that the Sandiganbayan has jurisdiction over are bribery offences.

³⁷² The Constitution Art VIII (the Philippines), s 5(4).

³⁷³ Ley 8275 creación de la jurisdicción penal hacienda función publica Art 1.

³⁷⁴ Organic Law of the Judicial Power (‘LOPJ’), Art 107.

³⁷⁵ See www.oas.org/juridico/PDFs/mesicic4_cri_juris.pdf para 42; or <http://ijj.ucr.ac.cr/wp-content/uploads/bsk-pdf-manager/2017/06/La-Juridicci%C3%B3n-Penal-de-Hacienda-y-de-la-Func%C3%B3n-P%C3%BAblica-Un-Obst%C3%A1culo-Para-El-Ciudadano-Eliminaci%C3%B3n-de-La-Especialidad-o-Regionalizaci%C3%B3n-De-los-Conflictos..pdf> accessed 22 December 2020.

³⁷⁶ Ley 8275 creación de la jurisdicción penal hacienda función publica, Art 1.

³⁷⁷ Criminal Procedure Code (Costa Rica), Art 397.

The question on venue in the Original Questionnaire focused on safeguarding against possible bias and conflicts of interest. The Modified Questionnaire expanded the consideration of the venue to include a question about mode of trial to try to capture information on how judicial corruption is dealt with in the system, and which courts are dealing with it.

4.5 Procedural safeguards

RELEVANT INTERNATIONAL STANDARDS

Universal Declaration of Human Rights

<p>Article 11</p>	<p>(1) Everyone charged with a penal offence has the right to be <i>presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.</i></p> <p>(2) <i>No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.</i></p>	
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<p>Article 14</p>	<p>1. All persons shall be <i>equal before the courts and tribunals</i>. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a <i>fair and public hearing by a competent, independent and impartial tribunal established by law</i>. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (<i>ordre public</i>) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.</p> <p>2. Everyone charged with a criminal offence shall have the <i>right to be presumed innocent until proved guilty according to law</i>.</p> <p>3. In the determination of any criminal charge against him, everyone shall be entitled to the following <i>minimum guarantees</i>, in full equality:</p> <p>(a) To be <i>informed promptly and in detail</i> in a language which he understands of the <i>nature and cause of the charge against him</i>;</p> <p>(b) To have <i>adequate time and facilities for the preparation of his defence</i> and to communicate with counsel of his own choosing;</p> <p>(c) To be <i>tried without undue delay</i>;</p> <p>(d) To be <i>tried in his presence, and to defend himself in person or through legal assistance of his own choosing</i>; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;</p> <p>(e) To <i>examine, or have examined, the witnesses against him</i> and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;</p> <p>(f) To <i>have the free assistance of an interpreter</i> if he cannot understand or speak the language used in court;</p> <p>(g) <i>Not to be compelled to testify against himself or to confess guilt</i>.</p> <p>4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.</p> <p>5. Everyone convicted of a crime shall have the <i>right to his conviction and sentence being reviewed by a higher tribunal according to law</i>.</p> <p>6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.</p> <p>7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.</p>	
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COMMENTARY AND COMPARISON

There is a wealth of information and scholarship about fair trial rights and the rights of defendants. It is not within the scope of this study to examine that scholarship in detail. However, it is important to note the rights of defendants here, and to note that judges, when being tried for corruption or any other crime, ought to be afforded the same safeguards and guarantees as other defendants.

Those safeguards are set out in Article 14 of the International Convention on Civil and Political rights. The safeguards most relevant in the current context are:

- equality before the law;
- fair and public hearing by a competent, independent and impartial tribunal, established by law;
- right to be presumed innocent until proven guilty, according to law;
- minimum guarantees in determination of any criminal charge;
 - to be informed promptly and in detail in a language he or she understands, the nature of the charge;
 - to be tried without undue delay;
 - to be tried in his or her presence, and to defend him or herself in person or through legal representation;
 - to examine witnesses against him or her, and call witnesses on his or her behalf;
 - to have the free assistance of an interpreter if needed; and
- right to have conviction and sentence reviewed by a higher tribunal according to law.

CASE STUDY COMPARISONS

On the face of it, the countries in this study meet the requirements set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The procedural safeguard addressed in most detail in the case studies is the appeals process. Information on procedural safeguards is limited in the case studies, but the main issues covered are appeals, open justice and the right to legal representation.

Appeals

All countries have a system of appeals. In Costa Rica, appeals against decisions made in the Criminal Court of Taxation and Public Administration are heard by the Appeals Court of the Criminal Decisions (Tribunales de Apelación de la Sentencia Penal).³⁷⁸ If the appellant pleads non-conformity with the established facts, the assessment and incorporation of the evidence, the legal arguments or the determination of the punishment, the Appeals Court carries out a comprehensive examination of the original judgment.³⁷⁹ The Third Chamber of the Supreme Court, the court of last resort, has the jurisdiction to hear cases on appeal from the Appeals Court.³⁸⁰ For Supreme Court judges, appeals from the Third Chamber of the Supreme Court (which is the court of first instance for Supreme Court judges) are heard by the Plenary Session of the Supreme Court.³⁸¹ The judges who decided the case at the Third Chamber level will be substituted in the Plenary Session of the Supreme Court.³⁸²

³⁷⁸ Criminal Procedure Code (Costa Rica), Title III, ch III.

³⁷⁹ *Ibid.*

³⁸⁰ Law for the Creation of the Taxation and Public Administration Jurisdiction, Law Number 8275, Art 2; and LOPJ (Costa Rica), Art 56(2).

³⁸¹ LOPJ (Costa Rica), Art 59(17); and Criminal Procedure Code (Costa Rica), Art 399.

³⁸² Criminal Procedure Code (Costa Rica), Art 399.

In the Philippines, the process in the Sandiganbayan appears to be unusual in that the first instance judge (or judges) can review their decision (on questions of law and fact), rather than such ‘review’ being carried out by a higher court. The timing of the review is unusual too, and it appears that this process combines two issues: the potential to request a retrial where there has been, for example, an irregularity in procedure or the jury has failed to agree a verdict and review/appeal of the case on the basis of fact and law.³⁸³ Appeal to a higher court is limited to appeals on the law. The Sandiganbayan can grant a new trial or reconsideration of a decision if made any time before a judgment becomes final, either of its own accord or on petition of the accused.³⁸⁴ The accused can also file a motion for a new trial or reconsideration within 15 days of the date of the final judgment, and that motion must be decided by the Sandiganbayan within 30 days.³⁸⁵ A decision to grant a new trial or reconsideration can be made on the grounds listed in section 2 of Rule 121 or section 14 of Rule 124 of the Rules of Criminal Procedure.³⁸⁶ The new trial or reconsideration is heard by the *ponente* (the author of the original judgment) and the other judges who participated in the original decision (unless they are no longer able to for reasons considered in section 2 of Rule 121).³⁸⁷ If a new trial or reconsideration is granted, the original judgment will be set aside or vacated, and a new judgment rendered accordingly.³⁸⁸

However, no motion for new trial or reconsideration filed by the accused judge can be acted on if the accused has also filed an appeal in the Supreme Court by petition for review on *certiorari*.³⁸⁹ A judge indicted by the Sandiganbayan can appeal to the Supreme Court by petition for review on *certiorari*, which only relates to questions in the law.³⁹⁰ If any decision of the Sandiganbayan results in life imprisonment or the death penalty, the decision is always appealable to the full bench of the Supreme Court.³⁹¹

In France, general provisions governing appeals apply to cases of corruption by magistrates: a decision of a *tribunal correctionnel* can be appealed to the relevant *cour d’appel*,³⁹² a *cour d’appel* decision can be referred on points of law to the *Cour de Cassation*,³⁹³ and a decision of a *cour d’assises* can be appealed on points of fact to another *cour d’assises* in a different county before a larger jury, or on points of law to the *Cour de Cassation*.³⁹⁴

In Ghana, any appeal of a conviction or sentence of judicial corruption must be entered within one month of the date the order was made.³⁹⁵ If an allegation of judicial corruption is tried on a summary basis and heard by the relevant circuit court, either party may appeal against the judgment to the relevant High Court.³⁹⁶ If an allegation of judicial corruption is tried as an indictable offence and heard by the relevant High Court, an appeal by either party will be heard in the Court of Appeal.³⁹⁷

383 Rules Criminal Procedure (the Philippines), r 121, s 3.

384 *Ibid*, r 121, s 1.

385 Supreme Court Resolution AM No 02-6-07-SB, ‘Re: Revised Internal Rules of the Sandiganbayan’ (the Philippines), pt IV, s 1.

386 *Ibid*, s 4.

387 *Ibid*, s 2.

388 *Ibid*, s 7; Rules of Criminal Procedure (the Philippines), r 121, s 6(c).

389 ‘Re: Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n 385 above), pt IV, s 8.

390 ‘Re: Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n385 above), r X, s 1(a); Rules of Court (the Philippines), r 45.

391 *Ibid*.

392 See https://e-justice.europa.eu/content_ordinary_courts-18-FR-en.do?clang=fr accessed 22 December 2020.

393 *Ibid*.

394 The possibility to appeal a decision of a *cour d’assises* was introduced in France with Law No 2000-516 of 15 June 2000 (Loi renforçant la protection de la présomption d’innocence et les droits des victimes).

395 COOP Act (Ghana), s 325(1).

396 Courts Act 1993 (Ghana), s 15(1)(b).

397 *Ibid*, s 11.

Appeals may be upheld on the basis that the verdict or conviction of the court with original jurisdiction was unreasonable or cannot be supported having regard to the evidence; the decision was wrong on any question of law or fact; or there was a miscarriage of justice.³⁹⁸

In the UK, in England and Wales, defendants who are tried in the magistrates' court can appeal on questions of fact to the Crown Court. This involves a rehearing of the case before a panel of two judges sitting with a magistrate.³⁹⁹ An appeal from the Crown Court sitting as a court of appeal is then only possible on points of law to the Administrative Division of the High Court by way of the 'case stated' on questions of law.⁴⁰⁰ When the Crown Court is sitting as a court of first instance (for indictable offences) the defendant can appeal against a finding of fact on the grounds of fact or law to the Court of Appeal, and then to the Supreme Court.⁴⁰¹

Open justice

In all five countries, a defendant has the right to be tried in public. In France, the UK, the Philippines and Ghana there are procedures for holding them in private, or *in camera*, in particular circumstances.⁴⁰² In Ghana, trials are held in public unless it is considered necessary to hold them in private in the interests of public morality, public safety or public order.⁴⁰³ Rights of a defendant are contained in Article 19 of the Constitution of Ghana. In the Philippines, a defendant has the right to be tried in public,⁴⁰⁴ but the public can be excluded from a trial either on the initiative of the court, or following a request from the accused.⁴⁰⁵

Legal representation

Other procedural safeguards expressly covered in the case studies for Costa Rica, France, Ghana and the UK were the right to legal representation, and trial within a reasonable time.

METHODOLOGICAL ISSUES

Original Questionnaire

Q A(4)(a)	Are there differences in the defence rights in cases of proceedings against judges or prosecutors for judicial corruption?
Q A(3)(b)	Who is entitled to defend a judge or a prosecutor in cases of judicial corruption?

Modified Questionnaire

Q A(5)(c)	Are there differences in rights of defence in proceedings against judges for judicial corruption?
Q A(5)(d)	Who is entitled to defend judges in cases of judicial corruption?
Q A(5)(e)	Are there any specific or additional procedural safeguards in place in cases of judicial corruption?
Q A(5)(f)	What is the appeals process in proceedings against judges for judicial corruption?

398 *Ibid*, s 31(1).

399 *Halsburys Laws*, para 652.

400 *Ibid*, para 654.

401 *Ibid*, para 652.

402 France: Criminal Procedure Code Art 306; England and Wales: www.cps.gov.uk/legal-guidance/hearings-private-camera accessed 22 December 2020.

403 The Constitution (Ghana), Art 19(14).

404 Rules Criminal Procedure (the Philippines), r 115, s 1.

405 *Ibid*, R 119, s 21.

Both questionnaires asked fairly open questions about the rights of the defendant, so it may be helpful to include some more specific questions about the rights of the defendant. The modified questionnaire included a question about appeals processes.

4.6 Sanctions for judicial corruption

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

Article 30(1)	Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.	
Article 30(7)	Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from: (a) Holding public office; and (b) Holding office in an enterprise owned in whole or in part by the State.	Optional

COMMENTARY AND COMPARISON

Article 30 of the UNCAC requires that offences should carry sanctions that ‘take into account the gravity of the offence’. The *Technical Guide* explains that ‘[t]he gravity of the offence may not be determined only by the value of, for example, an undue advantage, but by taking into account other factors, such as the seniority of those involved, the sphere in which the offences occur, the level of trust attached to the public official and so on’.⁴⁰⁶

The CCJE has noted that there should be ‘[a]dequate criminal, administrative or disciplinary penalties for a judge’s corrupt behaviour, and severe actual sanctions pronounced against corrupt judges, can serve as a strong deterrent and thus have a preventive effect’⁴⁰⁷ and ‘[c]orruption committed by a judge must be addressed in accordance with the principle of proportionality and taking into account its seriousness’.⁴⁰⁸ In addition, ‘[c]riminal acts must be punished by the penalties provided for by criminal law, up to a term of imprisonment’.⁴⁰⁹

When considering the proportionality of sanctions, the seriousness of criminal acts (committed by a judge) can be determined with reference to ‘their impact on the general public’s confidence in the judicial system’.⁴¹⁰ This is because, as reiterated in the preamble of the Bangalore Principles and various other international documents such as the Universal Charter of the Judge adopted by the IAJ Central Council in Taiwan, a primary obligation of a judge is that in performance of their judicial duties, ‘the judge must be impartial and must so be seen’.

406 UNODC, ‘Technical Guide’ (see n 20 above), 83.

407 CCJE, ‘Opinion No. 21’ (see n 160 above), para 48.

408 *Ibid*, para 49.

409 *Ibid*.

410 *Ibid*.

Sanctions vary among the countries in this case study, and three of the five – France, Costa Rica and the Philippines – have implemented the optional requirement under Article 30(7) to prevent public officials from holding public office when convicted of corruption offences.⁴¹¹ In the UK, disqualification from public office provisions is set out in relation to each office in different statutes.⁴¹² Judges are selected ‘on merit’ and must be of ‘good character’.⁴¹³ The good character provision does not automatically preclude someone who has been convicted of a criminal offence from being appointed to judicial office.⁴¹⁴ In addition, in France, Costa Rica and the UK, sentences can be extended for aggravating circumstances that include the reason for the corruption.

Table 8 Sanctions for corruption offences

	Offence/law	Sanction	Application
Philippines	Criminal prosecution pending	<ul style="list-style-type: none"> • Suspension from office 	All public officials
	S 3 Anti-Graft and Corrupt practices Act (bribery, extortion, abuse of office, conflict of interest, unexplained wealth)	<ul style="list-style-type: none"> • Imprisonment – not less than one year, not more than ten years • Perpetual disqualification from public office • Confiscation of prohibited interest or unexplained wealth • Loss of retirement benefits 	All public officials
	Revised Penal Code (bribery of public officers, corruption)	<ul style="list-style-type: none"> • ‘Prison Mayor’ offence: imprisonment, 6–12 years • ‘Correctional Penalty’: imprisonment, six months–six years • ‘Arresto Mayor’: imprisonment, one to six months 	All public officials
	Plunder Act (when a public officer ‘accumulates or acquires ill-gotten wealth of at least P75million’)	<ul style="list-style-type: none"> • Life imprisonment • Perpetual and absolute disqualification from holding public office 	All public officials
Ghana	Criminal and Other Offences (Procedure) Act (COOP Act), and Criminal Code 1960 ss 252, 253, 260 (corruption)	<ul style="list-style-type: none"> • Misdemeanour: imprisonment, not exceeding 25 years; plus hard labour unless in the case of less than three years, the court directs otherwise. 	All public officials
	COOP Act (conditions if imprisoned for three years or more)	<ul style="list-style-type: none"> • Public office position becomes vacant (unless the court declares otherwise) • Pension etc accruing forfeited from date of conviction 	All public officials
	Judicial Service Regulations (sanction if judge convicted of offence of fraud or dishonesty; or sentenced to imprisonment)	<ul style="list-style-type: none"> • No wages from date of conviction pending decision of disciplinary authority to dismiss • Removed from duty without salary from date of conviction 	Specific to judges
France	Criminal Code, Art 434-9 (bribery)	<ul style="list-style-type: none"> • Imprisonment of ten years • Fines up to €1m 	Specific to judges

411 France: Criminal Code Art 131-26; Costa Rica: Arts 191 and 195 of the LOPJ; Philippines: Plunder Act s 2, Anti-Graft and Corrupt Practices Act s 9.

412 For example, Representation of the People Act 1983 (the UK), s 173: disqualification from being elected to the House of Commons if convicted of a corrupt or illegal practice.

413 England and Wales: Constitutional Reform Act 2005, s 63; Scotland: Judiciary and Courts (Scotland) Act 2008, s 12; Northern Ireland: Justice (Northern Ireland) Act 2002 and Northern Ireland Act 2009.

414 Judicial Appointments Commission, ‘Good Character Guide’ (2018), paras 21-22; Judicial Appointments Board Scotland, ‘Criminal Conviction – Statement of Principles’ (2009); Northern Ireland Judicial Appointments Commission, ‘Character Guidance for Applicants’ (2018) .

	Criminal Code, Art 434-9-1 (trading in influence)	<ul style="list-style-type: none"> • Imprisonment of five years • Fines up to €500,000 	Specific to judges
	Criminal Code, Art 434-9 Aggravating circumstances: offence is committed for the benefit or detriment of a person subject to criminal proceedings	<ul style="list-style-type: none"> • Higher sanction, longer statute of limitation 	
	Criminal Code, Art 131-26(2) if judge convicted of corruption	<ul style="list-style-type: none"> • Ineligible to hold public office 	Specific to judges
Costa Rica	Criminal Code, Art 340 (bribery within exercise of official functions)	<ul style="list-style-type: none"> • Imprisonment, six months to two years • Disqualified from public office 	All public officials
	Criminal Code, Art 341 (bribery in exchange for public office)	<ul style="list-style-type: none"> • Imprisonment, one to five years • Disqualified from public office 	All public officials
	Criminal Code, Art 344 (judge accepting promise or taking receipt of gift or advantage to favour or impair process)	<ul style="list-style-type: none"> • Affects sentence, sanctioned more harshly <p>If outcome = criminal conviction with sentence of more than eight years, judge imprisoned for four to eight years</p>	Specific to judges
UK	Misconduct in public office (common law offence)	<ul style="list-style-type: none"> • Maximum sentence of life imprisonment 	All public officials
	Bribery Act 2010, ss 1 and 2	<ul style="list-style-type: none"> • Maximum ten years' imprisonment; or a fine 	Any person who bribes another, or agrees to be bribed
	If judge convicted of corruption	<ul style="list-style-type: none"> • Can be dismissed under summary disciplinary procedure⁴¹⁵ 	

METHODOLOGICAL ISSUES

Original Questionnaire

No questions on sanctions.

Modified Questionnaire

Q A(6)(a)	What sentences do crimes of corruption by judges carry?
Q A(6)(b)	Are there discretionary or mandatory sentences?
Q A(6)(c)	What factors contribute to decisions about sentencing judges for crimes of corruption?

The Original Questionnaire did not have any questions about criminal sanctions. These questions were introduced in response to feedback and included in the case studies during the review process (see 'Methodology' above). These three questions appear to have generated sufficient information about sanctions in the case study countries, and they highlight the differences of approach in sanctions and sentencing policies.

⁴¹⁵ The Judicial Conduct (Judicial and other Office holders) Rules 2014 (England and Wales), r 30.

4.7 Transparency

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

Art 5(1)	Each State Party shall, in accordance with the fundamental principles of its legal system, <i>develop and implement or maintain effective, coordinated anti-corruption policies</i> that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, <i>integrity, transparency and accountability</i>	Mandatory
Art 7(4)	Each State Party shall, in accordance with the fundamental principles of its domestic law, <i>endeavour to adopt, maintain and strengthen systems that promote transparency</i> and prevent conflicts of interest	Mandatory to try strengthen systems
Art 10	Taking into account the need to combat corruption, <i>each State Party shall</i> , in accordance with the fundamental principles of its domestic law, <i>take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate</i> . Such measures may include, inter alia: (a) <i>Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;</i> (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) <i>Publishing information, which may include periodic reports on the risks of corruption in its public administration</i>	Mandatory
Art 13(1)	Each State Party <i>shall take appropriate measures</i> , within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) <i>Ensuring that the public has effective access to information;</i> (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula; (d) <i>Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption</i> . That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or <i>ordre public</i> or of public health or morals.	Mandatory

COMMENTARY AND COMPARISON

Transparency is an important aspect of accountability and the rule of law, and ‘transparency in the judiciary must be guaranteed so as to avoid corrupt practices that undermine judicial independence and public confidence in the justice system’.⁴¹⁶ Openness, and access to information, enhances accountability.

The CCJE argued that ‘the most important safeguard to prevent corruption among judges seems to be the development and fostering of a true culture of judicial integrity’.⁴¹⁷ The judicial system should have a high level of transparency, as a ‘lack of transparency caused by preventing access to

416 See n 1 above, para 39.

417 CCJE, ‘Opinion No.21’ (n 160), para 22.

information relating to the judicial system facilitates corrupt behaviour, and is therefore often an important trigger for corruption'.⁴¹⁸

Article 5 of the UNCAC requires each state party to 'develop and implement or maintain' anti-corruption policies that are effective and coordinated and that promote the rule of law, proper management of public affairs and property, integrity, transparency and accountability. The general aims of Article 5 are supported by a range of mandatory and optional provisions in the UNCAC. Of particular relevance here are Articles 7(4), 10 and 13(1). Article 7(4) prescribes that states should 'endeavour' to 'adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest'. Article 10 requires states to 'take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate'. Article 10(a) (allowing public access to information about the organisation, functioning and decision-making processes of its public administration) and Article 10(c) (publishing information on the risks of corruption), are particularly relevant to the judiciary. The purpose of Article 10 is to 'make decision-making more efficient, transparent and accountable so that public organisations can be more open and responsive'.⁴¹⁹ This can be through the publication of booklets and documents and/or websites explaining 'the functions and services of the administration, how they are accessed, what forms and other documentation are needed and the processes of decision-making'.⁴²⁰ According to the *Technical Guide* to UNCAC,

'the key characteristics of effective access to information are:

- Those responsible for decisions are publicly known.
- These decisions they take are publicly known.
- People have access to information about decisions with technical information available in plain language.
- People know what decisions have been taken and the reasons for them.
- There are efficient and accessible means to challenge or appeal decisions.⁴²¹

Government departments and bodies should have clear policies on how they make, record and publish decisions, which should be accessible to the public.⁴²²

Article 10(1)(c) requires states to publish information about the risks of corruption in public administration. This means that states should be periodically reviewing the threats of corruption, and reporting on the measures taken.⁴²³ The kinds of questions that departments and public bodies should be asking are:

- What functions does the ministry or department perform?
- Which processes does it carry out?

418 *Ibid*, para 13, and see the discussion about transparency throughout the opinion.

419 UNODC, 'Technical Guide' (see n 20 above), 43.

420 *Ibid*.

421 *Ibid*, 44.

422 *Ibid*.

423 *Ibid*, 46.

- Which of its processes, systems and procedures are susceptible to fraud and corruption?
- What are the internal and external risks likely to be?
- What are the appropriate key anti-fraud and corruption preventive measures in place?
- How are they assessed in practice?⁴²⁴

There does not appear to be a common practice of producing such reports in the judiciaries of the five countries in this study.

Article 13 complements Article 10, with Article 13(1)(b) specifying the requirement that there should be ‘effective access to information’; and Article 13(1)(d) requiring that the public are free to ‘seek, receive, publish and disseminate information concerning corruption’, subject to restrictions protecting the rights of others, national security, public order or public health.

Of the five countries in this study, in one – Ghana – access to case law, and therefore the reasoning of judicial decisions on corruption cases, was very difficult. In Ghana, cases are reported, but the publication of official law reports is limited and the availability of case reports is intermittent, so there are gaps where reports for some years are not published at all.⁴²⁵ In all the other countries, cases are published and can be accessed online. In Costa Rica, judicial decisions and policies are published online,⁴²⁶ but there is limited information about judicial integrity cases, with only two cases in which judges were investigated for corruption as of 2016.⁴²⁷ Information about corruption cases in the Philippines is good, and quite detailed. This is because the specialist anti-corruption court, the Sandiganbayan, publishes its decisions on its own website.⁴²⁸ In France, most criminal cases, and all decisions of the *Cour de Cassation* since 1987, are published and are available online.⁴²⁹ In addition, there is strong media reporting of judicial corruption cases, and civil society engagement – TI France hosts an online database of corruption cases.⁴³⁰ In the UK, most cases are published and are available online through paid professional databases that can be accessed in some libraries, and through a free online database.⁴³¹ The government departments and agencies, and the judiciaries in each of the countries in this case study publish annual reports accounting for their activities through the year, in line with the requirements of Article 10(a).

Information about the criminal justice system in general seems to be available in all five countries, but the quality of the information varies. In the case study on Ghana, the description of the practical application of legal provisions in the investigation and prosecution processes is significantly drawn from interviews rather than case law and published information. In the five other countries, it appears that information about the investigation and prosecution of corruption cases is more readily available. However, while Article 10(a) requires information to be made available to the public about the organisation, functions and decision-making processes of public bodies, Article 10(c) goes further

424 *Ibid.*

425 Ghana Legal Information Institute <https://ghalii.org> accessed 22 December 2020.

426 See <https://nexuspj.poder-judicial.go.cr> accessed 22 December 2020.

427 See Boddiger (see n 294 above); Wilson (see n 296 above) and see also n 297 above.

428 See <http://sb.judiciary.gov.ph/index.html> accessed 22 December 2020.

429 See www.legifrance.gouv.fr accessed 22 December 2020.

430 See www.visualiserlacorruption.fr accessed 22 December 2020.

431 See www.bailii.org/ for cases; www.legislation.gov.uk for legislation online accessed 22 December 2020.

and indicates that there should also be ‘periodic reporting’ about ‘the risks of corruption in [...] public administration’. States should ensure that public organisations periodically report ‘on the threats of corruption and anti-corruption prevention measures undertaken’.⁴³² The kinds of questions public bodies should reflect on are:

- What functions does the ministry or department perform?
- Which processes does it carry out?
- Which of its processes, systems and procedures are susceptible to fraud and corruption?
- What are the internal and external risks likely to be?
- What are the appropriate key anti-fraud and corruption preventive measures in place?
- How are they assessed in practice?⁴³³

It is not within the scope of this report to look in detail at comprehensive anti-corruption policies in each state beyond their application to judicial corruption. However, all countries produce crime statistics, and the degree of available detail varies. The statistics give a general view of the prevalence of corruption crimes without specifying the type of public official involved, so one common issue across the case studies is that there is no specific breakdown of corruption cases involving judges. In the Philippines, the Sandiganbayan publishes monthly statistics of the cases that were filed and disposed of by corruption offences, but the information does not reflect the number of cases that involved judges.⁴³⁴ Individual case reports have to be looked at to determine that information. In Ghana, the Judicial Service provides statistics of criminal cases in both the superior and lower courts annually, but there is no information about judicial corruption.⁴³⁵ In France, information about the prevalence of judicial corruption is tracked by TI France.⁴³⁶ The official statistics report annually on the numbers of convictions for probity offences, including bribery and trading in influence, but the information is not disaggregated further.⁴³⁷ There are no general crime statistics provided in the Costa Rica study, but details of two cases against judges that were investigated by the Public Prosecutor’s Anti-Corruption Unit are given in the study.⁴³⁸ In the UK, crime statistics are gathered and reported by each jurisdiction (England and Wales, Northern Ireland and Scotland) separately. In England and Wales, corruption offences (bribery and misconduct in public office) were not included in the official Crime Survey until 2018, and then only on an experimental basis.⁴³⁹ At the time of writing, corruption cases are not habitually included in the national crime statistics for England and Wales. In Scotland, corruption cases are categorised as ‘crimes of dishonesty’, and listed as one of

432 UNODC, ‘Technical Guide’ (see n 20 above), 46.

433 *Ibid.*

434 See, eg: Sandiganbayan, *Statistics Report on Cases Filed, Pending, and Disposed of as of 30 June 2019* (Sandiganbayan Statistics Report, 30 June 2019) http://sb.judiciary.gov.ph/libdocs/statistics/failed_pending_disposed_June_30_2019.pdf accessed 23 July 2019.

435 Ghana Judicial Service (see n 262 above).

436 See www.visualiserlacorruption.fr accessed 22 December 2020.

437 CSPC *casier judiciaire national*, convictions for offences against probity (2005–2014) (at the time of writing, these were the most current figures available).

438 See Boddiger (see n 294 above); Wilson (see n 296 above).

439 Office for National Statistics, ‘Crime in England and Wales: Year ending June 2018’ (2018) s 13 and Table F6 www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2018 accessed 19 February 2020.

three ‘other crimes of dishonesty’, with no further disaggregation of the data.⁴⁴⁰ No crime statistics were available for Northern Ireland.

Article 13(1)(d) also stipulates that measures should be in place ‘[r]especting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption’. Freedom of information laws were not a focus of this study, so the case studies do not set out the legislative framework on freedom of information requests, and the ‘freedom to seek’ information about corruption. However, it is apparent from the case studies that there is relatively little information, received by the public or published and disseminated about corruption, or about judicial corruption specifically. Overall, while it may be evident that states in this study have taken some steps to meet the requirements of Article 7(4), which needs a general, system-wide approach, without more detailed information about the cases, and the types and sources of corruption in the judiciary, as well as the way in which such cases are handled, it is difficult to know how much has been done, and also difficult to hold the relevant individuals to account. This means that the goal of strengthening judicial integrity and preventing opportunities for corruption in judiciaries under Article 11 is severely undermined.

METHODOLOGICAL ISSUES

Original Questionnaire

Q A(8)	Please, quantify criminal proceedings for judicial corruption against judges and prosecutors: Number of cases of corruption (in general) initiated in the last year/last three years Number of cases of judicial corruption initiated in the last year/last three years Number of cases of judicial corruption dismissed in the last year/three years Number of acquittals in cases of judicial corruption in the last year/three years Number of convictions in cases of judicial corruption in the last year/three years
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Modified Questionnaire

Q A(7)(a)	Are judicial corruption cases heard in public?
Q A(7)(b)	How accessible is information about the process?
Q A(7)(c)	How accessible is information about the outcomes of judicial corruption cases?
Q A(8)(a)	Are there clear statistics available about corruption offences by judges?
Q A(8)(b)	What was the number of corruption cases in general initiated in the last year/three years?
Q A(8)(c)	What was the number of judicial corruption cases initiated in the last year/three years?
Q A(8)(d)	How many cases of judicial corruption were dismissed in the last year/three years?
Q A(8)(e)	How many acquittals were there in judicial corruption cases in the last year/three years?
Q A(8)(f)	How many convictions for judicial corruption were there in the last year/three years?

The questions in the Original Questionnaire about transparency focused on statistics. The Modified Questionnaire sought to expand that focus to include questions about the substantive aspects of transparency, such as openness and access to information, as well as seeking to gather information about corruption cases and statistics.

⁴⁴⁰ National Statistics for Scotland, ‘Recorded Crime in Scotland, 2018-2019’ (Scottish Government, 2019) www.gov.scot/publications/recorded-crime-scotland-2018-19/pages/29 accessed 19 February 2020.

5. Disciplinary procedures

5.1 Standards on judicial conduct and discipline

States have an obligation, under Article 11(1), to ‘take measures’ to ‘strengthen integrity’ and ‘prevent opportunities for corruption among members of the judiciary’. Measures to strengthen integrity include adopting and disseminating a code of judicial conduct; creating mechanisms for enforcing the code; judicial training and measures that address conflicts of interest and require asset disclosures and other interests (see ‘Context and concepts’ above for more detail).⁴⁴¹ In addition, the conditions for judicial independence must be present, and these include security of tenure, financial security for judges with a secure salary and pension and independence on the administration of the judicial function.⁴⁴²

Measures to prevent opportunities for corruption include having transparent procedures for appointments and promotions, which must be based on merit; ensuring that the judicial process is open and accessible; adopting a code of judicial conduct that is regularly monitored; requiring declarations of assets, interests and conflicts of interest; creating a ‘credible’ complaints mechanism; and ensuring due process rights for judges (see ‘Context and concepts’ above for more detail).⁴⁴³

The great challenge for judicial accountability is to hold judges to account appropriately, that is, in a way that does not undermine the very important principle of judicial independence. There are accepted international standards setting out the need for states to protect and uphold judicial independence, but there is also recognition of the need for judges to be held to account, and some guidance as to how states can do that while maintaining judicial independence.

The Bangalore Principles end with the following statement: ‘By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.’

The Bangalore Principles are directed at judges and national judiciaries, but of course these institutions need the help and cooperation of states to fully implement the principles. In 2010, the JIG issued a statement of Implementation Measures for the Bangalore Principles.⁴⁴⁴ These are divided into ‘Responsibilities of the Judiciary’ and ‘Responsibility of the State’. Measures concerning judicial discipline fall within the responsibilities of the state (see further below). One regional body that has considered standards of judicial conduct and disciplinary proceedings is the CCJE, a body of the Council of Europe that advises on ‘issues relating to the independence, impartiality and competence of judges’, has also considered how standards and codes of judicial conduct should be formulated and given effect. CCJE Opinion No 3 (2002) states the following with reference to the criminal, civil and disciplinary liability of judges:

441 UNODC, ‘Strengthening Judicial Integrity’ (see n 40 above), 25.

442 UNODC, ‘Technical Guide’ (see n 20 above), 48.

443 *Ibid.*, 49–50.

444 BP-IM (see n 90 above).

‘The corollary of the powers and the trust conferred by society upon judges is that there should be some means of holding judges responsible, and even removing them from office, in cases of misbehaviour so gross as to justify such a course. The need for caution in the recognition of any such liability arises from the need to maintain judicial independence and freedom from undue pressure [...] *In practice, it is the potential disciplinary liability of judges which is most important.*’⁴⁴⁵

While the Opinions of the CCJE are of course most relevant to the Member States of the Council of Europe, the analysis may be useful in the present study to build on and explore some of the international standards in conjunction with the opinions and jurisprudence of other international bodies, such as the UN Human Rights Committee and the Inter-American Court of Human Rights.

Many countries have adopted codes of judicial conduct, and some have fully incorporated the Bangalore Principles into their national codes. The variation in practice is primarily in the disciplinary schemes adopted by states. Generally accepted international standards for judicial discipline can be divided into three categories: (1) requirements to protect the rights of the judge subject to disciplinary proceedings; (2) general requirements to protect judicial independence and the independence of the disciplinary procedures; and (3) rights of complainants.

THE RIGHTS OF THE JUDGE

- A judge should be subjected to disciplinary proceedings for ‘serious misconduct’ only.⁴⁴⁶
- The law should define, as far as possible, in specific terms, the conduct that will give rise to disciplinary sanctions.⁴⁴⁷
- The law should set out the disciplinary procedures to be followed.⁴⁴⁸
- A person or body should be established to receive complaints and determine whether or not there is a case to answer before the initiation of disciplinary proceedings.⁴⁴⁹ This requirement ensures that only well-founded, as opposed to frivolous or vexatious, complaints are investigated.
- Disciplinary proceedings should be determined with reference to established standards of judicial conduct.⁴⁵⁰
- A judge who is the subject of disciplinary proceedings should be guaranteed full rights of defence,⁴⁵¹ and the right to a fair hearing.⁴⁵²
- Complaints should be processed expeditiously and fairly under an appropriate procedure.⁴⁵³

445 CCJE, ‘Opinion No. 3’ (see n 161 above), para 51 [emphasis author’s own].

446 BP-IM, para 15.1; ‘UNBP Judiciary’, Art 18. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 60.

447 BP-IM, para 15.1. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 63.

448 *Ibid.*

449 *Ibid.*, para 15.3. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 68.

450 *Ibid.*, para 15.5.

451 *Ibid.*, para 15.5. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 71, and CCJE, ‘Opinion No. 1’ (2001), para 60(b).

452 ‘UNBP Judiciary’, Art 17.

453 *Ibid.*

- Complaints should be confidential at the initial stage.⁴⁵⁴
- There should be an appeal from the disciplinary authority to a court⁴⁵⁵ or be subject to independent review (unless it is a decision of the highest court, or an impeachment).⁴⁵⁶
- Sanctions should be proportionate.⁴⁵⁷

PROTECTING JI AND THE INDEPENDENCE OF PROCEEDINGS

- The body responsible for judicial discipline should be independent;⁴⁵⁸ composed of retired or serving judges; and may include non-judges who are independent of the executive or legislature.⁴⁵⁹

RIGHTS OF THE COMPLAINANT

- A person who alleges that they have ‘suffered a wrong by reason of a judge’s serious misconduct’ should have the right to make a complaint.⁴⁶⁰
- Final decisions, whether or not the proceedings were closed proceedings, should be published.⁴⁶¹

5.2 Judicial misconduct

5.2.1 MEANING AND CATEGORIES OF MISCONDUCT

Relevant international standards

UN Convention Against Corruption

Art 11(1)	Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party <i>shall</i> , in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. <i>Such measures may include rules with respect to the conduct of members of the judiciary.</i>	<i>Code of conduct optional</i>
Article 8(6)	Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the <i>codes or standards established in accordance with this article.</i>	

Bangalore Principles – Implementation Measures

Para 15.1	Disciplinary proceedings against a judge may be commenced only for serious misconduct. The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.	<i>Serious misconduct only</i> ⁴⁶²
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⁴⁵⁴ *Ibid.*

⁴⁵⁵ BP-IM, para 15.6. See also, CCJE, ‘Opinion No. 3’ (see n 161 above), para 72.

⁴⁵⁶ ‘UNBP Judiciary’, Art 20.

⁴⁵⁷ BP-IM, para 15.8.

⁴⁵⁸ *Ibid.*, 15.4. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 77.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*, para 15.2. See also CCJE, ‘Opinion No. 3’ (see n 161 above), para 68.

⁴⁶¹ BP-IM, para 15.7. .

⁴⁶² As distinguished from failure to observe professional standards. See the discussion below in ‘International context and commentary’.

Art 18	Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.	
Art 19	All disciplinary, suspension or removal proceedings shall be <i>determined in accordance with established standards of judicial conduct</i> .	

Commentary and comparison

Codes of conduct

Under Article 11 of the UNCAC, the adoption of a code of conduct for judges is optional. However, under Article 19 of the UN Basic Principles on the Independence of the Judiciary, any disciplinary, suspension or removal proceedings must be ‘determined in accordance with established standards of judicial conduct’. The simplest, and most common, way of establishing and setting out standards of judicial conduct is in a Code of Judicial Ethics, or a Code of Judicial Conduct. In all five countries studied here, the judiciaries have a code of conduct or code of ethics for judges, as well as regulations that prescribe the procedures for disciplinary measures. In addition, in each of the Philippines, France, Ghana and the UK, the general expectations of judges, at a minimum, are stated in law or by way of an oath of office (see table below). In Costa Rica, while there is not a general statement of the expectations of judges, specific behaviour is prohibited by law (see Table 9). The codes of conduct expand on the professional and ethical standards that each judge should meet.

Table 9 Basic requirements of a judge

	Expectation	Source
Philippines	Judges must exercise their functions ‘free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason’.	Judiciary Code, Canon 1, s 1
France	‘[A]ny breach of the magistrate duties related to the exercise of [their] office, to the honour, the sensitivity, or the dignity of [their] office constitutes disciplinary misconduct. All severe and deliberate violations of the procedural rules laying down the fundamental guarantees of the parties constitute a violation of the magistrate’s duties.’	Decree 58-1270 on the Organic Law Status of Magistrates, Chapter VII: Discipline, ss I and II
Ghana	‘[A] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.’	Judicial Code of Conduct, r 2(a)
Costa Rica	Every employee of the judicial branch is prohibited from receiving any type of remuneration from parties to a judicial process for activities relating to the exercise of their judicial function. There is no more generalised statement.	Organic Law of the Judiciary, Art 9(9)
UK	Judges swear an oath to ‘do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will’.	Judicial oath

Meaning of ‘misconduct’

In a footnote to paragraph 15.1 of the BP-IM, the distinction between ‘serious misconduct’ and a breach of professional standards is explained:

‘Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should aspire. They should not be equated with conduct justifying disciplinary proceedings. However, the breach of professional standards may be of considerable relevance, where such breach is alleged to constitute conduct sufficient to justify and require disciplinary sanction.’⁴⁶³

The CCJE has noted that a breach of professional standards may be so significant as to constitute misconduct.⁴⁶⁴

The term ‘misconduct’ doesn’t tend to be defined. Instead, rules or regulations will list behaviours that might be considered misconduct, or in the case of Ghana, the Code of Conduct specifically states that breaches of the code will be sanctioned in accordance with the Judicial Service Regulations.⁴⁶⁵ The code of conduct sets out the principles of judicial ethics and the rules and standards of judicial conduct required by all judges.⁴⁶⁶ In addition, however, disciplinary action can also be taken against a judge for ‘stated misbehaviour’ under Article 151 of the Constitution.⁴⁶⁷ This is a very ambiguous term and it is unclear what it would cover. In Costa Rica, there is a separate Code of Judicial Ethics – a statement of principles separate from the Organic Law of the Judicial Power.⁴⁶⁸ The Organic Law sets out prohibitions, as well as a list of what is considered to be misconduct, and misconduct encompasses judicial corruption.⁴⁶⁹ As shown in Table 9, judges and employees of the judiciary are prohibited from receiving any type of remuneration from parties to a judicial process for activities relating to the exercise of their judicial function: bribery is expressly prohibited.⁴⁷⁰ In addition, the commission of a malicious criminal offence is also a form of gross misconduct.⁴⁷¹ There are three categories of disciplinary misconduct, each with corresponding sanctions: minor misconduct, serious misconduct and gross misconduct.⁴⁷² Separate from that, section 28 of the Ley Orgánica del Poder Judicial (LOPJ) prescribes a list of behaviours which lead to removal from office. Examples include incorrect behaviour in private life and loss of essential conditions to perform judicial duties.⁴⁷³ In France, the legislation on judicial discipline contains general disciplinary provisions that relate to public officials, and also provisions specific to judges.⁴⁷⁴ It sets out what constitutes disciplinary misconduct as shown in the table above. Disciplinary cases analysed in the case study indicate that the concept of disciplinary misconduct refers more commonly to behaviour relating to violations of the duty of probity, and in particular abuse of functions; failing to preserve the dignity of the judicial function; failing to be loyal to the judicial institutions; and failing to preserve the honour of the judiciary or maintain public confidence in the judiciary. This form of corruption falls more within the meaning set out in Article 19 of the UNCAC than either Articles 15 or 18.

463 *Ibid*, para 15.1 (see n 9 above).

464 CCJE, ‘Opinion No. 3’ (see n 161 above), para 61.

465 Code of Conduct for Judges and Magistrates 2003 (republished in February 2011) (Ghana), r 7B.

466 *Ibid*.

467 The Constitution (Ghana), Art 151(1).

468 ‘Código de Ética Judicial’ www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=50047&nValor3=53662&strTipM=TC accessed 22 December 2020.

469 LOPJ (Costa Rica), Art 9(9), and see LOPJ (Costa Rica), Arts 190–196 (see n 374 above).

470 LOPJ (Costa Rica) (see n 374 above).

471 LOPJ (Costa Rica), Art 191(7) (see n 374 above).

472 LOPJ (Costa Rica), Art 190-196; specifically Art 195 (see n 374 above).

473 *Ibid*.

474 Decree 58-1270 (France), Chapter VII: Discipline, ss I and II.

In the UK, both the Judicial Conduct Investigations Office (JCIO) in England and Wales and the Judicial Office for Scotland (JOS) list examples on their websites of the kinds of behaviour that can be complained about. These are: the use of racist, sexist or offensive language; falling asleep in court; misusing judicial status for personal gain or advantage; inappropriate use of social media (in England and Wales);⁴⁷⁵ and conflict of interest (in Scotland).⁴⁷⁶ In Northern Ireland, a distinction is made between serious complaints and less serious complaints – they are dealt with in different ways. ‘Serious’ complaints involve ‘a serious allegation of misbehaviour or inability to perform the functions of office, [and] which have a reasonable prospect of being substantiated’ and might include, for example, ‘making exceptionally inappropriate remarks, such as comments on a person’s religion or racial background’ or ‘failure to disclose a serious and fundamental conflict of interest’,⁴⁷⁷ whereas ‘less serious’ complaints might involve rudeness to court users or a member of the public at an official function; inappropriate remarks in court or in a judicial speech; and insensitive behaviour, such as towards a vulnerable witness or a member of a minority community.⁴⁷⁸

In the Philippines, as judges are also public officials, the Public Official Code applies to them, which specifically prohibits the solicitation or acceptance of gifts.⁴⁷⁹ The Judiciary Code applies to all judges, and requires that judges exercise their functions ‘free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason’.⁴⁸⁰ Disciplinary proceedings are also called administrative offences which are governed by Rule 140 of the Supreme Court Rules of Court. These rules provide a list of disciplinary charges that are ‘serious’, ‘less serious’ and ‘light’.⁴⁸¹ Serious charges encompass bribery and criminal activity, failure to pay debts, and ‘borrowing’ from lawyers and litigants in a case pending before the court, as well as broader, more ambiguous categories, such as ‘immorality’, ‘alcoholism and/or vicious habits’.⁴⁸² The sanctions imposed for serious misconduct are very significant.⁴⁸³ A judge of the Supreme Court, Judge Ferdinand Marcos, was found to be guilty of misconduct or ‘judicial corruption’ in 2001, and removed from office, for ‘failure to embody judicial integrity’ by having an extramarital affair.⁴⁸⁴

The case studies demonstrate that there is considerable variation as to what amounts to judicial misconduct. The language, or terminology, of ‘corruption’ is used, even in disciplinary proceedings, in Costa Rica, the Philippines and France. However, in Ghana and the UK, the terminology of ‘misconduct’ is used in disciplinary procedures, with ‘corruption’ referring to a criminal act, meaning that it is not within the competence of the disciplinary bodies or the disciplinary authority to investigate (see further below). The Philippines appears to have the broadest definition of misconduct: it includes corruption, which in turn expressly includes the morality and personal habits of the judge. In Costa Rica, ‘corruption’ is also ‘misconduct’, and can be dealt with as a disciplinary matter

475 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), Supplementary Guidance, 3.

476 JOS ‘Complaint Guidance for complaints about judicial office holders’ (Scotland) www.scotland-judiciary.org.uk/Upload/Documents/Guidance-forMembersofthePublic2017_3.pdf accessed 22 December 2020.

477 Complaints about the Conduct of Judicial Office Holders: Code of Practice issued by the Lord Chief Justice under section 16 of the Justice (Northern Ireland) Act 2002 (Northern Ireland), para 2.7.

478 Complaints About the Conduct of Judicial Office Holders (Northern Ireland).

479 Public Official Code (the Philippines), s 7(d).

480 Judiciary Code (the Philippines), Canon 1, s 1.

481 Rules of Court (the Philippines), r 140, s 21.

482 *Ibid*, s 22.

483 *Ibid*, s 11 (cf ss 8–10).

484 ‘Closing Remarks of Presiding Justice Amparo M Cabotaje-Tang on 40th Anniversary Celebration of Sandiganbayan 11 June 2018’ <http://sb.judiciary.gov.ph/inspirational.html> accessed 23 July 2019.

(see below for the relationship between criminal and disciplinary processes). In France, there appears to be a distinction between criminal corruption, such as bribery or trading in influence, and corruption that can be addressed through the disciplinary process, which is more akin to the UNCAC definition of ‘abuse of power’.⁴⁸⁵

One common theme, however, is that misconduct that can be addressed by disciplinary measures, is not limited to ‘serious misconduct’. In all the case studies, misconduct encompasses some form of failure to meet professional standards. That form of misconduct is distinguished from serious misconduct or ‘corruption’ by the sanction disciplinary authority can impose, with a broad range of sanctions available to disciplinary authorities to address varying degrees of seriousness (see further, section 5.6). State practice indicated by these case studies differs from international standards on the issue of the inclusion of less serious misconduct, and failure to meet professional standards, as ‘misconduct’ warranting disciplinary action. The CCJE has considered this issue and noted that ‘it is incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions’. However, they concede that there are occasions where failure to meet professional standards may amount to, or contribute to a finding of, misconduct.⁴⁸⁶ There is little guidance at the international level as to how draw these distinctions, or any uniformity as to the appropriate sanctions that should apply.

Methodological issues

Original Questionnaire

Q B(2)	What kinds of behaviours are considered misconduct for judges and prosecutors?
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Modified Questionnaire

Q B(1)(e)	What kind of behaviour is considered misconduct by judges?
Q B(1)(f)	How does misconduct as covered by the disciplinary process differ from crimes of judicial corruption as covered by criminal law and criminal process?

The second question in the Modified Questionnaire was aimed at trying to distinguish between conduct that is criminal and conduct that, while amounting to misconduct, can only be sanctioned through the disciplinary process. These distinctions are not always clear-cut. In Costa Rica, the Philippines and France, the terminology of ‘judicial corruption’ is used in the disciplinary process. However, in Ghana and the UK, the disciplinary process covers only ‘misconduct’, whereas ‘corruption’ would be a matter to be dealt with through the criminal justice system. A clear answer to Q B(1) (f) is not really evident in any of the case studies.

⁴⁸⁵ UNCAC, Art 19.

⁴⁸⁶ CCJE, ‘Opinion No. 3’ (see n 161 above), paras 60 and 61.

Relevant international standards

UN Convention Against Corruption

Art 5	<p>1. Each State Party <i>shall</i>, in accordance with the fundamental principles of its legal system, <i>develop and implement or maintain effective, coordinated anti-corruption policies</i> that promote the participation of society and <i>reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.</i></p> <p>2. Each State Party <i>shall endeavour to establish and promote effective practices aimed at the prevention of corruption.</i></p> <p>3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.</p> <p>4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.</p>	<i>General aims of Art 5(1) must be pursued through a range of mandatory and optional measures contained in the Convention.</i> ⁴⁸⁷
Art 11(1)	Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party <i>shall</i> , in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, <i>take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.</i> Such measures <i>may include rules with respect to the conduct of members of the judiciary.</i>	<i>Mandatory</i> ⁴⁸⁸

Bangalore Principles

Preamble	These principles presuppose that judges are accountable for their conduct to <i>appropriate institutions established to maintain judicial standards</i> , which are themselves <i>independent and impartial</i> , and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.	
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Bangalore Principles – Implementation Measures

Para 15.3	A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. <i>In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.</i>	<i>Disciplinary authority distinct from body that considers complaints</i>
Para 15.4	The power to discipline a judge should be <i>vested in an authority or tribunal which is independent of the legislature and executive</i> , and which is composed of <i>serving or retired judges but which may include in its membership persons other than judges</i> , provided that such other persons are <i>not members of the legislature or the executive.</i>	<i>Independent body; composed of judges and others</i>
Para 16.2	Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.	

487 UNODC, 'Legislative Guide' (see n 16 above), 20.

488 *Ibid.*, 34–36; UNODC, 'Technical Guide' (see n 20 above); UNODC, 'Strengthening Judicial Integrity' (see n 40 above); UNODC, 'UNCAC Implementation Guide for Article 11' (see n 113 above).

Commentary and comparison

Under Article 5 of the UNCAC, states must ‘endeavour to establish and promote effective practices aimed at the prevention of corruption’. The Bangalore Principles and the BP-IM identify the qualities of judicial disciplinary mechanisms that will make them effective:

- the existence of a specific body or person to receive, process and evaluate complaints against judges (BP-IM paragraph 15.3) – see ‘Making a valid complaint’, below;
- a disciplinary authority to take decisions on disciplinary action to be taken and to sanction misconduct (BP-IM paragraph 15.3); and
- the independence of both the body receiving and evaluating complaints, and the disciplinary authority from the executive and the legislature, meaning that the authority or tribunal responsible for judicial discipline should be composed of serving or retired judges, and possibly non-judges who must not be members of the executive or the legislature (BP-IM paragraph 15.4).

Some countries have different disciplinary procedures for different types, or seniority, of judges. There is no requirement for this under international standards, and these case studies indicate that sometimes this difference can have an effect on the actual or perceived independence of the disciplinary process.

Disciplinary authority

The BP-IM appears to distinguish between the ‘disciplinary authority’⁴⁸⁹ and the body or person that is responsible for ‘receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action’.⁴⁹⁰ The disciplinary authority is the ‘authority or tribunal’ with the power to discipline a judge,⁴⁹¹ and the BP-IM envisages that the person or body responsible for receiving and considering complaints will then ‘refer the matter to the disciplinary authority’ where there is a case that calls for ‘the initiation of disciplinary action’.⁴⁹²

In both Ghana and the UK, the head of the judiciary has overall responsibility for the discipline of judges.⁴⁹³ In Ghana, the Chief Justice is the disciplinary authority, and has set up disciplinary bodies (the Public Relations and Complaints Unit (PRCU) and the Public Complaints and Court Inspectorate Unit (PCCIU)) to receive complaints and consider them.⁴⁹⁴ Where the decision is to remove a judicial officer (other than a justice of the superior courts), the Chief Justice has the power to remove him or her if that decision is supported by two-thirds of the Judicial Council.⁴⁹⁵ In England and Wales, the Lord Chief Justice shares the responsibility for decisions about judicial discipline

489 BP-IM, paras 15.3 and 15.4.

490 *Ibid*, para 15.3.

491 *Ibid*, para 15.4.

492 *Ibid*, para 15.3.

493 Ghana: The Constitution, Art 125(4); Judicial Service Regulations 1963 L. I. 319 (‘The Regulations’); UK: Constitutional Reform Act 2005 (UK) ss 7(1), 11 and 108(2); Judiciary and Courts (Scotland) 2008 ss 2 and 28; and Justice (Northern Ireland) Act 2002 s 16.

494 PRUC Operational Guidelines (December 2017) http://sia.arapghana.eu/web/uploads/documents/Operational_guideline_FINAL.pdf accessed 22 December 2020.

495 The Constitution (Ghana), Art 151.

with the Lord Chancellor,⁴⁹⁶ and the Judicial Complaints and Investigations Office is responsible for receiving and filtering complaints, which are then considered by nominated judges and in some cases, a disciplinary committee.⁴⁹⁷ The procedure is similar in Northern Ireland and Scotland, except that there is no separate Complaints Office.⁴⁹⁸ In the Philippines, the Supreme Court as a whole is responsible for judicial discipline, and has set up the Judicial Inspection Board, which is part of the Supreme Court, to receive and consider complaints;⁴⁹⁹ in France, the High Council of the Judiciary (Conseil supérieur de la magistrature or CSM), is both the disciplinary authority and the disciplinary body (in the form of a Disciplinary Committee of the CSM) for complaints against all magistrates.⁵⁰⁰ There are differences in process between complaints against judges and prosecutors,⁵⁰¹ but this study focuses only on the process relating to judges. In Costa Rica, it is the Judicial Inspection Court (JIC) that has overall responsibility for judicial discipline,⁵⁰² as well as six other bodies, each of which is involved in different stages of the proceedings in respect of members of the judiciary.⁵⁰³ See section 5.4 for details about the investigation of complaints.

In most cases, except France, there is a different procedure for the discipline or removal from office for the most senior judges. This difference of process is envisaged in the BP-IM, paragraph 16. In removal proceedings against senior or superior court judges in the UK, the Philippines and Costa Rica, the legislature becomes a disciplinary body,⁵⁰⁴ following the referral of a case from the usual disciplinary body, and the legislature is also the disciplinary authority, deciding whether or not to remove a judge. Again, the inclusion of the legislature in the removal process is envisaged, but not required by the BP-IM (see further below). In Ghana, a petition for the removal of a superior court judge, which must be made to the President of Ghana, is considered by a disciplinary committee convened by the Chief Justice.⁵⁰⁵ This committee is both the disciplinary body and disciplinary authority – recommendations made by the committee must be followed and acted on by the President.⁵⁰⁶ Ghana is unusual in that it is the executive rather than the legislature that is involved in the removal process. However, the President’s role is limited to enacting, or enforcing, the decision of the disciplinary committee. In France, the CSM is the disciplinary authority, while the relevant disciplinary committee is the disciplinary body, and this is the same for all complaints, whether resulting in removal or not.⁵⁰⁷ For more detail on removal proceedings see below.

496 Constitutional Reform Act 2005 (UK), ss 108 and 115; Judiciary and Courts (Scotland) 2008, ss 2 and 28; and Constitutional Reform Act 2005 (UK) s 11(1B)(c) replaces s 12 of the Justice (Northern Ireland) Act 2002.

497 See Judicial Conduct Rules 2014 (England and Wales) (see n 415 above).

498 JOS ‘Complaint Guidance’ (n 476); Complaints about the Conduct of Judicial Office Holders (Northern Ireland), para 4.1

499 The Constitution (the Philippines), Art VIII, s 11.

500 *Ibid*, Art 65.

501 *Ibid*.

502 LOPJ (Costa Rica), Art 184 (see n 374 above).

503 See <https://estadonacion.or.cr/informes> accessed 22 December 2020 II Informe Estado de la Justicia (Programa Estado de la Nación, ed 2017), p 107.

504 England and Wales: Senior Courts Act 1981 s 11(3), Northern Ireland: Justice (Northern Ireland) Act 2002 ss 12C(9), 12C(10), and 12C(11), Scotland: Judiciary and Courts (Scotland) 2008 s 35(1); and Courts Reform (Scotland) Act 2014 s 21(1); Philippines: The Constitution Art XI s 2; Costa Rica: Art 182 LOPJ.

505 The Constitution (Ghana), Art 146(3).

506 *Ibid*, Art 146(4), (5) and (9). The Judicial Council (formed in accordance with Art 153 and exercising functions allocated to it under Art 154 of the Constitution) appoints three superior court judges to the Disciplinary Committee, and the Supreme Court Chief Justice appoints two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.

507 Ordonnance no 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature, Art 48.

Table 10 Disciplinary body and disciplinary authority

	Disciplinary body	Disciplinary authority
Ghana	Discipline and removal: PRCU, PCCIU Removal – senior judges: disciplinary committee following petition to the President	Discipline: Chief Justice, with advice from the President; sanctions subject to confirmation by the President; Removal: Chief Justice and Judicial Council; Senior judges – President on recommendation of Chief Justice and Committee
UK – England and Wales	Discipline and removal: JCIO; nominated judge; investigating judge, disciplinary panel Removal – superior court judges: UK Parliament	Discipline and removal: Lord Chief Justice (England and Wales) and Lord Chancellor; Removal – superior court judges: UK Parliament
UK – Scotland	JOS	Lord President; Scottish Parliament
UK – Northern Ireland		Lord Chief Justice (Northern Ireland); UK Parliament
Philippines	JIB (Supreme Court); House of Representatives	Supreme Court <i>en banc</i> ; House of Representatives
Costa Rica	JIC	JIC; Corta Plena; Supreme Court; Legislative Assembly
France	General Inspection Service: CSM	CSM Disciplinary Committee

Independence

The ‘appropriate institutions’ that are ‘established to maintain judicial standards’ must be ‘independent and impartial’.⁵⁰⁸ The disciplinary authority must be independent of the executive or the legislature; and composed of serving or retired judges, but may include ‘persons other than judges, provided that such other persons are not members of the legislature or the executive’.⁵⁰⁹ The person or body responsible for ‘receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge’ must be established by law.⁵¹⁰

The procedural requirements of judicial accountability mechanisms, particularly disciplinary measures, have been the subject of a number of cases before international tribunals such as the UN Human Rights Committee, the Inter-American Court of Human Rights and the ECtHR. These cases are examined by the UNSRIJL in the 2014 report on judicial accountability.⁵¹¹ Of particular relevance here are two cases in the ECtHR, which address the question of independence and impartiality under Article 6 of the ECHR in respect of disciplinary proceedings against a judge. These cases highlight the fundamental importance of the independence of the authority responsible for judicial discipline. In the case of *Oleksandr Volkov v Ukraine*⁵¹² the court found that the disciplinary system did not ensure enough separation of the judiciary from the other branches of the state, and that the violations in this case ‘suggest that the system of judicial discipline [...] does not ensure sufficient separation of the judiciary from other branches of State power [...] it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence’.⁵¹³

508 Bangalore Principles, Preamble.

509 BP-IM, para 15.4.

510 *Ibid*, para 15.3.

511 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), paras 77–87.

512 *Oleksandr Volkov v Ukraine*, Application No 21722/11, judgment of 9 January 2013.

513 *Ibid*, para 199.

These violations were a ‘threat to the independence of the judiciary as whole’.⁵¹⁴ In the case of *Olujic v Croatia*, the court noted that whether or not a body ‘can be considered independent’ depends, inter alia, on ‘the manner of appointment of its members and their term of office [...] the existence of guarantees against outside pressures and [...] the question whether the body presents an appearance of independence’.⁵¹⁵ In addition, the tribunal ‘must have jurisdiction to examine all questions of fact and law relevant to the dispute before it’.⁵¹⁶ While these two cases concentrate on the independence of the process from ‘outside pressures’, the court has gone further, and now recognises the potential for internal pressures to adversely affect individual independence.

The ECtHR has found a violation of the internal independence of judges in a number of cases.⁵¹⁷ According to Sillen, case law shows that the internal independence of a judge will be violated if ‘a colleague’, ‘who can exert pressure on the judge’, ‘tries to influence on the judge’s decision in a concrete case’.⁵¹⁸ There are different ways in which such pressure and influence may be exerted, but chief among them is an imbalance of power between judges and their senior colleagues in disciplinary processes and court administration. There are two elements of the court’s analysis that are relevant to the present study. The first is their analysis of what amounts to exerting ‘pressure’, and the second is their approach to determining ‘influence’. The ECtHR has recognised that a senior colleague does not necessarily have to exert direct pressure on a colleague, or even threaten to do so. Where one judge has the power to change the legal status of another judge, say in disciplinary proceedings: ‘the question is whether the powers conferred on the court presidents under the [domestic] law were capable of generating latent pressures resulting in judges’ subservience to their judicial superiors or, at least, making individual judges reluctant to contradict their president’s wishes, that is to say, of having “chilling” effects on the internal independence of judges’.⁵¹⁹

The focus, therefore, is on the power to promote judges, or impose disciplinary sanctions. This is because, as the ECtHR points out, those are the powers that ‘potentially have the most significant impact on the internal independence of judges’.⁵²⁰ The court’s approach is to consider whether or not there are ‘legitimate doubts’ about the impartiality and independence of the alleged influencer. In practice, therefore, these cases will involve the applicant judge trying to establish doubts about the independence of the ‘influencing’ judge, with the respondent state trying to establish that those doubts cannot be ‘objectively justified’.⁵²¹

While these cases, and the jurisprudence of the ECtHR, apply only to Member States of the Council of Europe, the approach taken by the ECtHR highlights the significance of the internal independence of individual judges, and the importance of ensuring that disciplinary procedures have safeguards in place to prevent improper influence and pressure on individual judges.

514 *Ibid*, para 205.

515 *Olujic v Croatia*, Application No 22330/05, judgment 5 May 2009.

516 *Ibid*, para 38.

517 Sillen (see n 78 above)

518 *Ibid*, 10.

519 *Parlov-Tkalčić v Croatia*, 1ECtHR 22 December 2009, Case No 24810/06, para 91, discussed in *ibid*, 116.

520 *Ibid*, paras 92–93, discussed in Sillen (see n 78 above), 116.

521 See discussion in Sillen (see n 78 above), 116–124.

First, considering the potential external interference or influence over disciplinary arrangements other than removal procedures, in Ghana, England and Wales, and France, there is some input from the executive in the process. In Ghana, there is direct involvement by the President of Ghana: while the Chief Justice is the disciplinary authority for judges,⁵²² any proposed sanction must be confirmed by the President,⁵²³ and the Chief Justice has the discretion to report the case to the President for ‘such direction as he may desire to give’.⁵²⁴ The President also gives a direction as to whether there should be a formal or informal inquiry.⁵²⁵ On the face of it, therefore, the Chief Justice has discretion to invite the President to give a view, and similarly, the President has wide discretion as to how much or how little influence to exert over the decision-making of the Chief Justice. The requirement that the President confirms the sanction to be imposed and decides whether there should be a formal or informal inquiry appears not to be discretionary. There is no information as to how the relationship between the Chief Justice and the President works in practice in the case study, but the regulations, as framed, suggest, at the very least, the potential for the executive to be very closely involved, and may generate perceptions that the process is not independent.

In England and Wales (in contrast to Scotland and Northern Ireland), decisions about what disciplinary action to take are made by the Lord Chief Justice and the Lord Chancellor (a member of the executive) together, on the advice of the investigative person or body.⁵²⁶ The Lord Chief Justice can only exercise his disciplinary powers ‘with the agreement’ of the Lord Chancellor.⁵²⁷ While there is, therefore, the involvement of a member of the executive, the decision-makers are formally required to consider the advice of the person or body who investigated the complaint, and to come to agreement, together, about their decision. In France, the Commission of the CSM responsible for the discipline of judges is composed of five judges; a public prosecutor; a lawyer; and six ‘qualified, prominent citizens who are not Members of Parliament, of the Judiciary or of the administration’, with the President of the Republic, the President of the National Assembly and the President of the Senate each appointing an additional two ‘qualified, prominent citizens’.⁵²⁸ While this arrangement meets the requirement that the disciplinary authority must not include members of the executive or legislature among its members, both the executive and the legislature are involved in determining the composition of the disciplinary body. That the executive and the legislature can each nominate commission members may go some way to mitigating one branch potentially having more influence than another, but there is a risk, at the very least, of a perceived lack of independence. Another issue in France is that, primarily for resource and capacity reasons, the MoJ initiates most disciplinary actions against judges and this has been flagged up by the Group of States against Corruption (groupe d’États contre la corruption or GRECO) as a vulnerability in

522 The Regulations (Ghana), r 27(1).

523 *Ibid.*

524 The Regulations (Ghana), r 28(2).

525 *Ibid.*

526 Judicial Discipline (Prescribed Procedures) Regulations 2014 (England and Wales), ss 12 and 15.

527 Constitutional Reform Act 2005 (UK), s 108(2).

528 The Constitution (France), Art 65; and see www.conseil-superieur-magistrature.fr/le-csm/composition-et-organisation accessed 22 December 2020.

the system in terms of effectively addressing corruption.⁵²⁹ This involvement of the MoJ also raises concerns of the independence of the process, or at the very least, could undermine perceptions as to the independence of the process. In Costa Rica and the Philippines, the judicial authority is a wholly judicial body (although details about the composition of the Judicial Inspection Tribunal are not given; see ‘Methodological issues’ below).

Removal procedures are usually framed separately from disciplinary procedures, and the BP-IM considers them separately. In France, the process, and responsible body, is the same for discipline and removal. Removal is simply one possible sanction for misconduct. In Ghana, Supreme Court judges are subject to the same disciplinary procedures and rules as other judges, but a Supreme Court judge may also be moved for ‘stated misbehaviour’ under Articles 146 and 151 of the Constitution.⁵³⁰ In addition, any person can petition the President of Ghana for the removal of a superior court judge.⁵³¹ These cases are investigated by a committee whose recommendations must be acted upon (see further below).⁵³² The binding nature of the recommendations in the case of a petition for the removal of a judge mitigates, to some extent, the involvement of the executive in the process.

In the Philippines, while the Supreme Court is the disciplinary authority for judges, it is worth noting that the judiciary is not established by the constitution as an explicitly independent branch of government. Judicial independence in the Philippines is implied, rather than expressly guaranteed.⁵³³ Other factors not covered in this report, such as the appointment of the Chief Justice and Supreme Court Justices, may contribute to the overall picture of how independent, or otherwise, the judiciary, and particularly, the Supreme Court, is in practice. In addition, the only possible disciplinary process available in respect of a Justice of the Supreme Court in the Philippines is impeachment and possible removal.⁵³⁴ Civil society groups have grave concerns about the way in which impeachment proceedings have been used, particularly in the 2018 removal of the then Chief Justice, Marcia Lourdes Sereno,⁵³⁵ and the earlier removal of Chief Justice Renato Corona in 2012.⁵³⁶ Chief Justice Sereno was denied representation in proceedings before the House of Representatives, and while grounds for impeachment were met,⁵³⁷ she was ultimately removed from office following the invalidation of her appointment by the Solicitor General.⁵³⁸ There is concern that Chief Justice Sereno’s removal was politically motivated.⁵³⁹

529 See GRECO, Fourth Evaluation Round, Corruption Prevention in Respect of Members of Parliament, Judges, and Prosecutors, Compliance Report France, adopted by GRECO at its 71st Plenary Meeting www.greco.int/greco accessed 22 December 2020. Specifically, see Point 67: ‘GRECO notes that no measures have been taken to implement [recommendation ix] and that the concerns mentioned in the Evaluation Report (para126) still remain. *The Minister of Justice* retains the power of referral to the CSM, *which, for its part, has no real investigative resources*’ [emphasis author’s own].

530 The Constitution (Ghana), Art 151(1).

531 *Ibid*, Art 146(3).

532 The Constitution (Ghana) Art 146(4), (5) and (9).

533 The Constitution (the Philippines), Art VII, s 4.

534 The Constitution (the Philippines), Art XI, s 2.

535 Oscar Franklin Tan, ‘What is in the Sereno Impeachment Complaint?’ *Philippine Daily Inquirer* (Manila, 13 September 2017).

536 Record of the Senate Impeachment Proceedings, held May 2012 www.officialgazette.gov.ph/downloads/2012/05may/20120529-Official-TSN.pdf accessed 23 July 2019.

537 ABS-CBN News, ‘Sereno “Looks Forward” To Senate Impeach Trial After House Bars Counsel’ *ABS-CBN News* (Manila, 22 November 2017); ABS-CBN News, ‘House Panel Finds Enough Grounds To Impeach Sereno’ *ABS-CBN News* (Manila, 8 March 2018).

538 *Republic of the Philippines v Maria Lourdes PA Sereno* GR No 237428 (11 May 2018).

539 Andreo Calozzo and Clarissa Batino, ‘First Female Chief Justice in Philippines Faces Impeachment’ *Bloomberg* (Manila, 8 March 2018).

As noted above, in the Philippines, the Supreme Court is responsible, *en banc*, for the discipline of judges (and lawyers).⁵⁴⁰ The Supreme Court exercises this supervisory jurisdiction over the conduct of judges through its Judicial Integrity Board (JIB),⁵⁴¹ and the Corruption Prevention and Investigation Office (CPIO).⁵⁴² The Supreme Court has vast powers in relation to initiating, investigating and sanctioning judicial conduct. Investigations into judicial conduct may be initiated by a complaint from a member of the public;⁵⁴³ by the JIB either in response to a judge having been convicted of a crime or *motu proprio*; ⁵⁴⁴ or by the Supreme Court judges in *motu proprio* (see below for further details).⁵⁴⁵ The Supreme Court, therefore, has significant power to initiate disciplinary proceedings against judges. This in itself could raise the possibility of ‘latent pressures resulting in judges’ subservience to their judicial superiors’, as the ECtHR put it in *Parlov-Tkalčić v Croatia*. However, an additional source of potential pressure may also be the draconian powers of the CPIO. The CPIO has the power to conduct investigative, intelligence, surveillance and entrapment operations to detect potential violations of the Judicial Code.⁵⁴⁶ These operations can be ordered by the Supreme Court, the Chief Justice or the JIB.⁵⁴⁷

As in the Philippines, disciplinary power in Costa Rica rests with the judiciary. However, while the disciplinary power in the Philippines is concentrated in the Supreme Court, in Costa Rica the disciplinary power is decentralised (see further below). The judiciary is constitutionally independent of the other branches of government,⁵⁴⁸ and there is a complex system in which different bodies and courts have jurisdiction over different forms of misconduct.⁵⁴⁹ The Corta Plena can impose and enforce disciplinary measures against ordinary judges who have allegedly caused delay or seriously erred in the administration of justice.⁵⁵⁰ One troubling aspect of this, according to the case study, is the broad discretion afforded to the Plenary Session of the Supreme Court to decide on cases in which there has been delay or serious and unjustifiable violations in the administration of justice, with the available outcomes including suspension or dismissal of the judge in question.⁵⁵¹ Although complaints about the judicial interpretation of rules are not valid complaints, the discretion in respect of delay and violations of the administration of justice can have the practical effect of allowing disciplinary decisions to be taken against judges who may differ in their interpretation of the law and rules.⁵⁵² If the disciplinary rules are used in this way, there is the potential for perceived threats to the individual, internal independence of judges.

540 The Constitution (the Philippines), Art VIII, s 11.

541 Supreme Court, ‘Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n 385 above), 2.

542 See <https://news.abs-cbn.com/news/11/13/18/sc-creates-2-new-offices-revises-guidelines-for-filing-complaints-vs-judges-justices> accessed 22 December 2020.

543 Rules of Court (Philippines), r 140, s 2.

544 *Ibid*, r 140, s 6.

545 *Ibid*, r 140, s 1.

546 Supreme Court, ‘Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n 385 above), 3; Daphne Galvez, ‘SC Forms Two New Offices to Prevent Judicial Corruption’, <https://newsinfo.inquirer.net/1053247/sc-forms-2-new-offices-to-prevent-judicial-corruption> accessed 22 December 2020.

547 *Ibid*.

548 Costa Rica Constitution <http://pdba.georgetown.edu/Parties/CostaRica/Leyes/constitucion.pdf> accessed 22 December 2020.

549 The disciplinary framework is set out in ch VIII of the LOPJ (Costa Rica). The JIC is the main disciplinary body, but others have some jurisdiction too: the Superior Council, Prefectures, Plenary Session of the Supreme Court, Executive Direction, the President of the Supreme Court and judges.

550 LOPJ, Art 199.

551 *Ibid*.

552 See <https://estadonacion.or.cr/informes> accessed 22 December 2020. II Informe Estado de la Justicia (Programa Estado de la Nación, 2017) 121.

In order to prevent interference with judicial independence and the functioning of the judiciary, it is important that disciplinary procedures apply in only very restricted circumstances. The UN Human Rights Committee has reiterated the importance of legal certainty in respect of judicial discipline, explaining that ‘[s]tates should establish clear procedures and objective criteria for the suspension and dismissal of the members of the judiciary and for disciplinary sanctions against them’.⁵⁵³ The Inter-American Court of Human Rights has also emphasised the need for disciplinary decisions and sanctions to be founded in law and that decisions about removal and discipline should be based on reasons established by law.⁵⁵⁴ In addition, as discussed above, the ECtHR has established that disciplinary procedures must meet the independence requirements of a fair trial under Article 6 of the ECHR.⁵⁵⁵

The UNSRJI has noted:

‘In order to safeguard the independence of justice operators, accountability mechanisms and proceedings must therefore have a restricted application. In relation to judges, international standards state that disciplinary measures and sanctions against them can be triggered only for reasons of incapacity or behaviour that render them unfit to discharge their duties and in cases provided for by the law. As a result, judges should not be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law.’⁵⁵⁶

However, judicial independence does not preclude accountability, and:

‘Judges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, wilful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics. In particular, justice operators must be duly held to account when engaged in corrupt practices. Indeed, judicial independence and immunity do not mean impunity and irresponsibility.’⁵⁵⁷

In all the case studies, disciplinary powers are prescribed by law, and supported by a code of judicial conduct. The main difference between jurisdictions is in the level of discretion afforded to the disciplinary body and the disciplinary authority (see the discussion on ‘Procedural sanctions’) and transparency around the application of the rules and that discretion.

Different processes for different judges

Three countries distinguish between different levels of judge in respect of the disciplinary procedure that applies to them. In the Philippines, the disciplinary scheme applies to ordinary judges but does not apply to Supreme Court judges.⁵⁵⁸ Where an allegation is made against a Supreme Court judge, the only disciplinary procedure available is impeachment and possible removal from office

553 *Cedeño v Bolivarian Republic of Venezuela* (communication No 1940/2010), discussed in UNGA, ‘Report on Judicial Corruption and Combatting Corruption through the Judicial System’ (see n 1 above), para 80.

554 *Chocrón Chocrón v Venezuela*, Judgment of 1 July 2011, paras 117–118, discussed in UNGA, ‘Report on Judicial Corruption and Combatting Corruption through the Judicial System’ (see n 1 above), para 82.

555 *Oleksandr Volkov v Ukraine*, Application No 21722/11, Judgment of 9 January 2013 and *Olujić v Croatia*, Application No 22330/05, Judgment 5 May 2009.

556 UNGA, ‘Report on Judicial Corruption and Combatting Corruption through the Judicial System’ (see n 1 above), para 84.

557 *Ibid.*

558 Supreme Court, ‘Revised Internal Rules of the Sandiganbayan’ (Philippines) (see n 385 above); and the Constitution (the Philippines), Art XI, s 2.

through the constitution.⁵⁵⁹ In Costa Rica, a distinction is made between ordinary members and other members of the ‘judicial power’,⁵⁶⁰ and Supreme Court judges and other members of the ‘supreme powers’.⁵⁶¹ The distinction applies in respect of enforcement or imposition of sanctions. Three bodies are responsible: the Corte Plena, in cases involving ordinary judges who have delayed or seriously erred in the administration of justice;⁵⁶² the JIC, in cases involving all other judicial servants except justices of the Supreme Court;⁵⁶³ and where the recommended sanction is a reprimand, a written reprimand or an unpaid suspension of up to 15 days, for ordinary judges, the Prefectures have the jurisdiction to impose those sanctions.⁵⁶⁴ The Supreme Court has the jurisdiction to impose disciplinary sanctions on Supreme Court judges (see further detail in the discussion on sanctions below).⁵⁶⁵ In the UK, the three legal jurisdictions of the UK (England and Wales, Scotland and Northern Ireland) each have their own judiciary. Within each judiciary there are different categories of judges, and the disciplinary framework is different for each category.⁵⁶⁶ Supreme Court judges, who as members of the Supreme Court of the UK (‘UKSC’) hear cases from each of the three jurisdictions, are subject to their own disciplinary process: the Lord Chancellor is consulted as to the action to be taken, and when formal action is required, a tribunal is established.⁵⁶⁷

Table 11 Disciplinary scheme

	Philippines	France	Ghana	Costa Rica	UK
Rules setting out disciplinary process?	Yes	Yes	Yes	Yes	Yes
Code of conduct/ethics for judges?	Yes	Yes	Yes	No	Yes
Specified body responsible for judicial discipline?	Yes	Yes	Yes	Yes	Yes
Any other body responsible?	No	Yes	No	Yes	Not within each jurisdiction
Application	Different for ordinary and Supreme Court judges	Same for all judges	Same for all judges	Different for ordinary and Supreme Court judges	Different in each jurisdiction Different for ordinary and Supreme Court judges

559 The Constitution (the Philippines), Art XI, s 2.

560 Law No 8 of 29 November 1937 and subsequent reforms as of Law No 7333 of 5 May 1993 www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=33635&nValor3=114826¶m2=5&strTipM=TC&lResultado=42&strSim=simp accessed 22 December 2020.

561 LOPJ, Art 182.

562 *Ibid*, Art 199

563 *Ibid*, Art 184; <https://unmejorj.poder-judicial.go.cr/Documentos/RegimenDisciplinario/Guia-General-Procedimiento-Sancionatorio-Disciplinario-Administrativo.pdf> accessed 22 December 2020 – Guía General: Procedimiento Disciplinario Administrativo en el Poder Judicial (San José 2017), República de Costa Rica Poder Judicial.

564 LOPJ, Art 185.

565 *Ibid*, Art 182.

566 JOS ‘Complaint Guidance’ (see n 476 above); Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 4.1.

567 UKSC Judicial Complaints Procedure (UK Supreme Court), www.supremecourt.uk/docs/judicial-complaints-procedure.pdf accessed 22 December 2020.

Methodological issues

Original Questionnaire

Q B(1)(b)	Who is responsible for investigating disciplinary actions for judicial corruption against judges and prosecutors in the judiciary?
Q B(1)(d)	Who is responsible for prosecuting disciplinary actions for judicial corruption in the judiciary/public prosecution service?
Q B(1)(e)	Who is responsible for adjudicating disciplinary actions for judicial corruption in the judiciary/public prosecution service?

Modified Questionnaire

Q B(3)(a)	Is there a specific body responsible for investigating allegations of judicial misconduct?
Q B(3)(e)	Who is responsible for hearing allegations of misconduct against judges?

The questions in the Original Questionnaire distinguished between three stages of disciplinary process: investigation, prosecution and adjudication. However, as the term ‘prosecution’ tends, in the legal context, to mean conducting criminal proceedings, the Modified Questionnaire aimed to adjust the language to account for the non-criminal nature of disciplinary proceedings; however, in doing that, a level of detail was lost. Additionally, neither version of the questionnaire asked specifically about who, or which body, has overall responsibility for judicial discipline, and the case studies indicate that while one individual or body may have overall responsibility for overseeing judicial discipline and sanctioning misconduct, the powers to investigate, ‘prosecute’ or conduct disciplinary proceedings and adjudicate may be delegated to another individual or body. The case studies indicate that this set of questions needs to be further refined to draw out the following issues:

- overall responsibility (and therefore accountability) for judicial discipline, including
- making rules and regulations;
- independence of the disciplinary authority and the disciplinary body;
- investigation;
- conduct of proceedings;
- adjudication; and
- responsibility for sanctions.

Adding a question or questions to reflect these differences should also highlight to what extent the national system meets the standards envisioned by the BP-IM.

In addition, the questionnaire does not address the question of the independence of the disciplinary authority or its composition. This information is therefore not explicitly given in the Costa Rica study, which means that conclusions cannot be drawn about the actual or perceived independence of the body, and as can be seen in the case of France, the appointments process of the relevant tribunal might affect the overall independence or perceived independence of the body. The addition of a question on this point would be helpful to draw out whether or not the process in any given country meets international standards.

5.3 Reporting judicial misconduct

5.3.1 HOW IS MISCONDUCT REPORTED?

Relevant international standards

UN Convention Against Corruption

Art 8(4)	Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.
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Bangalore Principles – Implementation Measures

Para 15.2	A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action.
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Commentary and comparison

There are no specific guidelines on how misconduct by judges should be reported, or how reporters of misconduct should be protected. However, the discussion on the protection of reporting persons set out above would be relevant here. The implementation measures focus more on the right of individuals to make complaints when faced with judicial misconduct. In all countries in this case study, there are relevant bodies to which an individual can make a complaint against a judge. For the most part, the procedures for doing this appeared to be relatively straightforward and accessible.

Only one country, the Philippines, allows anonymous reporting of judicial misconduct.⁵⁶⁸ In Ghana, any member of the public, including lawyers and other judges, can file a complaint against a judge.⁵⁶⁹ While anonymous complainants are not allowed, the name of the complainant can be withheld from the accused judge.⁵⁷⁰ Complaints can be filed in several ways: in person to the Chief Justice, Judicial Secretary or regional PRCU;⁵⁷¹ or by post to the Chief Justice, Judicial Secretary or PCCIU;⁵⁷² by email to the PCCIU;⁵⁷³ online to the PRCU⁵⁷⁴ or by leaving a complaint in the relevant court's complaints box.⁵⁷⁵ In the UK, individuals can make a complaint to the relevant complaints authority in their jurisdiction: the Chief Executive of the UKSC,⁵⁷⁶ the Judicial Complaints and Investigation Office in

568 Rules of Court (the Philippines), r 140, s2.

569 Ghana Judicial Service, Annual Report 2015–2016 (2017), 48.

570 PRCU Operational Guidelines (see n 494 above), 6.

571 *Ibid*, 4–5. The PRCU's functions in this regard fall under the supervision and control of the PCCIU.

572 Judicial Service PRCU, 'How to File a Complaint' (2019) (Ghana), www.judicialservicecomplaints.net/operationalinfo.aspx?pg=4 accessed 10 July 2019.

573 PRCU Operational Guidelines (see n 494 above), 5.

574 See www.judicialservicecomplaints.net accessed 22 December 2020.

575 PRCU Operational Guidelines (see n 494 above), 6.

576 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 1.

England and Wales,⁵⁷⁷ JOS in Scotland⁵⁷⁸ and the Complaints Officer in the Office of the Lord Chief Justice in Northern Ireland.⁵⁷⁹ In Northern Ireland, additional provision is made for whistleblower protection of members of court staff and the legal profession who report misconduct and do not want their identity or statement to be disclosed to the accused judicial officer.⁵⁸⁰ If the complaint alleges criminal conduct, the information will be passed on to the police, and anonymity cannot be guaranteed.⁵⁸¹ In Scotland, the disciplinary judge can also initiate an investigation where he or she has received ‘information from any source which suggests to him or her that consideration under these Rules of a possible allegation of misconduct is appropriate’.⁵⁸² In France, while individuals can file a complaint of misconduct by a judge to the CSM,⁵⁸³ in practice, according to interviews, complaints tend to be filed by the MoJ. This is because complaints by litigants or individuals tend to be reviewed by the Complaint Admissibility Commission (CAC) and, if admissible, will proceed to the CSM.⁵⁸⁴ In both Costa Rica and the Philippines, the complaints body can begin an investigation on its own initiative.⁵⁸⁵ In Costa Rica, members of the public can complain to the JIC through an online form, or they can complain to the Judicial Power Services Comptroller’s Office.⁵⁸⁶ In the Philippines, while complaints can be made by anyone and can be anonymous, they must be filed to the JIB.⁵⁸⁷ In 2016, the Government of the Philippines created a reporting hotline for complaints against all public officials.⁵⁸⁸ However, in practice it didn’t function as an effective anti-corruption reporting line and was used instead by individuals making general enquiries rather than reporting misconduct.⁵⁸⁹ Where a judge has been convicted in the Sandiganbayan, or by another court for a felony or crime, the JIB must initiate disciplinary proceedings, and submit a report to the Supreme Court within ten days of being informed of the conviction, with a recommendation that the report is deemed as an ‘administrative complaint’ to be investigated by the JIB.⁵⁹⁰ The Supreme Court can also initiate disciplinary proceedings itself.⁵⁹¹

Methodological issues

Original Questionnaire

Q B(5(a))	(a) Who can initiate disciplinary complaints against judges/prosecutors for judicial corruption (eg, citizens, public prosecutors, judicial council, etc)?
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- 577 Judicial Discipline (Prescribed Procedures) Regulations 2014 (England and Wales), s 4. Note that there are separate rules for magistrates in England and Wales.
- 578 Complaints about the Judiciary (Scotland) Rules 2017, s 6.
- 579 Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above).
- 580 *Ibid.* See para 10.
- 581 *Ibid.*, para 10.4.
- 582 Complaints about the Judiciary (Scotland) Rules 2017, r 19.
- 583 Decree 58-1270 (France), Arts 50-1 to 50-3.
- 584 *Ibid.*, Arts 50-3 and 63; Loi organique No 94-100 du 5 février 1994 sur le Conseil supérieur de la magistrature, Art 18.
- 585 Costa Rica: Yaruma Vásquez Carrillo, ‘The State of Justice second report: The disciplinary regime and judicial power in the face of corruption challenges’ (trs, The State of Justice, March 2017), www.dplf.org/sites/default/files/1196715002_0.pdf accessed 22 December 2020. Philippines: Rules of Court, r 140, ss 2, 6, 5 and 10.
- 586 See <https://inspeccionjudicial.poder-judicial.go.cr/index.php/denuncias/formulariodenunciasinspeccionjudicial> accessed 22 December 2020.
- 587 Rules of Court (the Philippines), r 140, s 2.
- 588 ABS CBN News, ‘Dial 8888, 911: Gov’t Opens Complaints, Emergency Hotlines’ *ABS CBN News* (Manila, 1 August 2016).
- 589 Anna Felicia Bajo, ‘8888 Not Effective As Anti-Corruption Hotline, Says UP Prof’ *GMA News Online* (Quezon City, 23 August 2017).
- 590 Rules of Court (the Philippines), r 140, s 6.
- 591 *Ibid.*, s 1.

Q B(2)(a)	Is there a specific complaints procedure for complaints against judges, or are they treated as public officials?
Q B(2)(b)	Is the complaints procedure the same for all judges, or are there different procedures for different types/levels of judges?
Q B(2)(c)	Who can report misconduct by judges? (eg, citizens, judges)
Q B(2)(d)	How is misconduct by judges generally reported? (eg, directly to police, prosecuting agency, or through anonymous means, such as a hotline)
Q B(2)(e)	To whom is misconduct by judges reported? (eg, police, judicial leader(s), prosecuting authority, anti-corruption body)
Q B(2)(f)	Is there a difference between reporting misconduct by a lower court judge and reporting misconduct by a senior judge or supreme court judge?

The additional questions in the Modified Questionnaire are about the complaints body and the process by which individuals can make a complaint. This is useful in understanding to what extent guidance set out in the BP-IM is given effect in practice.

5.3.2 LIMITATION PERIOD

Relevant international standards

UN Basic Principles on the Independence of the Judiciary

Art 17	A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.	<i>Must be dealt with expeditiously</i>
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Commentary and comparison

No specific guidance is given in the international standards as to limitation periods in respect of disciplinary proceedings. However, it is clear that once a complaint has been lodged, it should be processed expeditiously and fairly.⁵⁹² There needs, therefore, to be a balance between speed and fairness, so that an individual judge is not left with an unresolved complaint against him or her for a long period of time, but equally, there is enough time to investigate and hear the complaint fairly.

Both Ghana and the Philippines have no limitation period for making a complaint against a judge, although in Ghana, complaints should be dealt with as soon as possible after the occurrence of the alleged misconduct.⁵⁹³ France, Costa Rica and the UK all have time limits on the making of a complaint.

⁵⁹² UNGA 'Report on the Independence of Judges and Lawyers' (see n 9 above), para 79.

⁵⁹³ The Regulations (Ghana), reg 28(1).

Table 12 Time limits for disciplinary procedures

	Time limit	Source
Philippines	None	N/A
Ghana	None, but complaints must be made as soon as possible.	Judicial Service Regulations 1963 reg 28(1).
France	Three years from time the conduct was (or should have been) discovered.	Art 50-3, Ordonnance 58-1270.
Costa Rica	Time limits on three stages of disciplinary process: <ul style="list-style-type: none"> • initiating stage: within one month • investigation: within one year • enforcing sanction: one month from conclusion of investigation 	Organic Law of the Judicial Power, Art 211.
UK	Complaints must be made within three months of alleged misconduct. Extension of time limits possible in 'exceptional circumstances'.	UKSC: Judicial Complaints Procedure, para 1 England and Wales: Judicial Conduct (Judiciary and Other Office Holders) Rules 2014, rr 11, 12, 14, 15 and 16 Scotland: Complaints about the Judiciary (Scotland) Rules 2017, r 7 Northern Ireland: Complaints about the Conduct of Judicial Office Holders, Code of Practice 2006, para 2.6

While France and the UK have a single time limit on making complaints, in Costa Rica, there are time limits on different stages in the process.⁵⁹⁴ The Legal Direction of the Judicial Power has highlighted the problematic nature of the time frame for the initiation of an investigation, which must be within one month from the time the matter is brought to the attention of the investigator.⁵⁹⁵ It is not clear how this works in practice as there is a lack of clarity over whether the one month period is a prescription period or an expiry date – which would have important ramifications for preliminary investigations and the gathering of evidence. The Legal Direction of the Judicial Power argued that time should run from the point at which the competent body has the precise facts and all the necessary elements to transfer charges.⁵⁹⁶ According to the case study, many have argued for a single limitation period to remove any ambiguity.⁵⁹⁷

It may, in theory, be helpful to have time limits in the different stages of the process, but the practice in Costa Rica shows that it can create confusion when it is unclear at what point time begins to run.

Methodological issues

Original Questionnaire

Q B(1)(a)	What is the statute of limitations applying to judges and prosecutors that can be subject to disciplinary proceedings for judicial corruption?
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Modified Questionnaire

Q B(2)(g)	Is there a limitation period for reporting judicial misconduct?
Q B(2)(h)	From when does the limitation period begin?

⁵⁹⁴ LOPJ (Costa Rica), Art 211 (see n 374 above).

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Dirección Jurídica del Poder Judicial 2016, as cited in II Informe Estado de la Justicia ed 2017, p 118.

⁵⁹⁷ LOPJ (Costa Rica), Art 211 (see n 374 above).

The Modified Questionnaire adjusted the question about limitation periods in disciplinary proceedings to try to gather more detail about the nature of such time limits, and the start point for the limitation. As seen in the discussion, there is some ambiguity in some of the countries in this study around what the limitation period covers, and that can cause problems.

5.3.3 MAKING A VALID COMPLAINT

Relevant international standards

Bangalore Principles – Implementation Measures

Para 15.3	A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.	<i>Must have a body that filters complaints and gathers response</i>
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Commentary and comparison

As seen above, protection from vexatious litigation or complaints is an important factor in increasing the likelihood of identifying and addressing corruption. It is necessary, therefore, to have mechanisms in place that allow genuine complaints while filtering out vexatious ones. The BP-IM states, in footnote 10, that: ‘Unless there is such a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants.’ There has to be a means of ensuring that disciplinary procedures are initiated where there is a genuine complaint about misconduct, rather than simply because individuals are unhappy with the outcome of their case. The experience of the Philippines highlights this problem of effective mechanisms for complaints to be made. The government introduced a complaints hotline in 2016.⁵⁹⁸ In the first year of operation, the hotline received 150,000 calls.⁵⁹⁹ Over 50 per cent of the calls were general enquiries, with only 800 relating reports of fixing and extortion, and only 200 were complaints of graft and corruption.⁶⁰⁰

The available level of detail about what is required for a complaint to be valid or admissible varies between the countries in this study. In Ghana and Costa Rica, there is little guidance given as to how the complaints must be presented and what kind of evidence is required to support it. In Ghana, once a complaint has been received by the relevant person or body, and if it is a complaint concerning a superior court judge, the process set out in the regulations must be followed as soon as possible.⁶⁰¹ Where there is evidence that a criminal offence may have been committed, the disciplinary authority must consult the Attorney-General as to whether a criminal prosecution should be started, unless the police have or are about to take action.⁶⁰² There is very little information available about the process where a complaint is about a lower court judge.

598 ABS CBN News, ‘Dial 8888, 911: Gov’t opens complaints, emergency hotlines’ (see n 588 above).

599 Bajo (see n 589 above).

600 *Ibid.*

601 The Regulations (Ghana), reg 28(1).

602 *Ibid.*, reg 29.

In France, a complaint must allege specific misconduct.⁶⁰³ Where the complaint is filed by the MoJ or a head of a jurisdiction, it will be referred to the competent disciplinary commission of the CSM.⁶⁰⁴ Complaints filed by individuals will be reviewed by the CAC, which is composed of two magistrates and two non-magistrates from among the CSM members.⁶⁰⁵ The CAC will review the complaint, and may hear oral evidence from the accused magistrate and other actors to determine the viability of the complaint,⁶⁰⁶ but it is not clear what the admissibility criteria are. Where the four members of the CAC are split as to whether or not it is admissible, a complaint will automatically be referred to the CSM.⁶⁰⁷ The number of litigant complaints that are made to the CSM is very small: in 2016, the CSM received 250 litigant complaints, but only seven were deemed admissible.⁶⁰⁸

In the UK, an initial assessment is made by the Chief Executive (UKSC),⁶⁰⁹ JCIO (England and Wales),⁶¹⁰ JOS (Scotland)⁶¹¹ or the Complaints Officer (Northern Ireland).⁶¹² In respect of a complaint about a justice of the UKSC, where the complaint refers to a matter other than a judicial decision, the Chief Executive refers the complaint to the president of the Supreme Court (unless the complaint relates to the president, in which case it's referred to the deputy president).⁶¹³ A complaint made to the JCIO must 'contain an allegation of misconduct'.⁶¹⁴ In Scotland, the 'complaint document' must contain detailed allegations of misconduct and the name of an 'identifiable judicial officer' against whom the allegation is made, as well as the date(s) of the alleged misconduct.⁶¹⁵ In Northern Ireland, complaints must be submitted to the Complaints Officer⁶¹⁶ in writing⁶¹⁷ (provision is made for assisting complainants in submitting their complaints (eg, for individuals with a disability)).⁶¹⁸ A distinction is made between 'serious' and 'less serious' complaints. Less serious complaints will be investigated by the Complaints Officer and reported to the Lord Chief Justice.⁶¹⁹ Where a complaint is considered 'serious', it will be investigated by a tribunal convened by the Lord Chief Justice.⁶²⁰ In England and Wales, for an interviewee that has confirmed that a criminal offence appears to have been committed, the matter will be referred to the police. In Scotland and Northern Ireland, the Rules and Code, respectively, require that where it appears that 'an allegation is of an act, omission or other conduct which may constitute a criminal offence'⁶²¹ or 'criminal conduct is involved',⁶²² the matter must be referred to the police. Under the UKSC complaints procedure,

603 Decree 58-1270 (France), Arts 50-1 to 50-3.

604 Ordonnance no 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature, Art 50-1.

605 Decree 58-1270 (France) Arts 50-3 and 63; Loi organique No 94-100 du 5 février 1994 sur le Conseil supérieur de la magistrature, Art 18.

606 Loi organique No 94-100 (France), Art 18.

607 *Ibid.*

608 See the annual report of the CSM for 2016 www.conseil-superieur-magistrature.fr/publications/rapports-annuels-dactivite accessed 22 December 2020.

609 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 1.

610 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), r 20.

611 Judiciary (Scotland) Rules 2017 (see n 578 above), r 8.

612 Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above).

613 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 2.

614 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), Supplementary Guidance, r 6.

615 Judiciary (Scotland) Rules 2017 (see n 578 above), r 5(2).

616 Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 4.1.

617 *Ibid.*, para 4.2.

618 *Ibid.*, pt 3.

619 *Ibid.*, pt 6.

620 *Ibid.*, pt 7.

621 Judiciary (Scotland) Rules 2017 (see n 578 above), r 6.

622 Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 2.5.

‘formal action’ will be taken, regardless of whether or not a complaint has been made when a justice of the court has been ‘finally convicted of any offence which might reasonably be thought to throw serious doubt on that member’s character, integrity or continuing fitness to hold office’, or his or her ‘conduct otherwise appears to be such as to throw serious doubt on that member’s continuing fitness to hold office’.⁶²³

In the Philippines, a complaint must clearly state, in writing, the acts and omissions complained of and how they constitute violations of the Supreme Court Rules and the Judiciary Code.⁶²⁴ The complaint must be supported by an affidavit given by someone with personal knowledge of the facts or, if the complaint is being made anonymously, it must be accompanied by public records.⁶²⁵ The JIB will decide whether the complaint is sufficient in form and substance.⁶²⁶ If it is not, the JIB will recommend to the Supreme Court that it be dismissed, and this has been the outcome of a few cases to date.⁶²⁷ In two jurisdictions in the UK, England and Wales, and Northern Ireland,⁶²⁸ and in the Philippines, vexatious complaints will be dismissed at this stage.⁶²⁹ In Scotland, vexatious complaints are dismissed at the next stage of the process by the disciplinary judge.⁶³⁰ In the Philippines, if it is determined that a complaint, in respect of an act committed at least one year before filing by a judge who is within six months of their retirement age, is intended to harass and embarrass the accused judge, the JIB will recommend to the Supreme Court that the complaint be dismissed, and that the complainant be cited for indirect contempt of court.⁶³¹ If the complainant is a lawyer, he or she may be sanctioned by the Philippine Bar unless he or she can demonstrate why he or she should not be sanctioned.⁶³² The criteria that the JIB applies for determining whether a complaint is to harass or embarrass a retiring judge is unclear.

Methodological issues

Original Questionnaire

Q B(5)(a)	Who can initiate disciplinary complaints against judges/prosecutors for judicial corruption (eg, citizens, public prosecutors, judicial council etc)?
Q B(4)(c)	Does the status of the complainant (eg, individual or public body) affect the mandatory or discretionary prosecution?

Modified Questionnaire

Q B(3)(a)	Is there a specific body responsible for investigating allegations of judicial misconduct?
Q B(3)(b)	Is there one body responsible for complaints against all judges, or are there separate bodies for different types/levels of judges?
Q B(3)(c)	If a complaint is received, is an investigation mandatory or does the complaints body have discretion in the matter?

623 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 4.

624 Rules of Court (the Philippines), ss 22, 23 or 24; r 140, s 2.

625 *Ibid*, r 140, s 1.

626 *Ibid*, s 3.

627 *Ibid*, s 3 and see *Re: Complaint Letters filed by Rosa Abdulharan and Rafael Dimaano charging Justice Jane Aurora C Lantion* (July 2017) and *Diomampo v Judge Alpajora* 483 Phil 560 (2004).

628 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), r 21 and Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 4.6.

629 Rules of Court (the Philippines), r 140, s 11.

630 Judiciary (Scotland) Rules 2017 (see n 578 above), r 11(4).

631 Rules of Court (the Philippines), r 140, s 11.

632 *Ibid*.

The questions in the Original Questionnaire and the Modified Questionnaire each had a slightly different focus. The Original Questionnaire drew out the question of who can complain and whether or not an investigation is mandatory once a complaint is made. The Modified Questionnaire was more focused on the body responsible for receiving complaints and investigating misconduct. Neither version of the questionnaire specifically addressed the issue of how valid complaints are made, and how invalid complaints are filtered out. This should perhaps be addressed directly with a question about requirements for making a valid complaint.

5.4 Investigating judicial misconduct

In two out of the five case studies, France and the Philippines, no distinction is made between different types or categories of judges when it comes to investigating misconduct. In the other three countries, distinctions are made between the different categories of judges in terms of the way that allegations of misconduct are investigated. In addition, there are different processes and procedures for investigations which may result in sanctions other than removal from office ('standard misconduct investigations'), and investigations that may result in removal from office ('removal from office investigations').

5.4.1 STANDARD MISCONDUCT INVESTIGATIONS

Relevant international standards

Bangalore Principles

Preamble	These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.
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Bangalore Principles – Implementation Measures

Para 15.1	Disciplinary proceedings against a judge may be commenced only for serious misconduct. The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.
Para 15.5	All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.

Commentary and comparison

It is important, in order to prevent interference with judicial independence and the functioning of the judiciary, that disciplinary procedures apply in only very restricted circumstances. As the UNSRJIL has noted:

'In order to safeguard the independence of justice operators, accountability mechanisms and proceedings must therefore have a restricted application. In relation to judges, international standards state that disciplinary measures and sanctions against them can be triggered only for

reasons of incapacity or behaviour that render them unfit to discharge their duties and in cases provided for by the law. As a result, judges should not be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law.⁶³³

However, as discussed earlier, judicial independence does not preclude accountability, and:

‘Judges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, wilful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics. In particular, justice operators must be duly held to account when engaged in corrupt practices. Indeed, judicial independence and immunity do not mean impunity and irresponsibility.’⁶³⁴

In the Preamble, the Bangalore Principles note the importance of ensuring that judges are accountable for this conduct to ‘appropriate institutions’ that are established to ‘maintain judicial standards’ (see the discussion above). Each of the countries studied here have one or more bodies with specific responsibility for maintaining judicial standards and investigating complaints (see the discussion above). In addition, disciplinary proceedings should only be commenced for ‘serious misconduct’ (see the discussion above), the law should define conduct that gives rise to such proceedings in ‘specific terms’, and set out the procedures to be followed (see the further discussion below). There should be established standards of judicial conduct against which disciplinary proceedings are determined (see the discussion above), and there should be a procedure determining full rights of defence. There is very little guidance on the investigative process, save to note that disciplinary processes respect the principles of fair trial set out in the ICCPR,⁶³⁵ which will be discussed more fully below.

Disciplinary powers and the investigative process

In Ghana, all complaints are initially investigated by the PCCIU or a regional PRCU.⁶³⁶ Complaints against lower court judges are dealt with by the PRCU; complaints against judges of the High Court are dealt with by a judge in the PCCIU; and the Director of the PCCIU personally investigates complaints against judges of the Court of Appeal or higher.⁶³⁷ If the complaint is one that only the Chief Justice can deal with, then the PCCIU must refer the complaint to the Chief Justice immediately.⁶³⁸ Where a complaint is made against a lower court judge to the PRCU, once the judge against whom the complaint is made has had the opportunity to respond to the allegations, the PRCU must refer the complaint to the PCCIU.⁶³⁹ In the PCCIU, once the relevant investigating judge or the director is satisfied that all available evidence is before him or her, he or she prepares a recommendation to the Chief Justice on what further action should be taken.⁶⁴⁰ The Chief Justice will make the final determination as to what action, if any, will be taken,⁶⁴¹ taking into consideration

633 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 84.

634 *Ibid*, para 84.

635 *Ibid*, paras 79–80.

636 PRCU Operational Guidelines (see n 494 above), 6–7

637 *Ibid*, 6–9.

638 *Ibid*, 9.

639 *Ibid*.

640 *Ibid*, 4.

641 The Regulations (Ghana), reg 28.

the Regulations⁶⁴² and the Code of Conduct.⁶⁴³ The Chief Justice will also consider whether the allegation warrants removal of the judge.⁶⁴⁴ In the case of superior court judges, the Chief Justice may refer the allegation to the President for directions as to whether to institute a formal or summary inquiry (see further below for information about the procedure and safeguards).⁶⁴⁵

In Costa Rica, the three general inspectors of the JIC have the responsibility of investigating misconduct by judges.⁶⁴⁶ Their powers include the receipt of complaints and verifying them; raising complaints to the Superior Council; investigating irregularities related to judicial figures; and the calling of witnesses and experts in order to obtain proof in individual cases.⁶⁴⁷ The case will be assigned to one of the general inspectors who will be the investigating judge.⁶⁴⁸ There must be a preliminary investigation to gather the necessary elements that substantiates misconduct,⁶⁴⁹ and at the beginning of the investigation, the investigating judge must notify the accused of the facts and either request a report from the accused or take testimony without the accused being sworn in.⁶⁵⁰ The accused judge has five days to provide exonerating evidence,⁶⁵¹ and following the completion of the investigation, the accused has three days to present his or her defence.⁶⁵²

In France, there are two routes that a complaint might take: if the MoJ filed a complaint, the investigation will be carried out by the General Inspection Service.⁶⁵³ Otherwise, once a complaint has been transferred to the competent Disciplinary Commission in the CSM, that commission will appoint a rapporteur to investigate, and the rapporteur is the only person who is competent to investigate.⁶⁵⁴ There are big differences in the investigative capacity of the general inspection service and a commission rapporteur – the CSM does not have a specific inspection unit, and the most a rapporteur can do is to seek the assistance of another magistrate who must be at least the same rank as the magistrate to be investigated.⁶⁵⁵ This may be the reason why the MoJ initiates most disciplinary proceedings. To date, requests to increase the CSM's investigative capacity have not been met, and this issue was identified by GRECO, in the Fourth Evaluation Round Compliance Report for France, as a vulnerability in the French legal and institutional framework to prevent corruption by magistrates.⁶⁵⁶ However, while resources capacity may differ between the CSM and the MoJ, whichever investigative authority takes on a case has all the necessary powers to investigate, including access to documentation, and can summon and depose relevant individuals.⁶⁵⁷

642 *Ibid.*

643 Rule 7B of the Code of Conduct (Ghana) (see n 465 above) states: 'Where a Judge commits a breach of any rule of this Code he shall be sanctioned with reference to the gravity of the act or omission constituting the breach in accordance with the [...] Regulations'.

644 PRCU Operational Guidelines (see n 494 above), 4.

645 The Regulations (Ghana), reg 28(2).

646 LOPJ (Costa Rica), Arts 198, 200 and 203 (see n 374 above).

647 *Ibid.*, Art 188; <https://inspeccionjudicial.poder-judicial.go.cr/index.php/quienessomos/funciones> accessed 22 December 2020

648 LOPJ (Costa Rica), Art 198 (see n 374 above).

649 See <https://unmejorpj.poder-judicial.go.cr/Documentos/RegimenDisciplinario/Guia-General-Procedimeinto-Sancionatorio-Disciplinario-Administrativo.pdf> accessed 22 December 2020 – Guía General: Procedimineto Disciplinario Administrative en el Poder Judicial (San José 2017), República de Costa Rica Poder Judicial.

650 LOPJ (Costa Rica), Art 200 (see n 374 above).

651 *Ibid.*, Art 398.

652 *Ibid.*

653 The General Inspection Service is a service within the MoJ, staffed with magistrates and responsible for monitoring performance and investigating disciplinary misconduct.

654 Decree 58-1270 (France), Art 51.

655 See the Annual Report of the CSM for 2016 (see n 608 above).

656 GRECO, Fourth Evaluation Round, Compliance Report France (see n 529 above).

657 *Ibid.*

In the Philippines, the JIB, a body set up by the Supreme Court, is responsible for investigating complaints against judges.⁶⁵⁸ It has the power to administer oaths to the parties and their witnesses, to issue subpoenas to witnesses, to see documents, and depose complainants and witnesses.⁶⁵⁹ Failure or refusal of a party to comply with a subpoena may result in Supreme Court proceedings for indirect contempt of court.⁶⁶⁰ Formal investigations may not occur when a complaint or disciplinary action against the judge can be resolved on the basis of the pleadings of the parties, the documents and papers or public court records.⁶⁶¹ Where investigation is required the CPIO has very broad powers to conduct investigations, surveillance or entrapment operations to gather intelligence about a judge and his or her behaviour, including discreet investigations, surveillance or entrapment operations on judges subject to anonymous or unverified complaints.⁶⁶² Such intelligence gathering investigations can be conducted with the authority of the Supreme Court, the Chief Justice of the Supreme Court or the JIB.⁶⁶³ The CPIO must submit its reports and recommendations to the Chief Justice, the Supreme Court or the JIB.⁶⁶⁴

In the UK there are separate disciplinary processes for the UK Supreme Court, and in each of the three jurisdictions: England and Wales, Northern Ireland and Scotland. For a complaint against a Supreme Court judge, the President of the Court and appropriate member will consult the next senior member in order to decide how to proceed.⁶⁶⁵ They may take no action, notify the accused justice and try to resolve the matter informally, or consider taking formal action.⁶⁶⁶ Taking formal action means that a tribunal will be established to investigate the complaint. The tribunal reports to the Lord Chancellor. The Lord Chancellor will then decide whether or not to initiate proceedings for removal from office (see below).⁶⁶⁷ In England and Wales there are a number of stages involved in the investigation. The JCIO makes an initial assessment, after which it can recommend to the Lord Chief Justice and the Lord Chancellor, by way of summary procedure, that ‘the office holder concerned should be removed from office without further investigation’.⁶⁶⁸ This will only happen when the officeholder has been convicted of a criminal offence, either in the UK or elsewhere; has been cautioned in respect of a criminal offence; or if several other conditions, ranging from the way they conduct themselves professionally, to failing to meet the basic requirements of their role, such as sitting requirements, have been met.⁶⁶⁹

If the complaint is not dismissed after the initial assessment,⁶⁷⁰ or by way of summary procedure,⁶⁷¹ the substance of the complaint will be investigated by a nominated judge who will decide what

658 Rules of Court (the Philippines), r 140, s 7.

659 *Ibid*, s 15.

660 *Ibid*.

661 *Ibid*, s 12.

662 ‘Re: Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n 385 above), 3; and Galvez (see n 546 above).

663 ‘Re: Revised Internal Rules of the Sandiganbayan’ (the Philippines) (see n 385 above), 3.

664 *Ibid*.

665 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 3.

666 *Ibid*.

667 *Ibid*, para 7.

668 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), r 30.

669 *Ibid* r 30.

670 *Ibid*, r 21.

671 *Ibid*, r 30.

disciplinary action to take.⁶⁷² However, if the nominated judge considers that the complaint is ‘sufficiently serious or complex’, or ‘a detailed investigation is required to establish the facts of a complaint’ it will be referred for investigation by an investigating judge.⁶⁷³ The investigating judge reports to the Lord Chancellor and the Lord Chief Justice.⁶⁷⁴ If an investigation results in a recommendation to dismiss or remove a judge, the judge concerned may opt to have his or her case reviewed by a disciplinary panel.⁶⁷⁵ In Northern Ireland, ‘less serious’ complaints are investigated by the complaints officer.⁶⁷⁶ The complaints officer reports to the Chief Justice.⁶⁷⁷ If the Chief Justice considers the complaint to be serious, he or she will convene a tribunal to take over the investigation of the matter.⁶⁷⁸ Parties to the complaint have the opportunity to apply for review of the decision.⁶⁷⁹

‘Serious’ complaints are referred to a complaints tribunal that will provide advice to the Lord Chief Justice on how to deal with a complaint.⁶⁸⁰ The tribunal consists of two judicial office holders and one lay member.⁶⁸¹ Decisions by the tribunal are by simple majority and the tribunal prepares a report summarising its findings, detailing additional evidence, and making a recommendation as to the disposal to be made.⁶⁸² The report is sent to the Lord Chief Justice, who will consider the recommendations, and may direct the tribunal to make additional enquiries.⁶⁸³ Following an investigation by a tribunal, the parties are automatically invited to comment on the report.⁶⁸⁴ In Scotland, JOS undertakes the initial assessment.⁶⁸⁵ The complaint can be dismissed at this stage if it lacks sufficient information, is about a judicial decision, raises a matter that has already been dealt with and does not present additional evidence, or falls within the functions of the Judicial Complaints Reviewer.⁶⁸⁶ If it is not dismissed, at this stage, it will be considered by the Disciplinary Judge,⁶⁸⁷ who can dismiss the complaint, refer the complaint for further investigation by a nominated judge or recommend the establishment of a tribunal to consider fitness for office.⁶⁸⁸ If the case is referred to a nominated judge,⁶⁸⁹ the nominated judge must consider what action to recommend and complete a report of his or her investigation.⁶⁹⁰ The disciplinary judge then reviews that report and may ask the nominated judge to reconsider.⁶⁹¹ Once that has happened, the disciplinary judge reports to the Lord President.⁶⁹²

672 *Ibid*, r 38.

673 *Ibid*, rr 44 and 59.

674 *Ibid*, r 72.

675 *Ibid*, rr 52 and 53; and pt 6 (concerning the composition and conduct of the Disciplinary Panel).

676 Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 6.1.

677 *Ibid*, para 6.5.

678 *Ibid*, para 6.6.

679 *Ibid*, para 6.7.

680 *Ibid*, para 7.1.

681 *Ibid*, para 7.2.

682 *Ibid*, paras 7.6 and 7.7.

683 *Ibid*, para 7.7.

684 *Ibid*, para 7.8.

685 Judiciary (Scotland) Rules 2017 (see n 578 above), ss 8(1) and (2).

686 *Ibid*, s 8(4).

687 *Ibid*, r 11.

688 *Ibid*.

689 *Ibid*, r 12(1).

690 *Ibid*, r 13(2).

691 *Ibid*, r 15(4).

692 *Ibid*, rr 16(1) and 16(2).

Methodological issues

Research challenges

One challenge that researchers faced was in finding accurate information about these proceedings. In Ghana, in particular, information about the disciplinary and removal process as it applies to lower court judges is not made public and the procedures are unclear.

Original Questionnaire

Q B(1)(b)	Who is responsible for investigating disciplinary actions for judicial corruption against judges and prosecutors in the judiciary?
Q B(1)(c)	What are the powers of the investigating body in a case of judicial corruption involving judges and prosecutors?
Q B(1)(d)	Who is responsible for prosecuting disciplinary actions for judicial corruption in the judiciary/public prosecution service?
Q B(1)(e)	Who is responsible for adjudicating disciplinary actions for judicial corruption in the judiciary/public prosecution service?

Modified Questionnaire

Q B(3)(d)	Is there a disciplinary procedure for investigating and hearing complaints against judges?
Q B(3)(e)	Who is responsible for hearing allegations of misconduct against judges?
Q B(3)(f)	Is the process the same for all judges, or are there different processes for different types/levels of judges?

The Modified Questionnaire attempted to collate questions B(1)(b) and B(1)(c) into one. However it is phrased, it is important to ensure that the powers of the investigative body are examined. In addition, it would be helpful to add a question about the independence of the investigative process.

5.4.2 REMOVAL FROM OFFICE INVESTIGATIONS

Relevant international standards

Bangalore Principles – Implementation Measures

Para 16.1	A judge may be removed from office only for <i>proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.</i>
Para 16.2	Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.
Para 16.3	The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its replacement or appointed to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office.

Commentary and comparison

The BP-IM considers disciplinary processes and removals separately, as do many states. The BP-IM indicates that where there are grounds for removal, the procedure should incorporate added levels of scrutiny, such as in paragraph 16.2, a recommendation from the disciplinary authority *and*

a decision by the legislature, if they are part of the process. However, the BP-IM suggests that it is not necessary to have the legislature as part of the removal process. The UNSRJIL, drawing on the Commonwealth (Latimer House) Principles on the Three Branches of Government, notes that ‘proper procedures for the removal of judges for reasons of incapacity or misbehaviour, as well as any disciplinary procedures, should be fairly and objectively administered in order to ensure that judicial accountability does not impair judicial independence’.⁶⁹³

In Costa Rica, France and the Philippines, the removal of a judge from office appears to be treated as a sanction consequent to a disciplinary investigation rather than requiring a separate process altogether.

In Ghana, procedures for removal from office differ for lower court judges and for superior court judges. Ghana is unique among the five case studies in that an individual can petition to have a superior court judge removed, and the petition is to the President of Ghana, rather than by way of a complaint to a disciplinary body.⁶⁹⁴ If the President receives a petition, it must be referred to the Chief Justice to determine whether or not a *prima facie* case exists for the removal of the judge.⁶⁹⁵ If the Chief Justice decides that there is a case, they must set up a disciplinary committee to investigate the complaint and make recommendations to the Chief Justice.⁶⁹⁶ These recommendations are then referred to the President and must be acted on.⁶⁹⁷ The Attorney-General must appoint a prosecutor to assist the disciplinary committee.⁶⁹⁸ The accused judge may represent himself or herself, or have legal representation to present a defence, and the proceedings are held in camera and not open to the public.⁶⁹⁹ There is a clear process set out in the constitution.⁷⁰⁰ By contrast, proceedings for the removal of lower court judges are much less clear. The Chief Justice has the power to remove the lower court judge for ‘stated misbehaviour, incompetence or inability to perform his functions arising from infirmity of body or mind’ and upon a resolution supported by the votes of not less than two-thirds of all the members of the Judicial Council.⁷⁰¹ It is understood from interviews that an enquiry is conducted in a similar style to an inquiry into a superior court judge, although the Regulations are unclear on this.⁷⁰² Interviewees have described these investigations as akin to informal criminal trials, and as much more inquisitorial than adversarial.

In the UK, there are different procedures for Supreme Court judges, judges in England and Wales, Northern Ireland and Scotland. A superior court judge (Court of Appeal, High Court and Crown Court) can only be removed from office following an ‘address of both houses’, that is, a parliamentary procedure prescribed under the Supreme Court Act 1981.⁷⁰³ The process is the same for removal of a

693 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 38.

694 The Constitution (Ghana), Art 146.

695 *Ibid*, Art 146(3).

696 The Constitution Art 146(4), (5), and (9). The Judicial Council (formed in accordance with Art 153 and exercising functions allocated to it under Art 154 of the Constitution) appoints three Superior Court judges to the Disciplinary Committee, and the CJ appoints two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.

697 The Constitution (Ghana), Art 146(4), (5) and (9).

698 Yaw Gyampo, ‘The Special Prosecutor and the Fight Against Corruption in Ghana: Some Thoughts’ in *My Joy* (3 January 2018) www.myjoyonline.com/opinion/2018/January-3rd/the-special-prosecutor-and-the-fight-against-corruption-in-ghana-some-thoughts.php accessed 22 December 2020.

699 The Constitution (Ghana), Art 146(8).

700 *Ibid*, Art 146.

701 *Ibid*, Art 151.

702 Note that Regulation 40 (The Regulations (Ghana)) sets out the rules in respect of attendance of witnesses for ‘formal inquiry the holder against whom charges have been preferred’. However, as the Regulations distinguish between ‘judicial office holders’ and ‘holders of a judicial service post’ it is not clear who r 40 relates to.

703 Supreme Court Act 1981 (England and Wales), s 11(3).

justice of the UKSC.⁷⁰⁴ In England and Wales, a judge may be removed by way of the summary process where he or she meets certain criteria: he or she has been convicted of a criminal offence, either in the UK or elsewhere; cautioned in respect of a criminal offence; discharged bankrupt or is the subject of bankruptcy restrictions; failed to disclose information concerning his or her suitability to hold judicial office; subject of a fitness to practice investigation that has resulted in removal or suspension from the register of a professional body or is subject to restricted practice; removed from another judicial office; or failed to meet the sitting requirements of his or her role.⁷⁰⁵ The procedure for the summary process is prescribed in the rules, and in particular, the judge concerned must be given the opportunity to make representations.⁷⁰⁶

A judge may request that his or her case is heard by a disciplinary panel if following an investigation, the recommendation is removal from office.⁷⁰⁷ In Scotland, the procedure for removal from office is separate: at the point of the initial assessment, the disciplinary judge can recommend to the Lord President that he makes a request for the complaint to be considered by a tribunal for fitness for office under a procedure set out in the Scotland Act 1998.⁷⁰⁸ Where the Lord President indicates that he will make such a request, the complaints procedure under the Judiciary Rules ceases to apply.⁷⁰⁹ Under the statutory procedure, the First Minister of Scotland ‘must’ constitute a tribunal when requested to do so by the Lord President, and ‘may’ constitute a tribunal in ‘such other circumstances as the First Minister thinks fit’.⁷¹⁰

The procedure for removal from office in Costa Rica appears to be the same as any other complaint, with differences in the sanctions applicable to different categories of misconduct: gross misconduct (punishable by unpaid suspension until the revocation of appointment (ie, dismissal),⁷¹¹ serious misconduct (punishable by written warning and unpaid suspension of up to two months)⁷¹² and minor misconduct (punishable by reprimand and written reprimand).⁷¹³ Judicial corruption is a very severe offence if it is proven that a crime has been committed,⁷¹⁴ and the offender is therefore subject to a correspondingly severe penalty. Article 28 of the LOPJ also prescribes a list of behaviours that would lead to removal from office, including incorrect behaviour in private life, loss of essential conditions to perform the duties and so on.⁷¹⁵ In respect of Supreme Court judges, the Supreme Court is the competent disciplinary authority,⁷¹⁶ and if two-thirds of Supreme Court judges consider that the judge in question ought to be dismissed, the court will inform the Legislative Assembly, and it will be the assembly who resolves the issue.⁷¹⁷ It is not clear whether the Legislative Assembly exercises its authority to remove a judge ‘only after a recommendation’ to do so from the Supreme Court, or whether they make a decision separate from any findings or recommendations from the Supreme Court (which, if that is the case, would be inconsistent with paragraph 16.2 of the BP-IM).

704 UKSC Judicial Complaints Procedure (UK Supreme Court) (see n 567 above), para 7(4) and Constitutional Reform Act 2005 (UK), s 33.

705 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), s 30.

706 *Ibid.*, ss 31–33.

707 *Ibid.*, pt 6.

708 Judiciary (Scotland) Rules 2017 (see n 578 above), rr 11(8) and 11(9); and Judiciary and Courts (Scotland) Act 2008, s 35.

709 Judiciary (Scotland) Rules 2017 (see n 578 above), s 11(10).

710 Judiciary and Courts (Scotland) Act 2008, s 35.

711 LOPJ, Arts 190-196; specifically 195.

712 *Ibid.*

713 *Ibid.*

714 *Ibid.*, Art 191.

715 *Ibid.*

716 *Ibid.*, Art 182.

717 *Ibid.*

In both France and the Philippines, removal from office is a sanction that can be imposed as a result of a disciplinary investigation.⁷¹⁸ In the Philippines, judicial corruption is a form of serious misconduct and can result in removal from office.⁷¹⁹ Also, a distinction is made between lower-level judges and Supreme Court judges and the Chief Justice. There are no disciplinary procedures for Supreme Court judges or the Chief Justice other than impeachment.⁷²⁰ In France, removal from office is one of nine possible sanctions (*sanctions disciplinaires*) of increasing seriousness that can be ordered at the conclusion of disciplinary proceedings.⁷²¹

The BP-IM emphasises the kinds of conduct that may warrant removal of a judge: ‘proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary’.⁷²² However, as seen in the discussion above, the definition and classification of misconduct varies widely between countries, and most countries still have rather vague and ambiguous phases associated with the conduct that will warrant removal, which leaves it open to broad interpretation and, in some cases, potential abuse.

Methodological issues

There were no questions on removal procedures in the questionnaires. The question of removals was instead, treated as a sanction rather than a separate process. It may be helpful for the purposes of comparative work in the future to include a question about the removals procedure.

5.4.3 BURDEN AND STANDARD OF PROOF

Relevant international standard

There is no specific guidance given in international standards, or the BP-IM, on the burden and standard of proof in disciplinary proceedings against judges. However, the UNSRJIL was unequivocal in her report on judicial accountability that proceedings must meet the standards of Article 14 of the ICCPR and Article 11 of the UNDHR, and this includes the principles of presumption of innocence.⁷²³ There is no guidance on the standard of proof required in disciplinary proceedings.

Commentary and comparison

Practices in the five countries in this study show that there is considerable variation between both the burden of and standard of proof in disciplinary cases. In Costa Rica, following an investigation, where there is any doubt, the disciplinary body must rule in favour of the public servant.⁷²⁴ The burden of proof is on the inspector.⁷²⁵ In Ghana, the burden of proof in disciplinary hearings is on the investigators conducting the enquiry. The standard of proof has been described as ‘a sliding scale’. Less serious allegations that are unlikely to result in

718 Philippines: Public Official Code (the Philippines), s 11. France: Ordonnance 58-1270 (France), Art 45.

719 Rules of Court (the Philippines), r 140, s 11 (cf ss 8–10).

720 The Constitution (the Philippines), Art XI s 2.

721 Ordonnance 58-1270 (France), Art 45.

722 BP-IM, para 16.1.

723 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 79.

724 LOPJ (Costa Rica), Art 203 (see n 374 above).

725 *Ibid.*

the removal of a judge will be decided on the balance of probabilities; while in more serious allegations that might result in removal, the standard is closer to that required for a criminal allegation, but is not ‘beyond reasonable doubt’.⁷²⁶ In France, a complaint will be inadmissible if it does not contain a detailed account of the facts and allegations. Consequently, the burden of proof lies with the claimant.⁷²⁷ In the Philippines, the burden of proof in administrative proceedings falls on the complainant.⁷²⁸ The standard necessary for a finding of guilt is substantial evidence or evidence that a reasonable mind might accept as adequate to support a conclusion.⁷²⁹ In England and Wales, questions as to whether a fact has been established ‘must be decided on the balance of probabilities’.⁷³⁰ In Scotland, the standard applied to disciplinary proceedings is the balance of probabilities.⁷³¹ In Northern Ireland, serious complaints are considered by a tribunal, and decisions are by simple majority. Differences in opinion as to the facts of the case or the recommendation, ‘may be reflected in their report if agreement cannot be reached’.⁷³²

It would be helpful to have some international guidance on this issue, given how important the question of judicial discipline is in terms not only of its impact on judicial accountability, but also the potential such procedures, if used improperly, may have on judicial independence.

METHODOLOGICAL ISSUES

Original Questionnaire

Q B(2)	What is the burden of proof in disciplinary proceedings?
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Modified Questionnaire

Q B(4)(a)	What is the burden of proof in investigations of judicial misconduct?
Q B(4)(b)	What is the standard of proof in investigations of judicial misconduct?

The Modified Questionnaire included a question about the standard of proof, as well as the burden of proof because these are two distinct but equally important concepts. As can be seen from the discussion above, there appear to be variations between countries on both the standard and burden of proof in disciplinary cases, and having the two questions in the questionnaire helped to highlight these differences.

⁷²⁶ Information based on interviews.

⁷²⁷ Art 50-3, Ordonnance 58-1270 (France).

⁷²⁸ *Re: Abdulharan and Dimaano* (see n 627 above).

⁷²⁹ *Ibid.*

⁷³⁰ Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), ss 39, 60 and 75.

⁷³¹ Judiciary (Scotland) Rules 2017 (see n 578 above), s 14.

⁷³² Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 7.6.

Relevant international standard

Bangalore Principles – Implementation Measures

Para 15.4	The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.
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Commentary and comparison

In Ghana, the Supreme Court has jurisdiction to conduct disciplinary proceedings, except against magistrates of the district court, who are under the authority of the Judicial Secretary.⁷³³ In Costa Rica, once an investigation concludes, the files are transferred to the General Inspectors of the Judicial Inspection Body – they have three days to study the file and five days to make a decision.⁷³⁴ In terms of jurisdiction and venue, the jurisdiction for enforcing the measures against ordinary judges and other public servants varies according to the sanction. The Corte Plena has jurisdiction in cases involving ordinary judges who have delayed or seriously erred in the administration of justice;⁷³⁵ the JIC has jurisdiction in cases involving all other judicial servants, except justices of the Supreme Court.⁷³⁶ The Supreme Court has the competency to enforce the disciplinary regime in cases involving Supreme Court judges.⁷³⁷ In a disciplinary process, judges are not required to recuse themselves, if the proceeding is against a colleague.⁷³⁸ In France, it is the CSM that has the jurisdiction to hear and conduct disciplinary proceedings.⁷³⁹ In the Philippines, there are no provisions setting out where disciplinary proceedings should be heard; however, a judge against whom a complaint is made is never subject to proceedings in his or her own jurisdiction or courtroom.⁷⁴⁰ In the UK, there are no specific provisions on the venue.

Jurisdiction and venue do not appear to be significant issues in respect of judicial discipline.

Methodological issues

There were no questions on jurisdiction and change of venue. However, the case of *Maceda v Ombudsman*⁷⁴¹ in the Philippines (see section 6.2) suggests that there may be value in including questions on this issue in future research as jurisdictional disagreements may have an impact on the chronology of criminal and disciplinary proceedings.

⁷³³ The Regulations (Ghana), regs 27(2), and 28(2) and (3).

⁷³⁴ LOPJ (Costa Rica), Art 206 (see n 374 above).

⁷³⁵ *Ibid*, Art 199.

⁷³⁶ *Ibid*, Art 184.

⁷³⁷ LOPJ, Art 182.

⁷³⁸ LOPJ (Costa Rica), Art 212 (see n 374 above).

⁷³⁹ Ordonnance 58-1270 (France), Art 48; Loi organique no 94-100 (France), Art 18.

⁷⁴⁰ Rules of Court (the Philippines), r 116, s 1.

⁷⁴¹ *Bonifacio Sanz Maceda v Hon. Ombudsman Conrado, M. Vasquez, and Atty. Napoleon A. Abiera*, GR No 102781 (22 April 1993)

5.5 Procedural safeguards

RELEVANT INTERNATIONAL STANDARDS

Bangalore Principles

Preamble	These principles presuppose that judges are accountable for their conduct to <i>appropriate institutions established to maintain judicial standards</i> , which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.
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Bangalore Principles – Implementation Measures

Para 15.5	All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.
Para 15.6	There should be an appeal from the disciplinary authority to a court.
Para 15.7	The final decision in any proceedings instituted against a judge involving a sanction against such a judge, whether held in camera or in public, should be published.

Commentary and comparison

The UNSRJIL notes that ‘[i]nternational and regional jurisprudence has confirmed how important it is that any accountability mechanism and proceedings respect the aforementioned general principles of a fair trial’,⁷⁴² and goes on to elaborate:

‘All complaints made against justice operators should be processed expeditiously and fairly and the determination as to whether particular behaviour or conduct constitutes a cause for sanction must be carried out by an independent and impartial body pursuant to fair proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights. That includes the principle of the presumption of innocence, the right to be tried without undue delay, and the right to defend oneself in person or with legal counsel of one’s own choosing. In addition, in the case of judges, the investigation and proceedings against them should be kept confidential as, even if found innocent, the damage to their reputation could prove irreversible.’⁷⁴³

The procedural safeguards required in disciplinary proceedings are, therefore, the same as those examined in chapter 4, with some adjustments:

- established procedure (BP-IM, paragraph 15.5);
- equality before the law;
- fair hearing by an independent and impartial tribunal, established by law; fairness would usually require an open and public hearing; however, note the important qualification in judicial disciplinary procedures that the proceedings should be confidential – the BP-IM also

⁷⁴² UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 80.

⁷⁴³ *Ibid*, para 79.

acknowledges that it may be more appropriate in the case of disciplinary proceedings, for them to be held in private (paragraph 15.7);

- right to be presumed innocent until proven guilty according to law;
- minimum guarantees in determination of the complaint:
 - to be informed promptly and in detail in a language he or she understands, the nature of the allegation;
 - to be investigated without undue delay;
 - to be investigated in his or her presence, and to defend him or herself in person or through legal representation;
 - to examine witness against him or her, and call witnesses on his or her behalf; and
 - to have the free assistance of an interpreter if needed;
- right to have the outcome and sanction reviewed by a higher tribunal according to law;
- publication of decisions – in addition, the BP-IM states that the final decision of a disciplinary body, whether the hearing and investigation was held in camera or in public, should be published; and
- legal certainty – see above, in the discussion on ‘Responsibility for judicial discipline’.

The BP-IM emphasises, in particular, the independence and impartiality of the disciplinary body and disciplinary authority,⁷⁴⁴ the right of a full defence⁷⁴⁵ and the availability of appeal.⁷⁴⁶

Established rules of procedure

Paragraph 15.5 of the BP-IM states that ‘[a]ll disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence’. There is very little guidance on the investigative process, save to note that disciplinary processes respect the principles of fair trial set out in the ICCPR,⁷⁴⁷ and guarantees full rights of defence,⁷⁴⁸ both which will be discussed more fully below. However, all the countries in this study have codes of judicial conduct. In all five countries, the procedures for judicial discipline are prescribed by law;⁷⁴⁹ however, there is a lot of variation between states as to the accessibility, clarity and detail of these rules. There is also, in some cases, a difference between the accessibility, clarity and detail of rules concerning standard misconduct investigations, in contrast with removal proceedings.

744 BP-IM, Preamble, and paras 15.4 and 16.2.

745 *Ibid*, para 15.5.

746 *Ibid*, para 15.6.

747 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 80.

748 BP-IM, para 15.5.

749 As outlined throughout this section.

Independence of disciplinary body or bodies

As discussed in section 5.2.1, the disciplinary authority, and its investigation into alleged misconduct, must be independent and impartial. The UNSRIJL asserts that the rights to a fair trial under Article 14 of the ICCPR apply to judicial accountability proceedings, and explores these issues through the jurisprudence of international and regional tribunals (see above). Much of the focus is on the independence of the process from the executive and the legislature. The BP-IM emphasises not only the independence from the executive and the legislature (see paragraph 15.4), but also the need for the disciplinary body to be composed mainly of judges. However, removal procedures routinely involve the judiciary, the executive and the legislature, and this is where fair trial rights become imperative to safeguard the process from undue influence (see the discussion above).

The case studies for Ghana and France indicate that there may be issues with, at the very least, a perceived lack of independence of the process. In Ghana, this is because, in the case of superior court judges, the Chief Justice may seek the view of the President of Ghana as to whether or not to proceed with a formal or informal inquiry.⁷⁵⁰ There is no clear information as to the criteria for either a formal or informal inquiry. In France, while the CSM is independent, a lack of investigative capacity means that the majority of investigations are conducted by the MoJ,⁷⁵¹ which is, of course, not independent of the executive. In the Philippines, by contrast, the JIB, a body formed and overseen by the Supreme Court, has considerable, one might say draconian, powers, of surveillance, entrapment and investigation of judges against whom a complaint is made or who are suspected of misconduct.⁷⁵² This is the opposite extreme of a lack of independence, and it is not clear how a suspected judge is protected in these circumstances, or what oversight there is of these powers.

Notice and hearings

Much of the detail on the procedure for disciplinary proceedings focuses around hearings, or the ability of an accused judge to make representations and call witnesses. In Ghana, the details of the procedure with respect to lower court judges are unclear because there is no legislative framework. For superior court judges, in standard proceedings, witnesses may be summoned and evidence produced in a formal enquiry, but not an informal one.⁷⁵³ In Costa Rica, the investigating judge notifies the accused of the facts and can either request a report from the accused judge or receive testimony. Once the investigation is finished, the accused judge has three days to present his or her defence.⁷⁵⁴ In the Philippines, the Judicial Investigation Board, under the auspices of the Supreme Court, has the powers to administer oaths to the parties and their witnesses, issue subpoenas and inspect documents.⁷⁵⁵ Failure or refusal to comply with a subpoena issued by the Judicial Inspection Board may result in indirect contempt of court.⁷⁵⁶ The JIB conducts an investigative hearing at which the parties may present documentary evidence and affidavits, and they can be cross-examined by the accused judge, and by the chairman and members of the Judicial Inspection Board.⁷⁵⁷

750 The Regulations (Ghana), reg 28(2).

751 GRECO, Fourth Evaluation Round, Compliance Report France (see n 529 above)

752 Rules of Court (the Philippines), r 140.

753 The Regulations (Ghana), reg 40.

754 LOPJ (Costa Rica), Art 398 (see n 374 above).

755 Rules of Court (the Philippines), r 140, s 15.

756 *Ibid*, s 15.

757 *Ibid*, s 14.

In the UK, at each stage of the investigation in each jurisdiction, there are clear procedures that allow the individual investigating a complaint to gather evidence, but also allow an accused judge to comment and respond to complaints, and to decisions made by the investigating individual.⁷⁵⁸

Transparency and publication of outcomes

The ICCPR requires that trials be held in public, but the BP-IM recognise that this is not always desirable in the context of judicial discipline and require only that the outcomes are published, whether proceedings were in public or in camera. There is a tension here between the two approaches, but full, open hearings could potentially be detrimental to an individual judge, even if exonerated, and possibly to perceptions about the judiciary. In Ghana, proceedings are closed and not open to the public,⁷⁵⁹ and decisions are not published⁷⁶⁰ (although the Judicial Service Authority publishes statistics about the number of petitions and cases registered and disposed of).⁷⁶¹ France is the only country in this study where disciplinary proceedings are held in public, thereby providing full transparency, unless there is a public interest reason for a closed hearing.⁷⁶² Disciplinary decisions are published and accessible online.⁷⁶³ In the UK, decisions as to disciplinary sanctions are only published in England and Wales, but not in Scotland or Northern Ireland. In the Philippines and Costa Rica, disciplinary decisions are published.⁷⁶⁴

Appeals

The BP-IM reiterates the need for the availability of an appeal to a *court*, but the case studies indicate that this is not consistent practice. In Ghana, where an inquiry into the conduct of a judge has been completed and the judge has been sanctioned, he or she has a right of appeal to the President.⁷⁶⁵ Appeals must be filed in writing to the Judicial Secretary within ten days of the date of the decision.⁷⁶⁶ In Costa Rica, for ordinary judges, the decision of the JIC is appealable before the Superior Council, which is the second instance body.⁷⁶⁷ However, decisions made in respect of Supreme Court judges by the Supreme Court cannot be appealed.⁷⁶⁸ In France, judges can appeal the decision of the Disciplinary Committee to the Conseil d'Etat.⁷⁶⁹ If the Conseil d'Etat upholds the appeal, the case will be sent back to the CSM for re-evaluation by the disciplinary committee.⁷⁷⁰ In the Philippines, the Supreme Court is the decision-making body for disciplinary proceedings,

758 UKSC: UKSC Judicial Complaints Procedure (n 567), para.7(ii); England and Wales: Judicial Discipline (Prescribed Procedures) Rules 2014, and Judicial Conduct Rules 2014 (England and Wales) (n 415); Northern Ireland: Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (n 477); and Scotland: Judiciary and Courts (Scotland) Act 2008, s.28 and Judiciary (Scotland) Rules 2017 (n 578), r 14

759 The Constitution (Ghana), Art 146(8).

760 They are not made available to the public.

761 Ghana Judicial Service, 'Annual Report 2017–2018', 54–55.

762 Decree 58-1270 (France), Art 57.

763 See www.conseil-superieur-magistrature.fr/missions/discipline accessed 22 December 2020.

764 See the Philippines: <http://sc.judiciary.gov.ph>; Costa Rica: Israel Aragón Matamoros 'Mecanismo de Revisión Independiente: Informe de fin de término de Costa Rica 2015–2017', www.opengovpartnership.org/wp-content/uploads/2018/06/Costa-Rica_End-of-Term_Report_2015-2017.pdf accessed 22 December 2020.

765 The Regulations (Ghana), reg 41(1)–(3).

766 *Ibid*, reg 41(4).

767 LOPJ (Costa Rica), Art 209 (see n 374 above).

768 *Ibid*, Art 58. II Informe Estado de la Justicia (Programa Estado de la Nación, ed 2017), 108.

769 Julie Joly-Hurard, 'La responsabilité civile, pénale et disciplinaire des magistrats' (2006) 58 (2) *Revue internationale de droit comparé*, 439.

770 *Ibid* and Code de justice administrative (France), Art L821-2.

and as it's the highest court in the Philippines, there is no mechanism to appeal against a decision concerning disciplinary measures.⁷⁷¹ In the UK, in each jurisdiction, the disciplinary process involves a series of stages, referrals and reviews, and overall involves a process through which the evidence is considered by more than one person, and in Scotland, decision-makers may be asked to reconsider their decisions.⁷⁷² In cases where dismissal is recommended for example, in England and Wales, the judge against whom the complaint was made may request that his or her case be considered by a disciplinary panel.⁷⁷³ While there are no rights of appeal, ultimately, the decision of the Lord Chief Justice and the Lord Chancellor, or the Lord Chief Justice in Northern Ireland and the Lord President in Scotland would be reviewable by way of judicial review because these are statutory powers,⁷⁷⁴ and under the Human Rights Act 1998, it is unlawful for a public authority, such as a court or tribunal, or officials whose functions are of a public nature, to breach Convention Rights.⁷⁷⁵ In addition, the ECtHR has decided on the Article 6 (right to a fair trial) requirements of disciplinary proceedings decision, which the UK courts would take account of in any judicial review proceedings.⁷⁷⁶

Rights of representation

In Ghana, an accused judge may be represented at the inquiry, but only if the complainant is also presented,⁷⁷⁷ and a superior court judge facing proceedings to remove him or her from office under the Constitution is also entitled to legal representation.⁷⁷⁸ In Costa Rica, it is unclear whether or not there is a right to representation in disciplinary proceedings. In France, an accused judge may be assisted or represented by one of his or her peers, that is, another judge, or by a lawyer.⁷⁷⁹ In the Philippines, a judge facing disciplinary proceedings may be represented by a counsel;⁷⁸⁰ however, in a widely criticised process, the former Chief Justice Sereno was denied legal representation in her impeachment hearing.⁷⁸¹ In the UK, much of the focus of the procedural rules is about hearings, and the right of the accused judge to comment and make representations. In Scotland, interviewees in the investigative process, which would include a judge, may be accompanied by a person of his or her choice to offer moral support to assist with taking notes or managing papers.⁷⁸²

771 American Bar Association, *Judicial Reform Index for the Philippines* (Asia Law Initiative, March 2006) 23.

772 Judiciary (Scotland) Rules 2017 (see n 578 above), r 15.

773 Complaints about the Conduct of Judicial Office Holders, s 75. Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), r 53(c).

774 Under principles of UK administrative law decision makers must not go beyond the scope of their powers, and must not act unfairly, or follow improper procedure.

775 Human Rights Act 1998, s 6.

776 See also discussion in 'Responsibility for Judicial Discipline', and HRA 1998, s 2.

777 The Regulations (Ghana), reg 39.

778 The Constitution (Ghana), Art 146(8).

779 Decree 58-1270 (France), Arts 52 and 54.

780 'Re: Revised Internal Rules of the Sandiganbayan' (the Philippines) (see n 385 above), s 13.

781 ABS-CBN News, 'Sereno "Looks Forward" To Senate Impeach Trial After House Bars Counsel' *ABS-CBN News* (Manila, 22 November 2017).

782 Judiciary (Scotland) Rules 2017 (see n 578 above), r 14.

Original Questionnaire

Q B(1)(f)	What is the disciplinary appeal process for proceedings against a judge or a prosecutor for judicial corruption?
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Original Questionnaire

Q B(4)(c)	Are judges entitled to representation in disciplinary proceedings?
Q B(4)(d)	Who is entitled to defend judges in cases of judicial corruption?
Q B(4)(e)	Are judges entitled to an oral hearing?
Q B(4)(f)	Are cases heard in public or in private?
Q B(4)(g)	Are outcomes public or confidential?
Q B(4)(h)	Are there any specific or additional procedural safeguards in place in judicial conduct proceedings?
Q B(4)(i)	What is the appeals process in disciplinary proceedings?

Given the importance of procedural safeguards in disciplinary processes, especially as they pertain to protecting judges from undue pressure and undue influence, and the internal independence of the judiciary (see the discussion in chapter 2), the additional questions in the Modified Questionnaire were aimed at drawing out more detail on this matter.

5.6 Sanctions for judicial misconduct

RELEVANT INTERNATIONAL STANDARDS

Bangalore Principles – Implementation Measures

Para 15.8	Each jurisdiction should identify the sanctions permissible under its own disciplinary system, and ensure that such sanctions are, both in accordance with principle and in application, proportionate.
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The CCJE, states that ‘the sanctions available [...] in a case of a proven misconduct should be defined, as far as possible in specific terms, by the statute or fundamental charter of judges, and should be applied in a proportionate manner’.⁷⁸³

COMMENTARY AND COMPARISONS

One common trend in the case studies is to have a range of possible sanctions available as a consequence of disciplinary proceedings. These range from informal measures (in the UK and the Philippines) and reprimands at the lowest level of formal measures, to removal as the ultimate, most serious sanction. This would indicate that states do recognise in their disciplinary rules the need for proportionate sanctions. However, it is not always clear what the criteria are

⁷⁸³ CCJE, ‘Opinion No. 3’ (see n 161 above), para 77.

for the different sanctions. Northern Ireland and the Philippines provide the clearest examples in this study of the behaviour that warrants the different levels of sanction.⁷⁸⁴

The sanctions in each of the case studies is set out in Table 13.

Table 13 Disciplinary sanctions

	Possible sanctions	Relevant law/rule
Ghana	<ul style="list-style-type: none"> • Reprimand • Suspension • Dismissal 	Suspension: The Regulations, reg 33(1)
Costa Rica	<ul style="list-style-type: none"> • Minor misconduct: reprimand • Serious misconduct: warning and unpaid suspension up to two months • Gross misconduct: unpaid suspension until dismissal 	Arts 190-196 LOPJ; specifically 195
France	<ul style="list-style-type: none"> • Reprimand • Mandatory removal from office • Withdrawal of certain functions • Prohibition to be appointed as a single judge for up to a maximum of five years • Lowering of rank (corresponds to the reduction of the salary) • Temporary suspension from office for up to a maximum of one year, with full or partial suspension of salary • Demotion • Mandatory retirement with or without entitlement to the retirement benefits • Revocation (eg, dismissal with or without entitlement to the retirement pay) 	Ordonnance 58-1270, Art 45
The Philippines	<ul style="list-style-type: none"> • Distinguishes between serious charges, less serious charges and light charges • Judicial corruption in 'serious' charges results in one of the following: dismissal from service; forfeiture of all or part of the benefits as the Supreme Court may determine; and disqualification from reinstatement or appointment to any public office • Suspension from office without salary and other benefits for more than three but not exceeding six months • A fine of more than PHP 20,000.00 but not exceeding PHP 40,000.00 • For Supreme Court judges, the only disciplinary procedure appears to be removal from office 	Rules of Court, r 140, s 8.
	<ul style="list-style-type: none"> • Fine, removal or imprisonment 	S 11 Public Official code
UK	<ul style="list-style-type: none"> • Informal measures • Formal advice • Formal warning • Reprimand • Suspension • Removal 	England and Wales: Constitutional Reform Act 2005, s 108 Scotland: Judiciary and Courts (Scotland) Act 2008, s 29 Northern Ireland: Code of Conduct, para 8.2

784 Philippines: Rules of Court (the Philippines), r 140, ss 22, 23 and 24. Northern Ireland: Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above).

In Costa Rica, sanctions against Supreme Court judges, including reprimands and written reprimands require a simple majority vote from the Supreme Court.⁷⁸⁵ The suspension of any particular judge of the Supreme Court requires the endorsement of two-thirds of the Supreme Court judges. If two-thirds of the Supreme Court judges consider that the judge in question ought to be dismissed: the court will inform the Legislative Assembly and it will be the assembly who resolves the issue.⁷⁸⁶

METHODOLOGICAL ISSUES

Original Questionnaire

No questions on sanctions

Modified Questionnaire

Q B(5)(a)	What sanctions are there for judicial misconduct?
Q B(5)(b)	Who determines the sanction?
Q B(5)(c)	Are sanctions determined by different people/bodies depending on what type/level of judge is being sanctioned?
Q B(5)(d)	Are sanctions discretionary or mandatory?

As this is an important aspect of the disciplinary process, questions about sanctions had to be included. These questions were included following feedback, and the information about sanctions added into the case studies during the review phase (see ‘Methodology’, above).

5.7 Transparency

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

Art 5(1)	Each State Party shall, in accordance with the fundamental principles of its legal system, <i>develop and implement or maintain effective, coordinated anti-corruption policies</i> that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, <i>integrity, transparency and accountability</i>	Mandatory
Art 7(4)	Each State Party shall, in accordance with the fundamental principles of its domestic law, <i>endeavour to adopt, maintain and strengthen systems that promote transparency</i> and prevent conflicts of interest	Mandatory to try to strengthen systems
Art 10	Taking into account the need to combat corruption, <i>each State Party shall</i> , in accordance with the fundamental principles of its domestic law, <i>take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate</i> . Such measures may include, inter alia: (a) <i>Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;</i> (b) <i>Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and</i> (c) <i>Publishing information, which may include periodic reports on the risks of corruption in its public administration</i>	Mandatory

785 LOPJ, Art 182.

786 *Ibid.*

Article 13(1)	Each State Party <i>shall take appropriate measures</i> , within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) <i>Ensuring that the public has effective access to information</i> ; (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula; (d) <i>Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption</i> . That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or <i>ordre public</i> or of public health or morals.	<i>Mandatory</i>
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Bangalore Principles – Implementation Measures

Para 15.7	The final decision in any proceedings instituted against a judge involving a sanction against such a judge, whether held in camera or in public, should be published.
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Commentary and comparison

As noted in section 4.7, under Article 5(1) of the UNCAC, states must develop anti-corruption policies that, among other things, reflect the principle of transparency. In addition, states must meet the requirements of Articles 7(4), 10 and 13(1). Transparency is important in the context of disciplinary proceedings for the same reason that it is important in criminal proceedings: openness and access to information enhances accountability. The UNCAC requirements are therefore as relevant to the disciplinary process as they are to the criminal process: information about the organisation, and functioning and decision-making processes of disciplinary bodies and disciplinary authorities should be available in line with Article 10; there should be effective access to information and the right to seek, receive, publish and disseminate information about judicial corruption under Article 13(1); and overall, efforts should be made to enhance and strengthen transparency in the disciplinary systems, in line with Article 7(4).

In addition, the UNSRIJL has emphasised the need for transparency in the application of codes of conduct and disciplinary regimes, stating that they should be ‘applied in a consistent and transparent manner, with full respect for the fundamental guarantees of a fair trial and due process’.⁷⁸⁷ There are therefore two aspects to transparency here: the transparent and consistent application of the rules, and transparency of the process and outcomes. The BP-IM does not specifically address transparency, but it does emphasise the need for the publication of disciplinary decisions, whether the proceedings were held in public or private.⁷⁸⁸

There is a great deal of variation in the levels of transparency in the case studies, in particular in terms of ‘transparent and consistent’ application of the disciplinary rules. The most transparent procedures are in France and the UK. This may be because there is much better access to legal

⁷⁸⁷ UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 87.

⁷⁸⁸ BP-IM, para 15.7.

information and to information about the judiciary in these countries, and rules and regulations may be found online.⁷⁸⁹ In terms of transparency of outcomes, France, the Philippines, Costa Rica, and England and Wales (but not Scotland and Northern Ireland) are transparent in that they publish the outcomes of their decisions online.⁷⁹⁰ In England and Wales, however, disciplinary decisions are removed from the JCIO website after a year, unless the outcome is dismissal, in which case decisions are available for five years.⁷⁹¹ One of the challenges for case study researchers in Ghana, Costa Rica and the Philippines was checking whether the material they were referring to was the most up-to-date and relevant material. Websites are not always updated frequently, and major changes may not always be evident. While there are a number of online sources of legal materials for each of these countries, non-official sources need to be checked against official sources, but even official sources may be very difficult to navigate. In Ghana, there is relatively good information about processes relating to superior court judges. The Chief Justice delegates authority for disciplinary matters for lower court judges to the Judicial Secretary,⁷⁹² and it is understood from interviews that disciplinary investigations and the procedures followed in such investigations are somewhat ad hoc and at the discretion of the Chief Justice. In all the countries in this study, judiciaries issue annual reports that include statistics about complaints received, dismissed and upheld, even if the level of detail is limited.⁷⁹³

Lack of transparency in terms of what disciplinary rules are and how they are applied, as well as lack of transparency of the processes, and the reasoning of outcomes is problematic. The BP-IM is quite clear that, while disciplinary investigations may be held in private (the UNSRJIL goes further, arguing that they should be held in private), the decisions and outcomes should be published.⁷⁹⁴ It is worth noting that ‘transparency’ does not appear in the Bangalore Principles,⁷⁹⁵ although the Commentary on the Bangalore Principles does note the importance of transparency.⁷⁹⁶ The focus in the BP-IM is on the duty of judges to ensure transparency in the judicial process,⁷⁹⁷ but the principle is not highlighted in reference to disciplinary proceedings. Transparency, and its importance to strengthening integrity and preventing opportunities for corruption, needs to be highlighted much more as a principle relating to judicial accountability.

789 See France: www.conseil-superieur-magistrature.fr/missions/discipline; and UK: www.supremecourt.uk/about/judicial-conduct-and-complaints.html; <https://judicialconduct.judiciary.gov.uk/>; www.scotland-judiciary.org.uk/15/0/Complaints-About-Court-Judiciary; <https://judiciaryni.uk/judicial-conduct-and-complaints> accessed 22 December 2020.

790 See France: www.conseil-superieur-magistrature.fr/missions/discipline; Costa Rica: <https://estadonacion.or.cr/informes/> II Informe Estado de la Justicia (Programa Estado de la Nación, ed. 2017); Philippines: <http://sc.judiciary.gov.ph/media-releases>; UK: www.supremecourt.uk/about/judicial-conduct-and-complaints.html; <https://judicialconduct.judiciary.gov.uk/>; www.scotland-judiciary.org.uk/15/0/Complaints-About-Court-Judiciary; <https://judiciaryni.uk/judicial-conduct-and-complaints> accessed 22 December 2020.

791 JCIO, ‘Disciplinary statements: Publication policy’ <https://judicialconduct.judiciary.gov.uk/disciplinary-statements/publication-policy/> accessed 19 February 2020 accessed 22 December 2020.

792 The Regulations (Ghana), regs 28(3) and 38(5)–(7).

793 See, eg, France: *2016 Annual Report of the CSMP*, 91, www.ladocumentationfrancaise.fr/rapports-publics/174000541-conseil-superieur-de-la-magistrature-rapport-d-activite-2016; UK: UKSC, *Annual Report and Accounts 2018-2019*, 34 www.supremecourt.uk/docs/annual-report-2018-19.pdf; JCIO, ‘Reports & Publications’ <https://judicialconduct.judiciary.gov.uk/reports-publications>; Judiciary Northern Ireland, ‘Judicial Conduct and Complaints’ <https://judiciaryni.uk/judicial-conduct-and-complaints>; Costa Rica: Matamoros (see n 764 above); the Philippines: <http://oca.judiciary.gov.ph/>; and Ghana: Judicial Annual Report 2017–2018 found at: www.judicial.gov.gh/jsfiles/annualrep20172018.pdf, 54–55 accessed 19 February 2020.

794 BP-IM, para 15.7 and UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 79.

795 Bangalore Principles.

796 UNODC, ‘Commentary on the Bangalore Principles’ (see n 3 above), para 210

797 BP-IM ‘Transparency in the Exercise of Judicial Office’, paras 6.1–6.6.

Original Questionnaire

Q B(6)	<p>Please, quantify disciplinary proceedings for judicial corruption against judges and prosecutors:</p> <ul style="list-style-type: none"> • number of disciplinary proceedings (in general) initiated in the last year/last three years; • number of disciplinary proceedings for judicial corruption (please see comments above) initiated in the last year/last three years; • number of disciplinary proceedings for judicial corruption dismissed in the last year/three years; • number of acquittals in disciplinary proceedings of judicial corruption in the last year/three years; • number of disciplinary sanctions for judicial corruption in the last year/three years; and • general disposition data.
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Modified Questionnaire

Q B(6)(a)	How accessible is information about the process?
Q B(6)(b)	How accessible is information about the outcomes of judicial complaints?
Q (B)(7)(a)	Are there clear statistics available about judicial conduct and complaints?
Q (B)(7)(b)	How many complaints were made in the last year/three years?
Q (B)(7)(c)	How many complaints were investigated in the last year/three years?
Q (B)(7)(d)	How many complaints were dismissed in the last year/three years?
Q (B)(7)(e)	How many complaints were upheld in the last year/three years?

The Modified Questionnaire sought to invite researchers to give a brief narrative account of the accessibility of the data and therefore indicate the level of transparency of the process.

6. Interrelationship between criminal and disciplinary procedures

6.1 International standards

While the UNCAC requires states to take measures to ‘encourage [...] cooperation’ between all public authorities and public officials with the ‘authorities responsible for investigating and prosecuting criminal offences’,⁷⁹⁸ there is little guidance in international standards as to how this cooperation should be managed with respect to the prosecution of judicial corruption and the discipline of judges. However, it is possible to identify some principles concerning this area of practice.

IMPACT OF CRIMINAL PROCEEDINGS ON DISCIPLINARY PROCEEDINGS

- Disciplinary proceedings should not be prejudiced by the criminal process or the sanctions imposed for commission of a corruption offence.⁷⁹⁹

NON-CRIMINAL CONSEQUENCES OF BEING ACCUSED OR CONVICTED OF CORRUPTION

- States must consider non-criminal consequences for public officials accused of corruption offences, including being ‘removed, suspended or reassigned by the appropriate authority’.⁸⁰⁰
- Procedures for being removed, suspended or reassigned should maintain respect for the principle of the presumption of innocence.⁸⁰¹
- For public officials convicted of corruption offences, states must also consider, ‘where warranted by the gravity of the offence’, procedures for ‘the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law’ from holding public office.⁸⁰²

COOPERATION BETWEEN RELEVANT AUTHORITIES

- States must encourage cooperation between the relevant authorities,⁸⁰³ such cooperation must have regard for the principle of confidentiality applicable to both judges and prosecutors.⁸⁰⁴

SANCTIONS

- Sanctions, whether criminal or disciplinary (or criminal and disciplinary) should be proportionate and take account of the gravity of the offence.⁸⁰⁵

798 UNCAC, Art 38.

799 *Ibid*, Arts 30(1) and 30(8).

800 *Ibid*, Art 30(6).

801 *Ibid*, Art 30(6).

802 *Ibid*, Art 30(7).

803 *Ibid*, Art 38.

804 ‘UNBP Judiciary’, Art 15; UN Guidelines on the Role of Prosecutors, para 13(c).

805 UNCAC, Art 30(1).

6.2 Connections between the two processes

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

Art 30(1)	Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.	<i>Includes criminal and non-criminal sanctions</i> ⁸⁰⁶
Art 30(6)	Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.	<i>Obligation to consider measures</i>
Art 30(7)	Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from: (a) Holding public office; and (b) Holding office in an enterprise owned in whole or in part by the State.	<i>Obligation to consider measures</i>
Art 30(8)	Paragraph 1 of this article shall be <i>without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants</i> .	

COMMENTARY AND COMPARISON

Consecutive or parallel proceedings

There are no clear international standards or guidelines setting out at what stage criminal and disciplinary proceedings should take place relative to each other. It appears from Article 30(8) that the UNCAC allows for both criminal and disciplinary sanctions, and guidance on the interpretation for Article 30(1) indicates that non-criminal sanctions may accompany criminal sanctions.⁸⁰⁷ However, there is no further guidance on how these different spheres of oversight and sanctions should interact, or in what order non-criminal and criminal proceedings and sanctions should occur. In their *Practitioner's Guide No 13*, the ICJ notes that:

‘[T]o ensure respect for the separation of powers and independence of the judiciary and judicial function, it may be appropriate to require any non-judicial investigating body to obtain prior authorisation from a judicial council, a higher court judge, a chief justice, or other such independent offices, before exercising these powers. Or for instance, the principle of professional secrecy means it will generally not be possible for the body to require a judge to provide testimony or other information about discussions between the judges that formed part of the deliberations in a case.’⁸⁰⁸

806 UNODC, ‘Technical Guide’ (see n 20 above), 83: ‘non-criminal sanctions may accompany criminal sanctions but cannot substitute them’. See also UNODC, ‘Legislative Guide’ (see n 16 above), paras 382–384.

807 UNODC, ‘Technical Guide’ (see n 20 above), 83.

808 ICJ, ‘Judicial Accountability: A Practitioner’s Guide’ (2016) (see n 49 above), 61.

In Costa Rica and France, criminal and disciplinary proceedings can run parallel to each other. In Costa Rica, both processes can run parallel to each other, and a criminal investigation can start before a disciplinary investigation and vice versa.⁸⁰⁹ In France, while the two processes run parallel to, and independently of, each other, the disciplinary proceedings tend to be completed first, and a criminal investigation will generally trigger a disciplinary one, regardless of the outcome of the case. Once a criminal investigation has begun, the MoJ will be notified to allow for the initiation of disciplinary proceedings, and the MoJ will request the temporary suspension of the magistrate under investigation either ‘in the interest of the service of justice’, or directly on the merits of the case itself.⁸¹⁰ The disciplinary proceedings will address the impact of the investigation, indictment, and/or conviction on ‘the image of justice’ and the ‘good functioning of the service of justice’.⁸¹¹ The MoJ can request that the CSM temporarily stops administrative or criminal investigations against a magistrate who is already facing, or is likely to face, disciplinary proceedings.⁸¹² By way of illustration, in the 1980s, a magistrate facing criminal charges of bribery and trading in influence was sanctioned by the CSM’s Disciplinary Committee with a demotion.⁸¹³ The criminal charges were later dismissed, but the disciplinary sanction remained.⁸¹⁴

In the Philippines, according to the Supreme Court in the case of *Maceda v Ombudsman*,⁸¹⁵ disciplinary proceedings for allegations of judicial corruption that occur during the course of a judge’s administrative duties must take place before criminal prosecution. This is because the Supreme Court has the exclusive jurisdiction under the Constitution to determine whether a judge has acted within the scope of their administrative duties.⁸¹⁶ However, there are cases in which individuals have been found guilty in a criminal trial which has then triggered disciplinary proceedings under section 6 of Rule 140 of the Rules Court.⁸¹⁷ These cases indicate that, in practice, criminal prosecution can occur before disciplinary proceedings, or the two processes can run parallel: one is not a precondition to the other.⁸¹⁸

The possibility of parallel proceedings (as in Costa Rica and France), and the practice of parallel proceedings even if not expressly provided for (as in the Philippines) can create confusion and is likely to be inefficient, time consuming and ultimately have a negative impact on perceptions on both procedural fairness and the effectiveness of anti-corruption measures. There appears to be greater clarity on this issue in both Ghana and the UK. In both countries, if during the course of a disciplinary investigation it becomes apparent that a crime has been committed, the case will be referred to the police and the disciplinary investigation will stop.⁸¹⁹

809 Organic Law of the Judicial Power, Arts 26–28 and 191–193.

810 *Conseil supérieur magistrature*, www.conseil-superieur-magistrature.fr/missions/discipline accessed 10 September 2019.

811 Report of the Commission of reflection on the ethics in magistracy, November 2003 www.senat.fr accessed 22 December 2020.

812 Decree 58-1270 (France), Art 50.

813 Decision S049 of the Disciplinary Council for Judge, dated 29 April 1986.

814 *Ibid.*

815 *Maceda* (see n 741 above).

816 The Constitution (the Philippines), Art VIII, s 5.

817 See eg, *Office of the Court Administrator v Judge Sardido* (2003) 449 Phil 619 (Sardido case); *Office of the Court Administrator v Presiding Judge Joseph Cedrick O Ruiz* No RTJ-13-2361 (2 February 2016).

818 See The Philippines case study, discussed in Appendix D.

819 In the UK, see Judiciary (Scotland) Rules 2017 (see n 578 above), r 19 in Scotland; Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 2.5 in Northern Ireland, and confirmation given for England and Wales in interviews. In Ghana, The Regulations, reg 41(4).

The case studies offer no insight into whether disciplinary and criminal proceedings should run in parallel or consecutively, or in which order, and nor is there any international guidance on this.

Consequences of one process on the other

Articles 30(6) and 30(7) indicate that disciplinary consequences may flow from a corruption conviction. However, Articles 30(6) and 30(7) are not mandatory. All five countries in this study have implemented Article 30(6) by ‘establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned’. This indicates the significance of these measures to promoting ‘effective practices aimed at the prevention of corruption’ as required by Article 5 of the UNCAC. The Philippines, Costa Rica and France have opted to implement Article 30(7), which invites states to allow for disqualification from public office following a conviction for corruption.

In Ghana, where a judge is convicted of fraud or dishonesty, or sentenced to imprisonment, he or she will be suspended from duty without wages from the date of conviction,⁸²⁰ ‘pending the decision of the disciplinary authority empowered to dismiss him’ or her.⁸²¹ If acquitted of a criminal charge, a judge may nevertheless be dismissed or disciplined for separate infringements arising out of the same conduct as the criminal charge.⁸²² However, a judge cannot be dismissed in response to the conduct over which he or she was acquitted.⁸²³ In the UK, whether or not a judge has been charged or convicted of an offence is considered at the initial assessment stage, and a recommendation will be made that the judge should be dismissed, and no further disciplinary action will be taken.⁸²⁴ In the Philippines, a criminal conviction does not automatically result in dismissal – it depends on whether or not removal from office is a specified penalty for a particular offence, and some statutes provide for removal as a penalty, and others provide for automatic suspension during a criminal trial.⁸²⁵ In addition, sanctions under the Plunder Act and the Anti-Graft and Corrupt Practices Act include disqualification from public office.⁸²⁶ In Costa Rica, the consequences of a criminal conviction will depend on what sanction is attached to the crime. A number of provisions prescribe suspension, removal or disqualification from office as a penalty.⁸²⁷ In France, the initiation of any type of criminal proceedings will give rise to a disciplinary sanction, and the disciplinary process will be automatic if the judge is the subject of criminal proceedings.⁸²⁸ If a magistrate is convicted of corruption, he or she will be disqualified from public office.⁸²⁹

820 The Regulations (Ghana), reg 33(4).

821 *Ibid* reg 32.

822 *Ibid* reg 31.

823 *Ibid*.

824 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), Supplementary Guidance, 3; JOS ‘Complaint Guidance’ (see n 476 above), 3; Complaints about the Conduct of Judicial Office Holders (Northern Ireland) (see n 477 above), para 2.5.

825 Anti-Graft and Corrupt Practices Act (the Philippines), s 13; Plunder Act (the Philippines), s 5.

826 Plunder Act (the Philippines), s 2; Anti-Graft and Corrupt Practices Act (the Philippines), s 9.

827 LOPJ, Arts 26, 27 and 28.

828 Report of the Commission of reflection on the ethics in magistracy, November 2003 www.senat.fr accessed 22 December 2020.

829 Criminal Code (France), Art 131-26(2).

METHODOLOGICAL ISSUES

Original Questionnaire

Q C(4)	Are criminal proceedings for judicial corruption connected? <ul style="list-style-type: none">• Do both proceedings run parallel?• Is a disciplinary proceeding necessary as a first step of the criminal investigation?• Is the disciplinary proceeding mandatory after a criminal proceeding, regardless of the outcome?
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Modified Questionnaire

Q C(2)(a)	Are criminal and disciplinary proceedings connected?
Q C(2)(b)	Do both proceedings run parallel or are they consecutive?
Q C(2)(c)	Is a disciplinary investigation necessary before a criminal investigation?
Q C(2)(d)	Is a disciplinary investigation mandatory after a criminal prosecution (regardless of outcome)?
Q C(2)(f)	How do findings from a criminal proceeding affect a disciplinary investigation and vice versa?

The Modified Questionnaire simply separated out the questions set out in Q C(4) of the Original Questionnaire.

6.3 Information exchange

RELEVANT INTERNATIONAL STANDARDS

UN Convention Against Corruption

Art 38	Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include: (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or (b) Providing, upon request, to the latter authorities all necessary information.	<i>Mandatory</i>
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UN Basic Principles on the Independence of the Judiciary

Art 15	The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
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UN Guidelines on the Role of Prosecutors

Para 13(c)	In the performance of their duties, prosecutors shall: [...] Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise.
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Article 38 appears to be primarily focused on information exchange for the purposes of prosecuting offences, especially complex cases.⁸³⁰ Cooperation between ‘public authorities’ and ‘public officials’ with ‘authorities responsible for prosecuting criminal offences’ includes informing prosecutorial authorities where there are ‘reasonable grounds’ to believe that a public official has committed an offence,⁸³¹ and ‘providing all necessary information’.⁸³² This is perhaps the most problematic, and possibly most important, aspect of giving effect to Article 11 of the UNCAC. As the UNSRIJL noted: ‘Judges, prosecutors and the police need to cooperate with each other appropriately and transparently.’⁸³³ One reason why it is problematic is that there are competing interests at stake – the professional requirement on both judges and prosecutors to maintain secrecy and confidentiality in their work, and the practical challenges of cooperating.⁸³⁴

Information exchange in all countries in this study is limited, and this is in part due to the confidentiality of criminal investigations. In France, the MoJ will be notified if a criminal investigation is begun against a magistrate. In addition, if in the course of a disciplinary investigation, evidence of corruption is found by the CSM, the CSM or the MoJ could transfer the information to the prosecutor.⁸³⁵ In Ghana, when a judge is being investigated for a crime, the Registrar of his or her court must inform the Judicial Secretary and the judge must then show cause why he or she should not be dismissed.⁸³⁶ In the Philippines, the JIB findings and investigation reports in disciplinary proceedings are confidential and for the exclusive use of the Supreme Court,⁸³⁷ and the JIB only exchanges information with the Ombudsman if evidence of a crime arises during a disciplinary investigation.⁸³⁸ In Costa Rica, the balance is in favour of the criminal authorities who may require information from the disciplinary authorities.⁸³⁹ However, information doesn’t easily flow the other way because of the confidentiality of criminal investigations. Interviewees explain that the Deputy Prosecutor will strategically assess whether it is appropriate to inform the disciplinary body about the criminal investigations into a judge. Where there is a risk to the evidence, information will not be passed on. In the UK, the police are informed if it appears, during the course of disciplinary proceedings, that a crime has been committed.

There is relatively little information about the ways in which the disciplinary authority, conducting a disciplinary investigation, and the prosecution, conducting a criminal investigation, exchange information and cooperate. There is a risk that some important work is being duplicated, or that some factors may be missed. However, the principles that guide both investigations must be maintained. Across all the five countries in this study there is very little transparency (discussed in sections 4.7 and 5.7) around this area of practice, so it is difficult to assess how effective the processes are.

830 UNODC, ‘Technical Guide’ (see n 20 above), 122.

831 UNCAC, Art 38(a).

832 *Ibid*, Art 38(b).

833 UNGA, ‘Report on Judicial Corruption and Combatting Corruption through the Judicial System’ (2012) (see n 1 above), para 102.

834 The requirements are set out in ‘UNBP Judiciary’, Art 15 and UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 13(c)

835 Loi No 2016-1090 of 8 August 2016, Art 30.

836 The Regulations (Ghana), regs 42(1) and 42(4).

837 Rules of Court (the Philippines), r 140, s 18.

838 The Constitution (the Philippines), Art VIII, s 5.

839 LOPJ (Costa Rica) , Arts 6 (see n 374 above).

METHODOLOGICAL ISSUES

Original Questionnaire

Q C(4)(d)	Is there a sharing of information between the authorities responsible for the two proceedings?
Q C(4)(e)	How do findings coming from the criminal proceeding affect the disciplinary proceeding, and vice versa?

Modified Questionnaire

Q C(2)(e)	Is information shared between the criminal authorities and the disciplinary body?
Q C(2)(f)	How do findings from a criminal proceeding affect a disciplinary investigation and vice versa?

No new questions about information sharing were added to the Modified Questionnaire, as it was not necessary. The two questions (slightly rephrased in the Modified Questionnaire for additional clarity) sought to establish how much information sharing goes on, and the lack of information about this is not because the questions were not in the questionnaire, but because the information is not available to researchers.

7. Conclusions and recommendations

The three objectives of this study each address a different aspect of implementing international standards in the domestic setting.

The first objective was to develop a straightforward approach to the assessment of the judiciary's compliance with the integrity benchmark as defined at the international level (eg, the Bangalore Principles and Article 11 of the UNCAC). This is concerned with the *approach* states might take to *assessing the compliance* of their judicial institutions with international standards.

The second objective was to analyse not only formal compliance with national legislation, but also practices that either enhance or hinder the accountability of judges for corruption through either disciplinary or criminal procedures. This objective is therefore concerned with the question of *compliance and practices* associated with state compliance measures.

The third objective was to *test the effectiveness of the questionnaire* used in this study in order to develop a tool that policy-makers, members of the judiciary, academia and experts could use to evaluate how misconduct or corruption by judges is investigated, prosecuted and sanctioned through internal disciplinary systems and under criminal law.

7.1 *Approach to assessing compliance with the integrity benchmark*

The approach taken in this study to assessing state compliance with international standards in the five case studies was to identify the relevant international standards; consider UN guidance and practice and, where relevant, UN and regional jurisprudence relating to these standards; and then analyse national standards and practice against those benchmarks. This is a straightforward approach that led to two distinct, but related sets of outcomes.

First, this approach allowed for a methodical analysis of whether the states in these cases met the mandatory standards and either implemented or opted out of optional standards, and this is considered below in the conclusions on compliance and state practice. Second, this approach provided additional knowledge about the ease or otherwise of understanding and complying with international standards and recommendations, in particular the Bangalore Principles and BP-IM. What the analysis of the Bangalore Principles and state application of those principles shows is that, while the BP-IM go some way towards offering guidance on the implementation of the Bangalore Principles, there are significant gaps in the guidance.

GAPS IN THE GUIDANCE ON NORMATIVE STANDARDS

Defining misconduct

'Misconduct' is not defined in any international treaties and only 'serious misconduct' is said to warrant disciplinary proceedings. In the BP-IM, the question of what constitutes 'serious misconduct' is only addressed in a footnote. But the question of what is, or is not, serious misconduct, and what amounts to misconduct that warrants different sanctions, generates much disagreement and possible confusion.

The key distinction made in the BP-IM, and other commentaries on the matter, such as the Opinions of the CCJE, is between ‘conduct that gives rise to a disciplinary sanction’ and a ‘failure to observe professional standards’. *Further consideration and guidance as to this distinction and the appropriate sanctions or disciplinary action in respect of each is needed*, as sometimes they overlap, and a failure to observe professional standards can have a significant, detrimental effect on judicial integrity.

Distinguishing between judicial ‘corruption’ and judicial ‘misconduct’

It would be helpful to *explore further what behaviour by judges should primarily be classed as criminal, and addressed by way of criminal sanctions, and what behaviour should be classed as misconduct warranting removal or other disciplinary action short of criminal sanctions*. There are significant differences between the case studies on this point. The differences and relationship between conduct that amounts to criminal behaviour, serious misconduct that warrants removal, and misconduct that warrants disciplinary action short of removal, needs to be explored and elaborated. How behaviour is categorised has ramifications for the appropriateness and proportionality of sanctions, the potential for the label of corruption and associated sanctions to be used inappropriately in a way that impinges on judicial independence, and is also relevant in the context of perceptions about the robustness of anti-corruption measures in judicial systems, and whether or not serious misconduct is being addressed in the most effective way.

Note that Article 19 of the UNCAC requires states to consider criminalising ‘abuse of function or position’. Considering how this relates to judicial corruption and judicial misconduct may help to resolve some questions around what constitutes corrupt, criminal behaviour and what constitutes misconduct short of criminal behaviour. This study did not include Article 19 within the scope of its definition of corruption, but future studies should, as gathering research on how states characterise abuse of office and function might help to highlight the rationales that different states adopt in categorising some behaviour as corrupt (and criminal) and some as misconduct.

Reporting corruption and misconduct

As noted in chapter 4, the protection of reporting persons and whistleblowers was not a focus of this study. However, it is clear from the case studies that the question of reporting corruption or misconduct needs further consideration. There are no specific guidelines on the protection of reporting persons who allege judicial corruption or judicial misconduct, and *further guidance*, beyond the comments of the CCJE, *on the protection of judges who report judicial corruption or misconduct would be very welcome*.⁸⁴⁰ *Safeguards for reporting persons, in particular judges, should be embedded in the investigative process* as not protecting them could potentially impact their future careers and individual independence.

The disciplinary process and the individual independence of judges

In section 7.2, the potential for impinging on the independence of disciplinary authorities is raised as an issue that can undermine the implementation of Article 11 and judicial accountability. The BP-IM, like many other commentaries and standards, focuses on the independence of the disciplinary

⁸⁴⁰ Note, however, that the UNODC has published guidelines on the protection of reporting persons in general: UNODC, ‘Resource Guide on Good Practices in the Protection of Reporting Persons’ (see n 188 above).

process from external factors, notably the executive and legislature. However, as discussed in section 5.2.1, the potential for disciplinary processes to impinge on the individual independence of judges has been recognised at the regional level by the ECtHR, which has found breaches of Article 6 of the ECHR where internal pressures caused by the disciplinary process and the imbalance of power between lower-level and more senior judges, have affected individual judges.⁸⁴¹ *The potential impact of disciplinary measures on individual independence should be acknowledged by the BP-IM, and guidance is needed as to how to address the problem.*

Limitation periods and time limits

There is a clear difference of approach in the international standards between limitation periods as they apply to corruption allegations and limitation periods in respect of disciplinary action. Article 29 of the UNCAC states that state parties ‘shall, where appropriate, establish long limitation periods in which to commence proceedings’, and limitation periods in the countries in this study vary from no limit at all, to three years at the lower end of the scale and 30 years at the higher end of the scale. In contrast to the prescription for ‘long limitation periods’ in the UNCAC, the guidance for time limits in disciplinary action is quite different. The UNPBJI simply states that complaints against judges should be ‘processed expeditiously and fairly’. The emphasis under the UNCAC appears to be to allow for long limitation periods to ensure that complex corruption cases are fully investigated and prosecuted, while also ensuring timely prosecutions. The emphasis under the UNPJI appears to be on ‘expeditious’ proceedings, but without guidance as to appropriate time limits. The BP-IM is silent on this point, and the case studies vary from no time limit to a limit of three years within which to begin disciplinary proceedings. Short time limits may undermine the fairness of the disciplinary process, while long time limits may have an effect not only on the individual judge who is subject to the process, but also on public perceptions as to the effectiveness of the accountability process.

There are two issues with limitation periods or time limits. The first is that there is apparently little consensus, or international guidance, on when time should start to run, either in respect of limitation periods under the UNCAC, or in respect of time limits in disciplinary procedures. In criminal cases, states are likely to have established practices in determining when time starts to run, and the main element required of states is that there should be a sufficiently long limitation period to allow for effective investigation and prosecution of corruption cases. In disciplinary matters, time limits tend to be much shorter, so it is important to clearly establish when time limits begin and end. The second issue concerns the appropriate length of time limits in disciplinary cases, and what purpose they serve. How should the balance between ‘expeditious’ and ‘fair’ be struck? *Further guidance on appropriate time limits for complaints, and the core rationale of such time limits in disciplinary processes, would be helpful to ensure an appropriate balance between ‘expeditious’ proceedings, and ‘fair’ proceedings.*

Burden and standard of proof

No international standards elaborate on the burden of proof in disciplinary cases, or the standard of proof required. However, it is clear that international standards of fair trial should be met in

841 Sillen (see n 78 above).

these cases,⁸⁴² and this includes the principle of the presumption of innocence.⁸⁴³ In Costa Rica and Ghana, the *burden* of proof is on the investigator,⁸⁴⁴ in the UK⁸⁴⁵ the burden of proof is not explicitly stated, and in the Philippines and France, the burden of proof is on the complainant.⁸⁴⁶ Practice is very different in respect of the *standard* of proof in disciplinary proceedings. In Costa Rica, where there is any doubt, there is a presumption in favour of the individual against whom the complaint is made.⁸⁴⁷ Ghana applies what has been described as a ‘sliding scale’, ranging from the balance of probabilities standard, to something close to, ‘beyond reasonable doubt’, depending on the seriousness of the misconduct.⁸⁴⁸ The standard in the Philippines is that there should be substantial evidence, or evidence that a reasonable mind would accept as adequate,⁸⁴⁹ and in the UK in England and Wales, and Scotland the standard is the balance of probabilities.⁸⁵⁰ It is not clear what the standard of proof is in either France or Northern Ireland. None of the countries apply the ‘beyond reasonable doubt’ standard to disciplinary cases, which is perhaps understandable as they are generally regarded as administrative cases (as distinct from judicial cases – a phrase used in the BP-IM in relation to ‘transparency’). However, the effect and potential outcomes of disciplinary proceedings for judges are hugely significant: their careers and reputations are at stake. In addition, disciplinary measures can have a big impact on the actual or perceived independence of the judiciary, and of individual judges (see the discussion at section 5.2.1), so it is important that there are robust standards in place to safeguard against abuse of the process. *It is important, and it would be helpful to have further discussion and guidance on the appropriate standard of proof in disciplinary cases against judges.*

Transparency

The BP-IM does not explicitly require transparency in disciplinary proceedings. The issue of transparency is addressed in relation to ‘transparency in the exercise of Judicial duties’ in Section 6, concerning ‘judicial cases’. The Commentary on the Bangalore Principles does note ‘the importance of transparency’, but does not elaborate further.⁸⁵¹ There is some variation in the amount of information that is available about the disciplinary process in each of the countries in this study, from France, where disciplinary (or administrative) proceedings are held in public and decisions are published in full, and the UK, where proceedings are private but a summary of reasons and decisions is published, to Ghana, at the other end of the spectrum, where very little information about the rules and procedures is available and no disciplinary decisions are published. Given the importance of transparency to accountability, it would be helpful to develop *guidance on what the minimum requirement is in terms of transparency of rules, procedures and outcomes in relation to disciplinary procedures to ensure that both the transparency provisions and Article 11 of UNCAC are met more fully.*

842 See the discussion in s 5.4.3.

843 UNGA ‘Report on the Independence of Judges and Lawyers’ (2014) (see n 9 above), para 79.

844 Costa Rica: Organic Law of the Judicial Power, Art 203; Ghana: information obtained from interviews.

845 See Appendix D.

846 The Philippines: *Re: Abdulharan and Dimaano* (n 627); France: Art. 50-3, Ordonnance 58-1270.

847 Organic Law of the Judicial Power, Art 203.

848 Information from interviews.

849 *Re: Abdulharan and Dimaano* (see n 627 above).

850 Judicial Conduct Rules 2014 (England and Wales) (see n 415 above), ss 39, 60 and 75; Judiciary (Scotland) Rules 2017 (see n 578 above), ss 14.

851 UNODC, ‘Commentary on the Bangalore Principles’ (see n 3 above), para 210.

Interrelation between criminal and disciplinary regimes

This study has highlighted that the interrelation between the criminal and disciplinary mechanisms used to address judicial corruption and judicial misconduct is an area that needs further exploration and research. The lack of clarity in respect of the chronology of criminal and disciplinary proceedings, and the challenges of cooperation between the two spheres of accountability presents a significant obstacle to effectively promoting and protecting judicial independence and implementing Article 11 of the UNCAC. *Further guidance is needed, in particular to articulate principles of cooperation that take account of confidentiality requirements as well as the independence and autonomy of the relevant agencies; the most effective chronology for criminal and disciplinary proceedings; and, taking account of judicial independence, the appropriate degree of information sharing between anti-corruption agencies and the judiciary, and vice versa.*

7.2 Compliance and state practices

FORMAL COMPLIANCE WITH THE UNCAC AND OTHER INTERNATIONAL TREATIES

There are a number of international treaties that are relevant to state efforts to promote judicial independence, ensure judicial accountability and address judicial corruption. Of course, the main international standard on judicial corruption is Article 11 of the UNCAC, the UNCAC as a whole is relevant too in terms of a state's overall ability to prevent, investigate, prosecute and sanction corruption by judges. In addition, other important international treaties include the UN Basic Principles on the Independence of the Judiciary, the Universal Declaration of Human Rights and the ICCPR.

The UNCAC distinguishes between mandatory and optional measures. Other international treaties applicable in this study tend to set mandatory requirements. For the most part, the countries in this study formally meet the mandatory requirements, and some have implemented optional measures.

Compliance with mandatory provisions in international law

Overall, the five countries in this study formally comply with most of the provisions of the UNCAC that are relevant to judicial integrity and judicial corruption (see Appendix C for a summary of compliance with international standards). Article 11 is the only provision in the UNCAC that explicitly emphasises the importance of judicial integrity and the prevention of corruption in the judiciary. However, as will be shown below, there are areas of practice that undermine the effective implementation of Article 11 of the UNCAC. In addition, lack of transparency, in both criminal and disciplinary processes, and an apparent lack of cooperation and information sharing between prosecutorial bodies and judicial bodies also undermine the effective implementation of Article 11. These two issues are also covered by specific provisions in the UNCAC that countries in this study have not fully complied with.

There are a number of provisions – Articles 5, 7, 10 and 13 – that stipulate the need for transparency and the kinds of measures states must take to ensure transparency in their anti-corruption efforts. There are two areas where all five countries appear not to meet specific transparency requirements of the UNCAC in respect of the judiciary (broader anti-corruption practices and policies where not

considered in detail): publishing information which ‘may include periodic reports on the *risks of corruption in its public administration*’ [emphasis author’s own] under Article 10(1)(c); and ‘respecting, promoting and protecting the freedom to seek, receive, publish and disseminate *information concerning corruption*’ [emphasis author’s own] under Article 13(1)(d). It does not appear to be a common practice among the countries in this study to produce reports about the risk of corruption in their judiciaries. Freedom of information provisions were not considered in this study; however, in terms of the publication and dissemination of information about corruption, annual reports give an account of disciplinary measures and outcomes, and national crime statistics indicate the general level of crime but only two of the five countries – France and the Philippines – routinely publish statistics on corruption offences, and even those do not illustrate the levels of judicial corruption.

Article 38 of the UNCAC concerns cooperation between public authorities, and specifically requires states to ‘take all necessary measures’ to encourage ‘cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences’. While the wording of Article 38 indicates a recognition that different states will approach this in different ways, it is mandatory to ‘take all necessary measures’ in respect of cooperation, and researchers in this study found that there was very little information about what cooperation and information exchange exists. It is therefore not possible to say whether or not states have taken all necessary measures, or whether they have, but a lack of transparency and access to information hinders an assessment of compliance with Article 38 of the UNCAC.

One further problem area is reporting corruption. Article 13(2) requires states to provide access to anti-corruption bodies ‘for the reporting, including anonymously’ of instances of corruption. The mandatory aspect of this article is to ensure that members of the public can, and will, report corruption.⁸⁵² It appears from the *Technical Guide* that anonymous reporting is something for states to consider implementing in order to ensure that corruption is reported.⁸⁵³ However, the text of the article, and the associated guidance is somewhat unclear – there is an apparent reluctance to require anonymous reporting. Of the five countries in this study, only one – the UK – allows anonymous reporting of corruption. But anonymous reporting in the UK is limited to the types of cases that the SFO can investigate (see the discussion in section 5.3.1). There are, of course, practical difficulties in allowing anonymous reporting of corruption, but more research, and more discussion is needed on this issue in relation to reporting judicial corruption.

Implementation of optional provisions in international law

The optional provisions of the UNCAC that have been implemented by countries in this study are: Article 18, to criminalise trading in influence; Article 29 on limitation periods; and Article 30(7) on disqualification from public office. The UK is the only country in this study not to have explicitly criminalised trading in influence; however, it is noted that conduct associated with trading in influence is criminalised in the UK, but there is no express offence of trading in influence.⁸⁵⁴ Article 29, which requires long limitation periods for commencing corruption proceedings, only applies where

852 UNODC, ‘Technical Guide’ (see n 20 above), 64.

853 *Ibid.*

854 Discussed in Nicholls and others (see n 17 above), 186.

a state already has limitation periods in place. Two countries in this study, Ghana and the UK, have no limitation period, and the other three, France, Costa Rica and the Philippines, have limitation periods of varying lengths. It is unclear what constitutes a long limitation period, and as discussed in section 7.1, more guidance is needed on this. Under Article 29, where limitation periods are in place, states should allow for a ‘longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice’. France and Costa Rica have both implemented this aspect of Article 29: in France, limitation periods are extended when crimes are ‘hidden’,⁸⁵⁵ and in Costa Rica, limitation periods are suspended as long as the public official continues to perform the public function and criminal proceedings have not been instituted against him/her.⁸⁵⁶ Under Article 30(7) of the UNCAC, states must ‘consider’ establishing procedures for disqualification from public office where the gravity of the offence warrants it. Of the five countries in this study, only the UK has not implemented this measure.⁸⁵⁷

AREAS OF PRACTICE THAT UNDERMINE COMPLIANCE WITH ARTICLE 11 OF THE UNCAC

Alongside international treaties, normative standards, such as the BP-IM, exist to support state actors and civil society to give full effect to the principles and values underlying international treaties. These, as we have seen, are recommendations and guidelines rather than strict requirements. This study highlights some areas where practices may undermine the practical application of international standards.

Independence of disciplinary proceedings

Judicial independence is essential, and cannot be limited in pursuit of judicial accountability, so accountability mechanisms must ensure that judicial independence is protected. The UN Special Rapporteur on the independence of judges and lawyers has written of sanctions ‘disguised’ as accountability measures, but which are actually implemented to ‘induce a judge to dismiss the consideration of a case, to adjudicate a case in a particular way or to punish the judge for a decision taken in the exercise of the judicial function’. Where the independence of the disciplinary authority is compromised, this undermines the independence of the process, and ultimately the legitimacy of judicial accountability proceedings. That is why paragraph 15.4 BP-IM states that: ‘The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive’.

The disciplinary authority should be institutionally independent of the executive and the legislature, but the case studies show that the potential for perceived or actual lack of independence of the disciplinary authority is still an issue. Each of the countries in this study has taken a slightly different approach to judicial discipline, and on the face of it, the disciplinary authority is independent. However, the arrangement in France highlights the importance of the selection process for members of the disciplinary authority – while the body is ‘independent’ of government and the legislature,

855 Cheyion (see n 229 above).

856 Criminal Procedure Code (France), Art 34.

857 Judicial Appointments Commission, ‘Good Character Guide’ (2018), paras 21-22; Judicial Appointments Board Scotland, ‘Criminal Conviction – Statement of Principles’ (2009); Northern Ireland Judicial Appointments Commission. ‘Character Guidance for Applicants’ (2018).

and individual members may well be impartial, the involvement of the President of the Republic, and the Presidents of the National Assembly and Senate in selecting members⁸⁵⁸ may generate a perception that there is a political element to the selection process. The potential influence in France is somewhat distanced from the day-to-day decision-making of the disciplinary authority. However, that is not the case in England and Wales, and Ghana. In England and Wales, the Chief Justice and the Lord Chancellor (a member of the executive) are jointly responsible for making decisions about what disciplinary sanctions to impose on judges.⁸⁵⁹ The Lord Chancellor needs the agreement of the Lord Chief Justice to act, but nevertheless, the connection to the executive is close, and the Lord Chancellor is involved in every disciplinary decision.⁸⁶⁰

In Ghana, the President of Ghana is involved in judicial discipline in a few ways. The Chief Justice is responsible for judicial discipline, but may refer an allegation to the President for directions as to whether or not to institute a formal or informal inquiry.⁸⁶¹ In addition, a disciplinary decision may be appealed to the President,⁸⁶² and members of the public may petition the President to remove a judge.⁸⁶³ So, the President can be involved in some of the detail of judicial discipline; however, when the President receives such a petition, it will be considered by the Chief Justice and a tribunal, and the President must act on his/her recommendation (which is in line with the BP-IM). In the Philippines and the UK, decisions as to the removal of Supreme Court judges (and superior court judges in the UK) are taken by the legislature – they are political decisions.⁸⁶⁴ This is contrary to the guidance given in BP-IM paragraph 16.2. In Costa Rica, the legislature is involved in removal decisions, but it is not clear whether it decides independently of the disciplinary authority or not. The BP-IM is only guidance – there is no binding provision detailing how institutional independence of disciplinary bodies, and disciplinary and removal decisions, should be achieved. The ambiguity and apparent flexibility of these arrangements in practice can undermine efforts to address judicial corruption.

Institutional independence is not the only issue. The case studies also suggest that, in some countries, the disciplinary process may have an adverse impact on the individual independence of judges as, for example, found by the ECtHR in a number of cases.⁸⁶⁵ The BP-IM does not address this issue at all. In both the Philippines and Costa Rica, the disciplinary process (save for removal⁸⁶⁶ or impeachment of Supreme Court judges⁸⁶⁷) is independent of the executive and the legislature. However, the immense power of the Supreme Court of the Philippines in disciplinary matters – from draconian powers of investigation⁸⁶⁸ to the lack of an appeal from Supreme Court disciplinary decisions⁸⁶⁹ – means that there is great potential for internal pressures on lower-level judges due to the power of the Supreme Court to investigate lower-level judges at any time, and discipline them. In Costa Rica, the source of potential internal pressure is different. The disciplinary process is largely independent of even

858 The Constitution (France), Art 65; and see www.conseil-superieur-magistrature.fr/le-csm/composition-et-organisation accessed 22 December 2020.

859 Constitutional Reform Act 2005 (UK), ss 108 and 115; Judiciary and Courts (Scotland) 2008, ss 2 and 28; and Constitutional Reform Act 2005 s 11(1B) (c). S 11 replaces s 12 of the Justice (Northern Ireland) Act 2002.

860 *Ibid.*

861 The Regulations (Ghana), reg 28(2).

862 *Ibid.*, regs 41(1)-(3).

863 The Constitution (Ghana), Art 146.

864 See Philippines: The Constitution Art XI, s 2; and UK: Supreme Court Act 1981, s 11(3).

865 Sillen (see n 78 above).

866 Costa Rica: LOPJ, Art 182.

867 The Philippines: The Constitution, Art XI, s 2.

868 Rules of Court (the Philippines), r 140, ss 12 and 15.

869 American Bar Association, *Judicial Reform Index for the Philippines* (Asia Law Initiative, March 2006) 23.

the Supreme Court, but the Plenary Session of the Supreme Court retains one discretionary power that could impinge on internal independence: it can decide on cases in which there has been delay or serious and unjustifiable violations in the administration of justice, and it can suspend or dismiss the judge in question.⁸⁷⁰ These two cases show that even where disciplinary powers are completely in the hands of the judiciary, there must be safeguards in place to minimise discretionary powers and safeguard the internal independence of judges.

Process and procedural safeguards in disciplinary proceedings

The case studies show that disciplinary processes can vary considerably, and while the UNSRJIL has noted that the safeguards contained in Article 14 of the ICCPR and Article 11 of the UNDHR should be afforded in disciplinary proceedings as well as criminal proceedings,⁸⁷¹ the case studies indicate that, in practice, judges are not usually afforded the full extent of their rights to a fair trial in disciplinary proceedings (see the full discussion in section 5.5). In France, disciplinary cases are heard in public and judges are afforded the same rights as in court, but even in France, where the fullest set of fair trial rights are evident in disciplinary cases, it is not clear what the burden of proof is in such cases (see above, section 7.1). In all the case studies, accused judges have a right to representation, although this is not always legal representation. In all five countries, the rules of procedure are set out in rules or regulations, and many of the rules relate to notice, and the ability of the accused to make representations in response to the case against them, and appeal to a court is not available in all the countries in this study. It would be helpful to have the precise content of fair trial rights in disciplinary proceedings articulated more fully. Meeting the high standards of fair trial rights requires sufficient resources, and where they cannot be met, efforts to prevent corruption are hindered. Current practice appears to be to accept that slightly less stringent standards are sufficient. If this is not so, it needs to be articulated more clearly, and states need to be held to account for not providing full fair trial rights in disciplinary proceedings.

Lack of transparency and certainty as to process

Lack of transparency is a problem in all of the five countries in this study, and as noted above, in section 7.1, two aspects of particular concern in all five countries are their failure to meet the requirements of Article 10(1)(c) to provide period reporting in the risks of corruption in administration, and Article 13(1)(d) to disseminate and publish information about corruption. Greater transparency is needed, in all five countries about:

- Corruption cases, and in particular cases of judicial corruption – how often they occur, how they are prosecuted, the outcomes of cases and the risks of judicial corruption. Better statistics and analysis of statistics are needed. Without this information, efforts to address judicial corruption cannot be evaluated or improved.
- Disciplinary cases – how often they occur, the outcomes of cases and the risks of judicial misconduct. Better statistics and analysis of statistics are needed. Without this information, efforts to address judicial misconduct cannot be evaluated or improved.

⁸⁷⁰ LOPJ, Art 199.

⁸⁷¹ UNGA 'Report on the Independence of Judges and Lawyers' (2014) (n 9), para 79.

- More information is needed, especially in Ghana, but also to some extent, Costa Rica and the Philippines, about disciplinary processes and outcomes.
- The effectiveness of the system of addressing judicial corruption overall – reporting, complaints, criminal investigations, disciplinary investigations and their outcomes.
- Much more information is needed about communication and cooperation between criminal and judicial bodies.

Sanctions

Sanctions vary considerably across the five countries in this study, and as noted in section 7.1, differences in defining ‘judicial corruption’ and ‘judicial misconduct’, and differences in decisions about what conduct to criminalise and what conduct to address through disciplinary measures means that there is no coherence in the sanctions that may be imposed on judges. To take the example of the judge in the Philippines who was removed from office for having an extramarital affair⁸⁷² – such behaviour is unlikely to have been sanctioned at all, let alone resulted in removal in the other four countries in this study, yet there is no general consensus among states as to what precise conduct should warrant sanctions. The removal of a judge for an extramarital affair may seem extreme; however, it must be considered in the legal context of the Philippines, where Sharia law applies and such behaviour is criminalised.⁸⁷³

The interrelationship between criminal and judicial authorities in addressing judicial corruption

This area of practice appears to be unclear and confusing in France, Costa Rica and the Philippines, even though there is some information about what should happen. In France and Costa Rica, criminal and disciplinary proceedings can run parallel to each other, with risks of overlap, or even information being left out of the other proceeding, and a considerable impact for the accused. In the Philippines, the disciplinary process should precede a criminal trial, but in practice, they run parallel,⁸⁷⁴ and this can cause confusion. In Ghana and the UK, the disciplinary simply stops where it is evident that a crime may have been committed, and the criminal authorities take over. There is no information publicly available about what kind of information exchange, if any, there is between the judicial and criminal authorities. This lack of clarity and information severely undermines efforts to address judicial corruption in a coordinated and effective way.⁸⁷⁵

7.3 Effectiveness of the questionnaire

The strengths of the questionnaire are that it provides a clear, structured approach to researching this very complex area of practice. It also allows an individual researcher to decide how much or how little detail to go into, depending on the focus of their work. When applied in its entirety, it should provide a very full picture of the domestic laws and practice in respect of criminal and disciplinary approaches to judicial corruption which would allow a comprehensive review.

872 ‘Closing Remarks of Presiding Justice Amparo M. Cabotaje-Tang on 40th Anniversary Celebration of Sandiganbayan 11 June 2018’ <http://sb.judiciary.gov.ph/inspirational.html> accessed 23 July 2019.

873 Revised Penal Code (the Philippines), Arts 333 and 334.

874 See the Philippines case study, discussed in Appendix D.

875 See n 813 above.

Throughout the analysis, areas for improvement have been identified. These are:

CRIMINAL PROCEDURE

There should be:

- additional question(s) on the protection of reporting persons and whistleblower legislation as it applies in the judiciary;
- an additional question to reflect the requirements of Article 29 of the UNCAC in the extension/suspension of limitation periods where the offender has evaded justice or the crime is concealed;
- a separation of the question on which body is responsible for investigating judicial corruption and whether that body is independent;
- a specific question about whether or not prosecutors need the authority or consent of superiors in order to proceed; and
- specific questions about the rights of judges as defendants and compliance with Article 14 of the ICCPR.

DISCIPLINARY PROCEEDINGS

There should be:

- a refinement of the question(s) concerning responsibilities for judicial discipline to draw out the following issues:
 - overall responsibility (and therefore accountability) for judicial discipline, including making rules and regulations;
 - investigation;
 - conduct of proceedings;
 - adjudication; and
 - responsibility for sanctions;
- a specific question on how to make a valid complaint and the filtering process for complaints;
- a question about the independence of the investigative process;
- a question (or questions) about the detail of procedures for removing judges from office; and
- a question about jurisdiction and venue.

While the questionnaire will be long, and detailed, this detail will be of value as it provides a methodical approach to researching this area.

As noted in the Methodology, the focus of this study was to consider the implementation of Articles 15 (bribery) and 18 (trading in influence) of the UNCAC. However, this excludes the optional criminalisation of abuse of public functions as set out in Article 19 of the UNCAC. Given

the nature of corruption in the judiciary, and high standards expected of judges in the conduct of their duties, it would perhaps be helpful to expand future studies to include a consideration of the requirements of Article 19 of the UNCAC, and the likelihood or otherwise of states implementing this article of the UNCAC.

7.4 Recommendations

There are three general recommendations that arise from this report, with a number of specific recommendations associated with each general point.

RECOMMENDATION 1

Further research and collaboration among relevant stakeholders is needed to develop a more comprehensive guide to the implementation of the Bangalore Principles. In particular in respect of the following:

- the distinction between conduct that gives rise to a disciplinary sanction and a ‘failure to observe professional standards’, and the appropriate sanctions or disciplinary action in respect of each;
- what behaviour by judges should primarily be classed as criminal, and addressed by way of criminal sanctions, and what behaviour should be classed as misconduct warranting removal or other disciplinary action short of criminal sanctions;
- the protection of judges and other persons (staff, court users etc) who report judicial corruption or misconduct, and the integration of appropriate safeguards for such people into the investigative process;
- the potential impact of disciplinary measures on individual independence and safeguards to protect against disciplinary procedures undermining individual independence;
- the appropriate time limits for complaints, and the core rationale of such time limits in disciplinary processes and ways of balancing the need for both ‘expeditious’ and ‘fair’ proceedings;
- the appropriate standard of proof in disciplinary cases against judges; and
- minimum requirements in terms of the transparency of rules, procedures and outcomes in relation to disciplinary procedures, and how they can be balanced with the need for confidentiality, to ensure that both the transparency provisions and Article 11 of the UNCAC are met fully.

RECOMMENDATION 2

Further research and collaboration among relevant stakeholders is needed to develop guidelines on the interrelationship between the criminal and judicial authorities in addressing judicial corruption. In particular:

- the principles of cooperation that take account of confidentiality requirements as well as the independence and autonomy of the relevant agencies;

- the most effective chronology for criminal and disciplinary proceedings; and
- the appropriate degree of information sharing between anti-corruption agencies and the judiciary, and vice versa, taking account of the requirements of judicial independence.

RECOMMENDATION 3

The research questionnaire developed for this study should be revised to address the areas where there are gaps or a lack of clarity, and to develop some simple guidelines on using the questionnaire in full or selectively. In particular, questions on the following issues should be added to the questionnaire:

- the protection of reporting persons and whistleblower legislation as it applies in the judiciary;
- the requirements of Article 29 of the UNCAC in the extension/suspension of limitation periods where the offender has evaded justice or the crime is concealed;
- which body is responsible for investigating judicial corruption;
- whether the body investigating judicial corruption is independent;
- whether or not prosecutors need the authority or consent of superiors in order to proceed;
- the rights of judges as defendants and compliance with Article 14 of the ICCPR;
- a refinement of the question(s) concerning responsibilities for judicial discipline to draw out the following issues:
 - overall responsibility (and therefore accountability) for judicial discipline, including making rules and regulations;
 - responsibility for investigations in judicial discipline;
 - the conduct of disciplinary proceedings;
 - responsibility for adjudication in disciplinary proceedings; and
 - responsibility for imposing disciplinary sanctions;
- making a valid complaint about judicial conduct and the filtering process for complaints;
- the independence of the investigative process;
- procedures for removing judges from office;
- jurisdiction and venue; and
- the implementation of Article 19 of the UNCAC.

Appendix A

Original Questionnaire

CRIMINAL PROCEEDINGS						
Question	Summary of Paper Topic	Sources	Tools used to gather information	Current Practice	Sources	Tools to gather information
1) Is there in your legal system a legislation specific to judicial corruption or the legislation applied is the general one on corruption in the public sector?						
2) What is criminalized as judicial corruption (please, list the most relevant categories of crime punished as corrupt activities in your legal system)?						
1) (a) Is the statute of limitations that applies to corrupt conduct by judges and prosecutors different from corrupt conducts carried out by other public officials?						
1) (b) Is there a specific unit responsible for investigating allegations of corruption against judges and prosecutors?						
1) (c) Are the powers of the investigating body in a case of judicial corruption any different from other corruption case? Etc...						
1) (d) Who is responsible for prosecuting allegations of corruption in the judiciary / public prosecution service?						
1) (e) Who is responsible for adjudicating allegations of corruption in the judiciary / public prosecution service?						
1) (f) What is the appeal process for proceedings against a judge or a prosecutor for judicial corruption?						
3) Is the burden of proof in criminal proceedings involving judges or prosecutor any different from other cases?						
4) (a) Are there differences in the defense' rights in cases of proceedings against judges or prosecutors for judicial corruption?						
3) (b) Who is entitled to defend a judge or a prosecutor in cases of judicial corruption?						
4) Is the prosecution of judicial corruption any different from the general "mandatory/ discretionary prosecution rule" into force in the legal system of the Country?						
5) (a) Who can initiate complaints for judicial corruption against judges/ prosecutors? (e.g. citizens, public prosecutors, police, etc.)						
5) (c) Does the status of the complainant (e.g. individual or public body) affect the application of the "mandatory/discretionary prosecution rule"?						

CRIMINAL PROCEEDINGS						
Question	Summary of Paper Topic	Sources	Tools used to gather information	Current Practice	Sources	Tools to gather information
6) Are there specific rules for venue for criminal proceedings involving judges and prosecutors charged with corruption? (e.g. change of venue when a case involves a judge, to avoid having the case before their colleagues in the same court.)						
8) Please, quantify criminal proceedings for judicial corruption against judges and prosecutors:						
• Number of cases of corruption (in general) initiated in the last year/last three years						
• Number of cases of judicial corruption initiated in the last year/last three years						
• Number of cases of judicial corruption dismissed in the last year /three years						
• Number of acquittals in cases of judicial corruption in the last year /three years						
• Number of convictions in cases of judicial corruption in the last year /three years						

DISCIPLINARY PROCEEDINGS						
Question	Summary of Paper Topic	Sources	Tools used to gather information	Current Practice	Sources	Tools to gather information
1) Are the disciplinary rules for misconduct by judges and prosecutors codified/listed in a law or in any other document (e.g. Code of conduct, ethical rules for judges etc.)?						
2) What kind of behaviors are considered misconducts for judges and prosecutors?						
1) (a) What is the statute of limitations applying to judges and prosecutors that can be subject to disciplinary proceedings for judicial corruption?						
1) (b) Who is responsible for investigating disciplinary actions for judicial corruption against judges and prosecutors in the judiciary?						
1) (c) What are the powers of the investigating body in a case of judicial corruption involving judges and prosecutors?						
1) (d) Who is responsible for prosecuting disciplinary actions for judicial corruption in the judiciary / public prosecution service?						
1) (e) Who is responsible for adjudicating disciplinary actions for judicial corruption in the judiciary/public prosecution service?						
1) (f) What is the disciplinary appeal process for proceedings against a judge or a prosecutor for judicial corruption?						
2) What is the burden of proof in disciplinary proceedings?						
3) Is the starting of investigation about disciplinary proceedings mandatory or discretionary?						

DISCIPLINARY PROCEEDINGS						
Question	Summary of Paper Topic	Sources	Tools used to gather information	Current Practice	Sources	Tools to gather information
5 (a) Who can initiate disciplinary complaints against judges/prosecutors for judicial corruption (e.g. citizens, public prosecutors, judicial council etc.)?						
4 (c) Does the status of the complainant (e.g. individual or public body) affect the mandatory or discretionary prosecution?						
6) Please, quantify disciplinary proceedings for judicial corruption against judges and prosecutors:						
• Number of disciplinary proceedings (in general) initiated in the last year/last three years						
• Number of disciplinary proceedings for judicial corruption (please, see comments above) initiated in the last year/last three years						
• Number of disciplinary proceedings for judicial corruption dismissed in the last year /three years						
• Number of acquittals in disciplinary proceedings of judicial corruption in the last year/three years						
• Number of disciplinary sanctions for judicial corruption in the last year/three years						
• General disposition data						

CRIMINAL AND DISCIPLINARY CONNECTIONS						
Question	Summary of Paper Topic	Sources	Tools used to gather information	Current Practice	Sources	Tools to gather information
1) Are there disciplinary consequences if a judge or a prosecutor has been investigated for judicial corruption (For example: suspension; transfer; asset freezing)						
2) Are there disciplinary consequences if a judge or a prosecutor has been charged for judicial corruption (For example: suspension; transfer; asset freezing)						
3) Are there disciplinary consequences if a judge or a prosecutor has been sanctioned for judicial corruption (For example: suspension; transfer; asset freezing)						
4) Are criminal proceedings for corruption and disciplinary proceedings connected?						
• Do both proceedings run parallel?						
• Is a disciplinary proceeding necessary as a first step of a criminal investigation?						
• Is the disciplinary proceeding mandatory after a criminal prosecution regardless of the outcome?						
• Is there a sharing of information between the authorities responsible for the two proceedings?						
• How do findings coming from the criminal proceeding affect the disciplinary proceeding, and vice-versa?						

Appendix B

Modified Questionnaire

This questionnaire has been developed to support both desk and empirical research into criminal law, procedure and practice in relation to prosecuting corruption by judges, as well as administrative/disciplinary processes and practices for addressing misconduct by judges that are internal to judicial systems. The questionnaire focuses on three main areas and research questions: (a) criminal proceedings concerning judges: how does the criminal law of corruption treat judges in each country?; (b) disciplinary practices concerning judicial conduct: what are the internal processes and practices for addressing judicial misconduct?; and (c) the interrelationship between the criminal and disciplinary processes as they relate to judges: what is the relationship between the criminal law and the internal judicial complaints procedures?

The questions relating to the criminal law and procedure cover the following areas:

- Scope and definition of corruption as it relates to judges
- Reporting corruption by judges
- Investigating allegations of corruption by judges
- Prosecuting judicial corruption
- Procedural Safeguards
- Sanctions
- Transparency in relation to crimes of judicial corruption
- Statistics and data

A. CRIMINAL PROCEEDINGS			
	Question	Legal Framework	Practice
1. Scope and definition of corruption as it relates to judges	a) Are there anti-corruption laws of general application, or are there some laws that apply only to public officials?		
	b) If there are anti-corruption laws that apply to public officials, are there also specific crimes that relate to judges alone, or are judges included in the category of public official?		
	c) How is corruption defined in the domestic legal framework?		
	d) How does the domestic definition of corruption compare to the UNCAC definition? Is it broader or narrower?		
	e) How, if there are specific categories relating to judges, is corruption by or in relation to judges defined?		

	Question	Legal Framework	Practice
	f) Do the same rules of reporting, investigation and prosecution apply to all judges, or are there different procedures, e.g. for supreme court, senior judges and lower court judges?		
2. Reporting corruption by judges	a) Who can report corruption by judges? [e.g. citizens, judges]		
	b) How is corruption by judges generally reported? [e.g. directly to police; prosecuting agency, or through anonymous means such as a hotline]		
	c) To whom is corruption by judges reported? [e.g. police, judicial leader(s), prosecuting authority, anti-corruption body]		
	d) Is there a limitation period for reporting crimes of corruption by judges?		
	e) From when does the limitation period begin?		
	f) Is there a limitation period within which prosecution of reported crimes of corruption by judges must be initiated?		
3. Investigating allegations of corruption by judges	a) Is there a specific body or unit responsible for investigating allegations of corruption against judges?		
	b) If there is a specific body or unit responsible for investigating corruption by judges, how does it relate to other criminal justice bodies and prosecuting authorities? Is it independent?		
	c) If there is a specific body responsible for investigating judicial corruption, how does it hear of/receive allegations against judges? [e.g. directly and/or from the police, or an anonymous hotline]		
	d) Are the powers available to the body investigating allegations of corruption against judges (whether unique to judicial corruption or not), different from the powers available to investigate corruption by others?		

	Question	Legal Framework	Practice
4. Prosecuting judicial corruption	a) Is there a limitation period within which prosecution of reported crimes of corruption by judges must be initiated?		
	b) Who is responsible for prosecuting allegations of corruption by judges?		
	c) Do prosecutors have any discretion when deciding what crimes to prosecute in general?		
	d) Do prosecutors have any discretion in prosecuting corruption by judges, or is prosecution mandatory?		
	e) Does the status of the complainant (e.g. individual or public body) determine whether prosecution is discretionary or mandatory?		
	f) Are there specific rules about the venue of criminal proceedings involving judges (e.g. change of venue when a case involves a judge, to avoid having the case heard before colleagues in the same court)?		
	g) Are there rules as to mode of trial for corruption by judges (e.g. summary trial for offences carrying lesser sentences; trial on indictment for offences carrying longer sentences)?		
5. Procedural Safeguards	a) What is the burden of proof? Is the burden of proof in offences of corruption by judges different from other cases?		
	b) What is the standard of proof in cases of corruption by judges?		
	c) Are there differences in rights of defence in proceedings against judges for judicial corruption?		
	d) Who is entitled to defend judges in cases of judicial corruption?		
	e) Are there any specific or additional procedural safeguards in place in cases of judicial corruption?		
	f) What is the appeals process in proceedings against judges for judicial corruption?		
6. Sanctions	a) What sentences do crimes of corruption by judges carry?		
	b) Are there discretionary or mandatory sentences?		
	c) What factors contribute to decisions about sentencing judges for crimes of corruption?		

	Question	Legal Framework	Practice
7. Transparency in relation to crimes of judicial corruption	a) Are judicial corruption cases heard in public?		
	b) How accessible is information about the process?		
	c) How accessible is information about the outcomes of judicial corruption cases?		
8. Statistics and data	a) Are there clear statistics available about corruption offences by judges?		
	b) What was the number of corruption cases in general initiated in the last year/three years?		
	c) What was the number of judicial corruption cases initiated in the last year/three years?		
	d) How many cases of judicial corruption were dismissed in the last year/three years?		
	e) How many acquittals were there in judicial corruption cases in the last year/three years?		
	f) How many convictions for judicial corruption were there in the last year/three years?		

B. DISCIPLINARY PROCEEDINGS			
	Question	Legal Framework	Practice
1. Scope and definition of judicial conduct and misconduct	a) Are the rules of judicial conduct codified, for example, as a code of conduct or ethics?		
	b) Does the code of conduct apply to all judges, or are there different codes for different type/levels of judges?		
	c) Does the code of judicial conduct refer to the Bangalore Principles of Judicial Conduct?		
	d) How does the code of judicial conduct compare to the Bangalore Principles?		
	e) What kind of behaviour is considered misconduct by judges?		
	f) How does misconduct as covered by the disciplinary process differ from crimes of judicial corruption as covered by the criminal law and criminal process?		

	Question	Legal Framework	Practice
2. Reporting misconduct by judges	a) Is there a specific complaints procedure for complaints against judges, or are they treated as public officials?		
	b) Is the complaints procedure the same for all judges, or are there difference procedures for different types/levels of judges?		
	c) Who can report misconduct by judges? [e.g. citizens, judges]		
	d) How is misconduct by judges generally reported? [e.g. directly to police; prosecuting agency, or through anonymous means such as a hotline]		
	e) To whom is misconduct by judges reported? [e.g. police, judicial leader(s), prosecuting authority, anti-corruption body]		
	f) Is there a difference between reporting misconduct by a lower court judge and reporting misconduct by a senior judge or supreme court judge?		
	g) Is there a limitation period for reporting judicial misconduct?		
	h) From when does the limitation period begin?		
3. Investigating complaints against judges	a) Is there a specific body responsible for investigating allegations of judicial misconduct?		
	b) Is there one body responsible for complaints against all judges, or are there separate bodies for different types/levels of judges?		
	c) If a complaint is received, is an investigation mandatory or does the complaints body have discretion in the matter?		
	d) Is there a disciplinary procedure for investigating and hearing complaints against judges?		
	e) Who is responsible for hearing allegations of misconduct against judges?		
	f) Is the process the same for all judges, or are there different processes for different types/levels of judges?		

	Question	Legal Framework	Practice
4. Procedural safeguards	a) What is the burden of proof in investigations of judicial misconduct?		
	b) What is the standard of proof in investigations of judicial misconduct?		
	c) Are judges entitled to representation in disciplinary proceedings?		
	d) Who is entitled to defend judges in cases of judicial corruption?		
	e) Are judges entitled to an oral hearing?		
	f) Are cases heard in public or in private?		
	g) Are outcomes public or confidential?		
	h) Are there any specific or additional procedural safeguards in place in judicial conduct proceedings?		
	i) What is the appeals process in disciplinary proceedings?		
5. Sanctions	a) What sanctions are there for judicial misconduct?		
	b) Who determines the sanction?		
	c) Are sanctions determined by different people/bodies depending on what type/level of judge is being sanctioned?		
	d) Are sanctions discretionary or mandatory?		
6. Transparency of judicial discipline processes	a) How accessible is information about the process?		
	b) How accessible is information about the outcomes of judicial complaints?		
7. Statistics and Data	a) Are there clear statistics available about judicial conduct and complaints?		
	b) How many complaints were made in the last year/three years?		
	c) How many complaints were investigated in the last year/ three years?		
	d) How many complaints were dismissed in the last year/three years?		
	e) How many complaints were upheld in the last year/three years?		

C. INTERRELATION BETWEEN CRIMINAL AND DISCIPLINARY PROCEEDINGS

	Question	Legal Framework	Practice
1. Effect of criminal charge/conviction on disciplinary process	a) Are there disciplinary consequences if a judge has been investigated for judicial corruption? (e.g suspension, removal, transfer, asset freezing)		
	b) Are there disciplinary consequences if a judge has been charged with corruption offence? (e.g suspension, removal, transfer, asset freezing)		
	c) Are there disciplinary consequences if a judges has been convicted and criminally sanctioned for corruption? (e.g suspension, removal, transfer, asset freezing)		
2. Interrelation of criminal and disciplinary proceedings	a) Are criminal and disciplinary proceedings connected?		
	b) Do both proceedings run parallel or are they consecutive?		
	c) Is a disciplinary investigation necessary before a criminal investigation?		
	d) Is a disciplinary investigation mandatory after a criminal prosecution (regardless of outcome)?		
	e) Is information shared between the criminal authorities and the disciplinary body?		
	f) How do findings from a criminal proceeding affect a disciplinary investigation and vice versa?		

D. ADDITIONAL INFORMATION

- Are there any mechanisms that have been put in place to prevent or identify corruption cases (for example asset disclosure)?
- Any reform or debate trends regarding judicial corruption?
 - o Has there been any influence of international organizations or conventions?
 - o Has there been any influence of domestic public opinion/civil society/media interest in the issue of judicial corruption?

Appendix C

Summary of compliance with international law and normative standards

CRIMINAL PROCESS

Scope and definition of corruption

Most of the main requirements of this issue that are relevant here have mandatory elements. The mandatory requirements have been met by all five countries in this study:

- *Judicial independence must be guaranteed* (UN Basic Principles on the Independence of Judges (UNBPIJ), Articles 1, 2, 6 and 16): All five countries formally comply on the face of it, with the formal guarantees in place.
- *States must have codes of conduct to promote integrity, honesty and responsibility of public officials* (UNCAC, Article 8(1)): It is mandatory to promote these values, and all five countries have such codes.
- *States must take measures to strengthen integrity and prevent opportunities for corruption in the judiciary* (UNCAC, Article 11): All five countries have taken some measures. However, see the further discussion below for factors that impact on the effectiveness of such measures.
- *States must criminalise bribery* (UNCAC, Article 15): All five countries have criminalised bribery.
- *States must consider criminalising trading in influence* (UNCAC, Article 18): It is mandatory to consider criminalising trading in influence, but optional as to whether or not to do so. Four countries have expressly criminalised trading in influence, with the UK opting not to expressly create an offence of trading in influence.
- *Judges should be liable for crimes they commit* (BP-IM, paragraph 9.1): In four out of five of the case studies, this is the case. However, in Costa Rica, Supreme Court judges have criminal immunity, which may be lifted with the authorisation of the Legislative Assembly and a vote by the Supreme Court.
- *Judges should be protected by immunity from civil suits* (BP-IM, paragraph 9.2): It appears all countries in this study meet this standard.

Reporting corruption

- *States should consider measures to facilitate reporting by public officials of acts of corruption* (UNCAC, Article 8(4)): It is mandatory to consider such measures, but optional to implement them. The level of compliance is not clear as it was not fully within the scope of the study.
- *Ensure knowledge of and access to anti-corruption bodies* (UNCAC, Article 13(2)): It is mandatory to ensure access to anti-corruption bodies. All five countries have complied with this, to some extent.
- *Allow anonymous reporting of corruption* (UNCAC, Article 13(2)): It is mandatory to allow anonymous reporting. Only one of the five countries, the UK, allows anonymous reporting of corruption.

- *States must protect witnesses, experts and victims* (UNCAC, Article 32(1)): This is mandatory. This was not within the scope of this study, and further information would be needed to assess this aspect of anti-corruption enforcement measures in the five countries in this study.
- *States must consider measures to protect reporting persons* (UNCAC, Article 33): It is mandatory to consider adopting such measures; however, it is not clear from this study what general protections there are, but there are no specific protections for reporting judicial corruption in any of the five case studies.
- *States must take necessary measures to ensure cooperation between national authorities* (UNCAC, Article 38): This is a mandatory provision, and all five countries in this study are poor in this area. See the discussion in chapter 6.

Limitation periods

- *States should establish long limitation periods in which to commence proceedings* (UNCAC, Article 29): This provision does not require the introduction of limitation periods. Where a state already has statutes of limitation, they must allow for long limitation periods. There is a difference of approach in the case studies. Ghana and the UK have no limitation periods, whereas France, Costa Rica and the Philippines have limitation periods of varying lengths. See the discussion in section 7.1 concerning gaps in guidance for assessing how long limitation periods should be.
- *States should establish a longer limitation period where the offender has evaded justice* (UNCAC, Article 29): This is mandatory if limitation periods already exist. Of the three countries in this study that have limitation periods, France appears to be the only one that has implemented this provision – limitation periods are extended where crimes are ‘hidden’.
- *The statute of limitations should be suspended where the offender has evaded the administration of justice* (UNCAC, Article 29): This is optional. Of the five countries, only Costa Rica allows for the statute of limitations to be suspended for the period of time the accused is in office.

Investigating judicial corruption

- *States must develop and implement or maintain effective, coordinated anti-corruption policies* (UNCAC, Article 5(1)): This is mandatory and all five countries have anti-corruption policies.
- *States must endeavour to establish and promote effective practices aimed at the prevention of corruption* (UNCAC, Article 5(2)): It is mandatory to try to establish such practices. All five countries in this study have practices aimed at the prevention of corruption.
- *States must ensure the existence of a body or bodies that prevent corruption* (UNCAC, Article 6): This is mandatory and all five countries have anti-corruption bodies.
- *States must ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement* (UNCAC, Article 36): It is mandatory to have a body or bodies that specialise in anti-corruption practices in law enforcement – nothing further is specified. It is not necessary to have a separate anti-corruption enforcement body, so long as there is specialisation within the law enforcement framework. In France, anti-corruption expertise is subsumed into the existing

investigative bodies. In Ghana, the UK, Costa Rica and the Philippines, there are specialist anti-corruption investigative bodies.

Responsible body, and decision to prosecute

- *States must ensure that discretionary powers are used to maximise effectiveness of enforcement measures* (Article 30(3)): States must 'endeavour' to ensure that discretionary powers are used in this way. In the Philippines, the prosecution must provide probable cause, and then prosecution is mandatory. In Costa Rica, it appears that, once a decision has been made to lift criminal immunity in the case of a Supreme Court judge, investigation and prosecution is then mandatory. In the UK and France, prosecutors do have discretion as to whether to prosecute. In France, prosecutors must provide legal justification for their decision to prosecute, and in the UK, decisions to prosecute must meet established criteria. Both countries therefore meet this standard. It is unclear how discretion is used in Ghana.
- *States must ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement* (UNCAC, Article 36): This provision is mandatory. Both Costa Rica and the Philippines have a specialist body responsible for prosecuting corruption. In the UK, a specialist body is responsible for some cases (the most serious and complex cases); otherwise, expertise is subsumed into existing authorities. In Ghana and France, there is no specialist anti-corruption prosecution authority.

Procedural safeguards

- *Safeguards set out in Article 11 of the UDHR and Article 14 of the ICCPR*: On the face of it, all five countries in this study meet the standards set out in these articles. However, note that detailed information on many of the procedural safeguards was limited. Much of the detail in the case studies was about appeals (ICCPR, Article 14(5)). On the face of it, these countries met the requirements of Article 15(5). However, the appellate process in the Sandiganbayan in the Philippines is unusual, and raises concerns about the effectiveness of the appellate process in corruption cases.

Sanctions for judicial corruption

- *Sanctions must take into account the gravity of the offence* (UNCAC, Article 30(1)): This is a mandatory provision. All five countries in this study have a range of sanctions attached to corruption offences. Details of criteria for determining the gravity of offences and the subsequent sanction are not available in the case studies.
- *States must consider establishing procedures for disqualification from public office where the gravity of the offence warrants it* (UNCAC, Article 30(7)): Establishing such procedures is optional. In France, Ghana, Costa Rica and the Philippines, disqualification from public office is a sanction following conviction for corruption offences. A criminal conviction does not automatically disqualify a person from applying for or holding judicial office.

Transparency

- *States should develop and implement or maintain effective, coordinated anti-corruption policies that reflect the rule of law, proper management of public affairs and public property, integrity, transparency and accountability* (UNCAC, Article 5(1)): All five states have coordinated anti-corruption policies. However, lack of transparency is an issue for all of them.
- *States should endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest* (UNCAC, Article 7(4)): All states are making efforts in this area.
- *States should take such measures as may be necessary to enhance transparency in its public administration* (UNCAC, Article 10) (1)), including:
 - *Allowing the public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public* (UNCAC, Article 10(1) (a)): Case law and other information about the functioning of organisations is more easily accessible in the UK and France than in the other three countries, with Ghana performing the worst in this area.
 - *Publishing information, which may include periodic reports on the risks of corruption in its public administration* (UNCAC, Article 10(1) (c)): This does not appear to be common practice, in respect of the judiciary, in any of the five countries in this study.
 - *Ensuring that the public has effective access to information* (UNCAC, Article 13(1) (b)): Of the five countries in the study, in respect of criminal processes, France and the UK meet the standards for ‘effective access to information’. Costa Rica and the Philippines publish decisions and information about the criminal process, but it is not always clear or up to date. Ghana fares worst in terms of effective access to information.
 - *Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption* (UNCAC, Article 13(1) (d)): Freedom to seek information was not covered in detail in the case studies. The publication and dissemination of information concerning judicial corruption needs improvement in all five countries.

DISCIPLINARY PROCESS

Meaning and categories of misconduct

- *States must take measures to strengthen integrity and prevent opportunities for corruption in the judiciary* (UNCAC, Article 11(1)): All states in this study have taken some measures, but there are areas of practice that undermine full compliance with this article (see the discussion in the conclusion).
- *Such measures may include a code of conduct for the judiciary* (UNCAC, Article 11(1)): All five countries in this study have judicial codes of conduct.
- *Disciplinary proceedings can be brought only for serious misconduct* (BP-IM, paragraph 15.1): Definitions of ‘serious misconduct’ vary, which means that while on the fact of it each country

meets this standard, the kind of practice that meets the threshold domestically ranges from bribery to having an affair while in office (see the discussion about the Philippines in section 5.2.2).

- *Judges should be subject of suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge duties* (UNBPIJ, Article 18): All five countries meet this standard on the face of it; however, there are areas of practice that undermine full compliance with this article (see the discussion in the conclusion).
- *Disciplinary, removal and suspension should be determined in accordance with established standards of judicial conduct* (UNBPIJ, Article 19): All five countries meet this requirement, on the face of it.

Responsibility for judicial discipline

- *States should develop and implement or maintain effective, coordinated anti-corruption policies that reflect the rule of law, proper management of public affairs and public property, integrity, transparency and accountability* (UNCAC, Article 5(1)): All five states have coordinated anti-corruption policies. However, lack of transparency is an issue for all of them.
- *States must endeavour to establish and promote effective practices aimed at prevention of corruption* (Article 5(2)): All five states have established practices aimed at the prevention of corruption, but in respect of the judiciary, in each country in this study, there are questions either about the effectiveness of such measures, or about how the effectiveness of such measures can be assessed with limited transparency and access to information. England and Wales fares best in terms of access to information about the disciplinary process and outcomes, but the decisions of the JCIO are not available to the public indefinitely.
- *The Bangalore Principles are founded on the understanding that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial* (Bangalore Principles, Preamble): On the face of it, all five countries meet these requirements.
- *A body should be established by law with responsibility for receiving complaints and judging whether there is a case for disciplinary action* (BP-IM, paragraph 15.3): All five countries have a specific body of this kind.
- *Where it is concluded that there is a case for disciplinary action, there should be a disciplinary authority to which the matter is referred* (BP-IM, paragraph 15.3): All five countries meet this standard.
- *The body or authority vested with authority to discipline judges should be independent of the legislature or the executive* (BP-IM, paragraph 15.4): On the face of it, all five countries meet this criterion, but in France, the selection criteria for membership of the authority may affect perceptions of independence.
- *The disciplinary authority should be composed of serving or retired judges, but may include non-judges, provided that they are not members of the executive or the legislature.* The Philippines and Costa Rica meet this standard, as does France on the face of it. In England and Wales, the Lord Chancellor (a member of the executive) is, in partnership with the Lord Chief Justice, the disciplinary authority; and in Ghana, the President of Ghana may have some input into disciplinary decisions.

- *Where the legislature has the power to remove a judge, that power should only be exercised on the recommendation of the independent disciplinary authority* (BP-IM paragraph 16.2): In both the Philippines and the UK, the removal of Supreme Court judges (and superior court judges in the UK) can only be done by the legislature; it is a political decision. In Costa Rica, the legislature gives the final decision, but it is unclear whether it acts on the recommendation of the disciplinary authority or makes a determination itself. In Ghana, the President must act on the recommendation of the disciplinary authority. In France, the legislature is not involved in the decision.

Reporting judicial misconduct

- *There should be a right to complain to the person or body responsible for initiating disciplinary action* (BP-IM, paragraph 15.2): All countries in this study meet this standard.

Limitation periods

- *A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure* (UNBPIJ, Article 17): There is no specific guidance on limitation periods, or what criteria to consider when determining whether the process is expeditious and fair. Two countries, Ghana and the Philippines, have no time limit for complaints. The UK, France and Costa Rica have differing time limits.

Making a valid complaint

- *There should be a specific body responsible for receiving complaints and referring them to the disciplinary authority for disciplinary action* (BP-IM, paragraph 15.3): All five countries have disciplinary bodies that receive complaints.

Standard misconduct investigations

- *All disciplinary proceedings should be determined by reference to established standards of judicial conduct* (BP-IM, paragraph 15.5): All meet this standard.
- *All disciplinary proceedings should be determined in accordance with a procedure guaranteeing full rights of defence* (BP-IM, paragraph 15.5): All countries in this study have procedures that have some rights of defence. (See the discussion in sections 5.4.1 and 5.5).

Removal from office investigations

- *A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary* (BP-IM, paragraph 16.1): On the face of it, all the countries in this study meet this requirement. However, issues that undermine this provision include political removal procedures (eg, in the Philippines) and immense variation in the definition of what conduct meets this standard.
- *Where the legislature has the power to remove a judge, that power should only be exercised on the recommendation of the independent disciplinary authority* (BP-IM paragraph 16.2): See above under ‘Responsibility for judicial discipline’.

- *The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge* (BP-IM, paragraph 16.3): The issues raised in this paragraph of the BP-IM were not considered in this study.

Burden and standard of proof

- There are no agreed standards on burden and standard of proof in disciplinary proceedings.

Jurisdiction and venue

See BP-IM, paragraph 15.4, and ‘Responsibility for judicial discipline’ above.

Procedural safeguards

- *Safeguards set out in Article 11 of the UDHR and Article 14 of the ICPPR*: Procedural safeguards vary in the five countries in this study. The main areas in issue are: the independence of the disciplinary body or bodies; notice and hearings; transparency and publication of outcomes; and appeals and rights of representation (see the discussion in section 5.5).
- See also BP-IM, paragraph 15.5, ‘Standard misconduct investigations’ above.
- *There should be an appeal from the disciplinary authority to a court* (BP-IM, paragraph 15.6): France is the only country in this study where there is an appeal from every disciplinary decision to a court. In Ghana, an appeal against a disciplinary decision can only be made to the President of Ghana; in Costa Rica, decisions about lower-level judges can be appealed to a higher court, but decisions concerning Supreme Court judges cannot be appealed; in the Philippines, the Supreme Court is the disciplinary authority, and there is no appeal available; and in the UK, there is a review process, but no appeal to a court. It is unclear whether the decision of the disciplinary authority may be subject to judicial review.
- *The final decision, whether held in camera or in public, should be published* (BP-IM, paragraph 15.7): Disciplinary decisions are published in France, the Philippines, Costa Rica, and England and Wales (but not Scotland or Northern Ireland). Decisions are not published in Ghana. The only country where disciplinary hearings are public is France.

Sanctions for judicial misconduct

- *Sanctions should be proportionate* (BP-IM, paragraph 15.8): Variations in sanctions for different categories of misconduct indicate that the need for proportionate sanctions is recognised in each of the five countries in this study, although note that in the Philippines a judge has been removed from office for having an extramarital affair, which appears to be disproportionate, at the least.

Transparency

- *States should develop and implement or maintain effective, coordinated anti-corruption policies that reflect the rule of law, proper management of public affairs and public property, integrity, transparency and accountability*

(UNCAC, Article 5(1)): All five states have coordinated anti-corruption policies. However, lack of transparency is an issue for all of them.

- *States should endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest* (UNCAC, Article 7(4)): All five states are making efforts in this area in respect of judicial discipline.
- *States should take such measures as may be necessary to enhance transparency in its public administration* (UNCAC, Article 10) (1)), including:
 - *Allowing the public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public* (UNCAC, Article 10(1)(a)): France and the UK provide the most information about the processes of judicial discipline of the five countries; information in Costa Rica and the Philippines is available, but may not be accurate; and Ghana performs the worst in this area. As for information about outcomes, disciplinary decisions are published in France, the Philippines, Costa Rica, and England and Wales (but not Scotland or Northern Ireland). Decisions are not published in Ghana.
 - *Publishing information, which may include periodic reports on the risks of corruption in its public administration* (UNCAC, Article 10(1)(c)): This does not appear to be common practice, in respect of the judiciary, in any of the five countries in this study.
 - *Ensuring that the public has effective access to information* (UNCAC, Article 13(1)(b)): of the five countries in the study, in respect of disciplinary processes, France and the UK meet the standards for ‘effective access to information’ about the system. Costa Rica and the Philippines publish decisions and information about the disciplinary process, but it is not always clear or up to date. Ghana fares worst in terms of effective access to information.
 - *Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption* (UNCAC, Article 13(1)(d)): Freedom to seek information was not covered in detail in the case studies. The publication and dissemination of information concerning judicial corruption needs improvement in all five countries.

INTERRELATIONSHIP BETWEEN CRIMINAL AND DISCIPLINARY PROCESSES

Consecutive or parallel proceedings

- *Offences under UNCAC should be liable to sanctions that take into account the gravity of the offence* (UNCAC, Article 30(6)): This includes both criminal and disciplinary sanctions. All five countries have both.
- *Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by competent authorities* (UNCAC, Article 30(8)): This is, on the face of it, the case in all five countries – there appears to be very little information exchange between prosecuting and disciplinary authorities. However, in Costa Rica and France, both criminal and disciplinary proceedings can occur simultaneously; in the Philippines, a disciplinary action should precede criminal prosecution, but this is not always so in practice; and in the UK and Ghana, disciplinary investigations stop as soon as there is evidence that a

crime may have been committed, and the issue is left to the police.

Consequences of one process on the other

- *Each state party must consider measures by which a public official accused of a corruption offence may be removed, suspended or reassigned (UNCAC, Article 30(6))*: All five countries in this study have such measures in place.
- *Each state must consider establishing procedures for the disqualification of those convicted of a corruption offence from holding public office (UNCAC, Article 30(7))*: It is mandatory to consider implementing such measures. France, Costa Rica and the Philippines have adopted such measures, but, in respect of judges, the UK has not. It is unclear what the situation is in Ghana.

Appendix D

Case Studies

Case study: Costa Rica

Executive summary

The goal of the study is to determine how allegations of corruption against judges are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts. Apart from a few exceptions (ie, when the criminal conviction entails a disqualification penalty), in Costa Rica, criminal and disciplinary procedures run in parallel. For the purpose of this case study, and expanding on the general definitions in section 3.1.2 of this report, we have adopted the following contextual definitions:

- ‘Corruption’ includes both bribery and trading in influence (ie, bribery involving a third-party intermediary). As stated in section 1.3.2 of this report, we have adopted the definitions of these offences provided by the United Nations Convention against Corruption.¹
- ‘Judges’ means judges of all levels in Costa Rica. This study does not include prosecutors.

Key findings: criminal proceedings

- There are specific provisions in the Criminal Code and Criminal Procedure Code that regulate corruption committed by judges.
- In some cases, judges are given comparatively longer prison sentences compared to other public officials.
- The investigation and prosecution of allegedly corrupt public officials, which includes judges, is the responsibility of a specific anti-corruption unit called the Anti-Corruption Unit of the Public Prosecutor’s Office.
- The Criminal Jurisdiction of Taxation and Public Administration is a specific jurisdiction, comprising a tribunal and a court, that deals and hears crimes performed in public office in the first instance; however, they do not specialise in anti-corruption.
- The investigation and prosecution of allegedly corrupt members of the Supreme Powers, which includes judges of the Supreme Court, is the responsibility of the Public Prosecutor’s Office. The prosecution of judges of the Supreme Court needs the approval of the Supreme Court, as well as parliamentary authorisation. The Supreme Court hears cases of corruption allegedly committed by judges of the Supreme Court.
- There are special anti-corruption bodies in Costa Rica, including the Public Ethics Attorney Office of the State, the anti-corruption organ of the General Attorney’s Office of the Republic, which has the competency to initiate criminal action against public officials, including judges, and as

1 UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005).

mentioned above, there is also a specialised unit for public action crimes of corruption allegedly committed by public officials called the Anti-Corruption Unit of the Public Prosecutor's Office.

Key findings: disciplinary proceedings

- The Judicial Inspection Court is the body responsible for exercising the disciplinary regime, although the Organic Law of the Judiciary (Ley Orgánica del Poder Judicial or LOPJ) grants six other entities the powers to do the same in practice, each being involved in different stages of the proceedings in respect of judges.²
- There are three kinds of disciplinary misconduct – minor, severe and gross – each with corresponding sanctions whose imposition is left to the discretion of the judge.
- Minor misconduct is punishable by reprimand and written reprimand. Serious misconduct is punishable by written warning and unpaid suspension of up to two months. Gross misconduct is punishable by unpaid suspension until the revocation of appointment (ie, dismissal).
- The additional six entities with the authority to exercise the disciplinary powers are the Superior Council, Prefectures, Plenary Session of the Supreme Court, Executive Direction, President of the Supreme Court and judges.³
- The Supreme Court is competent for the enforcement of the disciplinary regime in cases involving judges of the Supreme Court.

Key findings: Interrelationship between criminal and disciplinary proceedings

- A criminal procedure can run in parallel with a disciplinary procedure. However, if the criminal conviction entails a disqualification penalty, a criminally convicted judge will be dismissed automatically.

Context

Costa Rica is a civil law country of the Romano Germanic legal tradition. Sources of law include the Constitution, legislation and treaties.

Article 9 of the Constitution of Costa Rica establishes the separation of powers between the executive, legislative and judicial branches, each independent of the other.⁴ Article 152 of the Constitution stipulates that the Supreme Court of Justice and other courts established by law exercise judicial power.⁵ The judiciary is divided into three spheres, as illustrated in Figure 1.⁶ The bodies of the jurisdictional sphere (*Ámbito Jurisdiccional*) are in charge of the administration of justice, and this function is assisted by the offices of the auxiliary (*Ámbito Auxiliar*) and administrative sphere (*Ámbito Administrativo*).⁷

2 Programa Estado de la Nación, *Segundo informe estado de la justicia* (PEN, ed 2017) 107. Please note that the listed entities are also involved in different stages in respect of other public officials.

3 See n 2 above.

4 Constitución Política de la República de Costa Rica.

5 *Ibid.*

6 'Historia, Organización y Funcionamiento' *Poder Judicial* <https://pj.poder-judicial.go.cr/index.php/historia-organizacion-funcionamiento> accessed 3 March 2020.

7 *Ibid.*

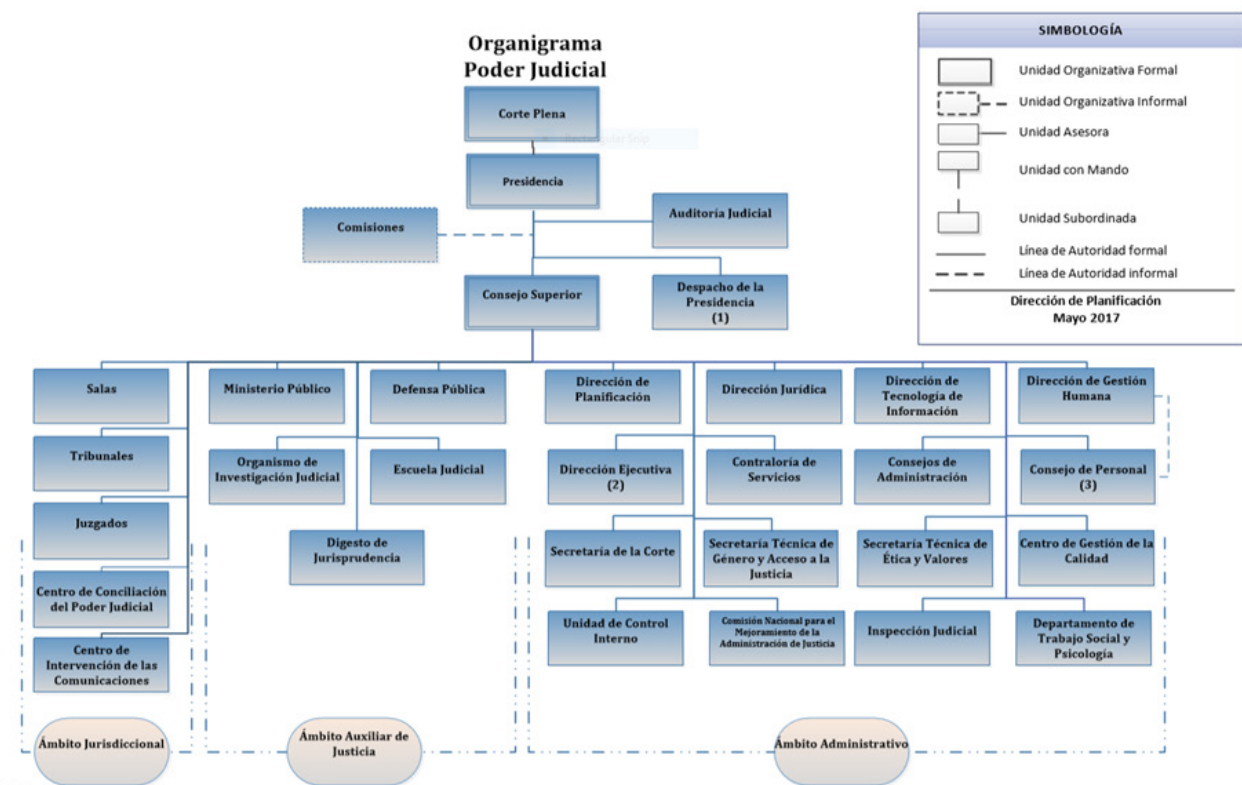


Figure 1. Diagram of judicial power.⁸

In the last few decades, corruption in Costa Rica has worsened, adversely affecting the functioning and progress of Costa Rica's Public Administration and deteriorating public confidence in the state and its laws.⁹ In response, Costa Rica has implemented a number of anti-corruption measures over the years in an attempt to address the situation. These include the Law on the Creation of the Public Ethics Attorney Office of the State (Procuraduría de la Ética Pública) in 2002,¹⁰ the anti-corruption organ of the General Attorney's Office of the Republic. It was intended to give effect to the Inter-American Convention against Corruption 1997 following its ratification.¹¹ Costa Rica became one of the few states to implement domestic law to prevent and combat corruption following the ratification of the convention. Its objective is to fight against corruption in the exercise of a public function, and promote ethics and transparency.¹² Subsequent measures include the Law on the Creation of the Criminal Jurisdiction of Taxation and Public Administration 2002 (Jurisdicción Penal de Hacienda y la Función Pública), the Law against Corruption and Illicit Enrichment in Public Office (Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública)¹³ and the ratification of the UN Convention against Corruption in 2007.¹⁴

8 'Organigrama Poder Judicial' (May 2017) <https://pj.poder-judicial.go.cr/images/documentos/organigramas/generalPJ.pdf> accessed 3 March 2020.

9 Towards the end of the Chinchilla administration in 2014, 20 per cent of the population considered corruption as the nation's main challenge; Programa Estado de la Nación, *Estado de la Nación en Desarrollo Humano Sostenible* (PEN, ed 2018), 221.

10 Ley de Creación de la Procuraduría de la Ética Pública, Ley No 8242 de 9 de abril de 2002.

11 Convención Interamericana contra la Corrupción, Ley No 7670 de 17 de abril de 1997.

12 Evelyn López Guerrero and Yariela Delgado Rodríguez, 'Acciones de la Procuraduría de la Ética Pública que disminuyen la corrupción: Hacia un estado con transparencia' (2016) http://ijj.ucr.ac.cr/wp-content/uploads/bsk-pdf-manager/evelyn_lopez_guerrero_y_yariela_delgado_rodriguez_tesis_completa_128.pdf accessed 3 March 2020.

13 Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública, Ley No 8422 de 6 de octubre de 2004.

14 Ratificación de la República de Costa Rica a la Convención de las Naciones Unidas contra la Corrupción, Decreto Ejecutivo 33540 de 9 de enero de 2007.

Methodology

A number of constraints and limitations were encountered during the research for this study. Preliminary research was based on secondary sources, including the following websites:

- Sistema Costarricense de Información Jurídica www.pgrweb.go.cr/scij/avanzada_pgr.aspx
- Public Prosecutor's Office <https://ministeriopublico.poder-judicial.go.cr/index.php/es>
- Judicial Inspection Body <https://inspeccionjudicial.poder-judicial.go.cr>
- Attorney's Office of Public Ethics www.pgr.go.cr/servicios/procuraduria-de-la-etica-publica-pep
- Judicial Investigation Body <https://sitiooj.poder-judicial.go.cr>

To verify the accuracy of our desk research, follow-up interviews with representatives of the judiciary, non-governmental organisations (NGOs) and lawyers were conducted via email or in person.

Criminal proceedings

Criminalisation of 'judicial corruption'

In Costa Rica, corruption committed by public officials is regulated by a specific section of the Criminal Code, where a distinction between 'improper' and 'proper' corruption is drawn.¹⁵ When public officials receive or accept the promise of any gift or other undue advantage in order to carry out an act within the scope of their duties ('improper corruption'), they can be subject to a prison sentence of one to five years.¹⁶ When public officials receive or accept the promise of any gift or other undue advantage in order to carry out an act contrary to their duties or to delay an act within the scope of their duties ('proper corruption'), they can be subject to a prison sentence of three to eight years. Moreover, in this circumstance, a monetary sanction up to 30 times the illicit benefit may apply.¹⁷

Judicial corruption is subject to a specific provision and, when judges or arbitrators have accepted an undue advantage in order to favour or prejudice a party in a trial, harsher penalties apply.¹⁸ In particular, they can be sentenced to a prison term of four to 12 years and, if the unjust ruling led to a criminal conviction with a prison term of more than eight years, they can face up to eight years imprisonment.¹⁹

Consistent with Article 18 of the UN Convention against Corruption, the Law against the Corruption and Illicit Enrichment in Public Office has criminalised trading in influence, with a prison term of two to five years.²⁰ Moreover, an explicit provision criminalises public officials who seek impunity or evasion for a person subject to investigation or convicted for any of the offences regulated by Law No 8204 on Narcotic Drugs, Psychotropic Substances, Drugs for Unauthorized Use, Related Activities, Capital Legitimation and Terrorism Financing (*Ley sobre Estupefacientes, Sustancias Psicotrópicas, Drogas de Uso no Autorizado,*

15 Código Penal, Ley No 4573 de 4 de mayo de 1970.

16 *Ibid*, Art 347.

17 *Ibid*.

18 *Ibid*, Art 351.

19 *Ibid*.

20 See n 13 above, Art 52.

Actividades Conexas, Legitimación de Capitales y Financiamiento de Terrorismo).²¹ Specifically, a prison term of three to ten years applies to public officials who seek the impunity or evasion of a person subject to investigation, indicated or convicted for any of the offences established under Law No 8204.²² If the public officials involved are judges or prosecutors, the harsher penalty of a prison term of eight to 20 years applies.²³

Reporting an allegation

Criminal proceedings against ordinary judges can be initiated by three bodies:

THE PUBLIC PROSECUTOR OFFICE

Criminal proceedings against ordinary judges can be initiated by the Public Prosecutor Office (Ministerio Público) upon it receiving a complaint by private citizens or by its own initiative.²⁴ Moreover, the action can be initiated by the Public Prosecutor Office, following information received by the police.²⁵ Once police officers of the Judicial Investigation Body are informed of public action crimes, they have six hours to inform the Office of the Public Prosecutor, from their first intervention.²⁶ Under the direction and control of the Public Prosecutor in charge of the investigation, they will conduct the preliminary investigative steps with urgency in order to gather sufficient evidence and prevent suspects from escaping or hiding.²⁷

GENERAL ATTORNEY'S OFFICE OF THE REPUBLIC

Criminal proceedings against ordinary judges can be initiated by the General Attorney's Office of the Republic (Procuraduría General de la República). In 2002, Law No 8242 established the Attorney's Office of Public Ethics (Procuraduría de la Ética Pública), the anti-corruption organ of the General Attorney's Office of the Republic, which has the competency to initiate criminal action upon receiving a complaint by private citizens²⁸ and by its own initiative.²⁹ Upon receiving a complaint, the Attorney's Office of Public Ethics carries out a preliminary investigation followed by a report. This report is given to the superior of the investigated public official who, alone, has the power to initiate the administrative process, despite whatever conclusions the Attorney's Office of Public Ethics report may make.³⁰

GENERAL COMPTROLLER'S OFFICE OF THE REPUBLIC

Criminal proceedings against ordinary judges can be initiated by the General Comptroller's Office of the Republic (Contraloría General de la Republica) upon it receiving a complaint by private citizens.³¹

21 Reforma integral Ley sobre estupefacientes, sustancias psicotrópicas, drogas de uso no autorizado, actividades conexas, legitimación de capitales y financiamiento al terrorismo, Ley No 8204 de 26 de diciembre de 2001, Art 62.

22 *Ibid.*

23 *Ibid.*

24 Código Procesal Penal, Ley No 7594 de 10 de abril de 1996, Art 16.

25 *Ibid.*, Art 283.

26 *Ibid.*

27 *Ibid.*

28 See n 10 above.

29 See n 24 above, Art 16.

30 See n 12 above.

31 'Denuncias Electrónicas de la Contraloría General de la República' <https://cgrw01.cgr.go.cr/apex/f?p=233:9> accessed 3 March 2020.

When allegations of corruption regard judges of the Supreme Court (and members of the Supreme Powers), the criminal action is initiated by the Public Prosecutor Office.³²

Investigation

The investigation of crimes in Costa Rica is under the responsibility of the Public Prosecutor's Office.³³

GENERAL PROCEDURE FOR PUBLIC ACTION CRIMES

For public action crimes generally, the Public Prosecutor's Office is appointed to lead the investigation and instruct the Judicial Investigation Body (Organismo de Investigación Judicial or OIJ) to undertake necessary investigative actions.³⁴ The Judicial Investigation Body is responsible for the police and is an auxiliary body of the Supreme Court. Any investigative action undertaken by the Judicial Investigation Body must be reported to the supervising prosecutor.³⁵ These actions may include search and seizure of evidence,³⁶ questioning witnesses,³⁷ seizure of communications³⁸ and the appointment of experts to analyse evidence.³⁹ Coercive measures, such as search, seizure and interception, require judicial approval.⁴⁰

At the completion of the investigation, the Public Prosecutor's Office must evaluate the evidence and decide whether to proceed to indictment or terminate the investigation.⁴¹ The investigation concludes when the prosecutor considers that no offence has been committed, the offence was not committed by the accused, a justification or defence applies, the statute of limitations expires, or the evidence is insufficient and there is no possibility of obtaining additional evidence.⁴² The decision to terminate an investigation is subject to judicial approval by a judge of the Criminal Court.⁴³

SPECIALISED UNIT FOR PUBLIC ACTION CRIMES OF CORRUPTION ALLEGEDLY COMMITTED BY PUBLIC OFFICIALS

When a crime of corruption is allegedly committed by a public official (including judges), the Anti-Corruption Unit of the Public Prosecutor's Office (Fiscalía Adjunta de Probidad, Transparencia y Anticorrupción) is responsible for its investigation.⁴⁴ The Anti-Corruption Unit was created by Circular 03-PPP-2010, which is within the Public Prosecutor's Office (Fiscalía General de la República). Its objective is to 'promote transparency, integrity, and good practice within the Public Prosecutor's Office, carry out the regime for disciplinary misconduct and promote the criminal prosecution of crimes of corruption'.⁴⁵

32 See n 24 above, Art 392.

33 Ley Orgánica del Organismo de Investigación Judicial, Ley No 5524 de 7 de mayo de 1974, Art 3.

34 See n 24 above, Art 283.

35 *Ibid*, Art 288.

36 *Ibid*, Arts 198, 199 and 286.

37 *Ibid*, Art 286.

38 *Ibid*, Art 201.

39 *Ibid*, Art 213.

40 *Ibid*, Art 277.

41 *Ibid*, Arts 297 and 303.

42 *Ibid*, Art 311.

43 *Ibid*, Arts 299 and 301.

44 UN Office on Drugs and Crime (18 April 2012) re FAPTA-361-2012 www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2013-August-26-28/Responses_NV/CostaRica_SP.pdf accessed 3 March 2020.

45 Fiscalía General de la República, 'Circular Administrativa 03-PPP 2010' https://ministeriopublico.poder-judicial.go.cr/documentos/Documentos_2018/Circulares/PPP/03-PPP-2010.pdf accessed 3 March 2020.

Its function, *inter alia*, is to investigate as well as prosecute criminal acts of corruption committed by public servants of the Public Prosecutor's Office, officials of the Judicial Investigation Body, judges and other public officials.⁴⁶

The Anti-Corruption Unit has nationwide jurisdiction to exercise its functions over corruption cases, although it operates in a centralised manner in the city of San José. Given the impact of judicial corruption on society, the Anti-Corruption Unit prioritises the investigation and prosecution of white-collar servants (eg, judges) that, owing to their privileged status, might fall outside the prosecution's reach, followed by organised crime through the exercise of a public function and crimes that cause general harm to public assets or interests.⁴⁷

SPECIAL PROCEDURE FOR CRIMES OF CORRUPTION BY MEMBERS OF THE SUPREME POWERS (SUPREMOS PODERES)

The Public Prosecutor's Office is responsible for investigating members of the Supreme Powers,⁴⁸ including judges of the Supreme Court,⁴⁹ as stipulated in Title V of the Criminal Procedure Code.⁵⁰ The initial investigation is conducted by the Attorney-General of the Public Prosecutor's Office personally.⁵¹ The Attorney-General will gather the necessary information to press charges or request dismissal before the Supreme Court.⁵² The Supreme Court can dismiss the charges if the acts substantiating the claim do not constitute a crime, or if the accused does not have immunity (*derecho de antejuicio*).⁵³ If a judge does have *derecho de antejuicio*, the Supreme Court will send the accusation to the Legislative Assembly. The Legislative Assembly is the body in charge of authorising the continuation of the process.⁵⁴

Following parliamentary authorisation and a Supreme Court vote to lift criminal immunity, the Third Chamber of the Supreme Court (also known as the Criminal Chamber of the Supreme Court) will instruct one of its judges to perform further investigative actions that must be carried out before the trial is held.⁵⁵

Note that the aforementioned procedure is not applicable to substitute judges of the Supreme Court.⁵⁶

Criminal prosecution

The prosecution of crimes in Costa Rica is under the responsibility of the Public Prosecutor's Office.⁵⁷

46 *Ibid*, para 7(7).

47 Ley de Creación de la Fiscalía Penal de Hacienda y de la Función Pública, Ley No 8221 de 8 de marzo de 2002.

48 See n 24 above, Art 392.

49 'Los salarios de los miembros de los supremos poderes' *La Nación* (15 May 2010) www.nacion.com/archivo/los-salarios-de-los-miembros-de-los-supremos-poderes/MRBMRY2GOFBQZGLGO6N7UJ3NTM/story accessed 3 March 2020. This article confirms that Supreme Court judges are members of the Supreme Powers.

50 See n 24 above, ch v.

51 Ley Orgánica del Ministerio Público, Ley No 7442 de 25 de octubre de 1994 Art 25(j); see n 24 above, Art 394.

52 *Ibid*.

53 See n 24 above, Art 395.

54 *Ibid*, Arts 396, 397 and 398.

55 *Ibid*, Arts 397 and 398.

56 *Ibid*, Art 401.

57 *Ibid*, Section III; see n 33 above, Art 3 clarifies the investigation functions of the police.

In addition to investigative duties, the Anti-Corruption Unit of the Public Prosecutor's Office is also responsible for the prosecution of a crime of corruption allegedly committed by a public official (including judges).⁵⁸

SPECIAL PROCEDURE FOR CRIMES OF CORRUPTION BY MEMBERS OF THE SUPREME POWERS (SUPREMOS PODERES)

The Public Prosecutor's Office is responsible for prosecuting members of the Supreme Powers,⁵⁹ including judges of the Supreme Court,⁶⁰ as stipulated in Title V of the Criminal Procedure Code.⁶¹ The accused judge is given three days to appoint a defence lawyer and designate a location to receive court notifications. The accused's statement will be taken within the same timeframe. The instructed judge will grant the accused judge a hearing for the provision of evidence for the trial within five days, subsequently issue a decision based on the evidence, and set the time for the oral and public trial.⁶²

Note that the aforementioned procedure is not applicable to substitute judges of the Supreme Court.⁶³

ISSUES IDENTIFIED IN THE INVESTIGATION AND PROSECUTION PROCEDURES

The effectiveness of the investigation and prosecution procedures is affected by two challenges: a lack of specialised police and an inexpedient criminal process. First, in 2018, the Superior Council decided not to extend the appointment of nine specialised experts to investigate important corruption cases.⁶⁴ The Judicial Investigative Body has recently submitted a complaint to the Attorney-General in this regard.⁶⁵ Second, the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery report provides that Costa Rica has been criticised for its 'slow judicial process with criminal cases taking an average of one year to proceed from indictment to trial'.⁶⁶ There are no fixed deadlines for the judicial process, rather the term 'reasonability' is relied on to fix a timeline.⁶⁷

LIMITATION PERIOD

General provisions regulating the statute of limitations for criminal proceedings apply to cases of corruption in which judges (including judges of the Supreme Court) are involved.⁶⁸ In particular, for crimes punishable with imprisonment, the criminal action shall be initiated within a period of time equal to the maximum sanction applicable to the offence.⁶⁹ In any case, the limitation period shall have

58 See n 44 above.

59 See n 24 above, Art 392.

60 See n 49 above.

61 See n 24 above, ch v.

62 *Ibid*, Art 398.

63 *Ibid*, Art 401.

64 Pablo Rojas, 'Corte deja al OIJ y Fiscalía sin peritos dedicados a investigar el cementazo e Infoccop' (2018) www.crhoy.com/nacionales/corte-deja-al-oij-y-fiscalia-sin-peritos-dedicados-a-investigar-el-cementazo-e-infocoop accessed 15 October 2018.

65 *Ibid*.

66 OECD, *Phase 1 Report on Implementing the OECD Anti-bribery Convention in Costa Rica* (June 2017) Art 66 www.oecd.org/corruption/anti-bribery/Costa-Rica-Phase-1-Report-ENG.pdf accessed 3 March 2020.

67 Alexander Rodriguez (Nicaraguan lawyer) quoted in Costa Rica: 'Why is the Costa Rica judicial process so slow compared to Nicaragua?' Q Costa Rica News (8 July 2016) <https://qcostarica.com/why-is-the-costa-rica-judicial-process-so-slow-compared-to-nicaragua> accessed 3 March 2020.

68 See n 24 above, Art 31.

69 *Ibid*.

a minimum term of three years and shall not exceed ten years.⁷⁰ It is important to notice that, when the offence is committed by a public official in the exercise of his/her duty, the limitation period is suspended as long as he/she continues to perform a public function and a criminal proceeding has not been initiated against him/her.⁷¹

BURDEN AND STANDARD OF PROOF

Pursuant to the principle of the presumption of innocence, the burden of proof is on the prosecutor.⁷² Consistently with this principle, when there is uncertainty over the interpretation of factual matters, the most favourable scenario for the accused person shall apply.⁷³ Moreover, pending the declaration of culpability, public authorities shall not represent a person as guilty or provide any information related to his/her guilt or innocence.⁷⁴

JURISDICTION AND CHANGE OF VENUE

Jurisdictional matters for ordinary judges

The Criminal Tribunal of Taxation and Public Administration (Juzgado Penal de Hacienda y la Función Pública) and the Criminal Court of Taxation and Public Administration (Tribunal Penal de Hacienda y la Función Pública) constitute the Criminal Jurisdiction of Taxation and Public Administration. The jurisdiction covers crimes performed in public office.⁷⁵ Both the Criminal Tribunal and Criminal Court are located in the Second Judicial Circuit of San José.⁷⁶

The Criminal Tribunal is involved in the preparatory and intermediate phases of criminal proceedings.⁷⁷ First, in the so-called ‘preparatory phase’, the Criminal Tribunal carries out a series of judicial procedures in order to monitor compliance with the principles and guarantees established in the constitutional and criminal procedural legislation.⁷⁸ It shall also carry out any such investigative actions that cannot be carried out subsequent to the trial.⁷⁹ In the ‘intermediate phase’, the judge of the Criminal Tribunal shall evaluate the merits of the case to determine whether it should be tried in the Criminal Court.⁸⁰

Appeals against the decisions made by the Criminal Tribunal in the preparatory and intermediate phases are heard by the Criminal Court.⁸¹ An appellant can appeal measures, such as preventative

70 *Ibid.*

71 *Ibid.*, Art 34.

72 *Ibid.*, Art 9.

73 *Ibid.*

74 *Ibid.*

75 Creación de la Jurisdicción Penal de Hacienda y de la Función Pública, Ley No 8275 de 6 de mayo de 2002, Art 1.

76 Organization of American States (OAS), *Cuestionario en relación con la disposición de la Convención Interamericana contra la Corrupción seleccionada para ser analizada en la cuarta ronda y para el seguimiento de las recomendaciones formuladas en la primera ronda* (24 August 2012), para 42 www.oas.org/juridico/PDFs/mesicic4_cri_juris.pdf accessed 3 March 2020.

77 LOPJ, Ley No 8 de 29 de noviembre de 1937, Art 107.

78 See n 24 above, Art 277.

79 Francis Sánchez Fallas, ‘La tramitación de procesos penales’ (2009) https://escuelajudicialpj.poder-judicial.go.cr/Archivos/bibliotecaVirtual/tecnicasJudiciales/2_proceso%20penal.pdf, 56 accessed 3 March 2020.

80 *Ibid.*, 57.

81 *Ibid.*, 70.

detention and other cautionary measures.⁸² Following the positive determination of merit by the Criminal Tribunal, the Criminal Court has the jurisdiction to hear the case in the first instance, as established by Law No 8275.⁸³

Jurisdictional matters for judges of the Supreme Court

The Criminal Chamber of the Supreme Court has the competency to hear and decide over crimes committed by judges of the Supreme Court in the exercise of their function, acting as a first instance court for such cases.⁸⁴ The indicted judges of the Supreme Court can appeal an adverse decision to the Plenary Session of the Supreme Court (Corte Plena), when all members of the Supreme Court assemble.⁸⁵ Note that the aforementioned procedure is not applicable to substitute judges of the Supreme Court.⁸⁶

Issues identified in jurisdictional matters for ordinary judges

There are a number of challenges regarding accessing justice flow from the centralised operation of the Criminal Tribunal and Criminal Court. As mentioned, both are located in the city of San José.⁸⁷ At a basic level, requiring persons to displace themselves to the capital city impacts the swift resolution of cases.⁸⁸ Moreover, the lack of regional counterparts hinders the investigation process of crimes performed outside San José and obstructs the quick transfer of witnesses that come from other parts of the country.

Change of venue

From a criminal perspective, the general provisions governing change of venue contained in the Criminal Procedure Code apply to a criminal procedure against members of the judiciary. Any judge must excuse himself or herself from knowing a particular matter when, before a process begins, he or she has been denounced or accused by any of the parties, unless subsequent circumstances show harmony between them (Article 55 f of the Criminal Procedure Code). In any case, a judge must excuse himself or herself from a particular matter whenever he or she has a direct interest in the outcome of the process (Article 55 a of the Criminal Procedure Code).

According to Article 57 of the Criminal Procedure Code, any of the parties has the right to challenge a particular judge if it believes there is a cause for which he or she should have excused himself or herself.

82 See n 24 above, Art 256.

83 Creación de la Jurisdicción Penal de Hacienda y de la Función Pública, Ley N° 8275 de 6 de mayo de 2002.

84 See n 24 above, Art 397.

85 *Ibid*, Art 399.

86 *Ibid*, Art 401.

87 Gustavo Carrillo Ugalde and Diego Rodríguez Muñoz, 'La jurisdicción penal de hacienda y de la función pública, un obstáculo para el ciudadano: eliminación de la especialidad o regionalización de los conflictos' (Universidad de Costa Rica, octubre 2014) <http://ijj.ucr.ac.cr/wp-content/uploads/bsk-pdf-manager/2017/06/La-Juridicci%C3%B3n-Penal-de-Hacienda-y-de-la-Func%C3%B3n-P%C3%ABlica-Un-Obst%C3%A1culo-Para-El-Ciudadano-Eliminaci%C3%B3n-de-La-Especialidad-o-Regionalizaci%C3%B3n-De-los-Conflictos.pdf> accessed 3 March 2020.

88 *Ibid*.

Article 340 of the Criminal Code prohibits bribery within the exercise of official functions. The violation of this law can lead to a prison sentence of six months to two years or one to five years for an official who grants a post in public office in exchange for a bribe. The same prison sentence is given to those who accept bribes when they are acting in their official roles.⁸⁹ The public servant who commits this crime would also be disqualified from office.⁹⁰

Bribery is sanctioned more harshly when members of the judiciary are involved. A judge is guilty of bribery if he or she accepts the promise of or receives a gift or an advantage once he or she favours or impairs a part of a process or ruling (even if this is an administrative process). If the unjust ruling made by the bribed judge concerned a criminal conviction with a prison term of more than eight years, then the judge faces four to eight years' imprisonment.⁹¹

APPEALS

Appeals against decisions made in the Criminal Court of Taxation and Public Administration are heard by the Appeals Court of the Criminal Decisions (Tribunales de Apelación de la Sentencia Penal).⁹² If the appealing party pleaded non-conformity with the established facts, assessment and incorporation of evidence, legal arguments or determination of punishment, the Appeals Court carries out a comprehensive examination of the original judgment.⁹³ Finally, the highest level of the appeals procedure is the Third Chamber of the Supreme Court, which has the jurisdiction to hear cases on appeal from the Appeals Court.⁹⁴

For Supreme Court judges, appeals from the Third Chamber of the Supreme Court (which is the court of first instance for Supreme Court judges) are heard by the Plenary Session of the Supreme Court.⁹⁵ The judges who decided the case at the Third Chamber level are substituted in the Plenary Session of the Supreme Court.⁹⁶

Cases

With regards to data related to 2016 cases, one corruption case against a judge was investigated by the Anti-Corruption Unit. The reason the timeframe for case analysis is limited to these two years is because the concept of judicial integrity is fairly new in Costa Rica and did not manifest itself prominently in prior years.

89 See n 15 above, Art 341.

90 LOPJ Arts 191 and 195.

91 See n 15 above, Art 344.

92 See n 24 above, Título III ch III.

93 *Ibid.*

94 See n 83 above, Art 2; LOPJ Art 56(2).

95 LOPJ Art 59(17); see n 24 above, Art 399.

96 See n 24 above, Art 399.

Rosa Elena Gamboa was a superior court judge in the Limón region who was arrested in May 2014 by the police of the Judicial Investigation Body.⁹⁷ Gamboa was linked to ‘questionable rulings’ involving alleged drug traffickers in 2011 and 2012. According to Chief Public Prosecutor Jorge Chavarría, the Public Prosecutor’s Office had been investigating Gamboa for three years. Prosecutors accused Gamboa of intervening in drug traffickers’ cases and reversing a lower court judge’s ruling on preventive measures.⁹⁸

Ultimately, Gamboa was sentenced to 14 years in prison by a Goicoechea courtroom for attempted graft and violation of drug laws.⁹⁹ Her conviction exemplifies the cross section of criminal sanctions, but it is unclear whether disciplinary action preceded her conviction.

Ex-judge Gamboa’s arrest and conviction is, however, an exception. The lack of funding precludes the Costa Rican system of oversight from pursuing most cases of suspected corruption.¹⁰⁰ Agencies like the OIJ do not have access to the resources necessary to conduct timely investigations and obtain appropriate convictions; in fact, much of Costa Rican corruption has been uncovered by organisations independent from the government, like the newspaper *La Nación*, which has exposed several scandals involving public officials.¹⁰¹ This discrepancy in effectiveness stems from funding and the increasingly international nature of corruption, notably cross-border drug operations.¹⁰²

EX-PRESIDENT OF THE SUPREME COURT, CARLOS CHINCHILLA

The former President of the Costa Rican Supreme Court, Carlos Chinchilla, resigned from his position in the judiciary in July 2018 in the wake of investigations indicating that he and several other judges were corrupt.¹⁰³ The group of judges allegedly dismissed a case against legislators who influenced peddling by Chinese importers – a case known as the ‘*cementazo*’.¹⁰⁴

In regards to disciplinary sanctions, 12 former colleagues and members of the court ruled in favour of sanctioning the four judges for ‘serious misconduct’, which would lead to the offenders’ dismissal from their judiciary positions.¹⁰⁵ Carlos Chinchilla resigned from his post after the Plenary Session of the Supreme Court presented this decision.¹⁰⁶ Criminal charges were not pursued, and Chinchilla was permitted to resign from his office.

97 M Boddiger, ‘Top Limón judge arrested on suspicion of collaborating with drug traffickers’ (Tico Times, 16 May 2014) <https://ticotimes.net/2014/05/16/top-limon-judge-arrested-on-suspicion-of-collaborating-with-drug-traffickers> accessed 3 March 2020.

98 *Ibid.*

99 *Ibid.*

100 Bruce M Wilson, ‘Costa Rica’s Anti-Corruption Trajectory: Strengths and Limitations’ (December 2013) German Institute of Global and Area Studies.

101 *Ibid.*, 23.

102 *Ibid.*, 24.

103 Alberto Font, ‘Supreme Court president steps down amid corruption scandal’ (Tico Times, 16 July 2018) <https://ticotimes.net/2018/07/16/supreme-court-president-resigns-over-corruption-scandal> accessed 3 March 2020.

104 *Ibid.*

105 *Ibid.*

106 ‘Cuatro magistrados aspiran a liderar Corte’ *La Nación* (31 July 2018) <https://advance.lexis.com/document/?pdmfid=1000516&crd=72867196-a85b-4a97-96ce-7d4a79fd473&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5T1F-37S1-JBJH-J1X2-00000-00&pddocid=urn%3AcontentItem%3A5T1F-37S1-JBJH-J1X2-00000-00&pdcontentcomponentid=323559&pdteaserkey=sr22&pditab=allpods&ecomp=1yrLk&earg=sr22&prid=4ddda4af05b2-4142-93fd-ae2f2f17510f> accessed 3 March 2020.

Disciplinary proceedings

The disciplinary regime derives its jurisdiction to sanction violations performed in the exercise of a public function from Resolution 1265-95, issued by the Constitutional Chamber.¹⁰⁷ Its objective is to preserve the organisation of the Public Administration through the imposition of sanctions.¹⁰⁸ There is also a Code of Judicial Ethics, approved in 2000.¹⁰⁹

Misconduct by judges

There are two types of disciplinary proceedings, one concerning ordinary judges and other members of the Judicial Power (including public servants from the Judicial Investigative Body and Public Defence, Prosecution Powers). The other type of disciplinary proceedings is applicable to judges of the Supreme Court and other members of the Supreme Powers (including the General Prosecutor, the Deputy General Prosecutor, the Director and Subdirector of the Judicial Investigation Body, members of the Superior Council and the Judicial Inspection Court).

The disciplinary regime is found in Title VIII of the LOPJ.¹¹⁰ In general, the Judicial Inspection Court (Tribunal de la Inspección Judicial) is the body responsible for exercising the disciplinary regime,¹¹¹ although the LOPJ grants six other entities the powers do the same, in practice, each being involved in different stages of the proceedings in respect of members of the judiciary.¹¹² These include the Superior Council, Prefectures, Plenary Session of the Supreme Court, Executive Direction, President of the Supreme Court, and judges.¹¹³ Moreover, three specialised bodies, including Internal Affairs of the Judicial Investigation Body, Fiscal Inspection of the Public Prosecutor's Office and Disciplinary Supervision of the Public Defence, have jurisdiction over constituent members of their respective bodies.¹¹⁴

The LOPJ establishes certain prohibitions, as well as a list of what is considered to be misconduct, which encompasses judicial corruption.¹¹⁵ Accordingly, Article 9(9) of the LOPJ prohibits every employee of the Judicial Branch from receiving any type of remuneration from parties to a judicial process for activities related to the exercise of his or her judicial function.¹¹⁶ Moreover, Article 191(7) of the LOPJ considers the commission of a malicious criminal offence, either committed as a perpetrator or accomplice, as a form of gross misconduct.¹¹⁷

107 See n 2 above, 102.

108 *Ibid.*

109 Código de ética judicial, Reglamento 9 de 28 de febrero de 2000.

110 Law No 8 of 29 November 1937 and subsequent reforms as of Law No 7333 of 5 May 1993 www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=33635&nValor3=114826¶m2=5&strTipM=TC&lResultado=42&strSim=simp accessed 3 March 2021.

111 LOPJ Art 184.

112 See n 2 above.

113 *Ibid.*

114 *Ibid.*

115 LOPJ Art 9(9), and see Arts 190–196.

116 LOPJ.

117 *Ibid.*, Art 191(7).

Making a complaint

The disciplinary process can be initiated by the competent bodies through their own initiative or following public complaints.¹¹⁸ Such complaints can be submitted to the Judicial Inspection Court directly through an online form.¹¹⁹ Moreover, citizens can complain to the Judicial Power Services Comptroller's Office, which coordinates proceedings with the Judicial Inspection Court.¹²⁰

Investigation

Investigating the misconduct of judges is the responsibility of one of the three General Inspectors of the Judicial Inspection Court.¹²¹ The powers of the inspection body include:¹²²

- receiving complaints and verifying them;
- raising complaints to the Superior Council;
- investigating various irregularities related to judicial figures; and
- using witnesses and experts in order to obtain proof.

Once the complaint has been submitted, the case will be assigned to one of the General Inspectors who will carry the role of investigating judge. Before initiating the disciplinary proceedings, the instructed body must carry out a preliminary investigation to gather the necessary elements that may substantiate a possible violation.¹²³ At the initiation of the investigation, the investigating judge notifies the accused of the facts and either requests a report from the accused or receives a testimony without the accused being sworn in.¹²⁴ After initiating the investigation, the accused has five days to provide exonerating evidence.¹²⁵ After finishing the investigation the accused has three days to present his/her defence.¹²⁶

Disciplinary proceedings

TRANSPARENCY OF INFORMATION

In 2017, Costa Rican legislators passed Decree CR0025 for Transparency and Access to Public Information as part of their second Action Plan 2015–2017.¹²⁷ Following the approval of four decrees and five directives aimed at achieving greater transparency, access to information saw an improvement

118 Yaruma Vásquez Carrillo, 'The State of Justice second report: The disciplinary regime and judicial power in the face of corruption challenges' (trs., The State of Justice, March 2017). www.dplf.org/sites/default/files/1196715002_0.pdf accessed 3 March 2020.

119 See <https://inspeccionjudicial.poder-judicial.go.cr/index.php/denuncias/formulariodenunciasinspeccionjudicial> accessed 3 March 2020.

120 See n 118 above.

121 LOPJ Arts 198, 200 and 203.

122 *Ibid*, Art 188; <https://inspeccionjudicial.poder-judicial.go.cr/index.php/quienessomos/funciones> accessed 3 March 2021.

123 <https://unmejorpj.poder-judicial.go.cr/Documentos/RegimenDisciplinario/Guia-General-Procedimeinto-Sancionatorio-Disciplinario-Administrativo.pdf> accessed 3 March 2020, Guía General: Procedimineto Disciplinario Administrative en el Poder Judicial' (San José 2017) by República de Costa Rica Poder Judicial.

124 *Ibid*, Art 200.

125 *Ibid*, Art 398.

126 *Ibid*.

127 Decreto de Transparencia y Acceso a la Información Pública (CR0025) www.opengovpartnership.org/members/costa-rica/commitments/CR0025 accessed 3 March 2020.

during the second year of implementation.¹²⁸ Public institutions, including the Judicial Power, published a greater amount of information.¹²⁹

LIMITATION PERIOD

Article 211 of the LOPJ lists different time limits for each one of the three stages of the disciplinary proceedings. The statute of limitations for initiating the investigation, the first stage of the disciplinary process, is one month from the moment at which the matter is brought to the attention of the person in charge of the investigation.¹³⁰ Subsequently, the investigation, the second stage, needs to be concluded within a year.¹³¹ If it leads to a sanction, the sanction, comprising the third stage, will need to be enforced a month after conclusion.¹³²

Issues identified

The first stage of the disciplinary proceedings, regarding the initiation of proceedings, is ambiguous. It is unclear whether the deadline qualifies as a prescription period or an expiry date. The legal consequences of each of these legal concepts are different. They have in common that they limit the power to impose penalties. However, the differences are that: (1) the expiry dates are shorter; (2) the expiry date can be declared ex officio, while the prescription period must be alleged by the interested party; and (3) the expiry date cannot be interrupted or suspended, while the prescription period can. Determining which one of these legal concepts is contained in Article 211 of the LOPJ will have direct consequences on how these cases are processed. For example, there are several situations in which the proceeding is usually suspended. This would not be possible if the expiry date was applicable to the case.

In 2016, the Legal Direction of the Judicial Power (Dirección Jurídica del Poder Judicial 2016) pointed out that the time begins to run once the competent body has precise, true and exact information on the facts that are going to be reviewed (it must have all necessary elements to transfer the charges).¹³³ If a preliminary investigation to decide whether or not to initiate the disciplinary proceedings is necessary, the inquiry time does not count as part of the prescription period.¹³⁴ This is because the competent disciplinary body does not yet have complete and full knowledge of the offence. The Supreme Court agreed with this criteria, but some specialised courts were not in agreement. They argued that the initiation of the proceedings is subject to the expiry date and not the prescription period. In order to resolve this matter, several experts have suggested having a single deadline consisting of a year.¹³⁵ This would encompass the whole process, including the preliminary investigation. In other words, the different states would not be defined by a timeline.

Interviewees for the present case study identified the high volume of expired disciplinary proceedings to be one of the most important challenges the Judicial Inspection Court faces.¹³⁶

128 Mecanismo de Revisión Independiente: Informe de fin de término de Costa Rica 2015-2017, autor: Israel Aragón Matamoros www.opengovpartnership.org/wp-content/uploads/2018/06/Costa-Rica_End-of-Term_Report_2015-2017.pdf accessed 3 March 2020.

129 *Ibid.*

130 LOPJ Art 211.

131 *Ibid.*

132 *Ibid.*

133 Dirección Jurídica del Poder Judicial 2016, as cited in II Informe Estado de la Justicia ed 2017, p 118.

134 *Ibid.*

135 The State of Justice is research undertaken by the State of the Nation Programme.

136 The State of the Nation Programme, 'The State of Justice second report' (trs, 2nd edn, 2017) c 2: 'The judicial government' <https://estadonacion.or.cr/informes> accessed 3 March 2020 II Informe Estado de la Justicia (Programa Estado de la Nación, ed).

In case of doubt, the disciplinary body must rule in favour of the public servant and dismiss and file the case. Therefore, the inspector in charge of the preliminary investigations carries the burden of proof.¹³⁷

In the event where the reported facts of the investigation lead to a suspension or dismissal, or there are substantial grounds for fear of obstruction of the investigation if the public servant remains in his or her office, the Judicial Inspection Court could temporarily suspend the accused judicial officer(s) from their respective post for a maximum of three months.¹³⁸

JURISDICTION AND CHANGE OF VENUE

Once the investigation procedure concludes, the file is transferred to the rest of the General Inspectors of the Judicial Inspection Body, who have three days to study it. They have five days to make a decision.¹³⁹

Enforcing the measures against ordinary judges and other public servants

The Corte Plena has the discretion to exercise disciplinary measures in cases involving ordinary judges who have allegedly delayed or seriously erred in the administration of justice.¹⁴⁰

The Judicial Inspection Court exercises the measures on all other judicial servants, except for those exclusively covered by the Supreme Court.¹⁴¹

The Prefectures have the jurisdiction to exercise the measures in cases involving all errors punishable by sanctions, such as a reprimand, written reprimand and unpaid suspension of up to 15 days, except for cases covered by the Judicial Inspection Court and Supreme Court.¹⁴²

Enforcing the measures against judges of the Supreme Court

The Supreme Court has the competency to enforce the disciplinary regime in cases involving judges of the Supreme Court.¹⁴³ A member of the Supreme Court will be appointed as the instructed body. Sanctions including reprimands and written reprimands will require a simple majority vote from the total number of its members.¹⁴⁴ The suspension of any particular judge of the Supreme Court will require the endorsement of two-thirds of the total number of judges of the Supreme Court. If two-thirds of the total number of judges of the Supreme Court consider that what is appropriate is the revocation of the appointment (ie, dismissal), the court will inform the Legislative Assembly, and the assembly will be the body who will resolve what corresponds.¹⁴⁵

137 LOPJ Art 203.

138 *Ibid*, Art 202.

139 *Ibid*, Art 206.

140 *Ibid*, Art 199.

141 *Ibid*, Art 184; <https://unmejorpj.poder-judicial.go.cr/Documentos/RegimenDisciplinario/Guia-General-Procedimeto-Sancionatorio-Disciplinario-Administrativo.pdf> accessed 3 March 2020, Guía General: Procedimeto Disciplinario Administrative en el Poder Judicial' (San José 2017) by República de Costa Rica Poder Judicial.

142 LOPJ Art 185.

143 *Ibid*, Art 182.

144 *Ibid*.

145 *Ibid*.

By comparison, in cases involving violations committed by the Superior Council and the Judicial Inspection Court, the Supreme Court will also have competency to exercise the disciplinary measures.¹⁴⁶ In cases involving the Deputy General Prosecution, and Director and Subdirector of the Judicial Investigation body, the disciplinary measures will also be exercised by the Supreme Court, although the instructed body in these cases will be the Judicial Inspection Body.¹⁴⁷

Change of venue

From a disciplinary point of view, and in the absence of an express rule, a change of venue is governed by the Civil Procedure Code (Article 31 of the LOPJ). However, the LOPJ contains several provisions governing the reasons why a judge must excuse himself or herself from a case, or otherwise, challenged by any of the parties. The consequence stays the same. The judge will be removed from the case and substituted. If a judge, for whatever reason, has had to separate himself or herself from taking a case, the LOPJ contemplates a mechanism that governs the substitution of one judge for another.

The timing of the change of venue is more complex. Article 205 of the LOPJ states that if during the processing of a disciplinary complaint against a member of the judiciary, other facts arise that may lead to the application of the disciplinary regime against that same member or any other, a new procedure must be initiated. The legal proceedings will be consolidated as long as it concerns the same civil servant and does not entail a serious delay in the processing of the initial complaint.

Finally, in a disciplinary process, a judge is not required to recuse himself or herself if the proceeding is against a colleague.¹⁴⁸

SANCTIONS

There are three kinds of disciplinary misconduct,¹⁴⁹ each with corresponding sanctions whose imposition is left to the discretion of the judge.¹⁵⁰ Minor misconduct is punishable by a reprimand and written reprimand.¹⁵¹ Serious misconduct is punishable by a written warning and unpaid suspension of up to two months.¹⁵² Gross misconduct is punishable by unpaid suspension until the revocation of appointment (ie, dismissal).¹⁵³ Judicial corruption may constitute a very severe offence if it is proven that a crime has been committed.¹⁵⁴ The offender is therefore subject to a correspondingly severe penalty.

Article 28 of the LOPJ also prescribes a list of ‘behaviours’ that lead to removal from office.¹⁵⁵ Examples of these are incorrect behaviour in one’s private life and loss of essential conditions to perform duties.¹⁵⁶ In addition, Article 194 of the LOPJ establishes the possibility to punish any other infringement or negligence in the performance of duties.

146 *Ibid*, Art 183.

147 *Ibid*, Art 182.

148 *Ibid*, Art 212.

149 *Ibid*, Arts 190–196, specifically 195.

150 See n 2 above, 121.

151 LOPJ Arts 190–196, specifically 195.

152 *Ibid*.

153 *Ibid*.

154 *Ibid*, Art 191.

155 *Ibid*, Art 28.

156 *Ibid*.

Issues identified

While the LOPJ classified the sanctions relevant to each kind of misconduct, the Law against Corruption and Illicit Enrichment in Public Office does not categorise the gravity of the punishable acts. In turn, the disciplinary body can apply different measures established in either Law. Owing to the imprecision of the nomenclature of the errors, similar misconduct may be interpreted, classified and addressed in different ways by different judges.¹⁵⁷

APPEALS

For ordinary judges, the decision of the Judicial Inspection Court is appealable before the Superior Council, which is the second instance body.¹⁵⁸ By contrast, decisions made by the Supreme Court over judges of the Supreme Court cannot be appealed.¹⁵⁹ See Figure 2.¹⁶⁰

Figure 2. Entities with disciplinary power in the Judicial Power.¹⁶¹

Órganos con potestades disciplinarias en el Poder Judicial

Organo disciplinario	Competencia	Apelación ante
Tribunal de la Inspección Judicial	Todos los servidores del Poder Judicial, y segunda instancia para casos específicos	Consejo Superior ¹⁵⁷
Jefatura de oficina	Faltas cuya sanción no exceda una suspensión de quince días	Tribunal de la Inspección Judicial
Juez	Dentro del proceso judicial	Tribunal de la Inspección Judicial
Dirección Ejecutiva	Sobre el personal de la Dirección Ejecutiva y jefaturas de las dependencias subordinadas	Tribunal de la Inspección Judicial
Consejo Superior	Funge como segunda instancia de los resuelto por el TIJ	No hay posibilidad de apelación
Corte Plena ¹⁵⁸	Sobre Corte Plena, Consejo Superior, TIJ, Fiscal General Adjunto, Dirección y Subdirección del OIJ	No hay posibilidad de apelación
Presidencia de la Corte	Sobre el personal de su despacho	Consejo Superior
Asuntos Internos OIJ	Sobre el personal del OIJ, por faltas cuya sanción no exceda una suspensión de quince días	Tribunal de la Inspección Judicial
Inspección Fiscal MP	Sobre el personal del MP, por faltas cuya sanción no exceda una suspensión de quince días	Tribunal de la Inspección Judicial
Supervisión Disciplinaria DP	Sobre el personal del DP, por faltas cuya sanción no exceda una suspensión de quince días	Tribunal de la Inspección Judicial

157 See n 2 above, 121.

158 LOPJ Art 209.

159 *Ibid*, Art 58; see n 2 above, 108.

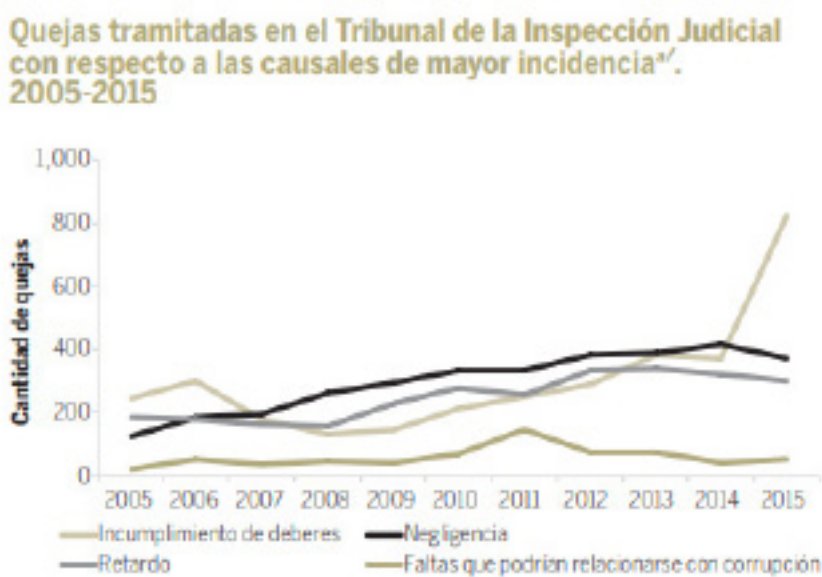
160 See n 2 above, 108.

161 *Ibid*.

Cases

Figure 3 illustrates the number of cases processed in the Judicial Inspection Court regarding the most frequent triggers to initiate disciplinary proceedings between 2005 and 2015.¹⁶² The graph, extracted from the *2017 Report on the State of the Nation*, classifies the causes for action that could be considered to relate to corruption.¹⁶³ These include, inter alia, document alteration, receiving undue commission, bias, receipt of gifts and leakage of information.¹⁶⁴ In doing so, the report seeks to compare the frequency of corruption-related causes for action with other causes, such as delays, negligence and breach of duties. Figure 3 indicates that corruption-related cases are comparatively less frequent, representing merely five per cent of the total disciplinary processes initiated by the Judicial Inspection Body between 2005 and 2015.¹⁶⁵

Figure 3. Complaints filed in the Judicial Inspection Court with respect to most frequent grounds.¹⁶⁶



Statistical data

General statistical data regarding the activity of competent authorities of the Judicial Power are available in annual *Reports on the State of the Nation*. The most recent publication was in 2017, titled *Report on the State of Justice*, which provided a compilation of information dating as far back as 2005. However, there is a serious lack of disaggregated data necessary to inform accurate conclusions on the disciplinary proceedings of Costa Rica.¹⁶⁷ For example, the information published in the annual reports from the Judicial Inspection Court is inadequate for establishing a relationship between the sanctioned public officials, the penalty, the sanction, their geographical location and the source of the complaint.¹⁶⁸

¹⁶² *Ibid.*, 122.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

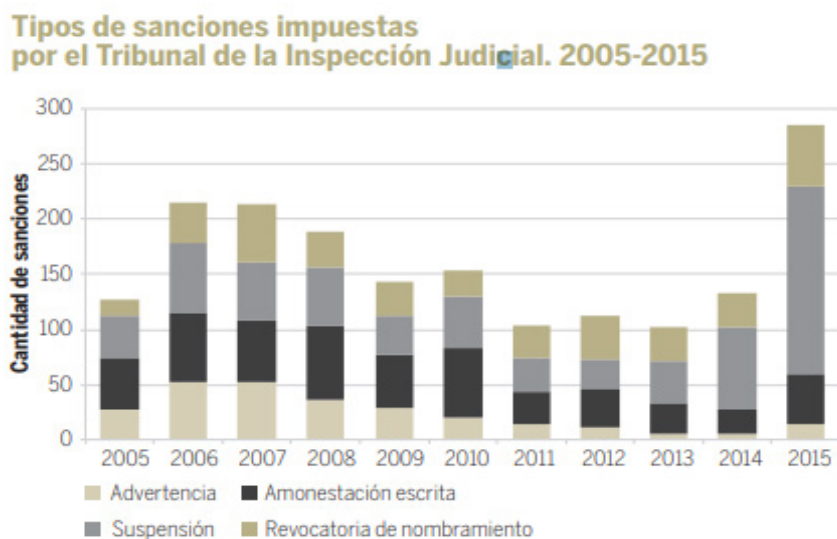
¹⁶⁷ *Ibid.*, 121.

¹⁶⁸ *Ibid.*

Available data related to judges shows that the most sanctioned judicial personnel were between 2005 and 2015, constituting an annual average of 27 per cent of all judicial servants sanctioned.¹⁶⁹ The principal sanction was a written reprimand in 2010, while suspension and dismissal became the most common sanctions from 2011 onward.¹⁷⁰ See Figure 4.¹⁷¹

While the report provides statistical information about the disciplinary actions against judges, these figures do not specifically refer to the hypothesis of judicial corruption.¹⁷²

Figure 4. Types of sanctions imposed by the Judicial Inspection Court.¹⁷³



Fuente: Elaboración propia con información de los Anuarios Judiciales.

Interrelationship between criminal and disciplinary proceedings

Parallel proceedings

Disciplinary and the criminal procedures can run in parallel. Moreover, a criminal investigation can start before a disciplinary investigation and vice versa. Articles 26, 27 and 28 of the LOPJ tackle the overlap between both procedures. Fundamentally, these three articles complement Articles 191, 192 and 193 of the LOPJ.

Article 26 establishes that any member of the judiciary will cease his or her duties if the member has been convicted, in a final judgment, for any crime that has a disqualification penalty for the performance of public office attached to it, and if declared bankrupt or insolvent.

Moreover, Article 27 provides two reasons for the suspension of members of the judiciary, as a disciplinary sanction: first, having been pre-trial detained, and second, if a court has issued an order

169 *Ibid*, 119.

170 *Ibid*.

171 *Ibid*.

172 *Ibid*, 122.

173 *Ibid*.

for the commencement of a trial for any crime committed in the exercise of their functions. In these circumstances, the judicial authority taking care of the criminal proceeding has the obligation to inform the Plenary Session of the Supreme Court or the Superior Council.

Article 28 establishes that a member of the judicial branch will be removed from office when he or she has been condemned with a disqualification penalty.

In addition to the aforementioned articles, Article 211 establishes that whenever there is no sufficient evidence for the disciplinary authority to make a decision and a criminal investigation takes place at the same time, the limitation period applicable to the disciplinary process shall be suspended.

Information exchanges

The authorities responsible for the criminal investigation may require information from those responsible for the disciplinary proceeding.¹⁷⁴ However, the opposite case has its limitations regarding the exchange of information, as there is a principle of confidentiality that applies to criminal procedures. The proceedings do not necessarily affect each other, as both may be resolved differently, since the actions that are pursued in each of them are also different.

The interviewees for the present case study stated that the Deputy Prosecutor's Office will strategically assess whether it is appropriate to inform the disciplinary body about the criminal investigation of a judge. If there is a risk with regards to the protection of evidence, the Deputy Prosecutor's Office will not inform the Judicial Court. Sometimes the Judicial Inspection Court is informed about the offence before the Deputy Prosecutor's Office. If this is the case, this court has the duty to inform the disciplinary body.

Current debates, trends and other issues

In addition to the issues identified throughout the body of the present case study, the following aspects of Costa Rica's criminal and disciplinary processes have been the subject of debate. Generally, the involvement of the Legislative Assembly in the appointment of judges of the Supreme Court is criticised as being a potentially politicised appointment process. While there are no consolidated proposals, there is the view that candidates should at least comply with the criteria established in the Law of the Judicial Career, Law No 7338 of 1993.¹⁷⁵

Moreover, recent corruption cases affecting the Supreme Court gave rise to doubts about voluntary early retirement potentially being used as a way of avoiding legal consequences.¹⁷⁶ As discussed above, the President of the Supreme Court Carlos Chinchilla recently left his position after being reprimanded for his role in an influence-peddling scandal in the 'Big Concrete Case' (Cementazo).¹⁷⁷

Three aspects of the disciplinary proceedings have been the subject of criticism. First, discretionary powers granted by the LOPJ have been perceived to threaten the independence of the judiciary.¹⁷⁸

174 LOPJ Arts 6 and 6(bis).

175 *Ibid.*

176 See n 103 above.

177 *Ibid.*

178 See n 2 above, 121.

While Article 199 of the LOPJ rejects any complaint that refers exclusively to issues of the judicial interpretation of rules, it also grants the Plenary Session of the Supreme Court discretionary power to decide on the permanence, suspension or dismissal of a judicial servant in the case of delay or serious and unjustifiable violations in the administration of justice.¹⁷⁹ In practice, this discretion allows the Corte Plena to decide against judges who happened to differ in their interpretation of rules.¹⁸⁰

Second, the decentralisation of the disciplinary regime has been perceived as problematic. As mentioned, in addition to the Judicial Inspection Court, the LOPJ grants six other entities disciplinary functions, each being involved in different stages of the proceedings in respect of judges.¹⁸¹ These are the Superior Council, Prefectures, Plenary Session of the Supreme Court, Executive Direction, President of the Supreme Court and judges.¹⁸² Moreover, three specialised bodies, the Internal Affairs of the Judicial Investigation Body, Fiscal Inspection of the Public Prosecutor's Office and Disciplinary Supervision of the Public Defence, have jurisdiction over constituent members of their respective bodies.¹⁸³

Finally, the evidentiary rules in the disciplinary process have been regarded as excessively restrictive. For example, the declaration of assets of members of the judiciary introduced with the Law against Illicit Enrichment in Public Office can only be obtained ex officio in the criminal process (upon request of the Public Prosecutor's Office). By contrast, in the disciplinary process, the disclosure of this information is subject to the approval by the judge accused of corruption. In addition, evidence obtained in a criminal procedure cannot be transferred to a disciplinary procedure dealing with the same case. If no evidence was obtained in the disciplinary proceeding, the proceeding will be suspended until there is a criminal judgment (*litispendes*). Finally, the admissible evidence in disciplinary proceedings is more limited than in criminal proceedings. Telephone tapping, monitoring and surveillance are considered as illegal proofs in the latter.

Reform trends and preventative measures

The Law against Illicit Enrichment of Public Officials was established in 2004 (and later reformed in 2012 through Circular No 21-CIR-2012) to implement the Inter-American Convention against Corruption.¹⁸⁴ The specific provisions obliging judges to disclose their patrimonial situation is thereby considered an active and preventative measure to combat corruption.¹⁸⁵ Following the disclosure of assets, an authenticated copy will be sent to the Legislative Assembly. Article 22 of this same text provides that the sworn declaration of their assets has to take place at the beginning and at the end of taking office, and on an annual basis.

179 LOPJ Art 199.

180 See n 2 above, 121.

181 *Ibid*, 107.

182 *Ibid*.

183 *Ibid*, 107.

184 See n 13 above.

185 *Ibid*, Art 21.

Case study: France

Executive summary

The goal of this study is to determine how allegations of corruption against judges and magistrates are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts. In the French Republic ('France'), criminal and disciplinary proceedings for allegations of judicial corruption are independent of each other, but still connected.

For the purpose of this case study, and expanding on the general definitions in section 3.1.2 of this report, we have adopted the following contextual definitions:

- 'Corruption' includes both bribery and trading in influence (ie, bribery involving a third-party intermediary). As stated in section 3.1.2 of this report, we have adopted the definitions of these offences provided by the United Nations Convention against Corruption.¹
- 'Judges' means both judges and prosecutors in France (they belong to a unified magistracy and may serve in both capacities in the course of their careers).

Key findings: criminal proceedings

- Judicial corruption is criminalised separately from public and private sector corruption under the Code Pénal (the 'Criminal Code').² There are specific articles that address bribery and trading in influence involving a magistrate.
- The severity of sanctions reflects the grave nature of the offences. The financial value of the fines for judicial corruption significantly increased in December 2013 as a result of Law 2013-1117 on Tax Fraud and Serious Economic and Financial Crimes.³
- Judges enjoy no immunity from prosecution for criminal behaviour and have no privileges or special treatment in criminal proceedings. Like all other individuals, magistrates facing criminal charges of judicial corruption have the right to a lawyer.⁴
- There is no different procedure for criminal prosecution of judges who sit in the top courts of the country: Cour de Cassation (Court of Cassation or Supreme Court of Appeal), Conseil d'Etat (Council of State) and Conseil Constitutionnel (Constitutional Council).⁵
- In criminal proceedings, hearings and reading of judgments are always held in open court unless doing so would be dangerous for order or morality.⁶

1 UN Convention against Corruption (adopted 31 October 2003 by resolution 58/4, entry into force 14 December 2005, and ratified in France on 11 July 2005) UNTS 2349 (p 41) www.unodc.org/unodc/en/corruption/ratification-status.html accessed 14 February 2020.

2 Code Pénal 1992 (revised 2016).

3 Law 2013-1117 increased maximum fines more than six times, from €150,000 to €1m for bribery and from €75,000 to €500,000 for trading in influence.

4 Code de Procédure Pénale (revised 2019) Preliminary Art III.

5 According to Loi no 93-2 du 4 janvier 1993 portant réforme de la procédure pénale, all judges are prosecuted as ordinary citizens, they have no privileges.

6 See n 4 above, Art 306.

Key findings: disciplinary proceedings

- The Conseil supérieur de la magistrature (CSM or High Council of the Judiciary) has the power to conduct disciplinary proceedings and sanction magistrates accused of misconduct.
- The disciplinary process and rules are codified under Decree 58-1270 on the Organic Law on the Status of Magistrates.⁷
- Disciplinary rules provide for nine specific sanctions (*sanctions disciplinaires*) of increasing seriousness⁸ determined by the CSM.⁹ Prior to 2002, the sanctions imposed were more lenient and involved demotion, mandatory reposting, and/or withdrawal of certain functions or responsibilities; however, decisions issued since 2002 show a zero-tolerance approach to allegations of corruption, with magistrates not only removed from their current functions or responsibilities but also entirely removed from the judiciary.
- There are no special rules applicable to disciplinary action derived from allegations of corruption involving a magistrate: the regular disciplinary process and rules apply. Judges facing disciplinary proceedings may be represented by a peer (another magistrate); a lawyer admitted before the Conseil d'Etat or the Cour de Cassation; or a bar-licensed lawyer.¹⁰
- Judges of the Cour de Cassation, Conseil d'Etat and Conseil Constitutionnel can face the same disciplinary proceedings as judges of all other levels for breaches of Decree 58-1270.¹¹
- Disciplinary hearings and reading of decisions are open to the public unless a closed hearing is required for public order, privacy or special circumstances, such as prejudice to the interests of justice.

Key findings: interrelationship between criminal and disciplinary proceedings

- Disciplinary and criminal proceedings tend to run parallel to and independently of each other; however, disciplinary proceedings almost always conclude before criminal proceedings.
- The initiation of criminal proceedings generally trigger disciplinary proceedings through the notification required to be given to the Ministry of Justice (MoJ). The MoJ will generally request that the CSM temporarily prohibits administrative or criminal investigations commencing against a magistrate already facing or likely to face disciplinary proceedings.¹²
- There is limited effect of a criminal or disciplinary decision affecting the other type of proceeding. The main connection is that disciplinary sanctions can be made upon the initiation of any type of criminal proceedings (regardless of whether the judge is guilty or not).
- Sharing information between the entities responsible for the disciplinary proceedings and the criminal proceedings is limited and only applies in certain situations, primarily partly due to the confidentiality of investigations preventing investigative judges from sharing records or evidence in their possession.

7 Ordonnance No 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature.

8 *Ibid*, Art 45.

9 Conseil Supérieur de la Magistrature, 'Missions & Attributions' (2019) www.conseil-superieur-magistrature.fr/node/1 accessed 23 March 2020.

10 See n 7 above, Art 52.

11 *Ibid*, Art 1.

12 *Ibid*, Art 50.

Context

France is a civil law country of Romano Germanic legal tradition¹³ governed by the Constitution of the Fifth Republic (the ‘Constitution’)¹⁴ and a system of codified law;¹⁵ however, case law also plays a significant role in the determination of the courts.

Article 64 of the Constitution establishes the independence of the judiciary.¹⁶ In addition, France’s attachment to the Declaration of Rights of Man and of the Citizen (1789) provides for a separation of powers between the executive, legislature and judiciary.

The most distinctive feature of the French judicial system is that it is divided into three separate branches:

- *ordre judiciaire* (judicial courts) for criminal and civil matters;¹⁷
- *tribunaux administratifs* (administrative courts) for the supervision of the government;¹⁸ and
- Conseil Constitutionnel for reviewing statutes before they are enacted and adjudicating on the constitutionality of laws.¹⁹

The highest of the judiciary courts is the Cour de Cassation. There are 36 *cours d’appel* (courts of appeal), 161 *tribunaux de grande instance* (high courts) and 307 *tribunaux d’instance* (courts of first instance) at the lowest level. The *tribunal correctionnel* is the original criminal division of the *tribunaux de grande instance*.

At the highest of the administrative courts sits the Conseil d’Etat, with eight *cours administratives d’appel*, and 42 *tribunaux administratifs*.²⁰

Since the 1990s, France has toughened up its legislative framework against corruption. In particular, in 1993, a law on the ‘prevention of corruption and transparency in economic life and public procedures’ (‘Sapin I’) was adopted.²¹ This law focused on the financing of political parties and the implementation of transparency requirements to fight against corruption in the country.²² Following Sapin I, France ratified the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention in 1999,²³ joined the Group of States against Corruption (groupe d’États contre la corruption or GRECO) in 1999²⁴ and ratified the UN Convention against Corruption in 2005.²⁵

13 Safia Muhametgalieva, Iskandar Muhametgaliev and Valentina Kuzmenko, ‘Influence of The Roman Law on Formation of the Romano-Germanic Legal Family’ (2015) *Review of European Studies* 7(6) 186–93, 187. <https://pdfs.semanticscholar.org/4961/79536be5244b996d686897a23a23eb14635f.pdf> accessed 22 August 2019.

14 Ministère de la Justice, ‘The French legal system’ (2012) 3 www.justice.gouv.fr/art_pix/french_legal_system.pdf accessed 24 March 2020.

15 See n 7 above.

16 *Constitution du 4 octobre 1958* (amended 1 December 2009), Art 64.

17 Richard J Terrill, *World Criminal Justice Systems: A Survey* (7th edn, Elsevier 2009).

18 *Ibid.*

19 *Ibid.*

20 Conseil d’Etat, ‘Administrative Justice in Brief’ (2019) 2 www.conseil-etat.fr/en/administrative-justice-in-brief accessed 23 March 2020.

21 Law No 93-122 of 29 January 1993 on the *prevention of corruption and transparency in economic life and public procedures* (Loi no 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques).

22 *Ibid.*, Title I and Title II, respectively.

23 Law No 99-424 of 27 May 1999.

24 GRECO, ‘Evaluations – France’ (Council of Europe) www.coe.int/en/web/greco/evaluations/france accessed 24 March 2020.

25 UNODC, ‘Signature and Ratification Status’ www.unodc.org/unodc/en/corruption/ratification-status.html accessed 24 March 2020.

In December 2016, a new law on the ‘promotion of transparency, the fight against corruption and the modernisation of the economy’ (‘Sapin II’) was promulgated.²⁶ Under Sapin II, companies operating in France with a turnover of more than €100m are expected to establish an anti-corruption programme to mitigate corruption risks.²⁷ Additionally, the law also provided for the creation of the National Anti-Corruption Agency (Agence Française Anti-Corruption), a new anti-corruption agency tasked with the prevention and detection of corruption (including foreign bribery).²⁸ Sapin II aims to further combat corruption both within the Public Administration and the private sector, and to increase transparency in relation to business operations.²⁹

Methodology

Several constraints and limitations were encountered during the research phases conducted for this case study.

During the initial desk research phase, we encountered challenges in identifying recent, disaggregated and reliable statistical data. The lack of data was later confirmed as an issue in interviews.

To verify the accuracy of our initial desk research, follow-up interviews with representatives of the judiciary, non-governmental organisations (NGOs) and lawyers were conducted via email or in person.

Criminal proceedings

Criminalisation of ‘judicial corruption’

Corruption by magistrates is criminalised under the Criminal Code separately from the provisions regulating public and private sector corruption. Corrupt behaviour by judges (as well as prosecutors, court clerks, judicial experts, court-appointed mediators and arbitrators) is criminalised in:

- Article 434-9 of the Criminal Code *for* active and passive bribery;³⁰ and
- Article 434-9-1 of the Criminal Code for active and passive trading in influence.³¹

The solicitation of a bribe is criminalised as ‘active’ bribery or trading in influence, and the acceptance of a bribe is criminalised as ‘passive’ bribery or trading in influence.³² These offences are classified as *délits* (misdemeanours) and are subject to the original jurisdiction of a *tribunal correctionnel*.³³

These articles echo the broader criminalisation of bribery and trading in influence by public officials in Articles 435-1, 435-3, 445-1 and 445-2 of the Criminal Code.³⁴ The elements constituting the

26 Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique Art 1; see also Gouvernement.fr, ‘Sapin II Law: transparency, the fight against corruption, modernisation of the economy’ (6 April 2016) www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy accessed 14 February 2020.

27 *Ibid*, Art 17.

28 *Ibid*, Arts 3 and 17-III.

29 Gouvernement.fr (see n 26 above); Conseil Constitutionnel, ‘Décision n° 2016-741 DC du 8 décembre 2016 – Communiqué de presse’ (*conseil-constitutionnel.fr*; 8 December 2016) www.conseil-constitutionnel.fr/actualites/communiquedecision-n-2016-741-dc-du-8-decembre-2016-communique-de-presse accessed 14 February 2020.

30 See n 2 above, Art 434-9.

31 *Ibid*, Art 434-9-1.

32 See n 1 above, Art 15.

33 See n 4 above, Arts 381 and 704.

34 See n 2 above, Arts 435-1, 435-3, 445-1 and 445-2.

offences of bribery and trading in influence reflect the parameters outlined in Articles 15 and 18 of the UN Convention against Corruption.³⁵

Article 434-9 also accounts for aggravating circumstances when the offence ‘is committed by a magistrate for the benefit or detriment of a person subject to criminal proceedings’.³⁶ This aggravation of the offence triggers higher sanctions and a longer statute of limitation. In this case, the offence is classified as a *crime* (a felony) and subject to the jurisdiction of *la cour d’assises* (the criminal courts with original jurisdiction to try felonies).³⁷

Reporting an allegation

Anyone who has witnessed a crime, such as corruption by a magistrate, can report it to the police.³⁸ Complaints must be made within three years for a *délit* and within ten years for a *crime*.³⁹ Allegations of judicial corruption can be made:

- by going directly to a police station and reporting to any police officer; or
- by putting the complaint in writing (in French) to the public prosecutor (PP) of the area where the crime was committed or of the residence of the offender (if known).⁴⁰

If reported at a police station, the police officer will write down a statement of the allegation, give the complainant a receipt (or a copy of the minutes of the interview if requested) and transmit the complaint to the PP.⁴¹

Complaints sent to the PP in writing must be signed and include specific details.⁴²

Investigation

An allegation of judicial corruption by a magistrate will be referred to an investigative judge by the PP as the first step of the investigation. Under applicable law, this referral is required for offences classified as *crimes* and optional for offences classified as *délits*.⁴³

Although referral to an investigative judge is optional for *délits*, interviewees indicated that referral to an investigative judge would be almost certain in practice, for the following reasons:

- *Complexity*: Cases of corruption generally tend to involve complex financial evidence requiring further investigation.

35 See n 1 above, Arts 15 and 18.

36 See n 2 above, Art 434-9.

37 European Justice (France), ‘Rights of defendants in criminal proceedings – France: 3. My rights during the trial’ (European Justice, 30 January 2017) https://e-justice.europa.eu/content_rights_of_defendants_in_criminal_proceedings_-169-FR-maximizeMS-en.do?clang=en&idSubpage=3 accessed 14 February 2020.

38 European Justice (France), ‘Rights of victims of crime in criminal proceedings – France: 1. My rights during the investigation of a crime’ (European Justice, 4 July 2018) https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FR-maximizeMS-en.do?clang=en&idSubpage=1&member=1#n01 accessed 14 February 2020.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 See n 4 above, Art 79.

- *Prevent risk of perceived corporatism:* Cases of corruption involving magistrates are sensitive and affect public trust in the judiciary. Referral to an investigative judge will protect those magistrates involved from potential perception of corporatism if the allegations are considered unsubstantiated and do not lead to trial. Decisions by an investigative judge not to pursue charges against a magistrate accused of corruption will be less likely to be perceived as preferential or lenient treatment by a peer.
- *Prevent risk of perceived attacks on the independence of the judiciary:* Prosecutors are closely linked to the executive arm of government, and a decision to pursue charges of corruption against a magistrate could be construed as an attempt to interfere with judicial independence. Decisions by an investigative judge not to pursue charges against a magistrate accused of corruption will be less likely to be suspected of attempted interference.
- *Protection of the rights of the defendant:* In recent years, magistrates investigated for corruption have been placed in pre-trial detention. An investigative judge can act as a check on detention and ensure the rights of the defendant are protected.

The French judicial system has four levels of increased specialisation of investigative judges:

- The simplest cases are handled by investigative judges alone in jurisdictions without *pôles de l'instruction* (investigation centres).
- The next level of specialisation is the *pôles de l'instruction* established in 2007 and staffed by groups of investigating judges,⁴⁴ which are located at the relevant *tribunaux d'instance*.
- The *juridictions inter-régionales spécialisées* (inter-regional specialised jurisdictions) are the next level of specialisation and were established in 2004, specialising in organised crime and complex financial arrangements.⁴⁵
- A central Parquet National Financier (NFP or French Financial Prosecution Office) handles the most complex cases, including those involving international aspects.⁴⁶

Interviewees indicated that previous cases of corruption involving magistrates have involved relatively low amounts (several thousands of euros) and simple financial arrangements; accordingly, the cases were most likely to be handled by an investigative judge if the only complexity were that the defendant was a magistrate. A Deputy Prosecutor of the NFP confirmed that in the period of 2015–2017, only one case of corruption by a magistrate was handled by the NFP.

Criminal prosecution

General provisions regulating the initiation of criminal proceedings apply to cases of corruption by magistrates. Criminal proceedings may be initiated by either the PP or an aggrieved party exercising the right of a 'civil party' to the proceedings.⁴⁷

44 Ministère de la Justice, 'The Judiciary in France' (23 September 2010) 17 www.justice.gouv.fr/art_pix/plaquette_justiceenfrance_angl.pdf accessed 14 February 2020.

45 Ministère de la Justice, 'Juridictions Inter-Régionales Spécialisées' (13 October 2014) www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/les-juridictions-interregionales-specialisees-13836.html accessed 14 February 2020.

46 Tribunal de Paris, 'Missions Du PNF' (2020) www.tribunal-de-paris.justice.fr/75/missions-du-pnf accessed 14 February 2020.

47 See n 4 above, Art 1.

The PP has the discretion to decide whether to pursue cases.⁴⁸ The PP first reviews the legality of prosecution, and then the opportunity for prosecution: it has no obligation to prosecute, even if the facts are determined to constitute an offence.

If the PP decides not to prosecute, it must provide justification regarding the legality and/or opportunity.⁴⁹ A decision not to prosecute is not absolute and may be overturned by the chief prosecutor of the relevant *cour d'appel*.⁵⁰ An aggrieved party may exercise the right of a 'civil party' and contest the PP's decision not to prosecute: first, before the chief prosecutor of the relevant *cour d'appel* and, in the event that application is unsuccessful, before the most senior investigative judge of a *tribunal de grande instance*.⁵¹ If the aggrieved party's application is successful, the PP is obliged to proceed with the case.

Under Preliminary Article III in the Criminal Procedure Code,⁵² all individuals have the right to a lawyer, which includes magistrates facing charges of judicial corruption. As mentioned before, hearings and reading of judgments are always held in open court unless doing so would be dangerous for order or morality.⁵³

Amendments to the Criminal Procedure Code in 2013 permit an organisation that lists one of its missions as the fight against corruption and has existed for at least five years to initiate a criminal proceeding as a 'civil party' for corruption proceedings.⁵⁴ This provision empowers civil society and public sector watchdogs to initiate criminal action in the case of inaction of the PP, eliminating the risk that PPs would exercise their discretionary authority not to pursue cases of corruption against their fellow magistrates out of corporatism.

LIMITATION PERIOD

General provisions regulating limitation periods for criminal proceedings apply to cases of corruption by magistrates:

- if the offence is classified as a *délit*, the limitation period is six years from the day the offence was committed;⁵⁵ and
- if the offence is classified as a *crime*, the limitation period is 20 years from the day the offence was committed.⁵⁶

The limitation period can be interrupted by any investigative or prosecutorial action, as well as by any judicial decision in the first or second instance.⁵⁷

48 *Ibid*, Art 40-1.

49 *Ibid*, Art 40-2.

50 *Ibid*, Art 40-3.

51 *Ibid*, Art 85.

52 *Ibid*, Preliminary Art III.

53 *Ibid*, Art 306.

54 *Ibid*, Art 2-23 (added by Law 2013-1117 of 6 December 2013, relating to the fight against tax fraud and serious economic and financial crimes, hereinafter 'Law 2013-1117').

55 *Ibid*, Art 8.

56 *Ibid*.

57 *Ibid*, Art 9-2.

An exception to the limitation period is made for hidden or concealed *délit* and *crimes*. Hidden offences are those that, because of their elements, could not be known to the victim or judicial authority.⁵⁸ Concealed offences are those in which deliberate actions were taken to prevent their discovery. In these cases, the limitation period runs from the date of discovery of the offence, but cannot exceed 12 years from the day the offence was committed for *délit* and 30 years for *crimes*.⁵⁹

BURDEN AND STANDARD OF PROOF

Pursuant to the principle of the presumption of innocence, the burden of proof is on the prosecutor⁶⁰ and the standard for a criminal conviction is proof ‘beyond reasonable doubt’.⁶¹ There is no restriction to the types of evidence that may be provided, provided they have been obtained ‘loyally’ (*loyauté de la preuve*).⁶²

Under French criminal law, a judge will decide a case based on his or her ‘intimate conviction’ that the evidence provided demonstrates:⁶³

- the offence was committed;
- the accused is the person who committed the offence; and
- the accused intended to commit the offence.

Therefore, it can be inferred that doubt will benefit the accused. However, the Cour de Cassation has clearly stated that it must be real, justified doubt and not doubt resulting from a lack of sufficient analysis of evidence or effort to determine the truth by the judge.⁶⁴

JURISDICTION AND CHANGE OF VENUE

General provisions governing the territorial and subject-matter jurisdiction apply to the investigation, prosecution, and adjudication of cases of corruption by magistrates. *Délits* are subject to the original jurisdiction of a *tribunal correctionnel*.⁶⁵ *Crimes* are subject to the jurisdiction of *la cour d’assises*.⁶⁶

However, offences of bribery or trading in influence involving judges may be assigned to a special jurisdiction in the case of complexity (due to the large number of actors or victims, or an extended geographic impact) by:

58 Justine Cheyton, ‘Statute of limitation reform in criminal matters’ (29 June 2017) www.soulier-avocats.com/en/statute-of-limitation-reform-in-criminal-matters/#_ftnref2 accessed 14 February 2020.

59 See n 4 above, Art 9-1.

60 *Ibid*, Preliminary Art.

61 Ministère de la Justice, ‘The French Legal System’ (2012) 10 www.justice.gouv.fr/art_pix/french_legal_system.pdf accessed 14 February 2020.

62 No de pourvoi 95-81.366 du 27 février 1996, Cour de Cassation, Chambre criminelle, among other French case law.

63 Catherine Esnard, Rafaele Dumas and Juliet Wakefield, ‘Jurors’ Verdicts Based on Their Intimate Conviction: Influence of Magistrate’s Opinion on Confirmatory Information Processing’ (2019) 6(1) *Cogent Psychology* 6 www.tandfonline.com/doi/full/10.1080/23311908.2019.1600633 accessed 14 February 2020.

64 See n 4 above, Preliminary Art III, together with French case law, such as No de pourvoi 13-87.027, du mardi 9 septembre 2014, Cour de Cassation, Chambre criminelle.

65 *Ibid*, Arts 381 and 704.

66 *Ibid*, Art 231.

- extending the territorial jurisdiction of the competent *tribunal correctionnel* to cover multiple appellate districts;⁶⁷ or
- transferring competence to NFP to prosecute in *tribunal de grande instance de Paris*.⁶⁸

Interviewees noted that, in practice, cases of corruption involving magistrates would not reach the level of complexity requiring transfer to special jurisdiction.

General provisions governing change of venue apply to the investigation, prosecution, and adjudication of cases of corruption by magistrates.⁶⁹ Interviewees indicated that a change of venue is neither mandatory nor automatic in these cases. There are five grounds for a change of venue: public safety, the good administration of justice, legitimate suspicions, detention or indictment of the accused in another jurisdiction, and the interruption of the delivery of justice.

The Cour de Cassation has the power to determine change of venue applications and must do so within a week or 15 days (depending on the grounds of the application).⁷⁰ Interviewees indicated that, in practice, a change of venue is highly likely in cases in which a magistrate is accused of corruption on the grounds of reducing the risk of suspicions that magistrates would protect a peer and not proceed with neutrality and undermining the ‘good administration of justice’.

The timing of when the venue is changed is more complex. An initial review of a complaint by the PP and preliminary investigations by the PP or an investigative judge may require a degree of secrecy preventing the PP or investigative judge from providing information justifying the application for change of venue. This means that the initial investigation is likely to occur within the jurisdiction where the magistrate works, but once the information can be communicated, the case is likely to be transferred.

SANCTIONS

Articles 434-9 and 434-9-1 of the Criminal Code set out the sanctions for those offences:

- bribery is punishable by ten years of imprisonment and fines of up to €1m; and
- trading in influence is punishable by five years of imprisonment and fines of up to €500,000.

When aggravating circumstances exist under those articles, the maximum imprisonment goes up to 15 years.⁷¹ The severity of the sanctions reflects the grave nature of the offences.

The amount of the fines significantly increased in 2013 in an effort to toughen the fight against tax fraud and financial crimes. Prior to the changes enacted by Law 2013-1117, fines were capped at €150,000 for bribery and €75,000 for trading in influence.

If a magistrate is convicted of corruption, he or she is also struck with a sanction of ineligibility to hold public office.⁷²

⁶⁷ *Ibid*, Art 704.

⁶⁸ *Ibid*, Art 705; see n 46 above.

⁶⁹ *Ibid*, Art 662.

⁷⁰ *Ibid*.

⁷¹ See n 2 above, Art 434-9.

⁷² *Ibid*, Art 131-26(2).

Additional sanctions may be imposed against those convicted (and those legal persons that may have been involved in the corrupt act)⁷³ over and above the fines and imprisonment set out above. These additional sanctions intend to prevent a convicted magistrate from benefiting from the proceeds of the corruption, to inform the public of the corruption and the people who participated in it, and to bar those involved from future employment in the judiciary and public institutions.⁷⁴

In the case of a magistrate convicted of corruption, he or she may face the following additional sanctions ordered at the discretion of the judge:

- prohibition of certain civic, civil and family rights;
- publication of the final judgment of conviction;
- prohibition of the exercise of public functions; and
- confiscation of the proceeds of the offence.⁷⁵

APPEALS

General provisions governing appeals apply to cases of corruption by magistrates:

- a decision of a *tribunal correctionnel* can be appealed to the relevant *cour d'appel*,⁷⁶
- a *cour d'appel* decision can be referred on points of law to the Cour de Cassation;⁷⁷ and
- a decision of a *cour d'assises* can be appealed on points of fact to another *cour d'assises* in a different county before a larger jury, or on points of law to the Cour de Cassation.⁷⁸

Cases

Some judgments in criminal prosecutions are published in an online database.⁷⁹ All decisions of the Cour de Cassation since 1987 are available in the database, and a selection of appellate and first instance decisions chosen for publication by the courts that issued them are also available.

In cases of corruption involving a magistrate, the case will have received extensive media coverage, making any information on convictions or disciplinary sanctions publicly available and easily cross-referenced. Additionally, Transparency International France hosts a portal⁸⁰ on which convictions for corruption are published in a searchable database: this is a valuable, albeit incomplete, snapshot of judicial activity in relation to corruption.

There have been few cases of prosecution (or investigation before the investigative judge) of magistrates for corruption: six cases have been identified since 2000 (see the table below).

73 *Ibid.*, Arts 434-47 and 434-48.

74 *Ibid.*, Arts 131-26-2, 434-44 and 434-46.

75 *Ibid.*, Art 131-26.

76 European Justice (France), 'Ordinary courts – France' (19 September 2013) https://e-justice.europa.eu/content_ordinary_courts-18-FR-en.do?clang=fr accessed 14 February 2020.

77 *Ibid.*

78 The possibility to appeal a decision of a *cour d'assises* was introduced in France with the Law no 2000-516 of June 15 2000 (Loi renforçant la protection de la présomption d'innocence et les droits des victimes).

79 See Légifrance, 'Le Service Public de la Diffusion du Droit' www.legifrance.gouv.fr accessed 14 February 2020.

80 Transparency International France, 'Interactive Map of Corruption' www.visualiserlacorruption.fr accessed 14 February 2020.

Name	Position	Facts	Decision	Date
Benoit Wargniez	Judge at the Douai Court of Appeal Former investigative judge	Maintained relations with a business owner known for his ties to criminal circles Received €120,000 over several years Placed in pre-trial detention	Convicted of bribery and trading in influence Sentenced to six months imprisonment (suspended)	2002
Jacques Rivailland	President of the Paris Commercial Court	Received 1m francs to facilitate a real estate transaction	Convicted of bribery Sentenced to two years imprisonment (suspended)	2004
Hugues Verita	Judge and President of the Digne First Instance Court	Multiple cases including allegations of falsification of documents, illegal interest and corruption	Convicted of bribery Sentenced to two and a half years imprisonment (suspended)	2007
Jean-Luc Voirain	Assistant Prosecutor at the Bobigny First Instance Court	Intervened in cases against payment Placed in pre-trial detention during the investigation Previously sanctioned disciplinarily for various misconducts	Convicted of trading in influence Sentenced to three years' imprisonment (partially suspended)	2008
Patrick Kiell	Assistant Prosecutor at the Montpellier First Instance Court	Received payments (range of €8,000–€13,000) to consult case files and provide information	Convicted for bribery Sentenced to one year imprisonment (suspended)	2012
Pierre Pichoff	Judge and President of the Correctional Court at the Bethune First Instance Tribunal	Allegedly received €50,000 to influence a decision to place an elected official in pre-trial detention Already sanctioned disciplinarily in the past	Acquitted of bribery charges	2016

All cases except one have resulted in conviction and led to prison sentences, most of which have been suspended regardless of the amount of money involved in the corruption. In most cases, the amount of money obtained from corruption was relatively small, and those magistrates investigated or prosecuted often showed a degradation in conduct over years (problems with alcohol and debts, relations with known criminals over years, past disciplinary sanctions etc). In most cases, the magistrate against whom allegations were raised and investigated was placed in pre-trial detention.

General statistical data related to the activity of criminal courts is readily available in official judicial statistics published by the MoJ and in annual reports produced by its *service central de prévention de la corruption* (Central Service for the Prevention of Corruption or CSPC).

The CSPC publishes data collected from the *casier judiciaire national* (national criminal conviction record). The last published report covers 2015 activity and provides data on all offences against probity (including bribery and trading in influence) between 2005 and 2014:

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
All convictions for probity offences	388	387	314	315	324	267	342	317	297	274
Inc bribery	132	128	105	131	120	115	155	138	141	127
Inc trading in influence	56	41	40	17	27	15	22	18	24	31

Data from the *casier judiciaire national* – convictions for offences against probity (2005–2014)

The lack of disaggregation of the data above makes it impossible to quantify cases specifically related to corruption involving magistrates; however, it does indicate that the number of convictions has decreased since 2012, and that bribery cases represent almost half (46 per cent) of all convictions/cases and trading in influence almost one-tenth (11 per cent).

Disciplinary proceedings

The disciplinary process and rules applying to judges are codified under Decree 58-1270 on the Organic Law on the Status of Magistrates in Sections I and II of Chapter VII: Discipline.⁸¹ There is also a collection of ethical obligations of magistrates (recently revised on 9 January 2019 by the CSM), which is not a disciplinary code but a guide setting out principles of professional conduct to structure the behaviour of magistrates.⁸²

The CSM is competent in handling disciplinary complaints against all magistrates, although slight differences exist between judges and prosecutors: the CSM has two Disciplinary Commissions (before which disciplinary hearings are held) – one for judges and one for prosecutors.⁸³ These Disciplinary Commissions are established under Article 65 of the Constitution.⁸⁴

The Disciplinary Commission for judges is composed of five judges and eight non-judicial members.⁸⁵ The Disciplinary Commission for prosecutors is composed of five prosecutors, one judge and eight non-judicial members.⁸⁶ The eight non-judicial members include one representative of the Conseil d’Etat, one lawyer and six personalities who are not members of parliament, the judiciary or administrative courts.⁸⁷

81 See n 7 above, c VII: Discipline, ss I and II.

82 Conseil Supérieur de la Magistrature, ‘Recueil des obligations déontologiques des magistrats’ (2019) www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques/recueil-des-obligations-deontologiques-des-0 accessed 3 March 2021.

83 See n 16 above, Art 65.

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

Prohibition of judicial corruption

In Chapter VII: Discipline of *Decree 58-1270*, Section I contains general disciplinary provisions and Section II contains provisions specific to judges. Within Section I, Article 43 states: ‘any breach of the magistrate duties related to the exercise of [their] office, to the honour, the sensitivity, or the dignity of [their] office constitutes disciplinary misconduct. All severe and deliberate violations of the procedural rules laying down the fundamental guarantees of the parties constitute a violation of the magistrate’s duties.’⁸⁸

While corruption may constitute disciplinary misconduct, the existence of a criminal corruption also constitutes a breach of the magistrate’s obligations as it affects the ‘image’ of the judiciary.

Case law for disciplinary proceedings concerning magistrates accused of corruption typically points to violations of the duty of probity, and especially obligations to: not to abuse their functions; preserve the dignity of the function; be loyal to the judicial institutions; preserve the honour of the judiciary; and maintain public confidence in the judiciary. The specifics of each case may also affect other duties, such as the duty of impartiality, the obligation to respect professional secrets, the confidentiality of investigation or judicial deliberations, or the duty of loyalty to higher ranking magistrates.

Making a complaint

A disciplinary action against a magistrate is initiated through the filing of a complaint alleging specific conduct by the magistrate constitutes disciplinary misconduct by:

- the MoJ;
- a head of jurisdiction (eg, a court president or chief prosecutor); or
- a litigant in any type of proceeding in the event he or she deems the magistrate’s conduct to constitute disciplinary misconduct.⁸⁹

According to interviewees, the MoJ typically files disciplinary cases because ongoing criminal investigation tends to be brought to its attention by the investigating prosecution office. Disciplinary complaints initiated by the MoJ or a head of jurisdiction are referred directly to the competent Disciplinary Commission within the CSM.

In practice, it is rare to see complaints of corruption brought to the CSM initiated by litigants. In the event of a complaint filed directly by a litigant, the complaint will first be reviewed by the Complaint Admissibility Commission (CAC), which is composed of two magistrates and two non-magistrates from among the CSM members.⁹⁰ The CAC will review the complaint, and may hear oral evidence from the accused magistrate and other actors to determine the viability of the complaint.⁹¹ In case of a split (2-2) decision, the complaint will proceed to the Disciplinary Commission of the CSM.⁹² This triage process ensures that frivolous or grossly unfounded complaints are summarily dismissed, but

88 See n 7 above, Art 43.

89 *Ibid.*, Arts 50-1 to 50-3.

90 *Ibid.*, Arts 50-3 and 63; Loi organique no 94-100 du 5 février 1994 sur le Conseil supérieur de la magistrature, Art 18.

91 *Ibid.*, Loi organique no 94-100 du 5 février 1994.

92 *Ibid.*

also provides for the complaint to proceed in case of doubt. In 2016, the CSM received 250 litigant complaints, but only seven were deemed admissible.⁹³

Investigation

If the MoJ filed the complaint, an investigation will typically take place through the General Inspection Service.⁹⁴

If a head of jurisdiction or a litigant files the complaint and it has been transferred to the competent Disciplinary Commission, that commission will appoint a rapporteur to investigate: the rapporteur is the only person competent to investigate.⁹⁵ In the absence of an inspection unit within the CSM, the ability to investigate will be limited: the rapporteur may mobilise another magistrate, who must be at least of the same rank as the magistrate investigated, to assist with the investigation.⁹⁶

The difference in investigative capacity between complaints lodged by the MoJ and a head of jurisdiction or a litigant may explain why the MoJ initiates most disciplinary proceedings. The CSM has previously asked that part of the General Inspection Service be attached to the CSM, which would increase its investigative capacity; however, this has not been actioned. The failure of French authorities to increase the CSM's investigative capacity has been identified as a vulnerability in the French legal and institutional framework regarding preventing corruption by magistrates.⁹⁷

The investigative authority (eg, the General Inspection Service or the rapporteur appointed by the CSM's competent Disciplinary Council) has all powers to investigate, including access to documentation, and authority to summon and depose the relevant magistrate and other individuals.⁹⁸

Disciplinary procedure

There are no special rules applicable to disciplinary action derived from allegations of corruption involving a judge; the regular disciplinary process and rules apply to these cases without distinction from those that apply to disciplining prosecutors.

Judges can be given warnings by their superiors prior to any formal disciplinary proceedings being instituted against them.⁹⁹ If deemed appropriate, the MoJ can also request the CSM to temporarily prohibit administrative or criminal investigation commencing against a magistrate facing disciplinary proceedings, but such a decision is not made public.¹⁰⁰

93 Conseil supérieur de la Magistrature, 'Annual activity report of the CSM for 2016' (2017) 8 www.vie-publique.fr/sites/default/files/rapport/pdf/174000541.pdf accessed 14 February 2020.

94 The General Inspection Service is a service within the MoJ, staffed with magistrates and responsible for monitoring performance and investigating disciplinary misconduct.

95 *Ibid*, Art 51.

96 See n 93 above.

97 Group of States against Corruption, 'Fourth Evaluation Round on Corruption Prevention in Respect of Members of Parliament, Judges, and Prosecutors: Compliance Report France' (2016) 16 (adopted by GRECO at its 71st Plenary Meeting) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c5dfb> accessed 14 February 2020. Specifically, see Point 67 'GRECO notes that no measures have been taken to implement [recommendation ix] and that the concerns mentioned in the Evaluation Report (paragraph 126) still remain. The Minister of Justice retains the power of referral to the CSM, which, for its part, has no real investigative resources' [emphasis author's own].

98 *Ibid*.

99 See n 7 above, Art 44.

100 *Ibid*, Art 50.

The MoJ conducts the disciplinary hearing against the accused magistrate and is represented in proceedings by the Director of Judicial Services.¹⁰¹ An accused judge may be assisted or represented by a peer (another magistrate), a lawyer admitted before the Conseil d'Etat or Cour de Cassation, or a bar-licensed lawyer.¹⁰² The disciplinary hearing is, in principle, open to the public, providing full transparency unless public order concerns require a closed hearing.¹⁰³

At the adjudicative stage, an important distinction exists between judges and prosecutors:

- For judges, the competent Disciplinary Commission decides the case and, in the case of a finding of disciplinary misconduct, will order sanction(s).¹⁰⁴
- For prosecutors, the competent Disciplinary Commission renders a recommendation that is relayed to the MoJ, who will decide the case and, in the case of a finding of disciplinary misconduct, will order sanction(s).¹⁰⁵

A central issue in the debate on the reform of the prosecution in France concerns the adjudicative role of the MoJ for cases of prosecutorial misconduct. In these cases, the MoJ has the responsibility of filing and investigating the complaint, prosecuting the charges and making the final decision in the case: this makes the MoJ de facto 'judge and party' to the process, while the CSM only has a limited advisory role.¹⁰⁶ An attempt at law reform in 2008 failed, and a draft law prepared in 2013 was never adopted by the French Parliament. A new reform initiative was announced in late 2017 and is expected to use the 2013 draft law as a starting point.¹⁰⁷

Law 2016-1090 on the Statutory Guarantees, Ethical Obligations, and Recruitment of Magistrates and on the CSM¹⁰⁸ created strict deadlines for the completion of disciplinary proceedings within 12 months of initiation (but a six-month extension is available with proper justification).¹⁰⁹

LIMITATION PERIOD

The limitation period for disciplinary proceedings is three years from the time the conduct was (or should have been) discovered.¹¹⁰

However, this would not impact the ability to sanction a magistrate being investigated for criminal allegations of corruption, as the criminal investigation itself could constitute a misconduct for which disciplinary action can be taken.

101 *Ibid*, Art 56.

102 *Ibid*, Arts 52 and 54.

103 *Ibid*, Art 57.

104 Alexandre Bailly and Xavier Haranger, Litigation and enforcement in France: overview (Thomson Reuters 2018), [https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) accessed 6 September 2019.

105 *Ibid*.

106 Taleb Akila and Ahlstrand Thomas, 'The public prosecutor, its role, duties and powers in the pre-trial stage of the criminal justice process – a comparative study of the French and the Swedish legal systems' (*Revue internationale de droit pénal*, 2011/3 (vol 82)) www.cairn.info/revue-internationale-de-droit-penal-2011-3-page-523.html accessed 6 September 2019.

107 Gouvernement.fr, 'The five justice-system projects' www.gouvernement.fr/en/the-five-justice-system-projects accessed 14 February 2020; Gouvernement.fr, 'J21, a reform of the justice system for all' (10 September 2014) www.gouvernement.fr/en/j21-a-reform-of-the-justice-system-for-all accessed 14 February 2020.

108 Law 2016-1090 (dated 8 August 2016).

109 See n 7 above, Arts 50-4 and 63-1.

110 *Ibid*, Art 47.

BURDEN AND STANDARD OF PROOF

A complaint against a magistrate is examined by an admissions commission. A complaint will be inadmissible if it does not contain the detailed indication of the facts and allegations alleged. Consequently, the burden of proof lies within the claimant.¹¹¹

JURISDICTION AND CHANGE OF VENUE

The CSM has jurisdiction to hear and conduct disciplinary proceedings.¹¹²

SANCTIONS

Sanctions imposed as part of disciplinary proceedings can be temporary and later confirmed. Trends in disciplinary proceedings show that magistrates under investigation for corruption will be immediately subject to temporary suspension, and full disciplinary action will be initiated on the merits of the case, and a permanent sanction ordered at this time.

Disciplinary rules provide for nine sanctions (*sanctions disciplinaires*) of increasing seriousness, which can be ordered at the conclusion of disciplinary proceedings:¹¹³

- reprimand;
- mandatory removal from office;
- withdrawal of certain functions;
- prohibition to be appointed as a single judge for up to a maximum of five years;
- lowering of rank (corresponds to the reduction of the salary);
- temporary suspension from office for up to a maximum of one year, with full or partial suspension of salary;
- demotion;
- mandatory retirement with or without entitlement to the retirement benefits; and
- revocation (eg, dismissal with or without entitlement to the retirement pay).

A review of case law indicates the most common sanctions applied to magistrates facing corruption charges are mandatory retirement and revocation.

A further discretionary sanction available in disciplinary proceedings is an order for the publication of the judgment in full, without anonymisation.¹¹⁴ This sanction is intended to inform the public of conduct damaging to the institution of justice, and thereby restore trust.

111 *Ibid*, Art 50-3.

112 *Ibid*, Art 48; Loi organique no 94-100 du 5 février 1994 (see n 90 above), Art 18.

113 *Ibid*, Art 45.

114 *Ibid*, Art 57.

A notable shift in sanctions occurred in the early 2000s.¹¹⁵ Prior to 2002, sanctions imposed were more lenient and involved demotion, mandatory reposting, and/or withdrawal of certain functions or responsibility; however, decisions issued since 2002 show a zero-tolerance approach to allegations of corruption, with magistrates not only removed from their current functions or responsibilities but entirely removed from the judiciary.¹¹⁶

APPEALS

Judges may appeal the decision of the Disciplinary Commission before the Conseil d'État.¹¹⁷

If the Conseil d'État upholds the appeal, the case will be sent back to the CSM for re-evaluation¹¹⁸ by the Disciplinary Commission.

Cases

All decisions of disciplinary proceedings are published and are fully anonymised. Decisions include all facts of the case, the reasoning of the decision, and the decision sanctioning or exonerating the magistrate. Disciplinary decisions are published in a searchable database on the website of the CSM.¹¹⁹ A search of the database of disciplinary decisions entered against magistrates facing allegations of corruption returned 13 decisions: eight concerned judges and five concerned prosecutors.¹²⁰

These cases show immediate action to temporarily suspend magistrates upon their indictment by the investigative judge, and permanent sanctions ordered relatively rapidly thereafter. Disciplinary sanctions tend to be ordered well before the decision in the criminal case.

Two appellate decisions illustrate the impact of retirement on the disciplinary procedure. The first (S064) rules that no sanction can be ordered against a magistrate who retired prior to initiation of the disciplinary action. The second (P047CE), issued on appeal by the Conseil d'État, rules that a request to retire that had not yet been accepted by the MoJ is insufficient to prevent disciplinary action.

115 Julie Joly-Hurard, 'La responsabilité civile, pénale et disciplinaire des magistrats' (2006) *Revue internationale de droit comparé* 58(2) 439–475, 473–474.

116 *Ibid.*, 466–467.

117 *Ibid.*

118 Code de justice administrative, Art L821-2.

119 Conseil supérieur de la Magistrature, 'Recueil des décisions et avis' www.conseil-superieur-magistrature.fr/missions/discipline accessed 14 February 2020.

120 *Ibid.*

Decision No	Magistrate's position	Disciplinary misconduct	Sanction	Date of disciplinary decision	Date of criminal decision (if known)
S049	President of Chamber at a Court of Appeal	Duty of probity (abuse of function, damage to the honour of justice)	Demotion	1986	1990s, no indictment
S064	President of Chamber at a Court of Appeal	Case related to whether a disciplinary sanction can be ordered against a former magistrate who retired before the procedure was initiated	The retirement of the magistrate makes it impossible to order a disciplinary sanction	1992	Unknown
S096	Vice-President of a First Instance Court	Duty of probity (damage to the honour of justice, failure to maintain public confidence in the judiciary)	Withdrawal of functions and mandatory repositing	1997	Same individual as S136 for a different case
S104	Judge at a Court of Appeal	Duty of probity (abuse of function, failure to maintain public confidence in the judiciary)	Temporary suspension	1999	Initiated in 1998, convicted in 2002
S111 (same individual as S104)	Judge at a Court of Appeal	Duty of probity (abuse of function, damage to the honour of justice, obligation to preserve the dignity of the function, failure to maintain public confidence in the judiciary)	Mandatory retirement	2000	Initiated in 1998, convicted in 2002
S124	Vice-President of a First Instance Court	Duty of probity (obligation to preserve the dignity of the function)	Temporary suspension after indictment for trading in influence	2002	Initiated in 2002, convicted in 2007
P045	Prosecutor at a Court of Appeal	Duty of probity (abuse of function, duty of loyalty, damage to the honour of the judiciary)	Temporary suspension after indictment for bribery and trading in influence and placement in pre-trial detention	2003	Initiated in 2003, convicted in 2008
S125 (same individual as S124)	Vice-President of a First Instance Court	Duty of probity (damage to the honour of justice, obligation to preserve the dignity of the function, failure to maintain public confidence in the judiciary)	Revocation	2003	Initiated in 2002, convicted in 2007

Decision No	Magistrate's position	Disciplinary misconduct	Sanction	Date of disciplinary decision	Date of criminal decision (if known)
P047 (same individual as P045)	Prosecutor at a Court of Appeal	Duty of probity (abuse of function, duty of loyalty, damage to the honour of the judiciary)	Revocation	2003	Initiated in 2003, convicted in 2008
S136	Vice-President of a First Instance Court	Duty of probity (damage to the honour of justice, obligation to preserve the dignity of the function, failure to maintain public confidence in the judiciary)	Mandatory retirement	2004	Initiated in 2003, acquitted in 2016
P047CE (same individual as P045 and P047)	Prosecutor at a Court of Appeal	Duty of probity (abuse of function, duty of loyalty, damage to the honour of the judiciary)	Dismissal of appeal against the disciplinary sanction on the grounds that he had previously requested retirement and the retirement was not effected	2005	Initiated in 2003, convicted in 2008
P059	Assistant Prosecutor at a First Instance Court	Duty of probity (abuse of function, obligation to preserve the dignity of the function, duty of loyalty, failure to maintain public confidence in the judiciary)	Temporary suspension after indictment for bribery	2008	Initiated in 2008, convicted in 2012
P061 (same individual as P059)	Assistant Prosecutor at a First Instance Court	Duty of probity (abuse of function, obligation to preserve the dignity of the function, duty of loyalty, failure to maintain public confidence in the judiciary)	Revocation	2009	Initiated in 2008, convicted in 2012

Statistical data related to disciplinary actions is also readily available in annual reports of the CSM, but, similar to statistics on criminal proceedings, the data is not disaggregated (although this time, by type of misconduct).

Although there are approximately 8,000 magistrates in France, an analysis of CSM statistical data between 2006 and 2016 indicates that disciplinary proceedings are not common. The CSM received only 60 complaints against judges and 22 against prosecutors, and rendered 63 rulings concerning judges and 25 concerning prosecutors over the same period.¹²¹ Six new cases were received in 2016,

¹²¹ See n 93 above, 91.

(four against judges and two against prosecutors): five of these were initiated by the MoJ and the final case, against a judge, was initiated by a litigant.¹²²

A review of cases in the disciplinary database of the CSM indicates that most disciplinary proceedings result in a finding of misconduct. Between 2006 and 2016, ten of the 63 rulings resulted in findings that no misconduct had occurred or that, if misconduct had occurred, it could no longer be sanctioned.¹²³

Interrelation between disciplinary and criminal proceedings

Consecutive or parallel proceedings

Disciplinary and criminal proceedings tend to run parallel and independently of each other; however, disciplinary proceedings will almost always conclude before criminal proceedings.

Article 50 of Decree 58-1270 declares that, if appropriate, the MoJ can request the CSM to temporarily prohibit administrative or criminal investigations commencing against a magistrate already facing or likely to face disciplinary proceedings.¹²⁴

In any event, the initiation of criminal proceedings will generally trigger disciplinary proceedings. Once criminal proceedings are initiated or become known to the head of the jurisdiction, the MoJ will be notified to allow for the initiation of disciplinary proceedings, and will request the temporary suspension of the magistrate under investigation either ‘in the interest of the service of justice’, or directly on the merits of the case itself.¹²⁵ This decision is almost automatic, especially if the magistrate under investigation is placed in pre-trial detention.

The initiation of any type of criminal proceedings is sufficient to trigger a disciplinary sanction, regardless of the outcome of the criminal case. The disciplinary proceedings will address the impact of the investigation, indictment, and/or conviction on ‘the image of justice’ and the ‘good functioning of the service of justice’.¹²⁶ A case from the 1980s illustrates this relationship, in which a magistrate facing criminal charges of bribery and trading in influence was sanctioned by the CSM’s Disciplinary Committee with a demotion. The criminal case later resulted in a dismissal of the charges, but the disciplinary sanction remained.¹²⁷

Information exchange

Sharing information between the entities responsible for the disciplinary proceedings and criminal proceedings is limited, if not non-existent, in France. This is primarily partly due to confidentiality of investigations preventing investigative judges from sharing records or evidence in their possession. That said, information exchanges are not impossible, and can (or could) occur:¹²⁸

122 *Ibid.*

123 See n 119 above.

124 See n 7 above, Art 50.

125 See n 119 above.

126 *Report of the Commission of reflection on the ethics in magistracy* (November 2003).

127 Conseil supérieur de la Magistrature, ‘Decision S049 of the Disciplinary Council for Judge, dated 29 April 1986’ www.conseil-superieur-magistrature.fr/missions/discipline/s049 accessed 14 February 2020.

128 See n 108 above, Art 30.

- If a criminal investigation is initiated against a magistrate, the head of jurisdiction will notify the MoJ in the initial stages of the process and the MoJ will initiate a disciplinary proceeding (the mere fact that a criminal investigation has been initiated is sufficient for initiating a disciplinary action for misconduct).
- If acts of corruption, or evidence that could contribute to proving acts of corruption, are identified in the context of a disciplinary proceeding, the CSM or MoJ could transfer the information to the prosecutor or investigative judge in charge of investigating any criminal prosecution against that magistrate.

Retirement

The disciplinary process only applies to active magistrates and not retired magistrates.¹²⁹ A practice of voluntary retirement by magistrates under investigation undermines the ability of the judiciary to self-regulate and draw the full consequences of convictions for corruption. Retired magistrates are eligible to keep the benefits (eg, use of the title '*honorariat*') from their past functions as magistrates. Disciplinary rules provide that the *honorariat* may be suspended in two situations:

- a magistrate sanctioned with mandatory retirement in disciplinary proceedings cannot claim the *honorariat*;¹³⁰ or
- if the magistrate is subject to disciplinary proceedings at the time of retirement, he or she cannot claim the *honorariat* until the disciplinary proceedings are completed. The *honorariat* can also be refused within two months of the end of the disciplinary proceedings.¹³¹

These provisions do not, however, provide solutions to address cases in which magistrates may have retired voluntarily prior to the initiation of disciplinary proceedings.

A case from 1992 indicates disciplinary proceedings cannot result in a sanction against a retired magistrate (even if the proceedings had been initiated prior to retirement) and that the *honorariat* cannot be withheld after the fact for misconduct dating back to before the retirement (even if misconduct is established).¹³² This ruling illustrates how voluntary retirement can be used to avoid sanctions and maintain the status of a magistrate, despite established misconduct.

A decision of the Conseil d'Etat entered on appeal against a disciplinary ruling in 2005 indicates there have been efforts made to restrict the use of retirement to avoid disciplinary sanctions. In this case, a magistrate had been revoked and was later convicted and sentenced for trading in influence. The magistrate had also asked to retire, but his request had not been administratively processed by the authorities.¹³³ The Conseil d'État dismissed the magistrate's appeal and upheld the disciplinary sanction on the ground that the retirement had not been effected at the time of the disciplinary action.¹³⁴

129 Andra Puran, 'Brief considerations on the disciplinary liability of the French magistrates' (2016) *Journal of Law and Administrative Sciences* (Issue 5/2016) 36.

130 See n 7 above, Art 46.

131 *Ibid*, Art 77.

132 Conseil supérieur de la Magistrature, 'Decision S064 of the Disciplinary Council for Judge, dated 2 July 1992' www.conseil-superieur-magistrature.fr/missions/discipline/s064 accessed 14 February 2020.

133 In this case, the Ministry of Justice. The individual in question was serving as a prosecutor at the time.

134 Conseil supérieur de la Magistrature, 'Decision P047CE of the Conseil d'Etat, dated 23 March 2005: Appeal from Decision P047 of the Disciplinary Council for Prosecutors, dated 5 December 2003' www.conseil-superieur-magistrature.fr/missions/discipline/p047ce accessed 14 February 2020.

Temporary suspension

Decree 58-1270 provides the opportunity to temporarily suspend a magistrate facing criminal proceedings.¹³⁵

The MoJ systematically requests the temporary suspension as soon as the magistrate is subject to investigation from the CSM's competent Disciplinary Commission, who has 15 days to decide whether to order the suspension. A temporary suspension will be ordered 'in the interest of the service of justice', and considers the emotion and public uproar that may surround misconduct (often exacerbated by the media), which is increasingly the case for corruption cases. A decision to temporarily suspend a magistrate is not publicised.¹³⁶

A temporary suspension will lapse if a disciplinary complaint is not filed within two months (or earlier if requested by the MoJ).¹³⁷

The use of the temporary suspension enables the judiciary to remove magistrates who are under criminal investigation as soon as the investigation is known without awaiting a disciplinary complaint, or the completion of either the disciplinary or criminal proceedings. As with disciplinary decisions, the temporary suspension of judges is ordered by the CSM, while that of prosecutors is recommended by the CSM to the MoJ, which makes the decision.

Current debates, trends and other issues

Recent trends indicate both a harder-line approach to allegations of corruption levied against magistrates and a focus on prevention to reduce the risks of corruption within the judiciary.

Transparency and disclosure of interests

Reforms to increase transparency in public administration have extended the requirements of interest disclosure to magistrates. Traditionally imposed on elected officials, these measures were introduced by Law 2016-1090.¹³⁸

Magistrates had opposed the measure as unnecessary in light of existing obligations and preventive measures (specifically, the ethic compendium, strict conflict of interest rules and the possibility of recusal). These declarations are not made public, but they can be consulted by the Disciplinary Commission in the course of a disciplinary proceeding.

Efforts to extend asset disclosure requirements to magistrates holding functions as heads of jurisdiction (eg, court presidents and chief prosecutors), also under the same law, were ruled unconstitutional by the Conseil Constitutionnel in July 2016 on the grounds that the provisions created different treatment of these magistrates vis-à-vis their peers without relevance to the purpose

135 See n 7 above, Arts 45, 50 and 58-1.

136 *Ibid*, Art 40-6.

137 *Ibid*, Arts 50 and 58-1.

138 See n 108 above.

of the law.¹³⁹ It is unknown whether a similar provision applicable to all magistrates would have been ruled constitutional.

Zero tolerance

The judiciary, through the CSM's disciplinary power and the MoJ's authority to request the temporary suspension of a magistrate under investigation, started addressing misconduct more openly and severely in the 1990s, with increasingly severe sanctions.¹⁴⁰

Prior to this time, misconduct – even serious misconduct derived from criminal behaviour – would have mostly resulted in the head of jurisdiction talking to the magistrate and encouraging him or her to request a transfer. The magistrate would relocate to a different court or prosecution office, and no further discussion or action would occur.

Multiple cases from the mid-1980s indicated a shift in this practice. For instance, several magistrates and the President of the *tribunal de grande instance de Marseilles* had a habit of 'borrowing' seized assets at the court and were severely sanctioned by the CSM.¹⁴¹ The President of the *tribunal de grande instance de Marseilles* was forced to retire.

Ethics tools and training

The judiciary has sought to equip magistrates with tools to determine whether conduct would violate ethics requirements. In 2010, a new Code of Ethical Obligations of Magistrates was adopted;¹⁴² it is not binding and cannot provide grounds for disciplinary action, but it provides useful guidelines for compliance with the ethical principles governing judicial conduct.

The Service of Assistance and Ethical Watch of the CSM was established on 1 June 2016 as a hotline to provide magistrates with practical assistance on ethics questions.¹⁴³ This body comprises three former CSM members with extensive experience in ethics. In its first six months of operation, this body received 30 requests for advice on ethics through its telephone hotline.¹⁴⁴

Ethics has taken an increasing place in initial and continuing legal education programmes delivered by the Ecole Nationale de la Magistrature (French National School for the Judiciary). The continuing legal education programme is offered regularly and is in high demand. An interviewee noted that these training programmes appear to have had the impact intended in promoting ethical conduct – the largest proportion of cases referred to Disciplinary Commissions concern magistrates who entered the judiciary from other professions, not those who completed the initial legal education programme at the Ecole Nationale de la Magistrature.

139 Conseil Constitutionnel, 'Decision 2016-732 of the Constitutional Council, dated 28 July 2016', para 37 www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-732-dc/decision-n-2016-732-dc-du-28-juillet-2016.147682.html accessed 14 February 2020.

140 See, among others, Gilles Gaetner, 'L'adieu à l'impunité' (27 March 2003) www.lexpress.fr/actualite/societe/justice/l-adieu-a-l-impunite_496403.html accessed 23 March 2020.

141 *Ibid.*

142 See n 82 above.

143 Conseil Supérieur de la Magistrature, 'Deontologie' www.conseil-superieur-magistrature.fr/missions/deontologie accessed 14 February 2020.

144 See n 93 above, 102.

Early intervention against misconduct

Early intervention against misconduct may also contribute to the low number of investigations and disciplinary actions related to acts of corruption. Disciplinary proceeding judgments indicate that situations which could constitute precursors to corruption (eg, insolvency situations or inappropriate relations) lead to sanctions; this, in turn, may trigger either adjustments in the magistrates' behaviour, or retirement and departure from the judiciary.

In addition, a 'pre-disciplinary' warning procedure¹⁴⁵ was introduced recently to allow the heads of jurisdiction to address conduct of concern; this could constitute a precursor to disciplinary misconduct. This procedure provides an opportunity to catch deteriorating conduct early without waiting for more serious violations to occur.

Weaknesses of the current system

The current system appears to overemphasise prevention as a solution to address corruption by magistrates. While prevention is important, effective disciplinary and criminal prosecution of cases of corruption is equally important. Strengthening the repressive mechanisms may require greater efforts to identify corruption, expand referral mechanisms, and close loopholes that enable magistrates to retire prior to facing prosecution.

Magistrates also remain vulnerable to the mechanics of their careers. Advancement and postings to prestigious positions will require political support within the CSM and MoJ, especially for prosecutors. This may result in a degree of compliance with perceived expectations, which, while it does not constitute corruption per se, does constitute a degree of deference to power.

The CSM also lacks investigative powers, which limits its capacity to discipline magistrates without the intervention of the MoJ. This maintains the disciplinary process subordinate to the will of the MoJ, which can result in interference to pursue (or not pursue) sanctions for certain individuals. The control of the MOJ is even greater in the case of prosecutors, for whom the CSM only has an advisory role.

¹⁴⁵ See n 7 above, Art 44.

Case study: Ghana

Executive summary

The goal of this study is to determine how allegations of corruption against judges and magistrates are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts. In the Republic of Ghana ('Ghana'), criminal and disciplinary proceedings for allegations of judicial corruption are independent of each other, but still connected. This case study also reviews the separate constitutional process of petitioning for the removal of a judge of a superior court.

For the purpose of this case study, and expanding on the general definitions in section 3.1.2 of this report, we have adopted the following contextual definitions:

- 'Corruption' includes both bribery and trading in influence (ie, bribery involving a third-party intermediary). As stated in section 3.1.2 of this report, we have adopted the definitions of these offences provided by the United Nations Convention against Corruption.¹
- 'Judges' means judges of all levels in Ghana. This study does not include prosecutors.

Key findings: criminal proceedings

- Judicial corruption is classified as a separate criminal offence. Trading in influence is criminalised in the case of all public officers (including judges).
- There are no special criminal sanctions for judicial corruption: sanctions for judges appear to be of the same severity as those for other public officers. There have been no criminal prosecution cases of judicial corruption to date, despite numerous judges being subject to disciplinary sanctions (including dismissals) since 2015 as a result of the extensive undercover investigation by journalist Anas Aremeyaw Anas (the 'Anas Investigation').
- Judges enjoy no immunity from prosecution for criminal behaviour in their public or private lives. Judges receive no special treatment in criminal proceedings: the standard procedure for criminal proceedings applies and the prosecution is conducted like any other case of corruption. Judges facing charges of corruption are entitled to the same rights as any other defendant, including the right to a lawyer.
- There is no different procedure for criminal prosecution of Supreme Court judges.
- Corruption charges can be tried as an indictable or summary offence; but either way, the prosecution of a judge is generally open to the public in accordance with Article 19(14) of the Constitution of the Republic of Ghana 1992 (the 'Constitution').²

1 UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005 ratified in Ghana on 27 June 2007) 2349 UNTS 41 (UNCAC) www.unodc.org/unodc/en/corruption/ratification-status.html accessed 11 January 2021.

2 Constitution of the Republic of Ghana 1992.

Key findings: disciplinary proceedings

- Under the Judicial Service Regulations 1963 (the ‘Regulations’),³ the Chief Justice of Ghana (CJ) is the disciplinary authority for all judges in Ghana (except district court magistrates, who are subject to the Judicial Secretary); however, any punishment he or she awards is subject to confirmation by the President.
- The Code of Conduct for Judges and Magistrates 2003 (the ‘Code of Conduct’)⁴ sets out the general principles of judicial ethics, and rules and standards of judicial conduct required of judges. Breaches of the Code of Conduct are addressed under the Regulations. A judge of a superior court can also be removed from office for ‘stated misbehaviour’ under Articles 146 and 151 of the Constitution.⁵
- Breaches of the Code of Conduct are to be sanctioned with reference to the gravity of the act or omission in accordance with the Regulations.⁶
- Any judge facing disciplinary proceedings may be represented at an inquiry or an investigation by a lawyer, but only if the prosecuting party is similarly represented.⁷ A superior court judge facing proceeds to remove them from office under the Constitution is also entitled to legal representation.⁸
- Supreme Court judges can face the same disciplinary proceedings as judges of all other levels for breaches of the Code of Conduct under the Regulations. As judges of a superior court, they can also be subject to removal for stated misbehaviour under the Constitution, or a petition for removal and the associated process.
- Proceedings to dismiss any judge from office are not open to the public.

Key findings: interrelationship between criminal and disciplinary proceedings

- Criminal and disciplinary proceedings can only run consecutively (criminal proceedings must occur first). Disciplinary proceedings are not mandatory after a criminal prosecution, but can only commence after criminal proceedings are either not pursued or complete (and only where a judge has been convicted).⁹
- A successful criminal prosecution does not trigger disciplinary proceedings, as they are not mandatory. However, disciplinary proceedings can trigger criminal prosecution through the uncovering of evidence of criminal activity.
- Criminal judgments and orders for cases of judicial corruption are sent to the disciplinary authority after a successful criminal prosecution for determination as to whether disciplinary proceedings are warranted too. If evidence of a crime is uncovered during a disciplinary investigation or inquiry, the disciplinary authority shall consult the Attorney-General as to whether a criminal prosecution should commence.

3 Judicial Service Regulations 1963, pt IV.

4 Judicial Service of Ghana, Code of Conduct for Judges and Magistrates 2003 (GTS, republished in February 2011) <http://judicial.gov.gh/jsfiles/CodeofConduct.pdf> accessed 11 January 2021.

5 See n 1 above, Art 151 (1).

6 See n 4 above, r 7B.

7 See n 3 above, reg 39.

8 See n 1 above, Art 146(8).

9 See n 3 above, reg 30.

Context

Ghana has a hybrid legal system of both common law and local customary law. The judiciary (known as the Judicial Service) was established in chapter 11 of the Constitution¹⁰ and is independent from the legislature and executive. The Constitution also establishes the Judicial Council,¹¹ which is tasked primarily with discussing and proposing reforms to improve the administration of justice, discharge of judicial functions and efficiency of the Judicial Service.¹²

There are two main branches of courts in the Judicial Service: the Superior Courts of Judicature and the lower courts. The Superior Courts of Judicature is made up of the Supreme Court, Court of Appeal, High Court, and ten regional tribunals (one for each region).¹³ Judges of the Superior Courts of Judicature are appointed in accordance with Article 144 of the Constitution. The Courts Act 1993 established the lower courts, comprising the circuit courts, district courts and juvenile courts.¹⁴

There is also a system of quasi-judicial bodies, including the judicial committees of the various Houses of Chiefs (from community level to the National House of Chiefs), which exclusively hear chieftaincy disputes.¹⁵ The High Court has supervisory jurisdiction over these adjudicating chieftaincy bodies.¹⁶ This system has limited interaction with the main branches of the Judicial Service.¹⁷

Methodology

A number of constraints and limitations were encountered during the research for this study.

Primary research was conducted through a number of key interviews in Ghana. The key interviewees were identified through international professional associations to provide the perspective of judges, prosecutors, lawyers and the disciplinary authority on the research questions.

During the desk research phase, we encountered challenges in identifying recent, disaggregated and reliable statistical data, which was also raised as an issue in the primary research interviews. A broad review of secondary sources (including analytical reports, case law and news articles readily available online) was conducted to validate findings and confirm the information collected in primary research interviews.

To verify the accuracy of our desk research, follow-up interviews with representatives of the judiciary, non-governmental organisations (NGOs) and lawyers were conducted via email or in person.¹⁸

10 See n 1 above, c 11.

11 *Ibid*, Art 153.

12 *Ibid*, Art 154(1).

13 *Ibid*, Art 126(1)(a).

14 See n 1 above, Art 126(1)(b); the Courts Act 1993, s 39.

15 The Chieftaincy Act 2008 (this Act revised and consolidated the provisions of the Chieftaincy Act 1971 to conform with the Constitution).

16 *Ibid*, s 43.

17 For example, s 24 of the Chieftaincy Act 2008 and Art 131(4) of the Constitution provide for the appellate jurisdiction of the Supreme Court for decisions made by the National House of Chiefs; and s 37 of the Chieftaincy Act 2008 provides a mechanism through which decisions and an adjudicating chieftaincy body can be enforced via application to the relevant High Court or District Court (decisions are otherwise unenforceable).

18 Among others, the lawyer Samuel Appiah Darko from Cromwell Gray LLP (Accra, Ghana) and investigative journalist Anas Aremeyaw Anas.

Criminal prosecution

Criminalisation of 'judicial corruption'

In Ghana, bribery in the context of the judicial decision-making process is explicitly criminalised under section 253 of the Criminal Code 1960. In particular, a judge or juror is guilty of misdemeanour if, in the execution of his or her duties, he or she 'makes or offers to make any agreement with any person as to the judgment or verdict which he will or will not give as a judicial officer or juror in any pending or future proceeding'.¹⁹ In addition, a public officer will be guilty of corruption if he or she directly or indirectly agrees or offers to permit his or her conduct to be influenced by the gift, promise or prospect of any valuable consideration to be received by him or her, or by any other person, from any person.²⁰

Significantly, there have been no criminal proceedings for corruption brought against any judge in Ghana to date.²¹

Reporting an allegation

A formal mechanism for reporting a criminal offence is contained in section 61 of the Criminal and Other Offences (Procedure) Act 1960 (the 'COOP Act').²² Any person who believes from a reasonable and probable cause that an offence has been committed by any other person may make a complaint to a district court judge, who has jurisdiction to try or enquire into the alleged offence.²³ Complaints must be made orally or in writing, and, if made orally, must be put in writing by the judge and signed by both the complainant and the judge.²⁴

However, an interviewee indicated that reporting allegations of judicial corruption are rarely pursued through this formal mechanism: many more people simply report allegations of criminal wrongdoings by judges to the Ghana Police Service (GPS) as they would with any other crime and/or by a letter to the CJ through the Judicial Secretary.

Investigation

General provisions regulating the investigation of criminal matters apply to the investigation of corruption against judges – no special investigative body is assigned. The GPS is charged with investigating allegations of judicial corruption as it would allegations of corruption against any other public officer.²⁵

However, it is unclear from the provisions of the COOP Act whether or how a district court judge (to whom a complaint is made) refers the complaint to the GPS to investigate prior to dealing with the complaint under the process in section 61 of that act. In addressing the complaint, the district

19 The Criminal Code 1960 (Act 29), s 253.

20 *Ibid*, s 252. 'Valuable consideration' is defined in s 261.

21 Kaunain Rahman, 'Overview of Corruption and anti-corruption in Ghana' (U4 Anti-Corruption Resource Centre, 2018) www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana-2018-update accessed 11 January 2021.

22 COOP Act 1960, s 61.

23 *Ibid*, s 61(1).

24 *Ibid*, s 61(2).

25 The Police Service Act 1990, s 1. The police are charged with investigating crimes generally, and as corruption charges are criminal, they fall under the investigation mandate of the GPS.

court judge may either refuse to issue a process (in which case, he or she must provide reasons for his or her refusal), or issue a summons or warrant to compel the attendance of the accused judge before a court of competent jurisdiction.²⁶ A warrant will not be issued against the accused judge unless the complaint has been made under oath by the complainant or by a material witness.²⁷

Article 218 of the Constitution also creates a mechanism for the investigation of allegations of judicial corruption by the Commission on Human Rights and Administrative Justice (the ‘Commission’), which is headed by a commissioner.²⁸ The functions of the Commission include investigating complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his or her official duties, and all instances of alleged or suspected corruption and the misappropriation of public money by officials.²⁹

The commissioner has the power to bring action in any Ghanaian court to seek any remedy that may be available from that court in exercise of its functions.³⁰ However, the Commission has only investigated allegations of political corruption to date.

A number of interviewees suggested that the Commission’s authority would not extend to investigations of allegations of corruption against judges of any superior court, given the protections afforded to them under Article 146 of the Constitution.³¹ Furthermore, any adverse finding made by the Commission against a judge of a lower court can be subject to appeal to the relevant superior court.

The Anas Investigation³² concerned allegations of corruption of various judges of the superior and lower courts released in 2015, and resulted in numerous disciplinary hearings, and recommendations from the Judicial Council to investigate those allegations with a view to pursue criminal charges. Despite the recommendations from the Judicial Council, the GPS has (to date) failed to provide the Attorney-General with sufficient evidence to indict those accused. This failure to gather evidence comes notwithstanding Anas’s extensive video documentation of the corruption.

Criminal prosecution

General provisions set out in section 60 of the COOP Act³³ regulating the initiation of criminal proceedings apply to cases of judicial corruption. In particular, allegations of corruption are triable as either an indictable or summary offence in a court of competent jurisdiction. If being tried as an indictable offence, it must be instituted by or on behalf of the Attorney-General.³⁴

26 COOP Act, s 61(3).

27 *Ibid*, s 61(4).

28 See n 1 above, Art 218.

29 *Ibid* Art 218(a) and (e). The Commission’s functions are codified in The Commission on Human Rights and Administrative Justice Act 1993.

30 See n 1 above, Art 229.

31 See n 1 above, Art 146(1) ‘A Justice of the superior court or a Chairman of the Regional Tribunal shall not be removed from office except for stated misbehavior or incompetence or on ground of inability to perform the functions of his office arising from infirmity or body or mind’.

32 The Anas investigation is an investigation undertaken by a Ghanaian journalist, the result of which might or might not affect the Ghanaian judiciary. See www.bbc.com/news/av/world-africa-34814630 accessed on 4 December 2020.

33 COOP Act, s 60.

34 *Ibid*, ss 2(3), 2(4) and 58.

An interviewee stated that after the GPS completes an investigation of alleged judicial corruption, it sends the docket to the Attorney-General for advice. If the Attorney-General recommends that a prosecution should proceed on the basis of the evidence presented, the matter will be referred to the Police Prosecutor for summary offences in the lower courts or retained by the Attorney-General for the prosecution of indictable offences in a superior court.

An interviewee indicated that the default position is prosecution as a summary offence, unless the Attorney-General decides otherwise; the determination of which generally depends on the amount of money involved (if any).

Under section 54 of the COOP Act, at any stage before the verdict or judgment, or in preliminary proceedings before a district court, whether the accused has or has not been committed for trial, the Attorney-General may enter an order for *nolle prosequi* to voluntarily discontinue the prosecution.³⁵ This may be done by stating so in the district court, or by informing the district court in writing that the state does not wish for the proceedings to continue. The accused will then be discharged in respect of the charge for which the *nolle prosequi* is entered.³⁶ The accused will be released if committed to prison (if held on remand), and if on bail, that bail will be cleared.³⁷ However, the discharge of criminal charges against the accused by an order of *nolle prosequi* does not prevent any subsequent proceedings from being brought against the accused on account of the same facts.³⁸

LIMITATION PERIOD

Ghana does not have a statute of limitations in relation to criminal matters: criminal proceedings may be initiated at any time,³⁹ subject to the general provisions regulating criminal prosecutions. The Limitation Act 1972 only applies to civil law proceedings, with section 34 specifically excluding ‘criminal proceedings’ from the definition of ‘action’ for the purposes of that act.⁴⁰

BURDEN AND STANDARD OF PROOF

In accordance with the presumption of innocence, the burden of proof in criminal matters rests with the prosecution.⁴¹

The standard of evidence required in criminal cases is proof beyond a reasonable doubt.⁴² The burden of persuasion, when it is on the accused as to any fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to his or her guilt.⁴³

35 *Ibid*, s 54.

36 *Ibid*.

37 *Ibid*.

38 *Ibid*, s 54.

39 An exemption applies under s 297 of The Criminal Code 1960 in relation to offences committed under s 296 (Throwing Rubbish in the Street).

40 The Limitation Act 1972, s 34.

41 The Evidence Act 1975, ss 11 and 15(1).

42 *Ibid*, s 13(1).

43 *Ibid*, s 13(2).

Provisions that regulate jurisdiction under the Courts Act 1993 apply to cases of judicial corruption. If a judge is charged with an offence under section 239 of the Criminal Code 1960, under which corruption by a public officer is classified as a misdemeanour⁴⁴ (and punishable by imprisonment for a term not exceeding 25 years):⁴⁵

- if the offence is charged summarily, the circuit court has original jurisdiction;⁴⁶ and
- if the offence is indictable, the High Court has original jurisdiction.⁴⁷

There are no special provisions for a change of venue in criminal cases involving judges.

SANCTIONS

There are no special criminal sanctions for judicial corruption in the existing legislative scheme, and sanctions for judges appear to be of the same severity as those for other public officers.

Under the COOP Act, a judge convicted of corruption under section 252 ('Accepting or Giving Bribe to Influence Public Officer or Juror') section 253 ('Corrupt Promise by Judicial Officer or Juror') of the Criminal Code 1960 is guilty of a misdemeanour and shall be liable to imprisonment for a term not exceeding 25 years.⁴⁸ A term of imprisonment shall be with hard labour unless, in the case of a sentence of less than three years, the court otherwise directs.⁴⁹

Under section 298 of the COOP Act, if a person is convicted and imprisoned for three years or more:

- his or her public office position, within the jurisdiction of the court in which the trial is heard, becomes vacant (unless the court declares otherwise);⁵⁰ and
- any money (eg, pension or superannuation) and any accruing right to that shall be forfeited from the date of the conviction.⁵¹

APPEALS

Any appeal of a conviction or sentence of judicial corruption must be entered within one month of the date the order was made.⁵²

If an allegation of judicial corruption is tried on a summary basis and heard by the relevant circuit court, either party may appeal against the judgment to the relevant High Court.⁵³ If an allegation of

44 The Criminal Code 1960, s 239.

45 COOP Act, s 296(5).

46 The Courts Act 1993, s 43; for removal of doubt, s 48(3) of the Courts Act 1993 prohibits the district court from having original jurisdiction under s 48(1) (b) to hear cases in relation to an offence under s 239 of the Criminal Code 1960 because the minimum penalty prescribed for an offence under that section by s 296(5) of the COOP Act exceeds the penalty permitted to be imposed by a district court under s 48(2) of the Courts Act 1993.

47 The Courts Act 1993, s 15(1).

48 The Criminal Code 1960, ss 252–253 and 260; COOP Act s 296(5).

49 COOP Act, s 296(6).

50 *Ibid*, s 298(1) (a).

51 *Ibid*, s 298(1) (b).

52 COOP Act, s 325(1).

53 The Courts Act 1993, s 15(1) (b).

judicial corruption is tried as an indictable offence and heard by the relevant High Court, an appeal by either party will be heard in the Court of Appeal.⁵⁴

Appeals may be upheld on the basis that:

- the verdict or conviction of the court with original jurisdiction was unreasonable or cannot be supported having regard to the evidence;
- there was a wrong decision of any question of law or fact; or
- there was a miscarriage of justice.⁵⁵

Cases

There have been no criminal cases for corruption brought against any judges in Ghana to date.

Judgments in criminal cases brought before a superior court are published in law reports and are intermittently available on various online platforms.⁵⁶ Judgments of the lower courts are not reported or published.

General statistical data related to criminal cases and disciplinary proceedings is available in the Judicial Service's Annual Reports. The latest available report covers activity in 2017–2018⁵⁷ and provides disaggregated data on criminal cases in the superior and lower courts. There is no data available for criminal charges of judicial corruption, as it is not treated as a separate crime, and there has been no prosecution of judicial corruption to date.

Disciplinary proceedings

Misconduct by judges

Under the Regulations, the CJ is the disciplinary authority for all judges in Ghana, but any punishment he or she awards is subject to confirmation by the President.⁵⁸ A magistrate of the district court (defined as a 'judge' for the purpose of this report) is classified as 'a holder of a judicial service post' under the Regulations, and is therefore subject to the disciplinary authority of the Judicial Secretary.⁵⁹

As established earlier, the Code of Conduct⁶⁰ sets out the general principles of judicial ethics, and rules and standards of judicial conduct required of all judges in Ghana. The definition of 'judges' for the purpose of the Code of Conduct includes 'an officer of the Judicial Service performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate'.⁶¹

54 *Ibid*, s 11.

55 *Ibid*, s 31(1).

56 Ghana Legal Information Institute <https://ghalii.org> accessed 11 January 2021.

57 Ghana Judicial Service Annual Report 2017–2018 <http://judicial.gov.gh/jsfiles/annualrep20172018.pdf> accessed 11 January 2021.

58 See n 3 above, Reg 27(1).

59 *Ibid*, Regs 27(2), and 28(2) and (3).

60 See n 4 above, r 2.

61 *Ibid*, r 7A.

Under Rule 2 of the Code of Conduct, a judge must avoid impropriety and the appearance of impropriety in all activities, and specifically states that ‘a judge shall respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary’.⁶²

Breaches of the Code of Conduct are to be sanctioned with reference to the gravity of the act or omission in accordance with the Regulations.⁶³

Disciplinary action can also be taken against a judge for ‘stated misbehaviour’ under Article 151 of the Constitution.⁶⁴

Making a complaint

Complaints against Ghanaian judges may be made by any member of the public, including lawyers and other judges.⁶⁵ Complaints cannot be anonymous, but the complainant can request that his or her name be withheld from the person complained against in appropriate circumstances.⁶⁶

Complaints against judges of both the superior and lower courts can be filed:

- in person at the CJ’s Secretariat;
- in person at the Judicial Secretary’s Secretariat;
- in person at the region’s Public Relations and Complaints Unit (PRCU)⁶⁷ located at the region’s high court or the Head of the Complaints Unit in Accra;⁶⁸
- by post to the CJ, the Judicial Secretary, or the Public Complaints and Court Inspectorate Unit (PCCIU);⁶⁹
- by email to the Head of Administration at the PCCIU;⁷⁰
- by placing a written complaint and/or completed form into a complaint box at any court;⁷¹ or
- online via the Judicial Service’s website.⁷²

The PCCIU was established in 2003 as part of an effort to promote good governance and entrench anti-corruption, accountability and transparency in the Judicial Service.⁷³ Its functions include investigating complaints by the public against judges relating to allegations of corruption or other negative practices, breaches of the Code of Conduct and any abuse of office or position. The PCCIU

62 *Ibid*, r 2(a).

63 *Ibid*, r 7B.

64 See n 1 above, Art 151(1).

65 Ghana Judicial Service, ‘Annual Report 2015-16’ (2017) <http://judicial.gov.gh/jsfiles/annualrep20152016.pdf> 48 accessed 11 January 2021.

66 Public Relations and Complaints Unit (PRUC) Operational Guidelines (December 2017) 6.

67 The first two PRCUs were established in December 2014 in Kumasi and Sekondi. All other regions have since established their own units.

68 See n 66 above, 4–5. The PRCU’s functions in this regard fall under the supervision and control of the Public Complaints and Court Inspectorate Unit (PCCIU).

69 Judicial Service PRCU, ‘How to file a complaint’ (2019) www.judicialservicecomplaints.net/operationalinfo.aspx?pg=4 accessed 10 July 2019.

70 See n 66 above, 5.

71 *Ibid*, 6.

72 See www.judicialservicecomplaints.net accessed 11 January 2021.

73 See n 66 above, 3.

is headed by a judge of the Court of Appeal, and assistance is provided by three judges of a high court and various administrative staff.⁷⁴

Where an allegation of misconduct is made against a judge, the disciplinary process under Part IV of the Regulations must be followed as soon as possible.⁷⁵

Investigation

STANDARD COMPLAINT

Any complaints not received directly by the PCCIU (or PRCU) will be referred there in the first instance for initial investigation, including taking of statements, addressing trivial complaints and providing the opportunity for the person complained against to respond.⁷⁶

Once the initial administration of the complaint has been completed, the complaint will be internally referred to the appropriate level:

- the PRCU deals with complaints against lower court judges;
- the judges working in the PCCIU deals with complaints against judges of a high court; and
- the PCCIU Director must personally deal with complaints against judges of the Court of Appeal or higher.⁷⁷

If the complaint is one that only the CJ can deal with, the PCCIU must refer the complaint to him or her directly.⁷⁸ Allegations of corruption received by the PRCU against lower court judges must be referred to the PCCIU once the person complained against has been given an opportunity to respond to the allegations.⁷⁹

Once the relevant judge or the PCCIU Director is satisfied that all available evidence regarding the allegation of corruption is before him or her, he or she will prepare a recommendation to the CJ on what further action should be taken.⁸⁰ Upon reading the file and recommendation from the PCCIU, the CJ will make the final determination as to what action, if any, will be taken in accordance with the Regulations⁸¹ and the Code of Conduct,⁸² and consider whether the allegation warrants the removal of the judge.⁸³

The CJ may, if he or she desires assistance, refer the allegation of corruption of a judge (other than a district magistrate) to the President for determination of whether a summary or formal inquiry should be conducted.⁸⁴ The Judicial Secretary must be informed of the style of inquiry.⁸⁵

74 *Ibid.*

75 See n 3 above, reg 28(1).

76 See n 66 above, 6–7.

77 *Ibid.*, 6–9.

78 *Ibid.*, 9.

79 *Ibid.*

80 *Ibid.*, 4.

81 See n 3 above, reg 28.

82 R 7B of the Code of Conduct states: 'Where a Judge commits a breach of any rule of this Code he shall be sanctioned with reference to the gravity of the act or omission constituting the breach in accordance with the [...] Regulations.'

83 See n 66 above, 4.

84 See n 3 above, reg 28(2).

85 *Ibid.*, reg 38.

If the President receives a petition for the removal of a judge of a superior court, the President must refer the petition to the CJ to determine whether a *prima facie* case exists for the removal.⁸⁶

In the event that the CJ determines that a *prima facie* case exists, he or she will set up a Disciplinary Committee to investigate the complaint and make recommendations to the CJ – these recommendations are then forwarded to the President and must be acted on.⁸⁷ As soon as a petition has been referred to the Disciplinary Committee, the President may suspend that judge from duty.⁸⁸

Disciplinary proceedings

STANDARD PROCEEDINGS

If the CJ determines to proceed to disciplinary proceedings for the complaint of judicial misconduct, he or she may initiate an inquiry into the relevant judge (other than a district magistrate) in accordance with the procedure set in regulation 38 of the Regulations.⁸⁹ Disciplinary proceedings for a district magistrate are delegated to the Judicial Secretary as the disciplinary authority, but with the CJ having oversight.⁹⁰

The Regulations stipulate that an accused judge may be represented at an inquiry or an investigation by a lawyer, but only if the prosecuting party is similarly represented.⁹¹ Witnesses may be summoned and evidence produced in a formal inquiry, but not an informal one.⁹²

PROCEEDINGS TO DISMISS A JUDGE FROM OFFICE

The disciplinary process for dismissing a judge is complex, and the procedure depends on whether the accused is a judge of a superior or lower court. Ultimately, the CJ has the power to remove a judge and upon a resolution supported by the votes of not less than two-thirds of all the members of the Judicial Council.⁹³

A superior court judge may only be removed in accordance with the procedures specified in Article 146 of the Constitution. For proceedings of this nature, the Attorney-General is required to appoint a prosecutor to assist the Disciplinary Committee established by the CJ.⁹⁴ The party making the complaint may present evidence and call witnesses, while the accused judge may present a defence, cross-examine the complainant's witnesses and call their own witnesses. Inquiries by the Disciplinary Committee into superior court judges are heard *in camera* and are not open to the public.⁹⁵

86 See n 1 above, Art 146(3).

87 *Ibid*, Art 146(4), (5) and (9). The Judicial Council (formed in accordance with Art 153 and exercising functions allocated to it under Art 154 of the Constitution) appoints three superior court judges to the Disciplinary Committee, and the Supreme Court CJ appoints two other persons who are not members of the Council of State, members of Parliament or lawyers.

88 *Ibid*, Art 146(10).

89 The Regulation, reg 38.

90 *Ibid*, regs 28(3) and 38(5)-(7).

91 *Ibid*, reg 39.

92 *Ibid*, reg 40.

93 See n 1 above, Art 151.

94 Yaw Gyampo, 'The Special Prosecutor and the Fight Against Corruption in Ghana: Some Thoughts' (My Joy, 3 January 2018) www.myjoyonline.com/opinion/2018/January-3rd/the-special-prosecutor-and-the-fight-against-corruption-in-ghana-some-thoughts.php accessed 11 January 2021.

95 See n 1 above, Art 146(8).

Complaints against lower court judges are dealt with by the PRCU. Once the judge against whom the complaint has been made has had the opportunity to respond to the allegations, the PRCU must refer the complaint to the PCCIU.⁹⁶ Once the relevant investigating judge within the PCCIU or the director of this unit is satisfied that all available evidence is before him or her, he or she will prepare a recommendation to the CJ on what the next steps should be.⁹⁷ The CJ will make the final determination as to what action, if any, will be taken,⁹⁸ taking into consideration the Regulations⁹⁹ and the Code of Conduct,¹⁰⁰ and whether the allegation in question warrants the removal of the judge.¹⁰¹

LIMITATION PERIOD

There is no statute of limitations in relation to disciplinary proceedings of judges.

However, the Regulations state that all acts of alleged misconduct by a holder of a judicial service post should be dealt with as soon as possible after their occurrence.¹⁰²

BURDEN AND STANDARD OF PROOF

The burden of proof in disciplinary hearings is on the investigators conducting the inquiry.

The standard of proof adopted has been described as ‘a sliding scale’:

- civil dispute standards (on the balance of probabilities) have been applied to less serious allegations that are unlikely to result in the removal of a judge; and
- standards closer to those required for criminal disputes have been applied to more serious allegations that might result in removal. Unlike an ordinary criminal matter, however, the burden of persuasion does not rise to ‘beyond a reasonable doubt’, as this threshold would be impossible to meet given the limited investigation conducted during the hearing.

JURISDICTION AND CHANGE OF VENUE

The Supreme Court has jurisdiction to conduct disciplinary proceedings against judges (except magistrates of the district court who are under the authority of the Judicial Secretary).¹⁰³

There are no special provisions for the change of venue for disciplinary proceedings of a judge.

SANCTIONS

Disciplinary remedies available for allegations of corrupt judges include reprimand, suspension or dismissal of the judge in question.¹⁰⁴

96 See n 66 above, 9

97 *Ibid.*, 4.

98 See n 3 above, reg 28.

99 *Ibid.*

100 See n 82 above.

101 See n 66 above, 4.

102 See n 3 above, reg 28(1).

103 *Ibid.*, regs 27(2), and 28(2) and (3).

104 For statistics on recent disciplinary hearings please see the Ghana Judicial Service Annual Report 2013–2014, pp 45–46; 2015–2016, pp 49–50; and 2017–2018, pp 54–55 www.judicial.gov.gh accessed 11 January 2021.

A judge may be suspended from exercising the powers and functions of his or her office by the disciplinary authority if proceedings that may result in their dismissal from office are being taken, or are about to be taken.¹⁰⁵

APPEALS

If the result of an inquiry by the CJ is that a judge of either a superior court or lower court has engaged in misconduct, and that judge has been sanctioned accordingly, he or she has a right of appeal to the President.¹⁰⁶

Appeals must be filed in writing with the Judicial Secretary within ten days of the date of the decision.¹⁰⁷

Cases

Although there have been no *criminal* charges brought against members of the judiciary for corruption to date, there have been a significant number of *disciplinary* proceedings instigated since 2015 following the Anas Investigation in which judges from the lower courts and the High Court were implicated.¹⁰⁸ At least ten judges from the High Court and 21 judges from the lower courts had disciplinary charges brought against them.

Of the ten High Court judges investigated and had disciplinary proceedings initiated against them:

- eight have been removed from office; and
- two retired prior to commencement of the proceedings.

All 21 lower court judges investigated were removed from office (eight from the circuit court and 13 from the district court).¹⁰⁹

Decisions in disciplinary cases are not available to the public, and recordings of the proceedings are not available. The Judicial Service Annual Report for 2017–2018 shows that from June to December 2016 there were 202 petitions received against conduct, of which 177 cases were disposed of (including outstanding cases). In 2017, from January to June, there were 96 cases registered, of which 104 cases were disposed of (including outstanding cases).¹¹⁰

Interrelationship

Criminal and disciplinary proceedings instigated by allegations of corruption of a judge are independent of each other, but still connected. As no criminal proceedings for judicial corruption have been prosecuted to date, the extent of the interrelationship is unclear.

The existing regulations provide some guidance as to how these two mechanisms may interact.

105 See n 3 above, reg 33(1).

106 *Ibid*, reg 41(1)-(3).

107 *Ibid*, reg 41(4).

108 Kaunian Rahman, 'Overview of Corruption and Anti-Corruption in Ghana' (U4 Anti-Corruption Resource Centre, 2018) www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana-2018-update accessed 11 January 2021.

109 Freedom House Report Ghana (2016) <https://freedomhouse.org/report/freedom-world/2016/ghana> accessed 11 January 2021.

110 Judicial Annual Report 2017-2018 www.judicial.gov.gh/jsfiles/annualrep20172018.pdf, pp 54–55 accessed 11 January 2021.

Consecutive or parallel proceedings

Where an investigation or inquiry initiated by a complaint uncovers that a criminal offence may have been committed, unless action has been or is about to be taken by the police, the disciplinary authority shall consult the Attorney-General as to whether a criminal prosecution should be instituted.¹¹¹ Where the Attorney-General does not advise for a criminal prosecution, he or she should advise whether disciplinary action should be taken.¹¹²

If criminal proceedings are recommended, disciplinary proceedings relating to any of the grounds raised in the criminal charge should not commence until the conclusion of the criminal proceedings.¹¹³

Where disciplinary action is recommended, the charges should be approved by the Attorney-General before the inquiry proceeds or the accused party is required to answer.¹¹⁴

Information exchange

If a judge is convicted of corruption in criminal proceedings, the Registrar of the court in which the verdict was passed must inform the Judicial Secretary and send him or her a copy of the charges and judgment.¹¹⁵

If the disciplinary authority (ie, the CJ or Judicial Secretary) decides that the disrepute brought upon the judicial service by the conviction warrants disciplinary action as well, the disciplinary authority will request that the convicted judge shows cause why he or she should not be dismissed or otherwise dealt with (unless an appeal against a conviction is pending).¹¹⁶ In the event that the convicted judge appeals his or her conviction, the notice of appeal must be given to the Judicial Secretary for referral to the CJ.¹¹⁷

Where a member of the judiciary has been acquitted of a criminal charge of judicial corruption, but disciplinary proceedings are intended, the draft disciplinary charges must be forwarded to the Attorney-General for his or her advice as to whether charges are appropriate.¹¹⁸

Disciplinary measures following criminal convictions

According to the Regulations, when a judge is convicted of an offence involving fraud or dishonesty or is sentenced to imprisonment, he or she:

1. shall not receive any wages from the date of the conviction pending the decision of the disciplinary authority empowered to dismiss him or her;¹¹⁹ and
2. shall be automatically removed from duty without salary from the date of his or her conviction.¹²⁰

111 See n 3 above, reg 29.

112 *Ibid.*

113 *Ibid.*, reg 30.

114 *Ibid.*, reg 29.

115 *Ibid.*, reg 42(1).

116 See n 3 above, reg 42(4).

117 *Ibid.*, reg 41(4).

118 *Ibid.*, reg 31(2).

119 See n 3 above, reg 32.

120 *Ibid.*, reg 33(4).

Where a judge is acquitted of a criminal charge, he or she may still be dismissed, or otherwise punished for other separate charges arising out of the same conduct, but cannot be dismissed for the same issues on which he or she was acquitted.¹²¹

Retirement

Judges who wish to retire before age 50 must submit an application to the CJ providing reasons for wishing to retire prematurely.¹²² Judges may retire voluntarily after age 50, subject to three months' notice of their intention to retire.¹²³ This notification period may be waived, unless criminal or disciplinary proceedings have been or are about to be instituted against the judge.¹²⁴ Judges must retire by the age of 60, unless determined otherwise by the President.¹²⁵

The Regulations also have provisions that would apply in circumstances where judges try to voluntarily retire without notice – and receive the associated pecuniary benefits – in circumstances where criminal or disciplinary proceedings have been or are about to be instituted against them.¹²⁶

Current debates, trends or other issues

Amendments to the regulations

In January 2018, members of the Judicial Council met to discuss amendments to the Regulations to provide specific guidance for instances of corruption by members of the judiciary. The Anti-Corruption Action Plan for the Judiciary and Judicial Services 2017–2019 was produced, with the slogan 'Uprooting corruption, wherever it is found'.¹²⁷ It is understood from interviewees that the nature of these new or amended provisions is likely to focus on civil, as opposed to criminal remedies.

The Judicial Council also intended to generate regulations to provide specific guidelines for the format of disciplinary hearings.¹²⁸ These regulations will provide greater clarity in respect of the nature of the investigative process, the appropriate standard for the burden of proof, and the order and framework of disciplinary proceedings.¹²⁹

Office of the Special Prosecutor

The Office of the Special Prosecutor (OSP) was created in 2017 with the mandate to investigate specific cases of corruption involving public officers and to prosecute these offences on the authority of the Attorney-General.¹³⁰

121 *Ibid*, reg 31.

122 *Ibid*, reg 49(4).

123 *Ibid*, reg 49(1).

124 *Ibid*, reg 49(2).

125 *Ibid*, reg 48(1).

126 *Ibid*, regs 48–49.

127 Anti-Corruption Action Plan for the Judiciary and Judicial Service (2017–2019) http://judicial.gov.gh/jsfiles/anti_corruption_action_plan.pdf accessed 11 January 2021.

128 *Ibid*.

129 *Ibid*.

130 Office of the Special Prosecutor Bill (2017) <http://ghananewsonline.com.gh/wp-content/uploads/2017/08/OFFICE-OF-THE-SPECIAL-PROSECUTOR-BILL.pdf> accessed 11 January 2021.

As at the date of this case study, the OSP had primarily focused on allegations of political corruption and not prosecuted any allegations of judicial corruption.¹³¹ It has also not publicly announced having received any complaints of judicial corruption.¹³²

Media and civil society

The Ghanaian media and civil society have had a significant impact on the approach to judicial corruption. Following the Anas Investigation, there were widespread protests and marches calling for a comprehensive review of the alleged misconduct.¹³³ The judiciary's response in commencing numerous disciplinary hearings is testament to the pressure of public sentiment.¹³⁴ However, we note that there have been no successful criminal convictions following these disciplinary hearings.

Under-reporting or under-prosecuting judicial corruption?

Despite judicial corruption still being reported as high in Ghana, statistics show a lack of criminal prosecution cases in relation to judges accused of judicial corruption. This might indicate a degree of under-prosecution of criminal cases against corrupt judges, which might ultimately lead to a degree of under-reporting of judicial corruption.

131 Kojo Pumpuni Asante (Corruption Watch Secretariat), 'An assessment of the Office of the Special Prosecutor, one year on' (Ghana Centre for Democratic Development, 13 May 2019) 7–10.

132 *Ibid.*

133 BBC, 'Ghana Judges to Be Investigated over Corruption Allegations' (BBC, 9 September 2015) www.bbc.co.uk/news/world-africa-34200721 accessed 11 January 2021.

134 Adwoa S Amankwah, 'Media Exposé of Judicial Corruption in Ghana: Ethical and Theological Perspectives' (2017) *Legon Journal of the Humanities* 1–9.

Case study: The Philippines

Executive summary

In the Republic of the Philippines (the ‘Philippines’), criminal and disciplinary proceedings instigated by allegations of corruption of judges are independent of each other, but still connected. This case study also comments on, but does not analyse, the separate constitutional process of impeachment.

Anti-corruption reform, awareness raising and training continue to be promoted in the Philippines, including by the Supreme Court; however, the effectiveness of current anti-corruption measures is questionable.

The purpose of the study is to determine how allegations of corruption against judges and magistrates are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts. For the purpose of this case study, and expanding on the general definitions in section 3.1.2 of this report, we have adopted the following contextual definitions:

- ‘Corruption’ includes both bribery and trading in influence (ie, bribery involving a third-party intermediary). As stated in section 3.1.2 of this report, we have adopted the definitions of these offences provided by the United Nations Convention against Corruption.¹
- ‘Judges’ means judges of all levels in the Philippines. This study does not include prosecutors.

Key findings: criminal proceedings

- Judicial corruption is not a specific crime in itself in the Philippines; instead, it falls under general laws criminalising corruption in relation to public officials. There is a specific set of offences applying to judges in relation to dereliction of duty; however, these do not cover ‘corruption’ as defined for the purposes of this case study.
- The sanctions for judges appear to be of the same severity as for all public officers.
- Judges enjoy no immunity from prosecution for acts constituting criminal offences committed in their public or private life. They enjoy no privileges or special treatment in investigation or prosecution procedure and, like all other public officials, are entitled to the same rights as any other defendant, including the right to a lawyer.
- There is no different procedure for the criminal prosecution of Supreme Court judges.
- All individuals in the Philippines (including judges) have the right to a public trial when facing criminal prosecution.² This right is generally implemented and upheld.³

1 UN Convention against Corruption, adopted 31 October 2003 by resolution 58/4, entry into force 14 December 2005 (ratified in Ghana on 27 June 2007) www.unodc.org/unodc/en/corruption/ratification-status.html accessed 11 January 2021.

2 The Constitution of the Republic of the Philippines 1987 (the ‘Constitution’), Art III, s 14(2); see also the Revised Rules of Criminal Procedure, r 115 s 1(h).

3 Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2015: Philippines* (United States Department of State 2015) 11.

Key findings: disciplinary proceedings

- The Judicial Integrity Board (JIB) investigates and conducts disciplinary proceedings against all judges (except those of the Supreme Court),⁴ with the supervision of the Supreme Court.⁵
- The standards of conduct that apply to all judges are contained in the Code of Conduct and Ethical Standards for Public Officials and Employees (1989) (the ‘Public Official Code’)⁶ and the New Code of Judicial Conduct for the Philippine Judiciary (2004) (the ‘Judiciary Code’).⁷ Rule 140 of the Rules of Court⁸ governs disciplinary proceedings for allegations of judicial corruption: violations of the Anti-Graft and Corrupt Practices Act; breaches of the Judiciary Code amounting to gross misconduct; and direct or indirect bribery are all categorised as ‘serious charges’.
- Similar to criminal prosecution, it appears that sanctions for judges appear to be of the same severity as for all public officials under standards applying to all public officials (ie, under the Public Official Code).
- The only disciplinary proceedings mechanisms available for Supreme Court judges are impeachment and removal from office through the Constitution of the Republic of the Philippines 1987 (the ‘Constitution’).⁹
- Reports of disciplinary proceedings against judges drafted by the JIB are confidential and for the use of the Supreme Court only.

Key findings: interrelationship between criminal and disciplinary proceedings

- It is unclear whether criminal and disciplinary proceedings run parallel or consecutively; however, it is clear that one is not a precondition for the other.
- A criminal conviction does not automatically result in dismissal from judicial office unless that is a penalty of the particular offence. Where it does not constitute part of the penalty, separate disbarment proceedings may be issued, however, this is not automatic. A number of acts provide for automatic suspension from office during a criminal prosecution.¹⁰
- Information is only exchanged from the JIB (investigating or conducting a disciplinary proceeding) to the Office of the Ombudsman (the ‘Ombudsman’) for criminal proceedings if any evidence of criminal behaviour comes to light during disciplinary proceedings. Criminal judgments are publicly available and could be used in future disciplinary proceedings. Disciplinary proceedings against judges are private and confidential: the Ombudsman cannot compel the JIB to submit its records of a certain judge that may contain a disciplinary proceeding decision.¹¹

4 Rules of Court, r 140 s 3 (as amended by AM No 18-01-05-SC).

5 The Constitution, Art VIII s 11.

6 Republic Act No 6713 ‘Code of Conduct and Ethical Standards for Public Officials and Employees (1989)’.

7 New Code of Judicial Conduct for the Philippine Judiciary (2004).

8 Rules of Court, r 140.

9 The Constitution, Art XI s 2.

10 Republic Act No 3019 (1960) (‘Anti-Graft and Corrupt Practices Act’), s 13; Republic Act No 7080 (1991) ‘An Act Defining and Penalising the crime of Plunder’, s 5.

11 *Bonifacio Sanz Maceda v Hon Ombudsman Conrado, M Vasquez, and Atty Napoleon A Abiera*, G R No 102781 (22 April 1993).

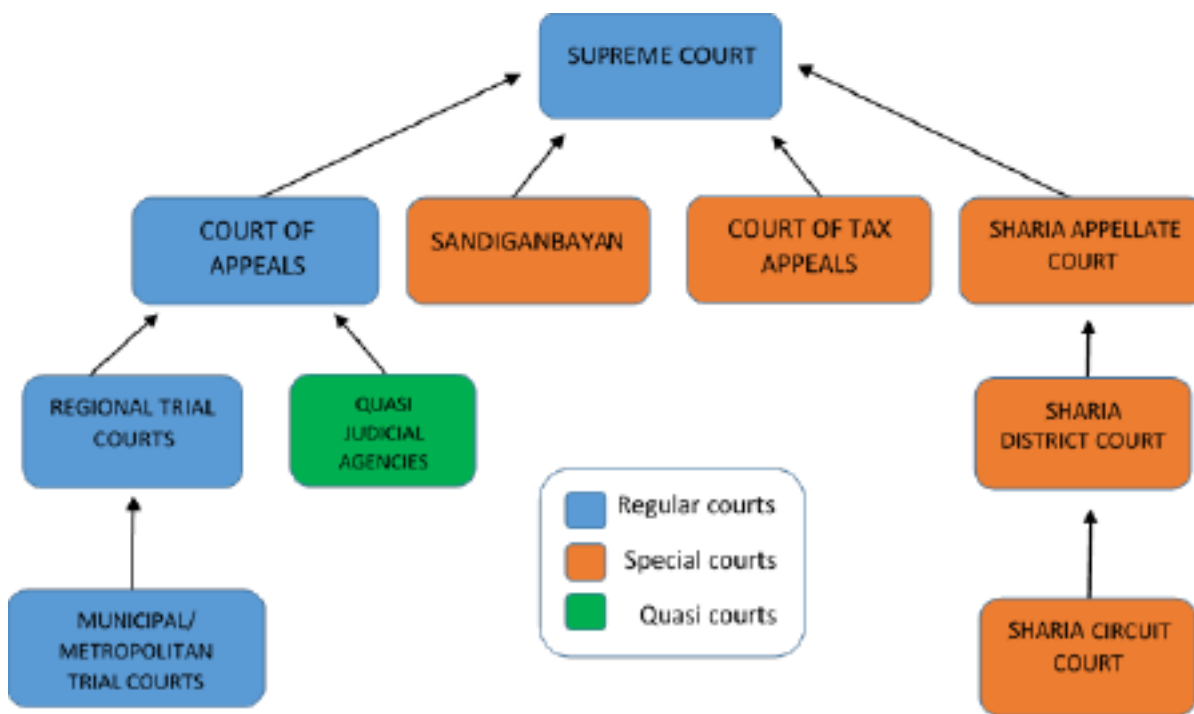
Context

The Philippines has a hybrid legal system combining customary, civil and common law traditions (in some instances, Islamic law is observed in parts of the Southern Islands).¹² Sources of law include the Constitution, statutes, treaties and judicial decisions.

Article VIII of the Constitution vests judicial power in the Supreme Court and any other lower courts established by law,¹³ including:

- those established under the Judiciary Reorganisation Act 1980 (court of appeals, regional trial courts, metropolitan trial courts, municipal trial courts, and municipal circuit trial courts);¹⁴
- the Sandiganbayan (a special appellate court for corruption cases of public officials);¹⁵
- the Court of Tax Appeals;¹⁶ and
- the Sharia district and circuit courts.¹⁷

The judiciary is not established as explicitly independent of the government and executive in the Constitution; however, it appears in practice to be independent through its ability to hear cases as to the constitutionality, application or operation of any treaty, law, agreement, presidential decree, proclamation or order (among other things).¹⁸



12 Islamic law applies to the Muslim population only, and only covers specific areas of the law, such as marriage, divorce, family relations and inheritance. It was codified with Presidential Decree No 1083 – A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and for Other Purposes.

13 The Constitution, Art VIII, s 1.

14 The Judiciary Reorganisation Act 1980.

15 The Sandiganbayan was established under s 5 of Art VIII of the 1973 version of the Constitution and Presidential Decrees No 1486 and 1606. Its mandate continues under s 5 of Art XI of the 1987 version of the Constitution. Republic Act No 8249 (1997) further defines the jurisdiction and funding of the Sandiganbayan.

16 The Court of Tax Appeals was established under Republic Act No 1125 (1954), and its jurisdiction was expanded in Republic Act No 9282 (2004) to include matters concerning civil tax, criminal tax, local tax, property tax and final collection of tax.

17 Sharia District and Circuit Courts were established under Presidential Decree No 1083 (1977).

18 The Constitution, Art VII, s 4.

Anti-corruption laws in the Philippines have deep roots: the first specific piece of anti-corruption legislation, Republic Act No 3019 (1960) (the ‘Anti-Graft and Corrupt Practices Act’),¹⁹ was enacted in the 1960s. However, the effectiveness of these anti-corruption laws is highly questionable. Transparency International’s 2018 Corruption Perceptions Index ranked the Philippines 99th out of 180 countries, with an index score of 36/100.²⁰ In 2008, the World Bank estimated that at least 20 per cent of the annual judiciary budget is lost to corruption, which undermines the capacity to properly administer justice.²¹ The Philippines Center for Investigative Journalism claimed that backlogs and congestion problems in the judiciary are ‘the biggest stumbling block’ to curbing corruption due to the snail-paced trial of graft charges.²²

Methodology

A number of constraints and limitations were encountered during the research for this study.

Primary desk research was conducted in the initial research stage, encompassing a broad review of secondary sources. We encountered a lack of codified information on judicial corruption cases, which could be attributed to the fact that they are treated as ordinary criminal proceedings. Reports from disciplinary proceedings remain confidential, so we were unable to review the content of these reports.

To verify the accuracy of our desk research, follow-up interviews with representatives of the judiciary, non-governmental organisations (NGOs) and lawyers were conducted via email or in person.²³

Criminal proceedings

Criminalisation of ‘judicial corruption’

Judicial corruption is not a specific crime in itself in the Philippines; instead, it falls under general laws criminalising corruption in relation to public officials:

- The Anti-Graft and Corrupt Practices Act criminalises active and passive bribery, extortion, abuse of office and conflicts of interest for public officers (as well as the individual obtaining an advantage from the corrupt public official),²⁴ and provides for dismissal of a public official due to unexplained wealth.²⁵
- The Revised Penal Code criminalises bribery of and by public officers,²⁶ and corruption of public officers²⁷ (where the same penalties imposed on the judge corrupted are also imposed against the

19 Anti-Graft and Corrupt Practices Act.

20 The Corruption Perception Index uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. The average score in 2018 was 43 www.transparency.org/cpi2018 accessed 11 January 2021.

21 Farzana Nawaz and Alfred Bridi, *Overview of Corruption and Anti-Corruption in the Philippines* (U4 Helpdesk, Transparency International, 17 August 2008) 4.

22 *Ibid.*

23 Among others, Lloyd Nicholas Vergara, Court Attorney VI at the Supreme Court of the Philippines.

24 Anti-Graft and Corrupt Practices Act, s 3.

25 *Ibid.*, s 8.

26 See n 26 above, s 210 (direct bribery); s 211 (indirect bribery); and s 211A (qualified bribery). ‘Public officers’ is defined under s 203 as ‘any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class’.

27 *Ibid.*, s 212.

person taking the action as described in sections 210, 211 and 211A to bribe that judge) under section 2 of chapter 2 of Title VII.

- The Act Defining and Penalising the crime of Plunder (the ‘Plunder Act’) criminalises ‘plunder’ as when a public officer ‘accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts [...] of at least P75 million’.²⁸
- Section 1 of chapter 2 of Title VII of the Revised Penal Code specifically addresses three offences concerning dereliction of duty by a judge: knowingly rendering an unjust judgment,²⁹ knowingly rendering an unjust interlocutory order³⁰ and maliciously delaying the administration of justice.³¹ Even though these provisions do not explicitly refer to ‘bribery’ or ‘trading in influence’, these offences may be relevant for the scope of this case study.

Reporting an allegation

Members of the public can report instances of judicial corruption:

- through an online complaint form on the website of the Ombudsman;³²
- in person at an Ombudsman office; or
- to the police at a police station.³³

The police record the details of the crime (victim, suspect and narrative details of the incident) in the Crime Incident Recording System (CIRS) at the time the report is made. A collated report of the information stored in the CIRS (called the Incident Record Form (IRF)) is printed and signed by the investigator and the complainant. The complainant keeps a copy of the IRF, which has a control number and can be used by the complainant to verify and follow up the status of his or her complaint.³⁴

Investigation

There are two main bodies involved in the investigation of judicial corruption cases: the Ombudsman and the National Bureau of Investigation (NBI). These bodies are independent of each other, but interact and cooperate on cases of judicial corruption.

The Ombudsman is an independent body with the mantra to ‘act promptly on complaints filed in any form or manner against officers or employees of the Government’.³⁵ The Ombudsman ‘has primary jurisdiction over cases cognisable by the Sandiganbayan and, in the exercise of his primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases’.³⁶ One of its responsibilities is to investigate public officials accused of graft and corruption.

28 See n 10 above, s 2 (cf s 1(d)).

29 See n 26 above, s 204.

30 *Ibid*, s 206.

31 *Ibid*, s 207.

32 See ‘Filing of New Complaint’ online by Office of the Ombudsman www.ombudsman.gov.ph/key-services/filing-of-complaint accessed 11 January 2021.

33 RPCRD, ‘Reporting a Crime to the PNP’ (Philippine National Police: Police Regional Office 9, 15 September 2014) <https://pro9.pnp.gov.ph/index.php/programmes-and-policies/announcements/226-reporting-a-crime-to-pnp> accessed 18 July 2019.

34 *Ibid*.

35 Republic Act No 6770 (1989) (the ‘Ombudsman Act of 1989’), s 13; see also the Constitution Art XI, s 12.

36 The Constitution Art XI, s 13(1); the Ombudsman Act of 1989, s 15(1).

Although primarily concerned with prosecution, the Office of the Special Prosecutor (OSP), the prosecution limb within the Ombudsman, also has power to conduct preliminary investigations of criminal cases.³⁷ The OSP has the exclusive authority to investigate (of its own accord or on complaint by any person) any act or omission of a public officer where it appears to be illegal, unjust, improper or inefficient.³⁸ It may also take over an investigation from any government investigatory agency.³⁹

The NBI is a specialist investigatory body within the Department of Justice with the mantra to ‘undertake investigations of crimes and other offences against the laws of the Philippines [...] [and] to render assistance, whenever properly requested in the investigation or detection of crimes and other offences’.⁴⁰ It is separate from the general Philippine National Police, and has divisions relating to different areas of crime including the Anti-Graft Division. The NBI is able to pass cases to the Ombudsman for continued investigation and prosecution.⁴¹

Criminal prosecution

Under section 14(2) of Article III of the Constitution, all individuals in the Philippines (including judges) have the right to a public trial when facing criminal prosecution.⁴² This right is generally implemented and upheld.⁴³

There are two main bodies involved in the prosecution of judicial corruption cases: the OSP (prosecutorial limb of the Ombudsman) and the National Prosecution Service (‘NAPROSS’). The former has primary jurisdiction over cases cognisable by the Sandiganbayan and, in the exercise of this function, may take over the investigation of those cases from any investigatory agency of the government.⁴⁴

A criminal complaint will only proceed to the Sandiganbayan if the Chief Special Prosecutor has proven the existence of probable cause following the preliminary investigation in accordance with the law: it is mandatory for the OSP to prosecute a meritorious case.⁴⁵ It has been suggested, however, that the Ombudsman’s record in prosecuting cases of judicial corruption is poor, and is supposedly due to:

- limited investigative power;
- limited prosecution capacity (as a direct consequence of the limited investigative power); and
- operational shortcomings, including the allocation of human resources.⁴⁶

37 The Ombudsman Act of 1989, ss 11(4)(a) and 15.

38 *Ibid*, s 15.

39 *Ibid*.

40 Republic Act No 157 (1947) ‘An Act creating a Bureau of Investigation, providing funds therefor, and for other purposes’, ss 1(a) and (b).

41 See www.acauthorities.org/successstory/philippine-experience-against-corruption accessed 11 January 2021 for the head of the Anti-Graft Division of the NBI on the value of inter-departmental cooperation: ‘a joint investigation was conducted [...] Networking of assets in the Philippines had proven fruitful.’

42 The Constitution Art III, s 14(2); see also: The Revised Rules of Criminal Procedure, r 115, s 1(h).

43 See n 3 above.

44 The Ombudsman Act of 1989, s 15(1). See also, Office of the Ombudsman, Power Functions and Duties www.ombudsman.gov.ph/about-us/powers-functions-and-duties accessed 11 January 2021.

45 Presidential Decree No 1606 (as amended by Republic Acts No 7975 and 8249), s 11: r 115 of the Revised Rules of Criminal Procedure outlines a defendant’s rights in criminal trials.

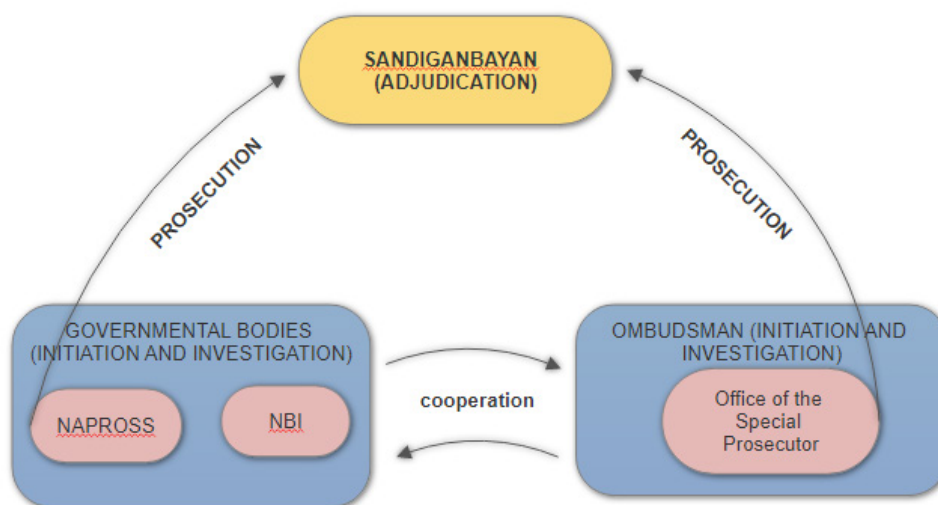
46 Emil P Bolongaita, ‘An exception to the rule? Why Indonesia’s Anti-corruption commission succeeds where others don’t – a comparison with the Philippines’ Ombudsman’ (U4 Issue 4, 2010).

NAPROSS is the prosecution limb of the Department of Justice, and consists of the Office of the Secretary of Justice, Regional State Prosecution Offices and Provincial and City Prosecution Offices. As NAPROSS has investigatory powers,⁴⁷ it may not necessarily require the specialist help of the NBI.

Prosecution rates in the Sandiganbayan (from 2013 World Bank statistics) reveal that the Sandiganbayan is the slowest of all the collegiate courts in the Philippines: the average time to resolve a criminal case increased from 6.6 years in 2003 to 9.1 years in 2012.⁴⁸ This slow rate of administration of justice has been attributed to court rules and procedures, limited financial resources and significant numbers of vacancies in judicial posts.⁴⁹ Other observers comment that the slow pace is also due to the Sandiganbayan consistently granting continuances when the Ombudsman is disorganised and unprepared in court: arguments have been made that the Sandiganbayan must be stricter in granting continuances to compel more efficient preparation by the Ombudsman.⁵⁰

There are two key distinctions between the Ombudsman, NBI and NAPROSS:

- the Ombudsman is entirely distinct from (and acts as a watchdog over) the government, of which the NBI and NAPROSS are agencies; and
- the Ombudsman is limited in the subject matter it considers, whereas the NBI and NAPROSS are parts of the generic criminal justice system.



LIMITATION PERIOD

There is no general statute of limitations in the Philippines. The statute under which the charges are brought determines the limitation period:

47 Republic Act No 10071 (2010) ('Prosecution Service Act of 2010'), s 3.

48 Eric Batalla, Michelle Sta Romana and Karen Rodrigo, 'Chapter 10: The Judiciary under Threat' in Mark Thompson and Eric Batalla (eds) *Routledge Handbook of the Contemporary Philippines* (Routledge 2018).

49 *Ibid.*

50 Matthew Stephenson, 'Specialised anti-corruption courts: Philippines' (U4 Issue 3, 2016) 3.

- prosecution under the Anti-Graft and Corrupt Practices Act must commence within ten years;⁵¹
- the period in which prosecution of crimes under the Revised Penal Code must commence depends on what the prescribed penalty is:⁵²
 - crimes punishable by ‘*prison mayor*’ (sections 204 and 210) must commence within 15 years;
 - crimes punishable by ‘correctional penalty’ (sections 207 and 211) must commence within ten years;
 - crimes punishable by ‘*arresto mayor*’ (sections 206 and 210) must commence within five years; and
- prosecution for crimes under the Plunder Act must commence within 20 years.⁵³

BURDEN AND STANDARD OF PROOF

The burden of proof in all criminal cases in the Philippines is on the prosecution to prove guilt beyond reasonable doubt. This applies to proceedings initiated by both the OSP and NAPROSS.

For the offence of ‘plunder’ committed under the Plunder Act, the prosecution needs to establish ‘beyond reasonable doubt a pattern of overt or criminal acts indicative of the overall unlawful scheme or conspiracy’.⁵⁴

JURISDICTION AND CHANGE OF VENUE

Municipal Circuit Trial Court judges are classified as ‘low-ranking officials’ and are prosecuted by NAPROSS in the regular court system.⁵⁵

All other judges, as ‘high-ranking officials’ (civil service salary grade 27 and above),⁵⁶ are subject to the original and exclusive jurisdiction of the Sandiganbayan, which has the power to hear cases concerning ‘members of the judiciary without prejudice to the provisions of the Constitution’⁵⁷ under:

- the Anti-Graft and Corrupt Practices Act;⁵⁸
- section 2 of chapter II of Title VII of the Revised Penal Code;⁵⁹
- ‘other offences or felonies whether simple or complexed with other crimes committed by [members of the judiciary] in relation to their office’;⁶⁰ and
- offences under the Plunder Act.⁶¹

51 Anti-Graft and Corrupt Practices Act, s 11.

52 See n 26 above, s 90.

53 See n 10 above, s 6. However, there is no limitation on the time for which the state may recover properties unlawfully acquired by public officers from the state or their nominees or transferees.

54 *Ibid*, s 4.

55 See n 46 above, 9 (fn 11); see n 48 above (Table 10.3).

56 *Ibid*.

57 Presidential Decree No 1606 as amended by Republic Act No 8249, s 4(a) (3). The offences under the Revised Penal Code (1960) that the Sandiganbayan has jurisdiction over are bribery offences.

58 *Ibid*, s 4(a).

59 *Ibid*, s 4(a) (3).

60 *Ibid*, s 4(b). This is likely to cover offences under s 1 of c II of Title VII of the Revised Penal Code (1930).

61 See n 10 above, s 3.

The Sandiganbayan also has the power and jurisdiction to dismiss cases for lack of merit.⁶²

There are no special provisions for changing the trial venue of a criminal prosecution of judicial corruption. However, the Supreme Court does have the power to ‘order a change of venue or place of trial to avoid a miscarriage of justice’.⁶³

SANCTIONS

If a prosecution is successful, the decision of the Sandiganbayan must contain findings of all facts and issues raised before it.⁶⁴ The statute under which the prosecution is brought determines the applicable sanctions: they appear to be of the same severity for all public officers (including judges).

Any judge with a criminal prosecution pending in a court under the Anti-Graft and Corrupt Practices Act, under the Revised Penal Code on bribery charges or under the Plunder Act shall be suspended from office.⁶⁵

A judge found guilty of corruption under section 3 of the Anti-Graft and Corrupt Practices Act shall face the following penalties:

- imprisonment for not less than one year nor more than ten years;⁶⁶
- perpetual disqualification from public office;⁶⁷
- confiscation or forfeiture in favour of the government of any prohibited interest and unexplained wealth manifestly out of proportion to his or her salary and other lawful income;⁶⁸ and
- loss of all retirement or gratuity benefits under any law.⁶⁹

A judge found guilty of the following offences under the Revised Penal Code faces the corresponding penalties:

- a ‘*prison mayor*’ offence (sections 204 and 210) is punishable by imprisonment for six to 12 years;⁷⁰
- a ‘correctional penalty’ crime (sections 207 and 211) is punishable by imprisonment for six months to six years;⁷¹ and
- an ‘*arresto mayor*’ crime (sections 206 and 210) is punishable by imprisonment for one month to six months.⁷²

62 Rules of Court, Rules of Criminal Procedure, r 112, s 5.

63 The Constitution Art VIII, s 5(4).

64 Presidential Decree No 1606, s 7.

65 Anti-Graft and Corrupt Practices Act, s 13; see n 10 above, s 5.

66 Anti-Graft and Corrupt Practices Act, s 9.

67 *Ibid.*

68 Anti-Graft and Corrupt Practices Act, s 9.

69 *Ibid.*, s 13.

70 Revised Penal Code (1930) Title III, c 3, s 1, Art 27.

71 *Ibid.*

72 *Ibid.*

If convicted of plunder under the Plunder Act, a judge shall be punished by life imprisonment with perpetual absolute disqualification from holding any public office.⁷³

If a judge is acquitted, he or she shall be entitled to reinstatement to office and to backpayment of the salaries and benefits withheld while suspended, unless in the meantime administrative proceedings have been filed against him or her.⁷⁴

Beyond the penalties prescribed by law, the statistics indicating the conviction rate by the Ombudsman in the Sandiganbayan are unclear and sometimes misleading (especially because they do not particularise prosecution rates for judges specifically). However, what is clear that the Ombudsman's conviction rates overall are very low:

- in the period for 2001 – May 2006 the conviction rate was reportedly 0.7 per cent;⁷⁵
- in 2001, the Ombudsman reportedly only secured 43 convictions out of 738 filed cases (conviction rate of six per cent) – but most of these verdicts were appealed to the Supreme Court and reversed;⁷⁶
- a 2003 study found 77 per cent of the Ombudsman's cases either result in acquittals or in successful appeals of guilty verdicts;⁷⁷
- a study from 2005 found that, of the Ombudsman's cases, 'less than 6 per cent of cases disposed resulted in a penalty', either criminally or administratively;⁷⁸ and
- in 2008, the Ombudsman incorrectly reported a conviction rate of 73 per cent, which was publicly denounced as misleading and corrected by the Sandiganbayan.⁷⁹

Critics on the application of sanctions say that the penalties for some corruption-related activities are not comparable to the severity of the offence. Some penalties are too low (eg, the maximum term for imprisonment for an offence under the Anti-Graft and Corrupt Practices Act is ten years), and others are too high (eg, instances of grave misconduct where it is the first offence, the penalty is immediate dismissal from the service).⁸⁰ It has been argued that 'extreme penalties do not encourage prosecution of offences' because of a cultural aversion to penalties that are considered either inadequate or too harsh.⁸¹

APPEALS

For criminal proceedings, the Sandiganbayan can grant a new trial or reconsideration of a decision it made any time before a judgment becomes final, either of its own accord or on petition of the accused.⁸²

73 See n 10 above, s 2.

74 Anti-Graft and Corrupt Practices Act, s 13; see n 10 above, s 5.

75 See n 46 above, 11.

76 *Ibid.*, 11–12.

77 *Ibid.*, 11.

78 *Ibid.*

79 *Ibid.*, 12.

80 Nelson Nogot Moratalla, *Graft and Corruption: The Philippine Experience* (113th International Training Course Participants' Papers, Resource Material Series No 56) 501, 515.

81 *Ibid.*

82 Rules of Criminal Procedure, r 121, s 1.

The accused can also file a motion for a new trial or reconsideration within 15 days of the date of the final judgment, and that motion must be decided by the Sandiganbayan within 30 days.⁸³

A decision to grant a new trial or reconsideration can be made on the grounds listed in section 2 of Rule 121 or section 14 of Rule 124 of the Rules of Criminal Procedure.⁸⁴ The new trial or reconsideration is heard by the *ponente* (the author of the original judgment) and the other judges who participated in the original decision (unless they are no longer able to for reasons considered in section 2 of Rule 121).⁸⁵ If a new trial or reconsideration is granted, the original judgment will be set aside or vacated, and a new judgment rendered accordingly.⁸⁶

However, no motion for new trial or reconsideration filed by the accused judge can be acted on if the accused has also filed an appeal in the Supreme Court by petition for review on *certiorari*.⁸⁷

A judge indicted by the Sandiganbayan can appeal to the Supreme Court by petition for review on *certiorari*, which only relates to questions in the law.⁸⁸ If any decision of the Sandiganbayan results in life imprisonment or the death penalty, the decision is always appealable to the full bench of the Supreme Court.⁸⁹

Cases

Criminal judgments in the Philippines are published upon determination, and include the facts of the case and reasoning. The Sandiganbayan website⁹⁰ publishes its decisions and resolutions, as well as reporting statistics on cases at the end of each calendar month. For the period of February 1979 to 30 June 2019,⁹¹ Sandiganbayan statistics show:

- 9,128 cases were filed for allegations of offences against the Anti-Graft and Corrupt Practices Act and 7,301 had been disposed of;
- seven cases were filed for allegations of malfeasance or misfeasance under the Revised Penal Code and all had been disposed of;
- 370 cases were filed for allegations of bribery under the Revised Penal Code and 353 had been disposed of; and
- 12 cases were filed for allegations of plunder against the Plunder Act and four had been disposed of.

There are no readily available statistics regarding how many cases involve judges. However, the Sandiganbayan does publish their decisions online for public viewing so the public can read decisions of cases of judicial corruption.⁹² See, for example:

83 Supreme Court En Banc Resolution AM No 02-6-07-SB, Re: Revised Internal Rules of the Sandiganbayan Part IV, s 1.

84 *Ibid*, s 4.

85 *Ibid*, s 2.

86 *Ibid*, s 7; Rules of Criminal Procedure, r 121, s 6(c).

87 See n 83 above, s 8.

88 Re: Revised Internal Rules of the Sandiganbayan, r X, s 1 (a); Rules of Court, r 45.

89 *Ibid*.

90 See <http://sb.judiciary.gov.ph/index.html> accessed 11 January 2021.

91 Sandiganbayan, *Statistics Report on Cases Filed, Pending, and Disposed of as of 30 June 2019* (Sandiganbayan Statistics Report, 30 June 2019) http://sb.judiciary.gov.ph/libdocs/statistics/filed_pending_disposed_june_30_2019.pdf accessed 23 July 2019.

92 See 'Recent Decisions' *Sandiganbayan* <http://sb.judiciary.gov.ph/index.html> accessed 23 July 2019.

- *The People v Domingo*, in which Judge Domingo, a Municipal Trial Judge, received PHP 10,000 in exchange for assurance of a favourable decision to a litigant, and was convicted of direct bribery under the Revised Penal Code;⁹³
- *The People v Sidro*, in which Judge Proceso Sidro was sentenced to seven years imprisonment and perpetual disqualification from public office for violating the Anti-Graft and Corrupt Practices Act by failing to deposit and return a bond in a criminal trial;⁹⁴ and
- *The People v Reyes*, in which Judge Ramon B Reyes was found guilty of indirect bribery under the Revised Penal Code for receiving money in consideration for dismissing a case heard before him.⁹⁵

The Ombudsman website⁹⁶ does not contain a database of investigations – presumably because if matters are found to have merit, they are referred to the Sandiganbayan for prosecution. The website does publish Sandiganbayan decisions.

Disciplinary proceedings

The Supreme Court *en banc* has exclusive jurisdiction over the supervision and discipline of judges and lawyers.⁹⁷

On 2 October 2018, the Supreme Court passed a resolution⁹⁸ and approved the recommendations of the Technical Working Group on Judicial Integrity⁹⁹ to:

- establish the JIB, which comprises two retired judges of the Supreme Court (for the positions of Chair and Vice-Chair) and three retired judges of the Court of Appeals, Sandiganbayan or Court of Tax Appeals (for the regular members);¹⁰⁰
- establish the Corruption Prevention and Investigation Office (CPIO), which is reportedly authorised to conduct investigations, intelligence, surveillance, or entrapment operations or lifestyle checks against judges;¹⁰¹ and
- make significant amendments to Rule 140 of the Rules of Court, which governs the discipline of judges (other than Supreme Court judges).¹⁰²

Prior to passing this resolution, the Supreme Court delegated authority to the Office of the Court Administrator (OCA).¹⁰³

93 *People of the Philippines v Henry L Domingo*, Criminal Case No 27773.

94 *People of the Philippines v Judge Proceso Sidro*, Criminal Case Number 17567.

95 *People of the Philippines v Judge Ramon B Reyes*, Criminal Case Number 24357.

96 See www.ombudsman.gov.ph accessed 11 January 2021.

97 The Constitution Art VIII, s 11.

98 Supreme Court Resolution AM No 18-01-05-SC.

99 This Technical Working Group on Judicial Integrity was established under Memorandum Order No 38-A-2016, and was made up of a number of sitting and retired judges, academics and lawyers. The mandate of this group was ‘researching measures to strengthen integrity and prevent corruption in the Judiciary, recommending the creation of offices, and proposing amendment to Rule 140 of the Rules of Court’.

100 See n 98 above, 2.

101 See <https://news.abs-cbn.com/news/11/13/18/sc-creates-2-new-offices-revises-guidelines-for-filing-complaints-vs-judges-justices> accessed 11 January 2021.

102 Rules of Court, r 140.

103 Supreme Court Circular No 30-91 (30 September 1991) Art II(A). The OCA was created through Presidential Decree 828 (1975). There is one Court Administrator, three Deputy Court Administrators, and two Assistant Court Administrators, see http://oca.judiciary.gov.ph/?page_id=9 accessed 23 July 2019.

For instances involving Supreme Court judges, the only disciplinary proceedings available are impeachment and removal from office through the Constitution.¹⁰⁴

Misconduct by judges

Two relevant documents codifying the standard of conduct expected of judges apply to all judges: the Public Official Code and the Judiciary Code.

The Public Official Code outlines prohibited acts of any public official or employee, and specifically disallows the solicitation or acceptance of gifts in section 7(d).¹⁰⁵ The Judiciary Code applies to all judges equally in the Philippines, and they must exercise their functions ‘free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason’.¹⁰⁶

Disciplinary proceedings, also-called administrative offences, are governed by Rule 140 of the Rules of Court and apply to all court personnel of the Courts of Appeals, Sandiganbayan, Court of Tax Appeals and regular or special courts.¹⁰⁷ Section 21 of Rule 140 identifies a non-exhaustive list of disciplinary charges that are divided into three groups: serious, less serious and light charges.¹⁰⁸ These groups tend to parallel how much influence these behaviours could have on the outcome of a case: instances of judicial corruption fall into the ‘serious charges’ category.

Serious charges¹⁰⁹	Less serious charges¹¹⁰	Light charges¹¹¹
<ul style="list-style-type: none"> • Bribery, direct or indirect • Dishonesty and violations of the Anti-Graft and Corrupt Practices Act • Gross misconduct constituting violations of the Code of Judicial Conduct • Knowingly rendering an unjust judgment or order as determined by a competent court in an appropriate proceeding • Conviction of a crime involving moral turpitude • Wilful failure to pay a just debt • Borrowing money or property from lawyers and litigants in a case pending before the court • Immorality • Gross ignorance of the law or procedure • Partisan political activities • Alcoholism and/or vicious habits 	<ul style="list-style-type: none"> • Undue delay in rendering a decision or order, or in transmitting the records of a case • Frequent and unjustified absences without leave or habitual tardiness • Unauthorised practice of law • Violation of Supreme Court rules, directives and circulars • Receiving additional or double compensation unless specifically authorised by law • Untruthful statements in certificate of services • Simple misconduct 	<ul style="list-style-type: none"> • Vulgar and unbecoming conduct • Gambling in public • Fraternising with lawyers and litigants with pending case(s) in court • Undue delay in submission of monthly reports

104 The Constitution Art XI, s 2.

105 See n 6 above, s 7(d).

106 See n 7 above, Canon 1, s 1.

107 Rules of Court, r 140, s 26.

108 *Ibid*, s 21.

109 *Ibid*, s 22.

110 *Ibid*, s 23.

111 *Ibid*, s 24.

Not all violations of the Judiciary Code will be ‘gross misconduct’ and therefore constitute ‘serious’ charges for the purpose of the Rules of Court.¹¹² It may be possible for a lesser breach of the Judiciary Code to be construed as a more minor form of misconduct and therefore fall into the non-exhaustive list of ‘less serious’ or ‘light’ charges.

Making a complaint

A complaint of judicial misconduct can be made by anyone (either identified or anonymous) and must be filed with the JIB.¹¹³ For a complaint to be verified, it must:

- be in writing and clearly and concisely state:
 - the acts and omissions constituting the misconduct specifically targeted under sections 22, 23 or 24 of the Rules of Court; or
 - the alleged violations of standards of conduct prescribed for judges by law, the Rules of Court, or the Judiciary Code;¹¹⁴ and
- be supported by:
 - an affidavit of a person with personal knowledge of the facts of the alleged misconduct; or
 - authentic documents that may substantiate said allegations; or
 - public records of indubitable integrity (for an anonymous complaint).¹¹⁵

All complaints are dealt with equally and without consideration of the nature of the complainant (ie, whether an individual or public body makes the complaint).

If the JIB finds a verified complaint is sufficient in form and substance, a copy is served on the accused and they are required to file a verified answer to or comment on the complaint with the JIB within ten days of service.¹¹⁶ If a complaint is not sufficient in either form or substance, the JIB will recommend to the Supreme Court that the complaint be dismissed.¹¹⁷ This has previously occurred in *Re: Complaint Letters filed by Rosa Abdulharan and Rafael Dimaano charging Justice Jane Aurora C Lantion*¹¹⁸ and *Diomampo v Judge Alpajora*.¹¹⁹

If a complaint is filed with the JIB within six months before the compulsory retirement age of a judge for a cause of action that occurred at least one year before filing, the JIB shall serve a copy of the complaint on the accused and require an answer or comment to be filed within ten days of service.¹²⁰ If it is established prima facie that the complaint is intended to harass and embarrass the accused judge (who is within six months of retiring age), the JIB shall recommend to the Supreme Court the

112 American Bar Association, Judicial Reform Index for the Philippines (Asia Law Initiative, March 2006) 32.

113 Rules of Court, r 140, s 2.

114 *Ibid.*

115 *Ibid.*, s 1.

116 *Ibid.*, s 3.

117 *Ibid.*

118 *Re: Complaint Letters filed by Rosa Abdulharan and Rafael Dimaano charging Justice Jane Aurora C Lantion* (July 2017).

119 *Diomampo v Judge Alpajora* 483 Phil 560 (2004).

120 Rules of Court, r 140, s 11.

dismissal of that complaint.¹²¹ The JIB shall also recommend that the complainant be cited by the Supreme Court for indirect contempt, and if the complainant is a lawyer, he or she may be required to show cause why he or she should not be administratively sanctioned as a member of the Philippine Bar and as an officer of the court.¹²²

In August 2016, the Philippine Government established the #8888 Hotline as a mechanism for the public to make complaints of inefficiency and corruption against public officials. These complaints are then forwarded to the relevant government agency and the Office of the President within five days of receipt.¹²³ Data from the Civil Service Commission shows that out of 150,000 calls received by the Hotline in the first year of operation, 800 concerned fixing and extortion reports, and more than 200 concerned graft and corruption complaints.¹²⁴ However, over 50 per cent were inquiries and the Hotline was not functioning effectively as an anti-corruption tool.¹²⁵

In response to the perceived ineffectiveness of the #8888 Hotline, a new civilian anti-corruption platform was created that partnered with a number of government agencies;¹²⁶ however, it was only a nine-month programme, and does not appear to be currently operational.¹²⁷ Ultimately, the existence of anti-corruption institutions is encouraging, but the actual incorporation and effectiveness of said institutions proves ambiguous.

INSTIGATED BY THE JIB

If a judge has been convicted by the Sandiganbayan or by the regular or special courts for a felony or a crime (as defined by special law), the JIB must initiate disciplinary proceedings *motu proprio* (of their own accord) in the Supreme Court.¹²⁸ The JIB will submit a report of said conviction to the Supreme Court within ten days from being informed of the conviction, with a recommendation that the report be deemed as an administrative complaint against the relevant judge and docketed as a regular administrative offence for the JIB to investigate.¹²⁹

INSTIGATED BY THE SUPREME COURT

The Supreme Court can instigate disciplinary proceedings in the JIB against a judge *motu proprio*.¹³⁰ If disciplinary proceedings are initiated by the Supreme Court (either *motu proprio* or on the basis of a verified complaint) and there are no substantial factual issues, the filed documents or papers and any newspaper or media reports submitted to the Supreme Court will be docketed as a regular administrative offence for appropriate final action by the Supreme Court.¹³¹ The accused judge will be served with a copy of the complaint, and filed documents, papers and any newspaper or media reports,

121 *Ibid.*

122 *Ibid.*

123 ABS CBN News, 'Dial 8888, 911: Gov't opens complaints, emergency hotlines' *ABS CBN News* (Manila, 1 August 2016).

124 Anna Felicia Bajo, '8888 not effective as anti-corruption hotline, says UP prof' *GMA News Online* (23 August 2017).

125 *Ibid.*

126 Michael Bueza, '#NotOnMyWatch: Reporting corruption made easier' *Rappler* (14 February 2017).

127 Marites Danguilan Vitug, 'In the Philippines, Journalists Confront Fake News and a Crackdown on Press Freedom' *Nieman Reports* (22 May 2018).

128 Rules of Court, r 140, s 1.

129 *Ibid.*, s 6.

130 *Ibid.*, s 1.

131 *Ibid.*, s 4.

and shall file a verified answer to or comment on the complaint with the Supreme Court within ten days of service.¹³²

Investigation

Verified or anonymous complainants against judges requiring the investigation of substantial factual issues (including those initially endorsed to or filed with the Supreme Court by quasi-judicial bodies of the government – such as the Civil Service Commission for breaches of the Public Official Code)¹³³ shall be transferred to the JIB for investigation.¹³⁴

Under section 15 of Rule 140 of the Rules of Court, the JIB's powers include:

- administering oaths to the parties and their witnesses;
- issuing subpoena *ad testificandum* and *duces tecum*; and
- conducting ocular inspections and taking depositions of the complainant and/or witnesses in accordance with the Rules of Court.¹³⁵

The failure or refusal of a party to obey or comply with the subpoena *ad testificandum* and *duces tecum* issued by the JIB shall be transferred to the Supreme Court for proceedings for indirect contempt of court.¹³⁶

However, not all complaints are investigated. Any disciplinary action against a judge that can be resolved on the basis of the pleadings of the parties, documents or papers, public or court records and/or documents, or papers filed with or submitted by the parties to the JIB may not be investigated.¹³⁷ Such documents shall be considered as submitted for the preparation and submission by the JIB for its report and recommendation to the Supreme Court within 60 days from receipt of the said pleadings and/or records or documents.¹³⁸

The CPIO has the power to conduct investigations and/or intelligence, surveillance or entrapment operations or lifestyle checks against judges to detect and identify violations of the Judiciary Code (among other things).¹³⁹ It can also conduct discreet investigations, or surveillance or entrapment operations on judges who are the subjects of anonymous or unverified complaints, or agencies, suspected of being involved in or connected with any of the aforementioned violations or other acts.¹⁴⁰ Such action can be taken on order or upon prior authority of the Supreme Court, Chief Justice of the Supreme Court or JIB, and the CPIO must submit its reports and recommendations to the Chief Justice, Supreme Court or JIB.¹⁴¹

132 *Ibid*, s 5 and s 10.

133 See n 6 above, s 12.

134 Rules of Court, r 140, s 7.

135 *Ibid*, s 15.

136 Rules of Court, r 140, s 15.

137 *Ibid*, s 12.

138 *Ibid*.

139 See n 98 above, 3; <https://news.abs-cbn.com/news/11/13/18/sc-creates-2-new-offices-revises-guidelines-for-filing-complaints-vs-judges-justices>; <https://newsinfo.inquirer.net/1053247/sc-forms-2-new-offices-to-prevent-judicial-corruption> accessed 11 January 2021.

140 See n 98 above, 3.

141 *Ibid*.

If based on the pleadings of the parties, there is a prima facie case against the accused judge but substantial factual issues are raised, the JIB shall recommend to the Supreme Court that:

- the case be considered and docketed as a regular administrative matter;
- the JIB be directed to conduct a formal investigation of the substantial factual issues raised by the parties; and
- the JIB be directed to submit a report and recommendation to the Supreme Court within 60 days from the termination of such investigation.¹⁴²

INVESTIGATIVE HEARING

In order to determine whether a complaint warrants the taking of disciplinary action, the JIB will conduct an investigative hearing. The JIB will set the disciplinary action for hearing (with due notice to the parties) where the parties may be heard, by themselves and/or counsel.¹⁴³ If after due notice, the accused judge (or other party) fails to appear, the investigative hearing shall proceed ex parte.¹⁴⁴

The parties may present documentary and/or object evidence and affidavits of the parties and their witnesses, after which they may be cross-examined by the other party, and may be examined by the Chairperson and members of the JIB.¹⁴⁵

TERMINATING THE INVESTIGATION AND REPORTING

The JIB shall terminate its investigation within 90 days of commencement (unless extended by the Supreme Court).¹⁴⁶ The investigative hearing shall not be interrupted or terminated by reason of:

- desistance of the complainant, settlement, compromises, restitution or withdrawal of the disciplinary action by the complainant;
- failure of the complainant to prosecute the same;
- the resignation or compulsory retirement of the accused judge;
- the accused judge having transferred his residence to a foreign country; or
- the death of the complainant or accused judge

subject to exceptional circumstances as may be determined by the JIB conformably with case law.¹⁴⁷

The JIB must submit its report on the findings and facts of the investigation and the JIB's recommendation to the Supreme Court within 60 days of termination of the investigation.¹⁴⁸ This report is confidential and for the exclusive use of the Supreme Court.¹⁴⁹

142 *Ibid.*

143 *Ibid.*, s 13.

144 *Ibid.*

145 *Ibid.*, s 14.

146 See n 98 above, s 17.

147 *Ibid.*, s 16.

148 *Ibid.*, ss 12 and 8.

149 *Ibid.*, s 18.

If the JIB receives a complaint within six months before the compulsory retirement age of a judge for a cause of action that occurred at least one year before filing, the JIB shall submit its report and recommendations to the Supreme Court within 60 days from receipt of the answer or comment from the respondent judge.¹⁵⁰

Disciplinary proceedings

The Supreme Court shall take such action on the report as the facts and the law, the Rules of Court, as well as the issuances of the Supreme Court and the Internal Rules of the Supreme Court may warrant.¹⁵¹ The decision and final resolution of the Supreme Court shall be attached to the record of the accused judge in the OCA and the Bar Confidant of the Supreme Court.¹⁵²

In practise, however, these time periods are not complied with, the average case has a reported life cycle of six months, with some cases lasting up to three years.¹⁵³

LIMITATION PERIOD

Rule 140 of the Rules of Court does not prescribe a limitation period for disciplinary proceedings.

BURDEN AND STANDARD OF PROOF

The burden of substantiating the charges in an administrative proceeding falls on the complainant.¹⁵⁴ The quantum of proof necessary for a finding of guilt is substantial evidence or that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁵⁵

JURISDICTION AND CHANGE OF VENUE

There are no provisions setting out where disciplinary proceedings are heard; however, a judge against whom a complaint is made is never subject to proceedings in his or her own jurisdiction and/or courtroom.¹⁵⁶

SANCTIONS

The Supreme Court may (*motu proprio*, on recommendation of the JIB or on request of the complainant) order a preventive suspension of the accused judge without pay and other monetary benefits for a period of 60 days, until a decision is reached by the Supreme Court, or until modified or lifted by the Supreme Court.¹⁵⁷

150 *Ibid*, s 11.

151 Rules of Court, r 140, s 19.

152 *Ibid*.

153 American Bar Association, 31– 32.

154 *Re: Complaint Letters filed by Rosa Abdulharan and Rafael Dimaano charging Justice Jane Aurora C Lantion* (July 2017).

155 *Ibid*.

156 Rules of Court, r 116, s 1.

157 *Ibid*, r 140, s 8.

Breaches of the Public Official Code are sanctioned under section 11 of that code: judges are penalised the same way as other public officials. Sanctions include a fine not exceeding PHP 5,000, removal from office or imprisonment not exceeding five years.¹⁵⁸

The type of sanctions that apply if a judge is found to have misconducted himself or herself in office in breach of Rule 140 of the Rules of Court (including breaches of the Judiciary Code) correspond to the category of seriousness of the charge (as explored above): serious, less serious or light charges.¹⁵⁹

Instances of judicial corruption fall into the ‘serious charges’ category, the penalties for which are:

- dismissal from service, forfeiture of all or part of the benefits as the Supreme Court may determine (except accrued leave credits) and disqualification from reinstatement or appointment to any public office (including government-owned or controlled corporations);
- suspension from office without salary and other benefits for more than three but not exceeding six months; or
- a fine of more than PHP 20,000.00 but not exceeding PHP 40,000.00.¹⁶⁰

As identified above, there appears to be a lack of disciplinary proceedings for complaints made against Supreme Court judges other than removal from office. If a Supreme Court judge is convicted for misconduct pertaining to the most serious charges (bribery, graft and corruption, and betrayal of public interest), he or she can only be removed by impeachment as per section 2 of Article XI of the Constitution.¹⁶¹ Members of the House of Representatives have the exclusive power to initiate the impeachment process, and the process set out in section 3 of Article XI is to be followed.¹⁶²

APPEALS

As the Supreme Court is the decision-making body for disciplinary proceedings and it is the highest court in the Philippines, there is no mechanism to appeal a disciplinary proceedings determination.¹⁶³

Cases

When the OCA was the investigating and disciplinary body, it published administrative orders, decisions and resolutions on its website,¹⁶⁴ but the case report remained confidential. Under section 18 of Rule 140 of the Rules of Court, the report generated by the JIB for the purpose of recommending action to the Supreme Court for disciplinary proceedings is confidential, but a copy of the decision or resolution of the Supreme Court shall be attached to the record of the accused judge in the OCA and the Bar Confidant of the Supreme Court.¹⁶⁵

158 See n 6 above, s 11.

159 Rules of Court, r 140, s 11 (cf. ss 8-10)..

160 *Ibid.*

161 The Constitution Art XI, s 2.

162 *Ibid.*, s 3(1).

163 See n 154 above, 23.

164 See <http://oca.judiciary.gov.ph> accessed 11 January 2021.

165 Rules of Court, r 140, s 18.

The Supreme Court website¹⁶⁶ provides access to decisions and publishes a Judiciary Annual Report and Judiciary Narrative Report that provide statistics on disciplinary action taken against judges.¹⁶⁷ The most recently published Judiciary Annual Report (2016 – June 2017)¹⁶⁸ (the ‘2017 Report’) details the statistics of disciplinary action taken against judges; however, not all complaints detailed in the statistics relate to allegations of corruption. To the best of our knowledge, there are no recent statistics identifying which complaints specifically relate to judicial corruption in the Philippines.

The 2017 Report indicates that, for the period of 2012 – June 2017, the following numbers of complaints were made and sanctions imposed by the Supreme Court:¹⁶⁹

Judges of the collegiate courts (Court of Appeals, Sandiganbayan, Court of Tax Appeal)	Judges of the lower courts (regional trial courts, metropolitan trial courts, municipal trial courts, municipal circuit trial courts, municipal trial courts in cities)
61 complaints filed	1,435 complaints filed
59 complaints dismissed	1,243 complaints dismissed
1 judge dismissed from service (Sandiganbayan)	20 judges dismissed from service
2 judges’ benefits forfeited	4 judges’ benefits forfeited
-	139 judges fined
-	16 judges suspended
-	31 judges reprimanded
3 judges admonished	47 judges admonished

Three of the above administrative investigations of the Supreme Court were initiated *motu proprio*.¹⁷⁰

As noted above, judicial corruption falls into the ‘serious charges’ category for sanctions, and is punishable by dismissal from service, forfeiture of benefits, suspension or fine.

Interrelationship

Consecutive or parallel proceedings

In theory, criminal prosecution and disciplinary proceedings for allegations of judicial corruption run consecutively. As per the judgment in *Maceda v Ombudsman*,¹⁷¹ disciplinary proceedings for allegations of judicial corruption must occur prior to criminal prosecution: the Supreme Court must determine whether the accused acted in breach of his or her official duties (the administration of which falls within the exclusive jurisdiction of the Supreme Court under the Constitution).¹⁷² In this case, the Supreme Court found: ‘where a criminal complaint against a judge [...] arises from their administrative duties, the Ombudsman must defer action on said complaint and refer the same to

166 See <http://sc.judiciary.gov.ph> accessed 11 January 2021.

167 See <http://sc.judiciary.gov.ph/media-releases> accessed 11 January 2021.

168 Supreme Court of the Philippines, *Judiciary Annual Report: 2016 – June 2017* (Judiciary Annual Report Series, 2017).

169 *Ibid.*, 32–33. There are likely to be cases filed before 2012 included in the sanctions statistics because these cases were determined in 2012 or later.

170 See n 169 above, 8.

171 See n 10 above.

172 The Constitution Art VIII, s 5.

[the Supreme] Court for determination whether said judge [...] had acted within the scope of their administrative duties.¹⁷³

In practice, however, it appears that criminal prosecution can occur before disciplinary proceedings or can run parallel: one is not a precondition to the other. This is evidenced by cases where an accused has been found guilty in a criminal prosecution and the conviction triggering disciplinary proceedings (per section 6 of Rule 140 of the Rules of Court).¹⁷⁴ It has also been explicitly recognised by the Supreme Court that ‘the dismissal of [a] criminal case does not warrant the dismissal of an administrative case arising from the same set of facts’.¹⁷⁵

Information exchange

Information is only exchanged from the JIB (investigating or conducting disciplinary proceedings) to the Ombudsman if any evidence of criminal behaviour comes to light during disciplinary proceedings.

Under Rule 140 of the Rules of Court, the JIB’s report on the findings and facts of the investigation and recommendation to the Supreme Court is confidential and for the exclusive use of the Supreme Court.¹⁷⁶ The decision and final resolution of the Supreme Court shall be attached to the record of the accused judge in the OCA and the Bar Confidant of the Supreme Court,¹⁷⁷ and it appears that this decision is to remain confidential. This is supported by the decision in *Maceda v Ombudsman*¹⁷⁸ (a case of petition of *certiorari*), where the Supreme Court stated: ‘the Ombudsman cannot compel this court, as one of the three branches of government, to submit its records, or to allow its personnel to testify’.¹⁷⁹ This case was determined when the OCA held the role of investigator and disciplinary body. As the JIB has now taken over that particular role of the OCA and its reports are submitted to the Supreme Court, it is likely that this judgment would also apply to the JIB’s reports.

Criminal judgments are publicly available and could be used in future disciplinary proceedings. Any criminal elements that arise during disciplinary proceedings are referred to the Ombudsman for investigation, as it has jurisdiction over public officials for criminal acts.¹⁸⁰ If the Ombudsman’s investigation establishes substantial evidence, criminal proceedings are initiated before the Sandiganbayan.¹⁸¹

Cross-sanctions

A criminal conviction does not automatically result in dismissal from judicial office unless that is a penalty of the particular offence. For example, a judge can be perpetually barred from any public office for

173 See n 10 above, 3.

174 See, eg, *Office of the Court Administrator v Judge Sardido* (2003) 449 Phil 619 (Sardido case); *Office of the Court Administrator v Presiding Judge Joseph Cedrick O Ruiz* No RTJ-13-2361 (2 February 2016).

175 *Sardido* case (see n 174 above), 628.

176 Rules of Court, r 140, s 18.

177 *Ibid*, s 19.

178 See n 10 above.

179 *Ibid*.

180 The Constitution, Art VIII, s 5.

181 Presidential Decree No 1606, s 11.

committing an offence under the Anti-Graft and Corrupt Practices Act¹⁸² or the Plunder Act.¹⁸³ Where it does not constitute part of the penalty, separate disbarment proceedings may be issued; however, this is not automatic.

A number of acts provide for the automatic suspension from office during a criminal prosecution.¹⁸⁴

Current debates, reform trends and other issues of relevance

Anti-corruption reform and education

In recent years, there has been a significant push by the Supreme Court towards anti-corruption reform, awareness raising and training among many aspects of the judicial system (police force, lawyers and judges). External organisations, such as the Judicial Reform Initiative, also advocate for anti-corruption reform to the Philippine justice system. Examples of such reform and education efforts include:

- In 2004, the Supreme Court adopted the New Code of Judicial Conduct for the Philippine Judiciary (referred to in this case study as the Judiciary Code). This new Judiciary Code repealed the Code of Judicial Conduct (1989) and is based on the Bangalore Principles of Judicial Conduct.¹⁸⁵
- In 2011, ‘public accountability and integrity were made a national priority’,¹⁸⁶ with President Aquino’s administration drafting the Philippine Development Plan for 2011–2016 and Aquino’s campaign slogan ‘if there is no corruption, there is no poverty’.¹⁸⁷ The Ombudsman also created and began hosting a programme called the ‘Workshop on Integrity, Transparency and Accountability in Public Service’ aimed to increase public servants’ awareness of accountability attached to positions in the government.¹⁸⁸
- In 2017, President Duterte created the Philippine Presidential Anti-Corruption Commission (PPACC), which has the power to ‘go after government officials and file corruption complaints and submit to the President for appropriate action’.¹⁸⁹ A few sitting politicians who are being investigated by the PPACC have complained that the PPACC has acted improperly by pre-empting its investigation.¹⁹⁰
- In 2017, the Ombudsman held a symposium on best practice anti-corruption measures, including in relation to the investigation and prosecution of corruption offences.¹⁹¹

182 Anti-Graft and Corrupt Practices Act, s 9.

183 See n 10 above, s 2.

184 Anti-Graft and Corrupt Practices Act, s 13; see n 10 above, s.5.

185 AM No 03-05-01-SC, Adopting the New Code of Judicial Conduct for the Philippine Judiciary Supreme Court of the Philippines, 2004. Chief Justice Hilario Davide of the Supreme Court of the Philippines had input to the drafting of these principles and its adoption is in line with international reforms.

186 ‘Philippines Symposium Review Anti-Corruption Efforts’, International Development Law Organization, (2 August 2017) www.idlo.int/news/highlights/philippines-symposium-reviews-anti-corruption-efforts accessed 23 July 2019.

187 See <http://neda.gov.ph/wp-content/uploads/2013/10/pdprm2011-2016.pdf> accessed 11 January 2021.

188 ‘Integrity, Transparency and Accountability in Public Service (ITAPS)’ Office of the Ombudsman www.ombudsman.gov.ph/transparency-in-government/programmes-projects/education-anti-corruption-promotion/integrity-transparency-and-accountability-in-public-service-itaps accessed 23 July 2019.

189 Xinhua Silk Road Information Service, ‘Philippines to boost anti-corruption cooperation with China: official’ *Xinhua Silk Road Information Service* (Manila, 18 January 2019). <https://en.imsilkroad.com/p/128370.html> accessed 23 July 2019.

190 Philstar.com ‘Duterte expands powers of Presidential Anti-Corruption Commission’ *Philstar.com* (Manila, 11 January 2019).

191 See n 187 above.

In 2018, the Philippines began collaborating with Hong Kong on a proposal to forge an anti-corruption partnership alongside other signatories to the UN Convention Against Corruption.¹⁹²

In 2019, the Philippines announced that it would further anti-corruption cooperation with China after a successful international operation.¹⁹³

The Supreme Court is leading initiatives to make information on the court more accessible to the general public – for example, through podcasts and live streaming – and to disseminate information about its reform initiatives, including in relation to anti-corruption.¹⁹⁴

Lack of legislative protection for corruption whistleblowers

A legislative gap of concern is the lack of protection given to whistleblowers who report on corruption in the Philippines. The Bill of the Whistleblower Protection Act of 2017 was introduced to the Philippine Congress in May 2017 to attempt to address this gap; however, at present, the bill is still pending at the committee stage.¹⁹⁵

Concern for the broad scope of ‘judicial corruption’

Debate also surrounds the broad scope of conduct that can constitute judicial corruption under the disciplinary regulation, Rules of Court, Rule 140 – for example, ‘failure to embody judicial integrity’ by having an extramarital affair.¹⁹⁶

Efficiency of Sandiganbayan

The intention behind the Sandiganbayan’s creation was to expeditiously deal with cases of graft and corruption by public officials; however, its efficiency has been a subject of debate over recent years. The Sandiganbayan’s reputation for integrity and independence is generally considered good, but the estimated average time for a case to be concluded from the date it has been filed in court was up to seven years in 2016.¹⁹⁷ In June 2018, the Sandiganbayan announced an increase in efficiency ‘from 10 years to a little over 5 years, counted from the filing up to the promulgation of judgment’, with the aim of hitting the one-year case duration mark.¹⁹⁸

Popularity of disciplinary proceedings over criminal prosecution

Interviewees have advised, anecdotally, that disciplinary proceedings are more popular as a mode through which to pursue claims of judicial corruption due to the lower standard of proof.

192 ‘PH Explores Possible Anti-Corruption Cooperation with HK’ Republic of the Philippines Dept of Foreign Affairs (27 February 2018) www.dfa.gov.ph/dfa-news/news-from-our-foreign-service-postsupdate/15724-ph-explores-possible-anti-corruption-cooperation-with-hk accessed 23 July 2019.

193 See n 189 above.

194 See <http://apjr.judiciary.gov.ph> accessed 11 January 2021.

195 See http://legacy.senate.gov.ph/lis/leg_sys.aspx?congress=18&type=bill&p=1 accessed 8 December 2020; J Art D Brion ‘Time for a whistleblower protection policy for the judiciary?’ *Manila Bulletin* (Manila, 6 February 2019).

196 Complaint against Judge Ferdinand Marcos, Supreme Court of the Philippines, AM 97-2-53-RJC, 6 July 2001.

197 See n 50 above.

198 ‘Closing Remarks of Presiding Justice Amparo M Cabotaje-Tang on 40th Anniversary Celebration of Sandiganbayan June 11 2018’ <http://sb.judiciary.gov.ph/inspirational.html> accessed 23 July 2019.

Impeachment

Civil society groups are concerned about the misuse or threat of impeachment proceedings against prominent public figures, including judges of the Supreme Court. Most recently, former Chief Justice of the Supreme Court, Maria Lourdes Sereno, had impeachment proceedings instigated against her by Congress on the basis of a complaint made by a Filipino lawyer.¹⁹⁹ It was alleged that former Chief Justice Sereno had engaged in culpable violation of the Constitution, corruption and other high crimes, such as tax evasion.²⁰⁰ The House of Representatives denied the former Chief Justice legal representation in their proceedings, and they established enough grounds to impeach Sereno in March 2018.²⁰¹ There was little news reporting on the findings of the Senate trial. While the impeachment proceedings were happening in Congress, the Solicitor General filed a *quo warranto* petition in the Supreme Court to invalidate Sereno's appointment as Chief Justice, which was upheld in May 2018, and the Chief Justice position was declared vacant.²⁰²

Former Chief Justice Sereno was not impeached by Congress, but was the second Supreme Court judge to be removed from their role: former Chief Justice Renato Corona was impeached in 2012 for similar reasons concerning income non-disclosure.²⁰³ Several publications have suggested that Sereno's removal as Chief Justice was politically motivated by President Duterte: Sereno disagreed with his efforts to take action against judges linked to illegal drugs in 2016, saying the Supreme Court should be the one to punish erring judges, not Congress.²⁰⁴

199 Oscar Franklin Tan, 'What is in the Sereno impeachment complaint?' *Philippine Daily Inquirer* (Manila, 13 September 2017).

200 *Ibid.*

201 ABS-CBN News, 'Sereno 'looks forward' to Senate impeach trial after House bars counsel' *ABS-CBN News* (Manila, 22 November 2017); ABS-CBN News, 'House panel finds enough grounds to impeach Sereno' *ABS-CBN News* (Manila, 8 March 2018).

202 *Republic of the Philippines v Maria Lourdes PA Sereno* GR No 237428 (11 May 2018).

203 Record of the Senate Impeachment Proceedings, held May 2012, see www.officialgazette.gov.ph/downloads/2012/05may/20120529-Official-TSN.pdf accessed 23 July 2019.

204 Andreo Calozzo and Clarissa Batino 'First Female Chief Justice in Philippines Faces Impeachment' *Bloomberg* (Manila, 8 March 2018).

Case study: United Kingdom

Executive summary

The goal of the study is to determine how allegations of corruption against judges are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts. The United Kingdom is made up of four nations: England, Wales, Northern Ireland and Scotland. There are three legal jurisdictions in the UK: England and Wales (E&W), Northern Ireland (NI) and Scotland; but there are four judiciaries: the Supreme Court, E&W, Northern Ireland and Scotland. Each is considered separately throughout the case study.

For the purpose of this case study, and expanding on the general definitions in section 3.1.2 of this report, we have adopted the following contextual definitions:

- ‘Corruption’ includes both bribery and trading in influence (ie, bribery involving a third-party intermediary). As stated in section 3.1.2 of this report, we have adopted the definitions of these offences provided by the United Nations Convention against Corruption (UNCAC).¹ In the UK, there are specific offences of bribing someone (section 1 of the Bribery Act 2010 (the ‘BA 2010’)) and being bribed (section 2 of the BA 2010). There is no specific offence of trading in influence, but the BA 2010 is considered to cover the conduct targeted by the crime of trading in influence. The common law offence of misconduct in public office, in E&W and NI, also addresses corrupt behaviour as defined in this study.
- ‘Judges’ means Justices of the Supreme Court, and the Courts Judiciary in E&W and NI, and the senior judiciary and sheriffs in Scotland (see ‘Context’ for an overview of types and levels of judges in the three jurisdictions of the UK).

Key findings: criminal proceedings

- There is no distinction made between judges and other public officials, or judges and ordinary citizens in respect of their liability for criminal acts. However, being in a position of authority – as a public official – is normally considered an aggravating feature when considering sentence, and may result in a harsher sanction.
- There are two main investigative bodies responsible for investigating corruption in conjunction with the police: the National Crime Agency (NCA) and the Serious Fraud Office (SFO). Allegations of bribery against a judge are most likely to be investigated by the NCA, in conjunction with the relevant police force in E&W or Scotland. However, the remit of the NCA in NI is limited as a consequence of the settlement under the Belfast Agreement of 1998, so allegations of corruption in NI would be investigated by the Police Service of NI (PSNI).
- The relevant prosecuting authorities in each jurisdiction are: the Crown Prosecution Service (CPS) (E&W), the Public Prosecution Service of NI (NI); and the Crown Office and Procurator Fiscal Service (COPFS) (Scotland). Each has its own Code for Prosecutors.

¹ United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) UNTS 2349 (p 41).

- There is very little statistical information about the prosecution of corruption offences in the UK. However, in E&W, statistics on corruption-related offences were included with the Statistical Bulletin for the first time in June 2018, as ‘experimental statistics’. These include statistics on misconduct in public office, bribing another person and being bribed.

Key findings: disciplinary proceedings

- Each of the four judiciaries in the UK (the Supreme Court, E&W, NI and Scotland) has its own disciplinary procedures, and there are different procedures for lower-level judges and more senior judges.
- Each judiciary has its own Code of Conduct.
- Responsibility for judicial discipline lies with the head of each judiciary: the President of the Supreme Court; the Lord Chief Justice of E&W (LCJ (E&W)); the LCJ of NI (LCJ (NI)); and the Lord President of Scotland (LP).
- Judicial misconduct ranges from being rude to parties in court to being convicted of fraud, with the range of sanctions reflecting the breadth of term misconduct: informal resolution, formal warning, formal reprimand, suspension and removal. In NI, a distinction is made between ‘less serious’ complaints and ‘serious complaints’.
- Disciplinary decisions are only published in E&W, and then only for a limited time.
- Statistics on the number of complaints received, concluded and upheld, by type of judge, are available for E&W, NI and Scotland.

Key findings: interrelationship between criminal and disciplinary proceedings

- In E&W, where a judge has been convicted or charged of a criminal offence, a recommendation to remove him or her may be made at the initial stage of the disciplinary procedure. Where evidence of a crime arises in disciplinary proceedings, the police will be informed.
- In NI, where evidence of a crime arises in disciplinary proceedings, the police will be informed and the disciplinary proceedings will be delayed.
- In Scotland, where conduct appears to constitute an offence, the disciplinary investigation will be suspended until the criminal case is concluded.
- There is no information on channels of communication between the judiciary and the prosecuting authorities in respect of judicial corruption.

Context

The UK is a union of four nations (England, Wales, NI and Scotland) and has three legal jurisdictions: E&W, NI and Scotland. Sources of law include common law, which is combined with statutory law created by the Parliament of the UK, as well as, in Scotland, Acts of the Scottish Parliament; in Wales, Acts of the Welsh Assembly; and in NI, Acts of the NI Assembly (note that the

NI Assembly was suspended in 2017 following disagreements over the power sharing arrangements necessary to ensure the functioning of the assembly and the government. The deadlock was broken in January 2020, and the assembly sat again for the first time on 11 January 2020).²

The UK exited the European Union on 31 January 2020; however, EU law continued to apply in the UK until the end of the transition period on 31 December 2020.³ The UK is also a member of the Council of Europe, and following the adoption in 1998 of the Human Rights Act by the UK Parliament, much of the European Convention on Human Rights has legal force in domestic law, with individuals being able to assert their Convention Rights in UK courts.⁴ The UK has an uncodified constitution, which means that there is no single written constitution, but instead the constitution is understood through common law, statute and accepted practice identified as constitutional conventions. Constitutional reform brought about by the Constitutional Reform Act 2005 (the ‘CRA 2005’) created a clearer separation of powers between the executive, legislature and judiciary than had existed before.⁵

The UK Judicial Committee of the Privy Council (‘UKPC’) is the final court of appeal for the British Overseas Territories, Crown Dependencies and a small number of Commonwealth countries.⁶ This case study does not cover those jurisdictions. However, Justices of the UK Supreme Court (UKSC) sit as the Privy Council when hearing cases from these jurisdictions. As such, the disciplinary procedure is the same for the UKPC as it is for the UKSC.

Each jurisdiction has its own courts and judicial system. Final appeal is to the UKSC (save for criminal matters from Scotland), which also deals with devolution issues – matters relating to the devolution of power to the devolved institutions in Scotland, NI and Wales. The court systems consist of lower courts and tribunals, superior courts and courts of appeal (see the diagram of the UK legal system).

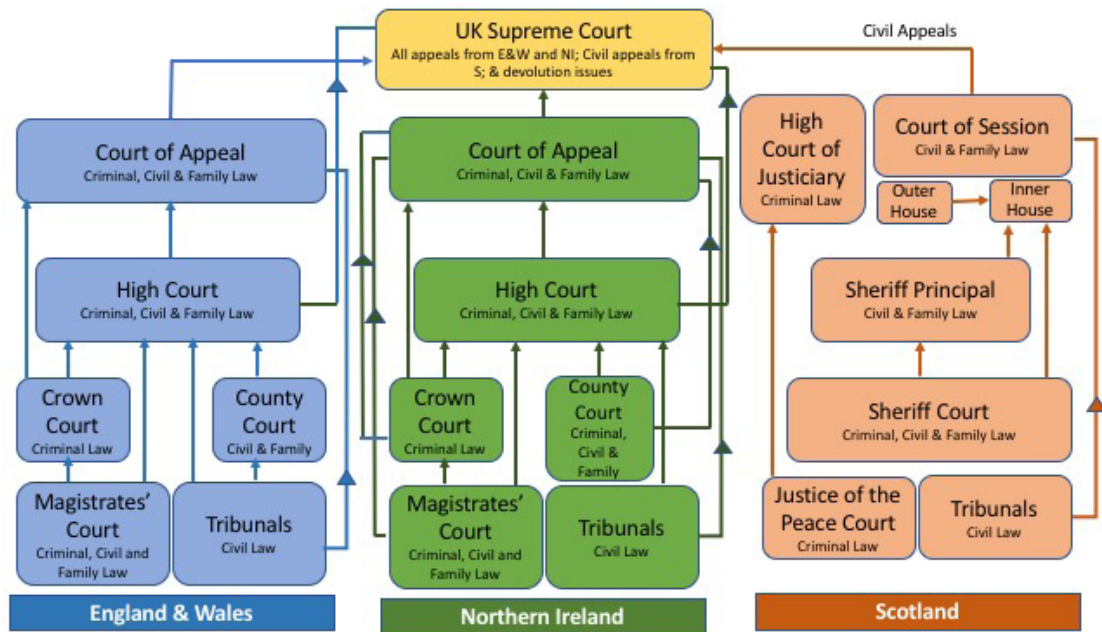
2 Jayne McCormack, ‘Stormont: What is it and why did power-sharing collapse in Northern Ireland?’ *BBC* (Northern Ireland, 10 January 2020) www.bbc.co.uk/news/uk-northern-ireland-politics-50822912 accessed 12 February 2020 and UK Government, ‘Deal To See Restored Government In Northern Ireland’ (UK Government Press Release, 9 January 2020) www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow?utm_source=bf51b5ed-7630-4f6e-b745-ec9dc4f43cf7&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate accessed 12 February 2020.

3 House of Commons, ‘The UK’s EU Withdrawal Agreement’ (Research Briefing, 8 July 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8453> accessed 12 February 2020.

4 On 7 December 2020, the Government announced an independent review of the Human Rights Act, available at: <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act>, accessed 24 February 2021. The review has raised concerns regarding its potential impact on the judiciary. See, for instance, J Rozenberg, ‘Clipping the Judges’ Wings’, *The Law Society Gazette* (15 February 2021) www.lawgazette.co.uk/commentary-and-opinion/clipping-the-judges-wings/5107389.article accessed 24 February 2021.

5 On 31 July 2020, the UK government launched an independent review on the reform of the judicial review process in the UK, the report was recently released in March 2021 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf accessed 14 April 2021. When announcing the review, the Lord Chancellor, Robert Buckland QC MP, stated that: ‘[t]his review will ensure this precious check on government power is maintained, while making sure the process is not abused or used to conduct politics by another means.’ www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review accessed 24 February 2021. In addition, the think tank Policy Exchange has put forward a proposal to reform the appointment of senior judges, for ‘increased ministerial inputs’. Concerns have been raised regarding the impact of this reform on judicial independence. See Richard Ekins and Graham Gee, *Reforming the Lord Chancellor’s Role in Senior Judicial Appointments* (Policy Exchange, 2021) 9 <https://policyexchange.org.uk/wp-content/uploads/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf> accessed 8 April 2021.

6 The Judicial Committee of the Privy Council www.jcpc.uk/index.html accessed 12 February 2020 and ‘The jurisdiction of the Judicial Committee of the Privy Council’ www.jcpc.uk/docs/jurisdiction-of-the-jcpc.pdf accessed 12 February 2020.



Adapted from the website of the UKSC: www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf

There are different categories of judges in each of the three judicial systems. Justices of the UKSC sit in the Supreme Court in London. The judiciary in E&W is composed of Courts Judiciary, Tribunals Judiciary and magistrates, as is the judiciary in NI. In Scotland, the judiciary is composed of Senators of the College of Justice (the most senior appellate judges); sheriffs; justices of the peace, and tribunal judges and members.

The Supreme Court of the United Kingdom

Head of the Supreme Court – The President of the Supreme Court

Justices of the Supreme Court

Judiciary of England & Wales

Courts Judiciary	Tribunals Judiciary	Magistrates
<i>Head of the Judiciary</i> – Lord Chief Justice	Tribunal Presidents	Bench Chairs
Court of appeal judges	Tribunal judges	Magistrates (volunteer judicial office holders; do not require legal training)
High court judges	Tribunal panel members (specialist non-legal panel members)	
Circuit court judges		
District judges		
District judges (magistrates' court)		
Recorders		

Judiciary of Northern Ireland

Courts Judiciary	Tribunals Judiciary	Magistrates
<i>Head of the Judiciary</i> – Lord Chief Justice Court of appeal judges High court judges County court judges District judges (magistrates' courts) Masters of the High Court District judges Coroners	Appeals Tribunal Lands Tribunal President Industrial and Fair Employment Tribunal Vice-President Industrial and Fair Employment Tribunal Industrial and Fair Employment Tribunal Judges	Lay magistrates (no formal legal education)

Judiciary of Scotland

Senior Judiciary	Sheriffs	Justices of the peace	Tribunals
<i>Head of the Judiciary</i> – Lord President Senators of the College of Justice – Court of Session (civil) and High Court of Justiciary (criminal) Temporary judges (Court of Session)	Sheriffs principal (heads of each of the six Sheriffdoms) Appeal sheriffs Sheriffs Summary sheriffs Part-time sheriffs	Justices of the peace (lay magistrates who sit with a legally qualified adviser)	President of Scottish Tribunals Judicial members Legal members Ordinary members

This case study focuses on procedures and practices concerning the Justices of the Supreme Court, and the Courts Judiciary in E&W and NI, and the senior judiciary and sheriffs in Scotland. In each of the following sections, each jurisdiction is described separately.

Methodology

Access to legal information in the UK is very good. As a common law jurisdiction, access to case law and precedent, as well as statutory materials, is essential. There are very good professional law databases, but they are not widely accessible to non-practitioners. However, there are also good online resources, including from the courts and tribunals websites themselves. Case law is freely available online from the British and Irish Legal Information Institute (BAILII), and legislation is freely available from [legislation.gov.uk](http://www.legislation.gov.uk). Additionally, following many of the reforms that came about under the CRA 2005 (see below for further information about this), information about judges, court governance, judicial appointments and judicial conduct is much more readily available now than it was in the past.

Desk research for this case study included the following sources:

- textbooks and practitioner's guides about the three jurisdictions of E&W, Scotland and NI;
- web-based legal resources:
 - www.legislation.gov.uk;
 - www.bailii.org;

- websites of the three judiciaries:
 - Courts and Tribunals Judiciary, E&W: www.judiciary.uk;
 - Judiciary of Scotland: www.scotland-judiciary.org.uk/1/0/Home;
 - Judiciary NI: <https://judiciaryni.uk>;
- websites of the judicial complaints bodies for each jurisdiction:
 - Judicial Conduct and Investigations Office: <https://judicialconduct.judiciary.gov.uk>; Judicial Appointments and Conduct Ombudsman: www.gov.uk/government/organisations/judicial-appointments-and-conduct-ombudsman;
 - Judiciary of Scotland, Complaints about Court Judiciary: www.scotland-judiciary.org.uk/15/0/Complaints-About-Court-Judiciary;
 - Judiciary Scotland, Complaints about members of the Scottish Tribunals: www.scotland-judiciary.org.uk/75/0/Complaints-About-Members-of-the-Scottish-Tribunals;
 - Judicial Complaints Reviewer (JCR) (Scotland): www.judicialcomplaintsreviewer.org.uk;
 - Judiciary NI, Judicial Conduct and Complaints: <https://judiciaryni.uk/judicial-conduct-and-complaints>;
- websites of the prosecutorial bodies of the three jurisdictions:
 - SFO: www.sfo.gov.uk;
 - CPS: www.cps.gov.uk;
 - COPFS: www.copfs.gov.uk/about-us/about-us;
 - Public Prosecution Service NI: www.ppsni.gov.uk; and
- professional legal databases such as Westlaw and LexisNexis.

Given that this is a pilot study that details the way in which allegations of corruption against judges are investigated, prosecuted and adjudicated through internal disciplinary systems and criminal courts, the emphasis is on describing systems and processes.

With so much information available, it was not necessary to conduct a large number of qualitative interviews. However, the judicial complaints bodies of each jurisdiction were contacted and asked if they would either agree to be interviewed or answer questions by email. They each agreed to respond to questions by email. Topic guides, with some questions tailored to the specifics of each jurisdiction, were sent to: the Judicial Conduct and Investigation Office (E&W), the Complaints Officer, Office of the LCJ (NI) and the Executive Director, Judicial Office for Scotland (JOS). Each responded, and its responses are incorporated and referenced below where relevant.

Criminal proceedings

Criminalisation of ‘judicial corruption’

Judges are subject to the criminal law, just as anyone else. There is no distinction made between different levels of judges, or between judges and other public officials under criminal law in the UK. The main offences relating to corruption in the UK that are relevant to this study are the common law offence of Misconduct in Public Office and the offences under the BA 2010. Common law on this issue is the same in both E&W and NI,⁷ but is different in Scotland. The BA 2010 applies to the whole of the UK.⁸

For the purposes of this study, corruption includes trading in influence as defined in Article 18 of the UNCAC. Article 18 only requires that ‘each party shall consider adopting such legislative and other measures as may be necessary’ to establish the offences of trading in influence or influence peddling,⁹ and there is no specific offence of trading in influence in the UK. However, in 2013, the UNCAC Implementation Review Group determined that the offences under the Bribery Act cover circumstances relating to trading in influence or influence peddling.¹⁰

Other general corruption-related offences in the UK include theft, fraud, conspiracy to defraud, laundering the proceeds of crime, contempt of court and perverting the course of justice. The common law offence of embracery (influencing a juror to give a false verdict) is considered to be ‘virtually obsolete’ and would now be covered by the BA 2010.¹¹

COMMON LAW: E&W AND NI

A ‘public officer’ commits the offence of misconduct in public office if they ‘wilfully neglect to perform their duty and/or wilfully misconduct themselves, to such a degree as to amount to an abuse of the public’s trust in the officeholder, without reasonable excuse or justification’.¹² The offence is committed if the public office holder ‘acts or omits to act, in a way which is contrary to their duty’ and the duty may be either a common law or statutory duty.¹³

It has been established by case law that ‘public officer’ includes a judicial officer.¹⁴ In the case of *R v Llewellyn-Jones* [1968], the defendant was the Registrar of Cardiff County Court. The behaviour that resulted in the misconduct conviction was set out in the case. The defendant ‘being and acting as the Registrar of the Cardiff County Court with the intention of gaining improper personal advantage and without proper regard to the interest’ of one party, ‘made an order which he would not otherwise have made that £5,000 be paid to [the other party] out of funds in court’.¹⁵ The court declined to give an exhaustive account of what would constitute misconduct, but instead was persuaded by the

7 Brice Dickson, *The Law of Northern Ireland*, (3rd edn, Hart 2018), 103.

8 BA 2010, s 18(1). In line with the Sewel Convention, the Scottish Parliament debated and agreed a legislative consent motion to this change to the criminal law of Scotland on 11 February 2010: Scottish Parliament Bill Bribery Bill [HL] Legislative Consent Motion [as agreed on 11 February 2010] (2009–2010) www.parliament.scot/parliamentarybusiness/Bills/15959.aspx accessed 12 February 2020.

9 See n 1 above, Art 18.

10 Implementation Review Group of the UNCAC, Fourth Session (Vienna, 27–31 May 2013) discussed in Colin Nicholls, Tim Daniel, Alan Bacarese, James Maton and John Hatchard (eds), *Corruption and Misuse of Public Office*, (3rd edn, Oxford University Press 2017), 186.

11 *Ibid*, ch 6.

12 *Halsbury’s Laws of England* (5th edn, LexisNexis 2016) vol 26, para 532.

13 See n 10 above, para 5.12.

14 *Rex v Borron* [1820] 3 B&Ald 432 and *Regina v Llewellyn-Jones* [1968] 1 QB 429.

15 *R v Llewellyn-Jones* [1968] 1 QBD 429.

fact that in this case there was dishonest and fraudulent motive.¹⁶ As Abott CJ stated in *R v Borron*: ‘... the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment’.¹⁷

Once the BA 2010 came into force, the expectation was that behaviour covered by the offence of misconduct in public office would instead be prosecuted under BA 2010 because ‘where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, provided the offences give the court adequate sentencing powers’.¹⁸ However, in its post-legislative scrutiny of the act, the House of Lords BA 2010 Committee has noted that the opposite is true, and in fact the offence is ‘still thriving and perhaps even enjoying a revival’.¹⁹ Misconduct in public office is used ‘far more’ than the BA 2010, and in 2017–2018 there were 106 misconduct in public office prosecutions, up from just two in 2005.²⁰

COMMON LAW: SCOTLAND

Historically, in Scotland, it was an offence in common law to ‘bribe a judicial officer, to attempt to do so, and for the officer himself to take a bribe’.²¹ Bribery, when committed by a judge, involved: ‘... the selling of his judgment for good deed or reward: Meaning by this, not only his taking a bribe to decide against his conscience, but in general his taking to show favour in his office...’.²²

Now, however, the common law crimes of bribery and taking a bribe in Scotland have been abolished by the BA 2010,²³ and cases of this kind will be prosecuted under statute.

BA 2010: WHOLE OF THE UK

The BA 2010 creates six general offences, and in sections 1 and 2, the circumstances that will amount to an offence are described as ‘Cases’:

- cases in which it is an offence to bribe another person (section 1 of the BA 2010);
- cases where it is an offence to be bribed (section 2 of the BA 2010);
- section 3 of the BA 2010 sets out the meaning of the ‘function or activity’ that is relevant to the bribe; for the purposes of the act, under section 3(2), a ‘function or activity’ is ‘relevant’ if it is:
 - a ‘function of a public nature’;
 - ‘connected with a business’;
 - ‘performed in the course of a person’s employment’; and
 - ‘performed on or behalf of a body of persons (whether corporate or unincorporated)’.

16 *Ibid*, 436G.

17 *Borron* (see n 14 above).

18 CPS, ‘Prosecution Policy and Legal Guidance: Misconduct in Public Office’ accessed 12 February 2020.

19 House of Lords Select Committee on the Bribery Act 2010, ‘*Report of Session 2017–2019; the Bribery Act 2010: Post-Legislative Scrutiny*’, in *HL Paper 303* (2019), 9.

20 *Ibid*, para 55, 19.

21 *Stair Memorial Encyclopaedia* (LexisNexis). Criminal Law (Reissue) para 400 (LexisNexis).

22 *Ibid*.

23 BA 2010, s 17(1) (b) and Criminal Justice (Scotland) Act 2003, ss 68 and 69 repealed by the BA 2010, s 17(3).

If the function or activity doesn't fall within section 2, it will be a relevant function or activity if the person performing the activity is:

- 'expected to perform it in good faith';
- 'expected to perform it impartially'; and
- 'in a position of trust by virtue of performing it'.

Clearly the judicial function would fall within this definition, and this offence would be applicable to a judge.

Reporting an allegation

In general, crimes in all three jurisdictions should be reported to the police. In E&W, there is no single police force – there are 43 territorial police forces. In Scotland, a unified police force for the whole of Scotland, Police Scotland, was established in 2013. In addition, in NI, the PSNI is responsible for the whole of NI. There are two specialist bodies that work with police forces across the UK to investigate, and prosecute serious and organised crime, including corruption and bribery: the NCA, which was established in 2013, and the SFO, created 2006.²⁴ The NCA 'leads the UK's fight to cut serious and organised crime, protecting the public by targeting and pursuing those criminals who pose the greatest risk to the UK'.²⁵ The SFO is a 'specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption' that works in E&W and NI, but not Scotland.²⁶ Corruption and bribery can be reported directly, and anonymously to the SFO through an online form.²⁷

Investigation

The NCA is a non-ministerial department, funded by the Treasury and established by the Crime and Courts Acts 2013.²⁸ The Director-General (DG) of the NCA is accountable to the Home Secretary, who sets the strategic priorities of the agency. The DG sets the operational priorities, including the ways in which it will meet the Serious and Organised Crime Strategy.²⁹ The DG has the equivalent powers of a Chief Constable, which means that he or she can 'instruct police and other agencies to carry out specific tasks or operations'.³⁰ The NCA has the same powers in Scotland as it does in E&W, but in NI, the political settlement and power sharing arrangement under the 1998 Belfast Agreement mean that the work of the NCA is limited to its border and customs functions in NI.³¹ The NCA leads on investigations into all organised and economic crime.³²

24 See n 10 above, 205–206.

25 NCA, 'Our Mission' www.nationalcrimeagency.gov.uk/who-we-are/our-mission accessed 12 February 2020.

26 SFO, 'About us' www.sfo.gov.uk/about-us accessed 12 February 2020.

27 Available via the SFO webpage, 'Reporting serious fraud, bribery and corruption' www.sfo.gov.uk/contact-us/reporting-serious-fraud-bribery-corruption accessed 12 February 2020.

28 Crime and Courts Act 2013, s 1.

29 See n 10 above, 206.

30 *Ibid*, 206, para 7.22.

31 *Ibid*, 206, paras 7.22 and 207.

32 *Ibid*, 207.

In 2018, the National Economic Crime Centre (NECC) was launched, with the aim of improving the UK's response to economic crime.³³ The NECC includes officers and representatives from the NCA, SFO, Financial Conduct Authority (FCA), City of London Police, Her Majesty's (HM) Revenue and Customs, CPS and Home Office. Together they 'identify and prioritise the most appropriate type of investigations, whether criminal, civil or regulatory to ensure maximum impact' and 'seek to maximise new powers, for example Unexplained Wealth Orders and Account Freezing Orders, across all agencies'.³⁴

Criminal prosecution

E&W

The CPS, headed by the Director of Public Prosecutions (DPP), prosecutes criminal cases in E&W,³⁵ and has a statutory duty to 'take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force'.³⁶ The DPP also has the discretion to take over any other case that has been initiated by another prosecuting agency.³⁷ The CPS and other agencies, including the SFO, cooperate with each other under the terms of the Prosecutors' Convention.³⁸

The CPS follows the Code for Crown Prosecutors, as does the SFO.³⁹ The Code sets out the general principles that prosecutors follow when deciding whether to prosecute cases. The CPS also issues guidance on prosecuting specific offences, including guidance on prosecuting misconduct in public office,⁴⁰ and joint guidance with the SFO on prosecuting offences under the BA 2010.⁴¹ Prosecutors decide whether to prosecute on the basis of whether they are 'satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge' and that a 'prosecution is required in the public interest'.⁴² Prosecution of offences under the BA 2010 cannot be initiated without the written consent of the DPP or the Director of the SFO.⁴³ This requirement has been criticised by some because it suggests that it is only to be used 'only at the highest echelons'⁴⁴ and causes delays in prosecutions. The House of Lords Select Committee on the Bribery Act 2010 concluded that the requirement for written consent is too rigid, and recommended that the act should be amended to allow DPPs to delegate the power to initiate prosecutions 'as they see fit'.⁴⁵

33 The National Economic Crime Centre, 'Improving the UK's response to economic crime' www.nationalcrimeagency.gov.uk/what-we-do/national-economic-crime-centre accessed 12 February 2020.

34 *Ibid.*

35 Established by the Prosecution of Offences Act 1985, s 1(1).

36 *Ibid.*, s 3(2)(a).

37 *Ibid.*, s 6(2).

38 CPS, 'Relations with Other Prosecuting Authorities', www.cps.gov.uk/legal-guidance/relations-other-prosecuting-agencies accessed 12 February 2020.

39 Stuart Alford QC, 'Enforcing the UK Bribery Act – the UK Serious Fraud Office's Perspective', 17 November 2014 www.sfo.gov.uk/2014/11/17/stuart-alford-qc-enforcing-uk-bribery-act-uk-serious-fraud-offices-perspective accessed 19 February 2020.

40 CPS, 'Misconduct in Public Office: Legal Guidance' www.cps.gov.uk/legal-guidance/misconduct-public-office accessed 19 February 2020.

41 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and accessed 19 February 2020.

42 Code for Crown Prosecutors, para 4.2.

43 BA 2010, s 10.

44 House of Lords Select Committee on the Bribery Act 2010, 'Bribery Act Post-Legislative Scrutiny', para 97.

45 *Ibid.*, paras 100–101

The prosecuting authority in NI is the Public Prosecution Service of NI (PPSNI), headed by the DPP for NI.⁴⁶ Like the CPS in E&W, the PPSNI has a Code for Prosecutors, and prosecutions are only initiated or continued if they meet both an evidential test (whether ‘the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction’) and a public interest test (whether ‘prosecution is required in the public interest’).⁴⁷ Consent is also required by the DPP in NI in order to prosecute under the BA 2010.

THE SFO: E&W AND NI

The SFO is a non-ministerial department, created by statute and headed by the Director of the SFO. The director ‘may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud’⁴⁸ and may ‘conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it’.⁴⁹ With the SFO focus on ‘serious and complex fraud’, the number of cases it investigates and prosecutes is relatively small: in the year 2018–2019 (March 2018 – March 2019), it opened 11 new criminal investigations; eight defendants were charged and 14 investigations were closed without charge; and by the end of the year, 16 defendants were waiting for trial.⁵⁰

SCOTLAND

The COPFS is responsible for prosecutions in Scotland.⁵¹ It is headed by the Lord Advocate, and the police conduct their investigations subject to the direction of the relevant Procurator Fiscal. In bribery or corruption cases, the police must report an allegation to the Procurator Fiscal, who has an investigative role, and provides instructions and directions to the police.⁵² Prosecution policy and guidance is contained in the Book of Regulations, which sets out how decisions are made and how the COPFS works with the police and other agencies in the investigation and prosecution of crimes.⁵³ Bribery and corruption cases are dealt with by ‘a specialist team of prosecutors, investigators and forensic accountants, who take a robust, effective and fair approach to the investigation and prosecution of these offences, in accordance with the Scottish Prosecution Code and other instructions issued by the Lord Advocate’.⁵⁴ The Procurator Fiscal must decide ‘whether the conduct complained of constitutes a crime known to the law of Scotland and whether there is any legal impediment to prosecution’.⁵⁵ There is no need for consent to prosecute under the BA 2010 in Scotland.⁵⁶

46 Public Prosecution Service (NI), ‘About the PPS’ www.ppsni.gov.uk/about-pps accessed 19 February 2020.

47 Public Prosecution Service (NI), ‘Code for Prosecutors’ (2016) 12.

48 Criminal Justice Act 1987, s 1(3).

49 *Ibid*, s 1(4).

50 SFO, ‘Serious Fraud Office Annual Report and Accounts 2018–2019’ (2019) 14 www.sfo.gov.uk/wp-content/uploads/2019/07/SFO-Annual-Report-and-Accounts-2018-2019.pdf accessed 23 March 2020.

51 COPFS www.copfs.gov.uk accessed 19 February 2020.

52 See further n 10 above, 217.

53 COPFS, ‘Prosecution Policy and Guidance: Book of Regulations’ www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=0 accessed 19 February 2020.

54 COPFS, ‘Bribery Act’ www.copfs.gov.uk/publications/bribery-act accessed 19 February 2020.

55 COPFS, ‘Prosecution Code’ www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf accessed 19 February 2020.

56 See n 54 above.

There is no statute of limitations on corruption offences in the UK.

BURDEN AND STANDARD OF PROOF

The burden of proof in cases of misconduct in public office and bribery is on the prosecution.⁵⁷ The standard of proof is ‘beyond reasonable doubt’.⁵⁸ Judges in E&W should direct a jury that ‘the prosecution proves its case if the jury, having considered all the relevant evidence [...] are sure that the defendant is guilty’.⁵⁹

JURISDICTION AND CHANGE OF VENUE

E&W and NI

Misconduct in public office is triable on indictment only,⁶⁰ which means that it must be brought before the Crown Court.⁶¹ Bribery is triable either way, meaning that a defendant can be tried either in the magistrates’ court, in summary proceedings or in the Crown Court on indictment.⁶² The venue is determined in a ‘mode of trial’ hearing in the magistrates’ court (‘committal proceedings’ in NI).⁶³ In deciding the mode of trial in either-way offences, the magistrate must consider ‘whether the sentence which a magistrates’ court would have power to impose for the offence would be adequate’⁶⁴ by referring to the Sentencing Guidelines for the offence,⁶⁵ and any representations made by the prosecution or the defendant.⁶⁶

Scotland

As a ‘triable either way’ offence, bribery can be tried in either the sheriff’s court (in summary proceedings),⁶⁷ or by solemn procedure in the sheriff’s court or high court in Scotland.⁶⁸

SANCTIONS

Misconduct in public office is a common law offence (therefore not defined in statute) and punishable by a maximum of life imprisonment. The range of sanctions is broad and is at the discretion of the court.⁶⁹

57 *Halsbury’s Laws of England* (LexisNexis), para 452; *The Laws of Scotland: Stair Memorial Encyclopaedia* (Lexis Nexis (Reissue), 2002), para 90; see n 7 above, 186.

58 *Ibid*, *Halsbury’s Laws of England*; *Ibid Stair Memorial Encyclopedia*; *Ibid*, see n 5 above.

59 *Ibid*, *Halsbury’s Laws of England*.

60 See n 18 above.

61 *Halsbury’s Laws of England*, para 311.

62 BA 2010, s 11.

63 Public Prosecution Service (NI), ‘The Prosecution Process’ www.ppsni.gov.uk/prosecution-process accessed 19 February 2020.

64 *Halsbury’s Laws of England*, para 190.

65 Sentencing Council, ‘Fraud, Bribery and Money Laundering Offences: Definitive Guideline’ (2014), www.sentencingcouncil.org.uk accessed 19 February 2020.

66 *Halsbury’s Laws of England*, para 190.

67 See n 53 above, ch 7.

68 *Ibid*, c 6.

69 *Halsbury’s Laws of England*, vol 26, para 532.

Where an individual is found guilty of bribery offences under section 1 (bribing another person) and section 2 (being bribed) of the BA 2010 on summary conviction (namely, following a trial or guilty plea in the magistrates' court), the sentence is imprisonment for a term not exceeding 12 months in E&W and six months in NI; a fine of up to £5,000 in E&W and NI, or £10,000 in Scotland; or to both imprisonment and a fine.⁷⁰

Where an individual is convicted on indictment (following a trial or guilty plea in the Crown Court), the sentence is imprisonment for a term of up to ten years or a fine (not limited by statute), or both.⁷¹ Any other person (ie, a person being bribed under section 1, or giving the bribe under section 2) is liable, on summary conviction to a fine of up to £5,000 in E&W and NI, or £10,000 in Scotland, or on indictment, to a fine (unlimited by statute).⁷²

One other possible outcome following conviction for corruption offences could be disqualification from public office. In the UK, provisions on disqualification are set out in relation to each office in different statutes.⁷³ However, a person who is convicted of a criminal offence is not automatically disqualified from judicial office in the UK. Judges are selected 'on merit' and must be of 'good character'.⁷⁴ The good character provision does not automatically preclude someone who has been convicted of a criminal offence from being appointed to judicial office in any of the three jurisdictions.⁷⁵

APPEALS

For an overview of the court structure and routes of appeal, see the diagram above.

E&W and NI

A defendant in a criminal case can appeal his or her conviction or sentence, or both. A conviction in a magistrates' court may be appealed to the Crown Court, which results in a rehearing of the case,⁷⁶ or may be appealed by way of 'case stated' to the high court, on the grounds that the court was wrong in law or was in excess of its jurisdiction.⁷⁷ An appeal to the Court of Appeal from the Crown Court (following a trial on indictment) requires a certificate from the court of trial that the case is fit for trial, and the permission of the Court of Appeal.⁷⁸

Scotland

In order to appeal against a conviction, sentence, or both, a defendant must seek permission from the court. The case is first sent to a senior judge to consider whether there are arguable grounds of appeal. If permission to appeal is refused at this stage, a defendant can appeal against the refusal, and this is considered by a panel of two or three senior judges.⁷⁹

⁷⁰ BA 2010, s 11 and see n 10 above, 96

⁷¹ *Ibid*, BA 2010, s 11(1)(b) and see n 10 above.

⁷² BA 2010, s 11.

⁷³ Eg, Representation of the People Act 1983, s 173: disqualification from being elected to the House of Commons if convicted of a corrupt or illegal practice.

⁷⁴ E&W: CRA 2005, s 63; Scotland: JCSA 2008, s 12; NI: Justice (NI) Act 2002 and Northern Ireland Act 2009.

⁷⁵ Judicial Appointments Commission, 'Good Character Guide' (2018), paras 21–22; Judicial Appointments Board Scotland, 'Criminal Conviction – Statement of Principles' (2009); Northern Ireland Judicial Appointments Commission, 'Character Guidance for Applicants' (2018).

⁷⁶ *Halsbury's Laws of England*, para 652.

⁷⁷ *Ibid*, para 654.

⁷⁸ *Ibid*, para 734.

⁷⁹ See Scottish Courts and Tribunals, 'Criminal Appeals' www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/criminal-appeals accessed 19 February 2020.

Cases

As noted above in the discussion on the criminalisation of corruption, judges have, albeit rarely, been found guilty of misconduct in public office.⁸⁰ There are no cases of judges being convicted for bribery under the BA 2010. Information about the prevalence of corruption charges and convictions is very limited in all three jurisdictions.

E&W

In E&W, statistics on corruption-related offences were included with the Statistical Bulletin for the first time in June 2018, as ‘experimental statistics’ (see the table below).⁸¹

England and Wales	Jul '16 to Sep '16	Oct '16 to Dec '16	Jan '17 to Mar '17	Apr '17 to Jun '17	Jul '16 to Jun '17	Jul '17 to Sep '17	Oct '17 to Dec '17	Jan '18 to Mar '18	Apr '18 to Jun '18 ³	Jul '17 to Jun '18 ³
	Number of offences									
Offences relating to offering, promising or giving bribes	3	6	3	1	13	4	0	1	4	9
Offences relating to requesting, agreeing to receive and accepting bribes	2	1	0	1	4	1	1	3	1	6
Commercial organisation – failure to prevent associate bribing another with intent to obtain or retain business or advantage	0	0	0	0	0	0	0	0	1	1
Misconduct in a public office	10	16	19	17	62	28	26	22	30	106
Total corruption offences	15	23	22	19	79	33	27	26	36	122
Source: Police recorded crime, Home Office										
1. Police recorded crime data are not designated as National Statistics.										
2. Corruption offences have been defined as: 99/7 Offences of bribing another person contrary to s 1 of the Bribery Act 2010; 99/8 Offences relating to being bribed contrary to s 2 of the Bribery Act 2010; 99/9 Bribery of a foreign public official contrary to s 6 of the Bribery Act 2010; 99/10 Failure of a commercial organisation to prevent bribery contrary to s 7 of the Bribery Act 2010; 99/12 Misconduct in a public office.										
3. Recent improvements in data collection procedures mean that data collected prior to April 2018 are not comparable with data supplied since April 2018. As a result, any differences should be interpreted with caution. In April to June 2018 data were only available from 38 of the 43 territorial forces in England and Wales. The Home Office is working to ensure a full dataset will be available in future publications.										

Source: Office for National Statistics, ‘Crime in E&W: Year ending June 2018’, Table F6

80 *Borron* (see n 14 above) (a magistrate); *Llewellyn-Jones* (see n 15 above) (County Court Registrar, now known as a district judge).

81 Office for National Statistics, ‘Crime in England and Wales: Year ending June 2018’ (2018) s 13 and Table F6 www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingjune2018 accessed 19 February 2020.

In Scotland, corruption offences are categorised with ‘crimes of dishonesty’ in official statistics as one of three ‘other crimes of dishonesty’, which in 2018–2019 rose by four per cent.⁸²

NI

There are no statistics on corruption offences in NI available.

Disciplinary proceedings

Misconduct by judges

The CRA 2005 brought about significant reforms relating to the governance of the judiciary and relations between the judiciary and other branches of government. Before 2005, the Judicial Committee of the House of Lords (the highest court in the land) was composed of judges who were also members of the House of Lords, the second chamber of the UK Parliament. The head of the Judiciary of E&W was the Lord Chancellor (LC), who was also a member of government and Parliament. In line with global and European standards, the CRA 2005 introduced a formal separation between the judiciary and the other branches of government by the creation of the UKSC, composed of judges who no longer sat in the House of Lords; formally recognised the LCJ as the Head of the Judiciary of E&W, while creating a partnership of consultation and agreement between the LCJ (E&W) and the LC in matters of judicial appointments and discipline; and required new independent judicial appointment bodies and independent complaints bodies in each jurisdiction. There are provisions concerning the governance of each of the three judiciaries in these jurisdictions, as well as separate arrangements for the UKSC. The Head of the Scottish Judiciary is the LP, and the Head of the Judiciary of NI is the LCJ (NI), each of which has responsibility for judicial conduct and discipline in their respective jurisdictions.

Each jurisdiction in the UK has its own complaints procedure, and the procedures also vary depending on whether the individual being complained about is a Justice of the Supreme Court, LCJ or LP, judicial office holder, magistrate or tribunal member. Under the CRA 2005, the LCJ may ‘with the agreement of the Lord Chancellor, make regulations providing for the procedures that are to be followed’ in the ‘investigation and determination of allegations by any person of misconduct by judicial office holders’.⁸³ These rules or regulations do not apply to a judicial office holder who exercises their judicial functions wholly or mainly in NI without the consent of the LCJ (NI),⁸⁴ nor to judicial office holders who exercise their judicial functions wholly or mainly in Scotland without the consent of the LP.⁸⁵

There are four codes of judicial conduct, one for the Supreme Court and one in each jurisdiction. In addition, each has a separate complaints process and disciplinary procedures. There are

82 National Statistics for Scotland, ‘Recorded Crime in Scotland, 2018–2019’ (Scottish Government, 2019) www.gov.scot/publications/recorded-crime-scotland-2018-19/pages/29 accessed 19 February 2020.

83 CRA 2005, s 115.

84 *Ibid*, s 121.

85 *Ibid*, s 120.

different disciplinary procedures for the different levels of judges in each jurisdiction. This study focuses on Justices of the Supreme Court, the Courts Judiciary in E&W and NI, and the senior judiciary and sheriffs in Scotland. Disciplinary processes are set out in secondary legislation that is required by the CRA 2005 in E&W and NI, and by the Judiciary and Courts (Scotland) Act 2008 (the 'JCSA 2008') in Scotland.

CODES OF JUDICIAL CONDUCT AND ETHICAL STANDARDS

Supreme Court

The UKSC has its own Guide to Judicial Conduct, because 'Every court should have a Code of Judicial Conduct that sets out the standards of ethical conduct to be expected of the Court'.⁸⁶ Lord Neuberger explains that a code 'serves a number of purposes'. It 'provides guidance to members of the Court'; informs court users of 'the standards that they can reasonably expect of its judges'; and it 'explains to members of the public how judges behave and should help to secure their respect and support for the judiciary'.⁸⁷

E&W

In 2002, the Judges' Council in E&W set up a working group of judges, building on work that had been started by the Judicial Studies Board, to develop a guide to judicial conduct.⁸⁸ Following consultation throughout the judiciary and with the LC, guidelines were published in 2004. The Guide to Judicial Conduct has since been revised a number of times, most recently in March 2019.⁸⁹ The guide was developed against the background of 'guides to judicial conduct having become commonplace', especially in the Commonwealth.⁹⁰

'Judicial Ethics in Australia' was published in 1988 by the Supreme Court of Queensland followed by many others, including, as the Guide for E&W notes, in Canada (1998), Australia more broadly (2002) and Nigeria.⁹¹ Also significant was the evolution of the Bangalore Principles of Judicial Conduct (the 'Bangalore Principles'), which were endorsed by the UN Human Rights Commission in 2003. In his forward to the Guide to Judicial Conduct, Lord Judge, then, noted the following: 'We are justifiably proud of our existing standards of judicial conduct. However, the recent adoption of written codes of conduct throughout the world and the endorsement of principles by the UN Human Rights Commission at Geneva in April 2003, have indicated that a written Guide for England and Wales would now be desirable and in accord with international practice.'⁹²

In developing the Guide to Judicial Conduct, 'weight has been given and acknowledgment is due to' the Bangalore Principles.⁹³ The 2019 revised edition notes that the '[g]uide applies to all judges in courts and tribunals, whether salaried or fee-paid, legal or non-legal. This includes magistrates and reserved tribunals'

86 UKSC, 'Guide to Judicial Conduct' (2009), forward by Lord Neuberger.

87 *Ibid.*

88 Courts and Tribunals Judiciary, 'Guide to Judicial Conduct' (2013) 4.

89 *Ibid.*

90 *Ibid.*, 7.

91 *Ibid.*

92 *Ibid.*, 3.

93 *Ibid.*, 8.

judiciary operating in Scotland and NI. It also applies to coroners.⁹⁴ However, Scotland and NI each have their own codes of conduct that are relevant to their respective jurisdictions.

NI

The LCJ (NI) has the same responsibility in respect of the judiciary of NI.⁹⁵ In addition, following a review of the criminal justice system in NI, which was initiated under the Belfast Agreement of 1998, the LCJ (NI) ‘must prepare a code of practice relating to the handling of complaints against any person who holds a protected judicial office’.⁹⁶ The LCJ (NI) first issued the Code of Practice for Judicial Office holders in 2006.⁹⁷ That code has also been revised and reissued a number of times, with the last revision being in 2013. Another of the recommendations of the Criminal Justice Review Group on NI, established under the Belfast Agreement, was that ‘consideration be given to drawing up a statement of ethics’ for the judiciary. The reason for this was because ‘there might be [an] advantage in the public having access to material on the standards required of the judiciary, as a confidence booster’ and as such it would ‘also be an opportunity to raise awareness about the nature of judicial responsibilities’.⁹⁸ The resulting ‘Statement of Ethics for the Judiciary in NI’ was first published in 2007, and revised in 2010 and 2011, and they refer to and draw on the Bangalore Principles.

Scotland

In Scotland, under section 2 of the JCSA 2008, the LP is recognised as the Head of the Scottish Judiciary and the act replicates the responsibilities of the Head of the Judiciary that are set out in sections 7 and 11(1B) of the CRA 2005. The Statement of Principles of Judicial Ethics for the Scottish Judiciary was first issued in 2010, and revised in 2013, 2015 and 2016. The Scottish Principles of Judicial Ethics were developed not only to reflect the global trend for stating such principles, but also because of the international recognition of the need for such statements of principle and the development of the Bangalore Principles.⁹⁹ In addition, while the Scottish Judiciary has always maintained high standards of judicial conduct ‘without the benefit of written guidance’, against the background of international developments it was ‘now appropriate for such guidance to be available in Scotland’.¹⁰⁰

DISCIPLINARY FRAMEWORK

Supreme Court

Under the Supreme Court’s Judicial Complaints Procedure, complaints must be made, in the first instance, to the Chief Executive of the Court, who then refers the complaint on to the President of

94 *Ibid.*, 4.

95 CRA 2005, s 11(1B)(c), s 11 replaces s 12 of the Justice (Northern Ireland) Act 2002, which set out the role of the LCJ (NI), following a review of the criminal justice system in NI under the 1998 Belfast Agreement.

96 Justice (Northern Ireland) Act 2002, s 16.

97 Belfast Agreement 1998. See ‘Policing and Justice’, paras 2 and 4; and Annex B ‘Review of the Criminal Justice System’. See also Criminal Justice Review Group, ‘Report of the Review of the Criminal Justice System of Northern Ireland, (2000)’, c 6 ‘The Judiciary’, especially paras 6.137 and 6.138.

98 Criminal Justice Review Group, para 6.138.

99 Judiciary of Scotland, ‘Statement of Principles of Ethics for the Scottish Judiciary’ (2016), para 1.1.

100 *Ibid.*

the Court (unless the complaint relates to the President, in which case the complaint is referred to the Deputy President of the Court).¹⁰¹ The process is set out in the Judicial Complaints Procedure and considered further below.

E&W

Under section 7(2) of the CRA 2005, the LCJ (E&W), as Head of the Judiciary of E&W, is responsible for ‘the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor’. The LCJ can only exercise his disciplinary powers ‘with the agreement’ of the LC.¹⁰² Therefore, decisions about what disciplinary action to take are made by the LCJ and the LC together, and they must consider the advice of the person or body that investigated the complaint.¹⁰³

NI

Under section 12(1) of the Justice (NI) Act 2002 (as amended by section 11 of the CRA 2005), the LCJ (NI) has similar powers and responsibilities to those of the LCJ (E&W). The LCJ (NI) is the Head of the Judiciary of NI and is responsible for ‘the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Northern Ireland within the resources made available by the Lord Chancellor’.

Scotland

The LP has powers, under section 28 of the JCSA 2008, to ‘make provision for or in connection with – (a) the investigation and determination of any matter concerning the conduct of judicial office holders, (b) reviews of any such determinations’.¹⁰⁴ In exercise of that power, the LP has made the Complaints about the Judiciary (Scotland) Rules 2017 (the ‘Judiciary Rules’).¹⁰⁵

Under the Judiciary Rules, the LP appoints a member of the Inner House of the Court of Session (the most senior court in Scotland) as the ‘Disciplinary Judge’ (DJ). The DJ is responsible for ‘supervising the operation generally of these Rules’ and ‘reporting to the Lord President about that matter as appropriate’.¹⁰⁶ Under the Tribunals Rules this responsibility falls to the President of the Scottish Tribunals.¹⁰⁷ There are two different processes: one for complaints against judicial office holders, and one for complaints against Tribunal Members. The JOS provides support to the LP, and is therefore involved in the administration of both disciplinary processes.

The Judiciary Rules set out the detail of the investigation of complaints and the processes to be followed. However, if a judge or a complainant has a complaint about the procedure as it has been applied to him or her, the judge may have recourse to the JCR.¹⁰⁸ The LP ‘must have regard’¹⁰⁹ to any

101 UKSC, ‘Judicial Complaints Procedure’, para 2 www.supremecourt.uk/docs/judicial-complaints-procedure.pdf accessed 19 February 2020.

102 CRA 2005, s 108(2).

103 Judicial Discipline (Prescribed Procedures) Regulations 2014, ss 12 and 15.

104 JCSA 2008, s 28(1).

105 Tribunals (Scotland) Act 2014, sch 8, para 3(1); Complaints about Members of the Scottish Tribunals Rules 2018.

106 Judiciary Rules, s 3(1).

107 Complaints About Members of the Scottish Tribunals Rules 2018, s 3(1).

108 JCSA 2008, s 30.

109 *Ibid*, s 30(4).

written representations made by the JCR ‘about procedures for handling the investigation of matters concerning the conduct of judicial office holders’.¹¹⁰

Given the importance of judicial independence and public confidence in the judiciary, in both E&W and Scotland, the fairness of disciplinary procedures is overseen by an ombudsman. Either a judge or a complainant may complain to the ombudsman about the disciplinary investigation.

Making a complaint

SUPREME COURT

In the first instance, complaints about a Justice of the Supreme Court should be made to the Chief Executive of the court. Where the complaint refers to a matter other than a judicial decision the Chief Executive refers the complaint to the president of the Supreme Court (unless the complaint relates to the President, in which case it is referred to the Deputy President).¹¹¹

E&W

Complaints to the JCIO must ‘contain an allegation of misconduct’.¹¹² ‘Misconduct’ is not defined; however, the Supplementary Guidance to the rules explains that: ‘The JCIO may only consider a complaint that contains an allegation of misconduct by a judge or other office holder. Such misconduct relates to the judge’s personal behaviour for example: a judge shouting or speaking in a sarcastic manner in court; or misuse of judicial status outside of court. It does not relate to decisions or judgments made by a judge in the course of court proceedings.’¹¹³

While the Judicial Conduct (Judicial and other Office Holders) Rules 2017 do not prescribe the process for dealing with apparent criminal conduct, the JCIO has confirmed that allegations of criminal conduct are to be dealt with by the police.¹¹⁴ Under the rules, the JCIO, through the summary procedure, may make a recommendation to the LC and LCJ, to dismiss a judge where the judge complained about has been convicted of a criminal offence (see further below).¹¹⁵

NI

Complaints must be sent to the complaints officer the office of the LCJ,¹¹⁶ and they should be made in writing.¹¹⁷

The Code of Conduct for Judicial Officers in NI distinguishes between complaints about the decisions or judgments made by a judge, and his or her personal conduct.¹¹⁸ In addition, the Justice (NI) Act 2002

110 *Ibid*, s 30(2) (d).

111 See n 101 above.

112 The Judicial Conduct (Judicial and Other Office Holders) Rules 2014, s 6.

113 *Ibid*, Supplementary Guidance, 3.

114 JCIO Response to Questions by email for the purposes of this study.

115 *Ibid*, pt 3.

116 Complaints About the Conduct of Judicial Office Holders; Code of Practice Issued by the Lord Chief Justice under Section 16 of the Justice (NI) Act 2002, para 4.1.

117 *Ibid*, para 4.2.

118 *Ibid*, para 2.3.

(as amended) explicitly distinguishes between serious misconduct and less serious conduct.¹¹⁹ The code therefore provides for two separate processes in respect of each kind of conduct. There is one procedure for ‘serious complaints’ – those that appear to involve ‘a serious allegation of misbehaviour or inability to perform the functions of office, [and] which have a reasonable prospect of being substantiated’; and another procedure for ‘less serious’ complaints.¹²⁰ Whether or not a complaint is serious will depend on ‘the full circumstances of the case’, but examples include ‘making exceptionally inappropriate remarks, such as comments on a person’s religion or racial background’ or ‘failure to disclose a serious and fundamental conflict of interest’.¹²¹ In determining whether a complaint should be considered serious, ‘regard will be given to the judge’s record of upheld complaints’.¹²² Less serious complaints would include rudeness to court users or a member of the public at an official function; inappropriate remarks in court or in a judicial speech; and insensitive behaviour, such as towards a vulnerable witness or member of a minority community.¹²³

SCOTLAND

The JOS has issued ‘Complaint Guidance’, which sets out who a person can complain about, and what a person cannot complain about (see the table below). Areas that are covered, and will be investigated include the use of racist, sexist or offensive language; falling asleep in court; misusing judicial status for personal gain or advantage; and conflict of interest.¹²⁴ As in E&W and NI, complaints about a judge’s decision, sentencing, verdict or management of a case will not be investigated by the JOS.¹²⁵

Who can be complained about¹²⁶
Judges of the Court of Session
Re-employed retired judges of the Court of Session
Chairman of the Scottish Land Court
Temporary judges of the Court of Session
Sheriffs principal
Temporary sheriffs principal
Sheriffs
Deputy Chairman of the Scottish Land Court
Summary sheriffs
Member of the Scottish Land Court
Re-employed retired sheriffs principal, sheriffs and summary sheriffs
Part-time sheriffs
Part-time summary sheriffs
Justices of the peace

119 Justice (NI) Act 2002, s 16.

120 See n 116 above, para 2.7.

121 *Ibid.*, 34.

122 *Ibid.*

123 *Ibid.*

124 JOS, ‘Complaint Guidance’, 3.

125 *Ibid.*

126 Adapted from the JOS ‘Complaint Guidance’ for complaints about judicial office holders www.scotland-judiciary.org.uk/Upload/Documents/GuidanceforMembersofthePublic2017_3.pdf accessed 19 February 2020.

What can be complained about ¹²⁷	
Matters than <i>can</i> be investigated	Matters that <i>cannot</i> be investigated
The use of racist, sexist or offensive language	A judgment, verdict or order
Falling asleep in court	The impact of the decision made
Misusing judicial status for personal gain or advantage	What evidence should be, or has been considered
Conflict of interest	The award of expenses or damages
	Decisions about hearing programming, case management or conduct of proceedings
	Who should be allowed to participate in hearing allegations of criminal activity

Where no complaint is made, but the ‘disciplinary judge received information from any source which suggests to him or her that consideration under these Rules of a possible allegation of misconduct is appropriate’, then the conduct of the judicial officer concerned may be considered under the Judiciary Rules.¹²⁸

Investigation

SUPREME COURT

Once the Chief Executive refers a complaint, the president or appropriate member will then consult the next senior member of the court to whom the complaint does not relate and may decide to take no action; notify the justice who is the subject of the complaint and try to resolve the matter informally; or ‘consider taking formal action’.¹²⁹

Formal action

Formal action will be taken when either ‘a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member’s character, integrity or continuing fitness to hold office’ or ‘a member’s conduct otherwise appears to be such as to throw serious doubt on that member’s continuing fitness to hold office’.¹³⁰ Formal action means that a tribunal is established.¹³¹ The tribunal is composed of the LCJ (E&W), the Lord President of the Court of Session and the LCJ (NI), and two independent persons of high standing nominated by the LC.¹³² The tribunal will be chaired by whoever of the heads of the judiciary has been in office the longest.¹³³ The tribunal investigates the complaint and reports to the LC.¹³⁴ The LC then has to decide whether it is appropriate to initiate proceedings for the removal of the justice under section 33 of the CRA 2005.¹³⁵

127 *Ibid.*

128 See n 106 above, r 19.

129 See n 101 above, para 3.

130 *Ibid.*, para 4.

131 *Ibid.*, para 7.

132 *Ibid.*, para 7(i).

133 *Ibid.*

134 *Ibid.*, para 7.

135 *Ibid.*, para 7(vii).

Removal from office

Judges of the Supreme Court hold office ‘during good behaviour, but may be removed from it on the address of both Houses of Parliament’.¹³⁶ This is a petition to the Queen to remove a judge.

E&W

Decisions on the outcome following a complaint rest with the LCJ and LC,¹³⁷ and the body responsible for investigating complaints against judicial office holders, in the first instance, is the JCIO.¹³⁸ Complaints should be made to the JCIO, and a complaint ‘must initially be considered by’ the JCIO.¹³⁹

Initial assessment

Each complaint begins with an initial assessment made by the JCIO in respect of a judge in E&W.¹⁴⁰

Summary procedure

The JCIO ‘may advise the Lord Chancellor and the Lord Chief Justice that the office holder concerned should be removed from office without further investigation’,¹⁴¹ where the office holder has been convicted of a criminal offence, either in the UK or elsewhere; has been cautioned in respect of a criminal offence; is a discharged bankrupt or is the subject of bankruptcy restrictions; has failed to disclose information concerning their suitability to hold judicial office; is the subject of a fitness to practice investigation that has resulted in removal or suspension from the register of a professional body or is subject to restricted practice; has been removed from another judicial office; or has failed to meet the sitting requirements of his or her role.¹⁴² The office holder against whom the complaint has been made must be given the chance to make representations before a decision under rule 30 is taken.

Consideration of the substance of the complaint

Once a complaint has been determined to fall within the remit of the complaints procedure, and cannot be dealt with by way of a summary procedure, the complaint will then be passed on for further consideration by a ‘nominated judge’.¹⁴³ The nominated judge must determine the facts of the case and determine whether the facts amount to misconduct and what disciplinary action, if any, should be taken.¹⁴⁴ The nominated judge has a number of options: he or she may ‘advise the Lord Chancellor and the relevant Chief Justice that a complaint should be dismissed’, dismiss a complaint; ‘deal with a complaint informally and direct that it may be considered as a pastoral or training matter’;

136 CRA 2005, s 33.

137 See n 103 above, ss 12 and 15.

138 *Ibid*, s 4.

139 See n 112 above, s 20.

140 See n 103 above, r 6 and see n 112 above, r 20.

141 See n 112 above, r 30.

142 *Ibid*, rr 30(a) to 30(o).

143 *Ibid*, r 25.

144 *Ibid*, r 38.

‘recommend that disciplinary action should be taken’; or ‘request that a complaint is referred to an investigating judge’.¹⁴⁵ Where an investigation results in a recommendation to dismiss or remove a judge, he or she may opt to have his or her case reviewed by a disciplinary panel.¹⁴⁶ A referral to an investigating judge is made where a ‘complaint is sufficiently serious or complex’, or ‘a detailed investigation is required to establish the facts of a complaint’.¹⁴⁷

Further investigation by the investigating judge

More serious complaints are investigated by an ‘investigating judge’. The investigating judge is again looking at the facts, whether the facts amount to misconduct, and what disciplinary action should be taken.¹⁴⁸ The investigating judge then reports to the LC and LCJ.¹⁴⁹

Consideration by a disciplinary panel

A disciplinary panel will have four members: an office holder or former office holder of higher rank than the judge concerned;¹⁵⁰ an office holder or former office holder of the same rank as the judge concerned;¹⁵¹ and two additional members, neither of whom has been an office holder,¹⁵² or a practicing or employed lawyer.¹⁵³ The senior ranking judge will chair the panel and have the casting vote.¹⁵⁴ A disciplinary panel may be convened when: (1) the judge against whom a complaint has been made requests it following an investigation by a nominated judge;¹⁵⁵ (2) when the LC and LCJ have made a referral because they require further investigation of the matter;¹⁵⁶ (3) when the ombudsman refers a case; (4) or where a complaint is reopened, in exceptional circumstances, when new information has been received by a nominated judge, who then refers it to a disciplinary panel.¹⁵⁷ The function of the disciplinary panel is to ‘consider and review’ findings of fact, recommendations as to the conduct of the office holder and the proposed disciplinary action.¹⁵⁸ A disciplinary panel can make inquiries, request documents and take evidence, including oral evidence.¹⁵⁹ The panel ‘must take oral evidence from the office holder concerned unless it considers it unnecessary to do so’.¹⁶⁰

Removal from office

Senior judges in E&W (judges of the high court or Court of Appeal) hold office ‘during good behaviour’ and can only be removed ‘by Her Majesty on an address presented to Her by both Houses

145 *Ibid*, r 41.

146 *Ibid*, r 53(c).

147 *Ibid*, r 44.

148 *Ibid*, r 59.

149 *Ibid*, r 72.

150 See n 103 above, r 11(a).

151 *Ibid*, r 11(b).

152 *Ibid*, r 11(c) (i).

153 *Ibid*, r 11(c) (ii).

154 *Ibid*, r 11(6).

155 See n 112 above, rr 73 and 53(c).

156 *Ibid*, r 73 and see n 103 above, rr 12 and 13.

157 See n 112 above, rr 73, 90 and 92(b).

158 *Ibid*, r 75.

159 *Ibid*, rr 79 and 81.

160 *Ibid*, r 80.

of Parliament'.¹⁶¹ This has only happened once.¹⁶² A senior judge may be suspended from office 'for any period during which the person is subject to proceedings for an Address'. Other judges may be removed from office by the LCJ and the LC as part of their powers to 'take disciplinary action',¹⁶³ following the procedures set out in the Judicial Discipline (Prescribed Procedures) Regulations 2014 and the Judicial Conduct (Judicial Office Holders) Rules 2014, as explained above. Where a nominated judge, having considered the substance of the complaint (see above) decides that a judge should be removed or suspended, the nominated judge must state in his or her report: '(a) [...] what findings of fact the nominated judge has made; (b) what misconduct there has been; and (c) why the nominated judge considers removal or suspension from office to be an appropriate sanction.'¹⁶⁴ If the investigation later proceeds to a disciplinary panel, and the nominated judge recommended removal or suspension, the disciplinary panel 'must advise the Lord Chancellor and the Lord Chief Justice whether removal or suspension is justified'.¹⁶⁵ The panel must send a draft of its report to the office holder concerned,¹⁶⁶ and invite him or her to comment on it before finalising it and sending it to the LC and LCJ.¹⁶⁷

NI

Initial assessment

The complaints officer must first determine whether the complaint 'concerns a relevant judicial office holder and relevant judicial conduct'.¹⁶⁸ The complaints officer also has to determine whether the complaint is 'serious' or not, and may make preliminary inquiries in order to do this.¹⁶⁹ A vexatious claim will not be investigated further.¹⁷⁰ 'Less serious' and 'serious' complaints will be dealt with in different ways, but first the complaints officer has to establish whether there are any ongoing proceedings which might require the investigation of the complaint to be delayed.¹⁷¹ Additionally, the Code of Conduct for Judges (NI) states that if 'at any time, it appears that criminal conduct may be involved, the complaints officer will inform the police'. The investigation of the complaint will then be delayed pending the outcome of any criminal investigation or subsequent proceedings.¹⁷²

Informal resolution

In the early stages of a less serious complaint, efforts will be made to resolve the issue by way of informal resolution, unless a judge has a history of similar complaints, in which case, the matter will be dealt with through a formal investigation.¹⁷³ Informal resolution is managed by the complaints

161 Senior Courts Act 1981, s 11(3).

162 Courts and Tribunals Judiciary, 'Judges and parliament' www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-inc/judges-and-parliament accessed 19 February 2020.

163 See n 103 above, r 2(1).

164 *Ibid*, r 48.

165 *Ibid*, r 77.

166 See n 112 above, r 83.

167 *Ibid*, rr 86 and 89.

168 Complaints About the Conduct of Judicial Office Holders, para 4.5.

169 *Ibid*, para 4.7.

170 *Ibid*, para 4.6.

171 *Ibid*, paras 2.4 and 4.8.

172 *Ibid*, para 2.5.

173 *Ibid*, para 5.1.

officer, and only proceeds where both the judge against whom the complaint is made, and the complainant, agree.¹⁷⁴

‘Less serious’ complaints

Responsibility for formally investigating less serious complaints is with the complaints officer,¹⁷⁵ who considers the complaint and gathers any additional information from the complainant and the judge.¹⁷⁶ The complaints officer can also take third-party witness statements and obtain transcripts, audio recordings of court proceedings, and other evidence that he or she considers relevant and necessary.¹⁷⁷ The judge against whom the complaint has been made will be informed of the evidence and given the opportunity to respond.¹⁷⁸ If at any point during the investigation of a less serious offence it becomes apparent that the complaint should instead be considered as a ‘serious’ complaint, it will be investigated as such.¹⁷⁹ Once the complaints officer has all the relevant information about a complaint, he or she will report to the LCJ (NI).¹⁸⁰ The LCJ (NI) may make additional inquiries, if necessary, before making a decision on the outcome of the case. Each of the parties has ten working days to request a review. The review may be conducted by an independent judge of ‘appropriate seniority’, who can review the handling of the complaint, the findings of the investigation and the outcome. The reviewing judge will then make recommendations to the LCJ (NI).¹⁸¹

‘Serious’ complaints

A serious complaint will be considered by a tribunal convened by the LCJ (NI). The role of the tribunal is to advise on how to deal with the complaint.¹⁸² A tribunal will be composed of two judicial office holders and a lay member appointed by the LCJ (NI).¹⁸³ The seniority of the judicial members, in relation to the judge being investigated, is laid out in the Code (eg, the judicial officers on a tribunal investigating a high court judge would have to be a Lord Justice of Appeal and a second Lord Justice of Appeal or a retired judge of an appropriate tier).¹⁸⁴ The most senior judge will chair the tribunal.¹⁸⁵ The procedure and rules of evidence will be ‘determined by the tribunal chairman in accordance with the rules of natural justice’.¹⁸⁶ The chairman of the tribunal, in ‘determining the procedure [...] must have regard’ to a number of things, including that the hearing ‘shall be inquisitorial’ and the ‘tribunal may call and question witnesses’.¹⁸⁷ The judge being investigated, and the complainant, are expected to comply with requests to attend a hearing and provide information, and ‘failure to do so may be taken into account in determining how to dispose of the complaint’.¹⁸⁸

174 *Ibid*, para 5.2.

175 *Ibid*, para 6.1.

176 *Ibid*, paras 6.1 to 6.3.

177 *Ibid*, para 6.4.

178 *Ibid*.

179 *Ibid*, para 6.6.

180 *Ibid*, para 6.5.

181 *Ibid*, para 6.7.

182 *Ibid*, para 7.1.

183 *Ibid*.

184 *Ibid*, para 7.2.

185 *Ibid*.

186 *Ibid*, para 7.4.

187 *Ibid*.

188 *Ibid*, para 7.5.

The tribunal decision is by simple majority, and members can express differences of opinion about the facts, or the recommendation ‘may be reflected in their report’ to the LCJ (NI).¹⁸⁹ Upon receiving the report from the tribunal, the LCJ (NI) may direct the tribunal to carry out additional inquiries.¹⁹⁰ A review is built into the process: the LCJ (NI) will ‘automatically’ invite the parties to comment on the tribunal’s report, and ‘will have regard to any comments received’ in making the final decision.¹⁹¹

Removal from office

If, following investigation by a tribunal convened by the LCJ (NI) under paragraph 7.1 of the Code, the LCJ (NI) decides that conduct may warrant removal, the case should be referred to a statutory tribunal.¹⁹² Provisions for the removal of lower-level judges from ‘listed judicial office’ (as opposed to a ‘senior judicial official’, such as the ‘Lord Chief Justice, a Lord Justice of Appeal or a judge of the High Court’), are set out in the Justice (NI) Act 2002.¹⁹³ The power to remove or suspend a judge from a ‘listed judicial office’ lies with the LCJ (NI),¹⁹⁴ and a listed office judge can only be removed or suspended following an investigation by a statutory tribunal, as prescribed by sections 7 (consequences of tribunal recommendations) and 8 (composition of the tribunal) of the act. A tribunal to ‘consider removal of the holder of a listed judicial office’ may be convened by either the LCJ (NI) or ombudsman.¹⁹⁵ The tribunal must be composed of a Lord Justice of Appeal¹⁹⁶ and a judicial member of the NI Judicial Appointments Commission (NIJAC),¹⁹⁷ both selected by the LCJ (NI) for the tribunal,¹⁹⁸ and a lay member of the NIJAC,¹⁹⁹ selected by the ombudsman.²⁰⁰ The lay member will be chair of the tribunal²⁰¹ and the procedure will be determined by the LCJ (NI).²⁰² A judge can only be removed from a listed judicial office if the tribunal recommends ‘that he be removed on the ground of misbehaviour or inability to perform the functions of the office’.²⁰³

Senior judicial officials may only be removed following the procedure set out in section 12B (procedure for removal of the LCJ (NI)) and 12C (procedure for removal of other senior judges) of the Judicature (NI Act) 1978.²⁰⁴ Senior judges ‘hold office during good behaviour’ and the Queen may remove a senior judge following an ‘address to both Houses of Parliament’. An address can only be made by the Prime Minister in the House of Commons, or the LC, or a Minister of the Crown on behalf of the LC, in the House of Lords. No such address may be made unless the LCJ (NI) has convened a tribunal and the tribunal has recommended that the judge be removed from office ‘on the ground of misbehaviour’, and the LCJ (NI) has advised the Prime Minister and the LC to accept

189 *Ibid*, para 7.6.

190 *Ibid*, para 7.7.

191 *Ibid*, para 7.8.

192 *Ibid*, para 8.2.

193 As amended by Justice (Northern Ireland) Act 2009, sch 3, paras 5–7.

194 Justice (NI) Act 2002, s 7(2).

195 *Ibid*, s 8(1).

196 *Ibid*, s 8(2) (a).

197 *Ibid*, s 8(2) (b).

198 *Ibid*, s 8(3).

199 *Ibid*, s 8(2) (c).

200 *Ibid*, s 8(3).

201 *Ibid*, s 8(5).

202 *Ibid*, s 8(6).

203 *Ibid*, s 7(3).

204 As amended by the Northern Ireland Act 2009.

the recommendation or the Prime Minister and the LC have consulted the LCJ (NI), and a copy of the tribunal's report has been presented to Parliament. The tribunal must be composed of one person who 'holds high judicial office' but is not, nor has been, a LCJ, Lord Justice of Appeal or a high court judge and a Justice of Appeal or judge of the Inner House of the Court of Session (both selected by the LCJ (NI)); and a lay member of the NIJAC (selected by the NIJAC).²⁰⁵ The tribunal procedure is determined by the LCJ (NI).²⁰⁶

SCOTLAND

Initial assessment

A complaint against a judicial office holder should be made to the JOS. If, 'it appears to the Judicial Office that an allegation is of an act, omission or other conduct which may constitute a criminal offence', then consideration of the complaint will be suspended until 'the relevant prosecutor indicates that no criminal proceedings are to be taken'; 'any such proceedings are concluded'; or 'it becomes clear to the Judicial Office that no such proceedings are to be taken'.²⁰⁷ Where there is no evidence of a crime, the JOS undertakes an initial assessment of the complaint.²⁰⁸ A complaint may be dismissed at this stage if it does not contain enough information, is about a judicial decision, raises a matter that has already been dealt with or raises a matter that 'falls within the functions of the Judicial Complaints Reviewer'.²⁰⁹ The judicial office holder is then notified of the complaint.²¹⁰ If the complaint relates to ongoing proceedings the JOS should seek advice from the DJ as to 'whether it would be appropriate for consideration under these Rules before the [...] proceedings are concluded'.²¹¹ If the advice is that it would be inappropriate to continue, consideration of the complaint is suspended until the end of the proceedings.²¹²

Consideration by the DJ

Where a complaint is not dismissed at the initial assessment stage by the JOS, it must be considered by the DJ. There are three possible outcomes at this stage:

Dismissal of the complaint

Rule 11(4) of the Judiciary Rules sets out seven possible reasons for dismissal of a complaint at this stage by the DJ: (1) lack of sufficient information; (2) it's a complaint about a judicial decision; (3) it is a matter that has already been dealt with; (4) it is a matter for the JCR; (5) it is vexatious; (6) it is without substance; or (7) it is insubstantial, that is, 'even if substantiated, it would not require any disciplinary action to be taken'. In deciding whether the complaint is without substance or is insubstantial, the DJ is to 'take due account of the extent to which the conduct concerned complies

205 Justice (NI) Act 2002, ss 12C(9), 12C(10) and 12C(11).

206 *Ibid*, s 12C(13).

207 See n 106 above, s 6.

208 *Ibid*, ss 8(1) and (2).

209 *Ibid*, s 8(4).

210 *Ibid*, s 9.

211 *Ibid*, s 10(2).

212 *Ibid*, s 10(3).

with any guidance issued by the Lord President under section 2(2)(4) of the JCSA 2008,²¹³ that is, guidance such as the Statement of Principles of Judicial Ethics for the Scottish Judiciary.

Possible establishment of a tribunal to consider fitness for office

If the DJ decides that rule 11(4) doesn't apply, he or she 'is to consider' whether 'the allegation, if substantiated, would raise a possible question of fitness for office'.²¹⁴ The question is whether a 'person holding a judicial office to which this section applies is unfit to hold the office by reason of inability, neglect of duty or misbehaviour'.²¹⁵ Where the DJ considers that the conduct could raise a question of fitness for office, the LP is informed by the JOS (or in the case of a justice of the peace (JP), the sheriff principal in the sheriffdom where the JP works),²¹⁶ and further consideration under the Judiciary Rules is given until the LP decides whether to request that the First Minister of Scotland (FM) establish a tribunal to consider fitness for office.²¹⁷ If the LP indicates 'an intention' to make a request that a tribunal is constituted, consideration under the Judiciary Rules ceases.²¹⁸ In the case of a JP, the sheriff principal who is informed of the conduct raising a question of fitness for office must consider whether to 'request that the LP appoints a tribunal under section 71 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007'.²¹⁹

Referral for investigation of complaint by a nominated judge

Where the complaint is not dismissed under rule 11 or considered under the fitness for office procedure, the JOS must refer the allegation to a 'judicial office holder nominated by the disciplinary judge' for consideration and investigation.²²⁰ The nominated judge must be either a judge of the Court of Session or a sheriff principal,²²¹ unless the allegation is against a judge of the Court of Session, Chairman of the Scottish Land Court or a sheriff principal,²²² in which case, the nominated judge must be a judge of the Court of Session.²²³

Investigation and reporting by the nominated judge

Where a complaint against a judicial officer is referred to a nominated judge, the nominated judge must first consider whether the allegation 'may be capable of resolution to the satisfaction of the person complaining and the judicial officeholder concerned without further investigation'.²²⁴ Where further investigation is required, the nominated judge must investigate the allegations and produce a report determining the facts of the matter, whether the allegation is substantiated and if so, whether the LP should exercise the power under section 29(1) of the JCSA 2008 to issue 'formal advice',

213 *Ibid*, r 11(5).

214 *Ibid*, rr 11(7) and 11(8).

215 JCSA 2008, s 35(1).

216 See n 106 above, r 11(9).

217 *Ibid*, r 11(9).

218 *Ibid*, r 11(10).

219 *Ibid*, rr 11(11) and (12).

220 *Ibid*, r 12(1).

221 *Ibid*, r 12(3).

222 *Ibid*, r 12(5).

223 *Ibid*, r 12(4).

224 *Ibid*, r 12(6).

a ‘formal warning’ or a ‘reprimand’.²²⁵ The report must be in writing and ‘contain reasons for its conclusions’.²²⁶ In determining whether the complaint is substantiated and in recommending action to be taken, the nominated judge must take ‘due account’ of guidance such as the Principles of Judicial Ethics.²²⁷

When investigating a complaint, the nominated judge may ‘make such inquiries’ as he or she ‘considers appropriate’; obtain and consider ‘any documents which appear to be relevant’; and ‘interview any persons he or she considers appropriate’.²²⁸ Interviewees are to be given ‘reasonable notice’ of the dates and times of interviews, and may be permitted to have someone accompany them.²²⁹ Arrangements can be made for interviews to be recorded.²³⁰ The judicial office holder against whom the complaint is made ‘is to comply’ with a request to be interviewed.²³¹ The nominated judge decides the procedure of the investigation as he or she ‘thinks fit’ but, under rule 14 must do so ‘consistent with the principles of fairness and natural justice’;²³² the judicial office holder against whom the complaint is made must be given the opportunity to submit a written response to the allegation;²³³ and both the judicial office holder concerned and the complainant must be given the opportunity to submit written comments about ‘any information obtained by the nominated judge which he or she has not previously seen’.²³⁴ The nominated judge must issue a statement of the proposed procedure to both the judge concerned and the complainant before the start of the investigation,²³⁵ and if he or she then decides to depart from the procedure as stated, must inform both parties in writing before continuing.²³⁶ The nominated judge must make a note, and keep a record of the substance of all material communications during the course of the investigation and create and maintain a file of these records.²³⁷ The investigation is, ‘so far as possible’ to be conducted in private ‘without disclosure to third parties of the identity of the person complaining or the judicial office holder concerned’.²³⁸ In determining questions of fact, the aim of the investigation is ‘ascertaining the truth’,²³⁹ and findings of fact are to be made ‘on the balance of probabilities’.²⁴⁰ Once the nominated judge has concluded their investigation and submitted their report, the report is then reviewed by the DJ.

At this stage of the process the DJ reviews the determinations of the nominated judge and may require that the nominated judge reconsider ‘any of them’.²⁴¹ If required to reconsider, the nominated judge may make further inquiries as appropriate, obtain further documents as appear

225 *Ibid*, r 13(2).

226 *Ibid*, r 13(3).

227 *Ibid*, r 13(4).

228 *Ibid*, r 14(1).

229 *Ibid*, r 14(2).

230 *Ibid*, r 14(3).

231 *Ibid*, r 14(4).

232 *Ibid*, r 14(5).

233 *Ibid*, r 14(5)(a).

234 *Ibid*, r 14(5)(b).

235 *Ibid*, r 14(6).

236 *Ibid*, r 14(7).

237 *Ibid*, r 14(8).

238 *Ibid*, r 14(5)(d).

239 *Ibid*, r 14(5)(c)(1).

240 *Ibid*, r 14(5)(c)(2).

241 *Ibid*, r 15(4).

to be relevant; and interview or re-interview people as appropriate.²⁴² The rules of procedure set out in rule 14 apply to the further investigation and reconsideration of the evidence as well.²⁴³ Having completed the reconsideration, the nominated judge issues another report which must set out ‘what the nominated judge did in reconsidering determinations’ and ‘what the outcome of the reconsideration was’.²⁴⁴

Report to the LP

Once the DJ has reviewed the determination of the nominated judge, and if necessary, the report of any reconsiderations, the report is put to the LP.²⁴⁵ If the report finds that the allegation is substantiated in full or in part and the report recommends that the LP should exercise a power under section 29(1) of the JCSA 2008, then the judicial office holder who is the subject of the report will be invited to make written representations. When inviting representations the LP’s letter must, ‘contain or be accompanied by such information, which may include the report, as he or she considers to be appropriate for the purpose of giving the judicial office holder a fair opportunity to make any representations’. The LP must consider any such representations before deciding whether to exercise disciplinary powers.

Fitness for office proceedings

The procedure for removing a senior judge from office is set out in chapter 5 of the JCSA 2008, and the procedure for removing a sheriff is set out in sections 21–25 of the Courts Reform (Scotland) Act 2014. In both cases, the FM constitutes a tribunal to investigate fitness for office,²⁴⁶ either on request from the LP, or in circumstances in which the FM thinks fit to do so (but the FM must consult the LP in respect of a tribunal to investigate a sheriff).²⁴⁷ A tribunal considering fitness for office of senior judiciary must consist of five members: two judges who hold high judicial office,²⁴⁸ at least one being a member of the UKPC²⁴⁹ and the other being, or having been,²⁵⁰ a judge of the Court of Session;²⁵⁰ one advocate or solicitor, with at least ten years in practice;²⁵¹ and one lay member.²⁵² The member of the UKPC will chair, or if both judicial members are members of the UKPC, the FM will appoint one to chair.²⁵³ The chair will hold the casting vote.²⁵⁴ The tribunal procedure will be set by the Court of Session by act of sederunt (secondary legislation),²⁵⁵ and the tribunal can require ‘any person’ to give evidence or produce documents.²⁵⁶ Failure to do so may

242 *Ibid*, r 15(6).

243 *Ibid*, r 15(7).

244 *Ibid*, r 15(10).

245 *Ibid*, rr 16(1) and 16(2).

246 JCSA 2008, s 35(1); and Courts Reform (Scotland) Act 2014, s 21(1).

247 Courts Reform Act, s 21(2).

248 JCSA 2008, s 35(4)(a).

249 *Ibid*, s 35(6).

250 *Ibid*, s 35(7).

251 *Ibid*, s 35(4)(b).

252 *Ibid*, s 35(4)(c).

253 *Ibid*, ss 35(9) and 35(10).

254 *Ibid*, s 35(11).

255 *Ibid*, s 37(5).

256 *Ibid*, s 37(1).

be a contempt of court, enforced by the Court of Session.²⁵⁷ The report of the tribunal is submitted to the FM, who then presents it to the Scottish Parliament.²⁵⁸ The process for considering fitness for office of a sheriff is very similar,²⁵⁹ the only difference being that the second judicial member is to be a member who holds ‘relevant judicial office’.²⁶⁰

Disciplinary procedure

The procedures for the various stages of the disciplinary process are set out in some detail in the relevant legislation. Most significant are provisions for notice, the ability for a judge to respond to allegations in full, witnesses and evidence and the review of procedures at a number of points in the process.

SUPREME COURT

Where a tribunal is convened to consider a complaint,²⁶¹ the tribunal is to adopt a procedure ‘as shall be fair and expeditious as is consistent with fairness’.²⁶²

E&W

The procedures to be adopted for the various stages of investigation and reporting in disciplinary proceedings are set out in the Judicial Discipline (Prescribed Procedures) Rules 2014, and in detail in the Judicial Conduct (Judicial and Other Office Holders) Rules 2014. These include gathering and considering independent evidence (rule 22); giving reasons for decisions (rules 24, 43(a) and 48); allowing the judicial officer against whom the complaint is made to comment on the complaint (rules 26(b) and 53(a)); allowing the judicial officer to make representations (rules 31, 53(b) and 61); making inquiries, gathering documents and conducting interviews (rules 40 and 62); allowing (rule 64), or requiring, the judicial officer the opportunity of an oral hearing (rule 80); giving the judicial officer the opportunity to comment on a draft report before it is finalised (rules 68 and 84); and providing a review process throughout, including the possibility of the complaint being considered by a disciplinary panel (rule 53(c)).

NI

The procedures for the investigations of complaints are set out in the Code of Practice for Complaints about the Conduct of Judicial Office Holders 2013, made by the LCJ (NI) under section 16 of the Justice (NI) Act 2002. For example, the complaints officer, investigating less serious complaints must gather witness statements, give the judge notice of evidence against them and give them the opportunity to respond to the allegations (paragraph 6.4). The decision of the complaints officer may be reviewed by a judge (paragraph 6.7). A tribunal convened to consider a serious complaint under paragraph 7.4 of the Code of Practice will follow the procedure set by the chair of the tribunal. Determining the chair should take into account a number of things, including the need to gather information; allowing the

257 *Ibid*, s 37(4).

258 *Ibid*, s 38.

259 Courts Reform Act, ss 21–25.

260 *Ibid*, s 21(4(b)).

261 See n 101 above, para 7.

262 *Ibid*, para 7(2).

judge to give a response to the allegation; taking witness statements and gathering evidence; allowing a hearing, which should be inquisitorial; and allowing the judge to bring a representative with him or her. On receiving the tribunal's report, the LCJ (NI) will 'automatically invite the parties' to comment on the report, and the LCJ (NI) is to have regard to these comments in reaching a final decision (paragraph 7.8).

SCOTLAND

Rules of procedure for a disciplinary investigation are set out in section 28 of the JCSA 2008 and rule 14 of the Judiciary Rules. The nominated judge investigating a complaint may make such inquiries as he or she considers appropriate; obtain and consider relevant documents; interview any person he or she considers appropriate to interview (giving reasonable notice of the time and date of the interview); an interviewee may be accompanied by a person of his or her choosing to give the interviewee moral support, help with managing papers, take notes or offer advice. The nominated judge is to set the procedure and conduct the investigation as he or she 'thinks fit', provided it is 'consistent with respect for the principles of fairness and natural justice' and includes the following: the opportunity to provide a written response to the complaint; so far as possible the investigation is to be conducted without disclosure to third parties the identities of the judge or the complainant; and the purpose of the investigation, when considering the facts, is to 'ascertain the truth'.²⁶³

LIMITATION PERIOD

Supreme Court

No time limit given.

E&W

A complaint must be made within three months of the conduct complained of,²⁶⁴ although an extension may be granted in 'exceptional circumstances'.²⁶⁵

NI

Complaints should be 'made promptly' and 'save in exceptional circumstances' should be made within three months of the conduct complained of.²⁶⁶

Scotland

A complaint must be made within three months of the occurrence of the conduct complained of; otherwise, the JOS must dismiss it.²⁶⁷ However, a complainant may make an application for a complaint about conduct that occurred more than three months before he or she lodged the complaint to be

263 See n 106 above, r 14(5).

264 See n 112 above, s 11.

265 *Ibid*, s 14.

266 Complaints About the Conduct of Judicial Office Holders, para 2.6.

267 See n 106 above, s 7(1).

‘treated as if it had been submitted on time’. This may be considered ‘only on the ground that exceptional circumstances exist which justify the granting of the application and the circumstances relied on must be specified in the application’. The DJ decides whether the allegation should be allowed to continue.

BURDEN AND STANDARD OF PROOF

E&W

Questions as to whether a fact has been established ‘must be decided on the balance of probabilities’.²⁶⁸

NI

Serious complaints are considered by a tribunal, and decisions are by simple majority. Differences in opinion as to the facts of the case or the recommendation, ‘may be reflected in their report if agreement cannot be reached’.²⁶⁹

Scotland

The standard applied to disciplinary proceedings is the balance of probabilities.²⁷⁰

JURISDICTION AND CHANGE OF VENUE

There are no specific requirements as to venue, except in the case of removal proceedings where the reports of fitness for office tribunals are laid before Parliament (see above). The power to discipline judges rests with the LCJ (E&W) and LC, LCJ (NI), and LP (see the outlines above).

SANCTIONS

Possible sanctions

Jurisdiction	Sanction	Legal source
Supreme Court	Informal resolution	Judicial Complaints Procedure, para 3
	Formal action, which means a tribunal and possible removal	Judicial Complaints Procedure, paras 3 and 7 CRA 2005, s 33
E&W	Informal advice or resolution	CRA 2005, s 108(3) Judicial Conduct (Complaints about the Judiciary) Rules 2014, r 44
	Formal advice	CRA 2005, s 108(3)
	Formal warning or reprimand	CRA 2005, s 108(3)
	Suspension	CRA 2005, ss 108(4)–108(8)

²⁶⁸ See n 112 above, ss 39, 60 and 75.

²⁶⁹ Complaints About the Conduct of Judicial Office Holders, para 7.6.

²⁷⁰ See n 106 above, s 14.

	Removal	CRA 2005, s 108(1) Senior Courts Act 1981, 2.11(3) Judicial Discipline (Prescribed Procedures) Rules 2014, rr 2(1), 6, 48 and 77 Judicial Conduct (Complaints about the Judiciary) Rules 2014, rr 14, 20, 30, 44, 53(c)
NI	Advice/training/mentoring Informal warning Formal warning Final warning Restriction of practice Referral to statutory tribunal Suspension	Code of Conduct, para 8.2
	Removal	Justice (NI) Act 2002, s 7
Scotland	Informal resolution	JCSA 2008, s 29(3)
	Formal advice Formal warning Formal reprimand	JCSA 2008, s 29(1) Judiciary Rules, rr 13(b) and 16
	Suspension	JCSA 2008, s 34
	Removal	JCSA 2008, c 5

Examples

Of the four jurisdictions, only decisions in E&W following a finding of misconduct are published. However, unless the decision is to remove a judge, the decisions are only published for a year, before being removed from the JCIO website, and decisions to remove a judge are available for five years.²⁷¹

Supreme Court

No details available.

E&W

Below are some examples from 2019–2020, available on the JCIO website.

Sanction	Reason given
Formal advice	A recorder 'posted political comments on social media which could have brought the judiciary into disrepute'. ²⁷²
Formal warning	A JP, during a hearing 'in open court [...] used his personal phone to speak twice to a defendant who had not attended the hearing. He also made comments about his actions to colleagues which were not appropriate in tone.' ²⁷³ A judge used inappropriate language at an event attended in a private capacity. ²⁷⁴

²⁷¹ Judicial Conduct Investigations Office (JCIO), 'Disciplinary statements: Publication policy' <https://judicialconduct.judiciary.gov.uk/disciplinary-statements/publication-policy> accessed 19 February 2020.

²⁷² JCIO, 'Disciplinary Statement (JCIO 05/20) – Recorder William Waldron QC' (28 January 2020).

²⁷³ JCIO, 'Disciplinary Statement (JCIO 03/20) – Judge Jinder Singh Boora' (17 January 2020).

²⁷⁴ JCIO, 'Disciplinary Statement (JCIO 02/20) – Recorder William Waldron QC' (28 January 2020).

Formal reprimand	A judge 'was sanctioned for professional misconduct by the Scottish Solicitors' Discipline Tribunal (SSDT) over delayed payments to a client and lack of communication and record keeping. He also failed to promptly report these matters.' ²⁷⁵ A 'company, of which [the JP] was the sole director incurred four criminal convictions for breaching food safety and hygiene legislation. In reaching their decision, the Lord Chancellor and Lord Chief Justice took into consideration that [she] had no direct involvement in running the company, was not personally convicted of any offences.' ²⁷⁶
Removal	A JP removed for 'failing, without reasonable excuse, to meet the minimum sitting requirements of her appointment'. ²⁷⁷ A JP removed for 'failing to undertake training and appraisals, as required' and failing to 'meet the key qualities required of a magistrate'. ²⁷⁸

NI

No details available.

Scotland

No details available

APPEALS

Supreme Court

No appeal available. A judge of the Supreme Court may be removed by the Queen, following an address of both Houses of Parliament.

E&W

While there is no appeal process, there are a series of review procedures in place throughout the disciplinary process. In theory, the exercise of statutory disciplinary powers by the LC could be challenged by way of judicial review, but this has not been tested. As with removal of judges of the Supreme Court, senior judges may be removed by the Queen, following an address of both Houses of Parliament.

NI

No appeals are available, but there are review procedures in place for both less serious and serious complaints, and before finalising a report into serious complaint, the LCJ (NI) will invite the judge concerned to comment on the report, and take those comments into account.²⁷⁹

Scotland

As in each of the other jurisdictions there are no appeals available. However, there are review procedures in place throughout the disciplinary process. In addition, in Scotland, the Judicial

²⁷⁵ JCIO, 'Disciplinary Statement (JCIO 38/19) – Judge Ian Watson' (6 November 2019).

²⁷⁶ JCIO, 'Disciplinary Statement (JCIO 37/19) – Nasreen Younis JP' (5 November 2019).

²⁷⁷ JCIO, 'Disciplinary Statement (JCIO 01/20) – Kathleen Tinkler JP' (17 January 2020); and JCIO, 'Disciplinary Statement (JCIO 04/20) – Fleur Disney JP' (28 January 2020).

²⁷⁸ JCIO, 'Disciplinary Statement (JCIO 14/19) – John Gilchrist JP' (5 July 2019).

²⁷⁹ Complaints About the Conduct of Judicial Office Holders, para 7.8.

Complaints Ombudsman²⁸⁰ provides a ‘totally independent, impartial and free service is for anyone unhappy with the way their complaint about the conduct of a member of the judiciary (judges, sheriffs and JPs) has been handled by the Judicial Office for Scotland’.²⁸¹ A judicial office holder who has ‘been the subject of a complaint may also seek a review of the handling of that complaint’.²⁸²

Cases

All the relevant complaints bodies publish annual reports recording statistical data about complaints against the judiciary.

SUPREME COURT

Information about complaints against Justices of the Supreme Court is provided in the Annual Report and accounts. The 2018–2019 report indicates that two judicial complaints were received, but neither was upheld.²⁸³ The reports for 2017–2018 and 2016–2017 are unclear on the number of complaints received.

E&W

Number of complaints received 2012–2017

Judicial office held	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017
Court Judiciary	1,340	1,093	1,694	1,680	1,720
<i>District Bench</i>	754	651	971	963	944
<i>Circuit Bench</i>	435	329	510	487	590
<i>High Court</i>	119	81	152	161	122
<i>Court of Appeal</i>	30	30	55	65	63
<i>Court of Protection</i>	2	2	6	4	1
Magistrate	28	30	55	44	47
Coroner	44	51	262	556	70
Tribunals	14	15	22	12	12
None defined	728	829	399	317	277
Total	2,154	2,018	2,432	2,609	2,126

Compiled from the annual reports of the JCIO from 2014–2018.²⁸⁴

No figures for this table were available in the 2017–2018 report.

280 JCSA 2008, ss 30–33.

281 JCR www.judicialcomplaintsreviewer.org.uk accessed 19 February 2020.

282 *Ibid.*

283 UKSC, ‘Annual Report and Accounts 2018–2019’, 34 www.supremecourt.uk/docs/annual-report-2018-19.pdf accessed 19 February 2020.

284 JCIO, ‘Reports & publications’ <https://judicialconduct.judiciary.gov.uk/reports-publications> accessed 19 February 2020.

Complaints by category for 2016–2018

Complaint Type	2016–2017	2017–2018
Not specified	-	420
Conflict of interest	23	13
Civil proceedings	-	2
Criminal convictions	-	6
Court proceedings and criminal proceedings	14	-
Discrimination	10	-
Inappropriate behaviour or comments	549	427
Financial fraud	-	5
Bankruptcy/IVA	1	-
Judicial decision or case management	1,862	1,220
Judicial delay	-	9
Misuse of judicial status	2	4
Motoring offences	4	5
Not fulfilling judicial duty	43	-
Failure to meet sitting requirements	-	13
Professional conduct	13	13
Not related to judicial office holder	32	-
General enquiries	662	526
Other	56	2
Total	3,271	2,652

Compiled from the annual reports of the JCIO.²⁸⁵

NI

Complaints received by LCJ (NI) 2015–2018

Judicial Tier	2018	2017	2016	2015
High Court	11	7	5	9
County court	10	9	7	5
District judge (Civil)	7	4	0	0
District judge (magistrates' court)	16	22	10	11
Statutory officers and coroners	1	2	10	16
Others	12	10	16	6
TOTAL	57	54	48	47

Source: Statistical return for 2018, Office of the LCJ (NI)²⁸⁶

285 *Ibid.*

286 Judiciary NI, 'Judicial Conduct and Complaints' <https://judiciaryni.uk/judicial-conduct-and-complaints> accessed 19 February 2020.

Final outcome of complaints concluded in 2018 (62 in total)

Outcome	Total	%
Beyond remit	44	71
Withdrawn	4	6.4
Not upheld	7	11.3
Upheld in part	0	0
Upheld	1	1.6
Carried forward to 2019	6	9.7

Source: Statistical return for 2018, Office of the LCJ (NI)²⁸⁷

Scotland

Breakdown of complaints concluded 2017–2018

Outcome	Senator/ temp judge	Sheriff principal/ temp sheriff principal	Scottish Land Court Chair/ members	Sheriff/part- time Sheriff	JP	Total
Out of time and not allowed	0	1	0	1	0	2
Dismissed by judicial office	11	3	0	57	5	76
Dismissed by the disciplinary judge	0	0	0	12	1	13
Referred to nominated judge and resolved	0	0	0	0	0	0
Referred to nominated judge and not substantiated	0	0	0	3	0	3
Complaint substantiated and report submitted to the Lord President	0	0	0	1	0	1
Withdrawn by complainer	0	0	0	1	0	1
JOH ceases to hold office	0	0	0	1	0	1
TOTAL	11	4	0	76	6	97

Source: Report 7 under the Complaints about the Judiciary (Scotland) Rules 2014²⁸⁸

Total number of complaints received 2013–2018

Year	Complaints received	Complaints substantiated/report to LP
2013–2014	95	4
2014–2015	95	4
2015–2016	13	0
2016–2017	95	4
2017–2018	97	1

Compiled from Reports 3–7 under the Complaints about the Judiciary (Scotland) Rules 2014²⁸⁹

287 *Ibid.*

288 Judiciary of Scotland, 'Publications' www.scotland-judiciary.org.uk/52/0/Publications accessed 19 February 2020.

289 *Ibid.*

Interrelation between disciplinary and criminal proceeding

Parallel or consecutive proceedings

E&W

In the initial stages of investigating a complaint, the JCIO may advise the LCJ that a judge should be removed where he or she has been convicted of a criminal offence, either in the UK or elsewhere, or been cautioned in respect of a criminal offence.²⁹⁰ Therefore, where criminal conduct is investigated and sanctioned before a disciplinary investigation, the impact of the criminal investigation or sanction is that a recommendation will be made by the JCIO to remove the judge from office. Where evidence of criminal conduct becomes apparent during the course of disciplinary proceedings, the matter would be dealt with by the police.²⁹¹

The LCJ (E&W) may suspend a judge, for any period, if he or she is ‘subject to criminal proceedings’, ‘is serving a sentence imposed in criminal proceedings’ or has ‘been convicted of an offence and is subject to prescribed procedures in relation to the conduct constituting the offence’.²⁹² In addition, the LCJ (E&W) may suspend a judge if he or she has ‘been convicted of a criminal offence’, ‘it has been determined under prescribed procedures that the person should not be removed from office’ and ‘it appears to the Lord Chief Justice with the agreement of the Lord Chancellor that the suspension is necessary for maintaining confidence in the judiciary’.²⁹³

NI

The Code of Conduct for Judges (NI) contains specific provisions stated on the effect of criminal conduct: if ‘at any time, it appears that criminal conduct may be involved, the complaints officer will inform the police’. The investigation of the complaint will be delayed pending the outcome of any criminal investigation or subsequent proceedings.²⁹⁴ It is not clear what impact a criminal conviction or investigation would have on disciplinary proceedings where it occurs before such proceedings are started.

SCOTLAND

The Judiciary Rules are clear about what happens if, in the initial stages of disciplinary proceedings ‘it appears to the Judicial Office that an allegation is of an act, omission or other conduct which may constitute a criminal offence’.²⁹⁵ In such a case, consideration of the complaint will be suspended until ‘the relevant prosecutor indicates that no criminal proceedings are to be taken’; ‘any such proceedings are concluded’; or ‘it becomes clear to the Judicial Office that no such proceedings are to be taken’.²⁹⁶ It is not clear what impact a criminal conviction or investigation would have on disciplinary proceedings where it occurs before such proceedings are started. However, a judge’s

²⁹⁰ See n 112 above, rr 30(a) to 30(o).

²⁹¹ See n 114 above.

²⁹² CRA 2005, s 108(4).

²⁹³ *Ibid*, s 108(5).

²⁹⁴ Complaints About the Conduct of Judicial Office Holders, para 2.5.

²⁹⁵ See n 106 above, s 6.

²⁹⁶ *Ibid*, s 6.

conduct can be investigated if the ‘disciplinary judge received information from any source which suggests to him or her that consideration under these Rules of a possible allegation of misconduct is appropriate’.²⁹⁷ Therefore, if the DJ is informed of charges against a judge, or a conviction, then the rules would apply. It is clear, however, that the criminal process must be concluded before the disciplinary process can proceed. A judge may be suspended if the LP considers that it is necessary for the purpose of maintaining public confidence in the judiciary.²⁹⁸

Information exchange

There is no information available about the exchange of information between the relevant Judicial Offices responsible for complaints and discipline, and the police in relation to criminal charges or proceedings against a member of the judiciary, or about what kind of information may be exchanged.

Current debates, reform trends and other issues of relevance

E&W and NI

CONSENT

The requirement under the BA 2010 for the personal consent of the DPP, the Director of the SFO or the Director of the Revenue and Customs Prosecutions before prosecution²⁹⁹ in E&W, and their NI counterparts, is problematic. Concerns have been raised that the requirement for consent from a director is too high (in previous anti-corruption legislation, the consent of the Attorney-General was required) and gives the impression that the act is to be used ‘only at the highest echelons’, and therefore restricts its application.³⁰⁰ The requirement of the personal, written consent of a director can also cause delays.³⁰¹

REGISTER OF JUDICIAL INTERESTS

There is currently no register of judicial interest in E&W and NI. Instead judges must, in accordance with the Code of Conduct, declare any interests as they arise. The UKSC considered introducing a register of interests but the justices decided that: ‘it would not be appropriate or indeed feasible for them to have a comprehensive Register of Interests, as it would be impossible for them to identify all interests, which might conceivably arise, in any future case that came before them. To draw up a Register of Interests, which people believed to be complete, could potentially be misleading.’³⁰²

The justices consider the Code of Conduct and the Judicial Oath to be a sufficient safeguard, ensuring that justices declare interests where necessary.

297 *Ibid*, r 19.

298 JCSA 2008, s 34.

299 BA 2010, s 10.

300 House of Lords Select Committee on the BA 2010, ‘Bribery Act Post-Legislative Scrutiny’, para 97.

301 *Ibid*, para 75.

302 UKSC, ‘Justices’ interests and expenses’ www.supremecourt.uk/about/justices-interests-and-expenses.html accessed 19 February 2020.

A petition to Parliament, in 2012, to introduce a Register of Judicial Interests did not generate the required support to have the issue debated.³⁰³

Scotland

REGISTER OF RECUSALS

Since 2014, the Scottish judiciary has maintained a Register of Recusals. This lists the name of the judge, the case and the reason a judge has been recused from hearing a case. The register for each year is available on the judiciary website.³⁰⁴

REGISTER OF INTERESTS

At present, there is no Register of Judicial Interests in Scotland. However, the campaign to create one has had more success in Scotland than similar attempts in E&W.³⁰⁵ The petition was made by Peter Cherbi in 2012, and it has been considered in some detail by the Public Petitions Committee, including taking written and oral evidence from experts and the LP.³⁰⁶ By March 2018, the committee had agreed to write to the LP and the Scottish Government recommending that a Register of Interests should be introduced, and referring the petition to the Justice Committee of the Scottish Parliament.³⁰⁷

303 UK Government, 'Petition: Register of Interests for UK Judiciary' (25 October 2012) <https://petition.parliament.uk/archived/petitions/20058> accessed 19 February 2020.

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