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CORRECTING MISCARRIAGES OF JUSTICE IN INDIA THROUGH DIAGONAL ACCOUNTABILITY?

The Case for Establishing a Criminal Cases Review Commission

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Abstract
This paper scrutinises the Indian criminal justice system through the public law accountability lens and contends that the existing remedies for wrongful convictions and sentences render the Supreme Court an inadequate accountability forum for identifying and correcting miscarriages of justice that may have initially gone undetected—thereby having been further perpetuated—in successive stages of the criminal process. Building on Mark Bovens' seminal work on public accountability, the paper attributes this systemic flaw to the hierarchical accountability arrangement of the Indian criminal justice system. To aid and bolster the Supreme Court as an effectual accountability forum for identifying and correcting deep-rooted miscarriages of justice, the paper seeks to introduce an element of diagonal accountability in the existing arrangement. It recommends the creation of a supplementary remedy of a complete review and investigation by an independent Criminal Cases Review Commission, drawing inspiration from the prototypes set up in the United Kingdom and New Zealand. The paper then proceeds to appraise the merits and demerits of the establishment of such a statutory body in the Indian context and concludes.

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I Introduction

The life of a criminal case involves a range of human participants and institutions that contribute to and shape its narrative. Every stage in the criminal justice system—from the beginning of the pre-trial investigations till the conclusion of the final appeal and review processes—entails human decision-making and fallibility affecting variables that can be the tipping point in the determination between innocence and guilt.

"Miscarriage of justice" is an umbrella term encompassing errors in the interpretation, procedure, or execution of the law—typically those that violate due process—often culminating in the wrongful conviction and sentencing of innocent people.[1] Its contours in Indian criminal jurisprudence were defined by the Privy Council in 1946:[2]

> … miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all … the violation of some principle of law or procedure must be such an erroneous proposition of law that if the proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect.

Despite there being a substantial body of criminal procedural rules devised with checks and balances to forestall and mitigate the influence of human frailty on the progression of the case, the risk of errors causing a failure of justice pervades throughout the system. Once left unchecked and uncorrected at the timely initial stages, these errors go on to become part of the case records, and further perpetuate in successive stages. In due course, they become embedded in too deep for a straightforward detection in later stages of the case.

For this reason alone, remedies for miscarriages of justice must effectually facilitate the answerability of all actors of the criminal justice system for their acts and omissions during their participation in the criminal process. Logically then, these remedies are accountability mechanisms geared towards identifying possible miscarriages of justice through the process of interrogation and account-giving,[3] to eventually correct the miscarriages and put a stop to the

[1] Brian Forst "The Problem" in Alfred Blumstein and David Farrington (eds) *Errors of Justice: Nature, Sources and Remedies* (Cambridge University Press, New York, 2004) 1 at 3.
[2] *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy and Others* [1946] 73 AC 246 (PC) at [259] per Lord Thankerton, Lord du Parco, and Sir Madhavan Nair.
[3] See Mark Bovens "Public Accountability" in Ewan Ferlie and others (eds) *The Oxford Handbook of Public Management* (Oxford University Press/Oxford Handbooks Online, Online Publication, 2009) 182 at 184–185.

enduring injustice for innocent persons who have been wrongfully accused, convicted, and sentenced.

But the state of affairs speaks of a different reality. Time and again there have been criminal cases involving the death penalty at the Supreme Court that have caused eminent jurists, commentators, and the public at large unease regarding the conclusiveness of the guilt and the degree of punishment awarded.[4] Typically, all such cases have run similar courses: their journey through the stages of the criminal process has been tainted by glaring substantive and procedural lapses, leaving ample room for reasonable doubt; and all available judicial and constitutional remedies have been exhausted. Yet the conviction and sentence have stood upheld by the Supreme Court, raising questions on the efficacy of the existing remedies for miscarriages of justice as being mere paper procedures.

In light of this chain of events, I examine the existing judicial and constitutional remedies through the public law accountability lens. To do so, I employ Mark Bovens' lens of public accountability as an institutional arrangement of account-giving,[5] and contend that it is the narrow scope of the existing remedies—a product of the hierarchical accountability structure of the Indian criminal justice system—that has rendered the highest court of the land an inadequate accountability forum for identifying and remedying miscarriages of justice that are not apparent on the face of the record. I support this contention with a recap of the resolution of two of the high-profile cases where the remedies proved to be of no avail. To aid and bolster the Supreme Court's position as a more incisive accountability forum, I propose introducing an element of diagonal accountability in the hierarchical arrangement through the creation of a supplementary remedy of a complete review and investigation by an independent body, the Criminal Cases Review Commission (CCRC). The purpose of this Commission would be to investigate into probable and alleged cases of miscarriages of justice and refer appropriate cases back to the Supreme Court for reconsideration on the grounds identified by the Commission. Such statutory bodies have existed in the United Kingdom[6] since 1997–1999 and have been set up as recently as 2020 in New Zealand.[7] Drawing inspiration from these Commission

[4] See for example *Kehar Singh & Others v State (Delhi Administration)* (1988) 3 SCC 609 (FB), *Mohammad Afzal v State (NCT of Delhi)* CA No 381 of 2004 reported in (2005) 11 SCC 600 (DB), *Dhananjoy Chatterji alias Dhanna v State of West Bengal* (1994) 2 SCC 220 (DB), *Ravji alias Ram Chandra v State of Rajasthan* (1996) 2 SCC 175 (DB) subsequently declared per incuriam in *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498 (DB), *Yakub Abdul Razak Memon v State of Maharashtra* (2013) 13 SCC 1 (DB).
[5] Bovens "Public Accountability" above n 3 at 184.
[6] Criminal Appeal Act 1995 (UK) c II and Criminal Procedure (Scotland) Act 1995 pt XA.
[7] Criminal Cases Review Commission Act 2019.

prototypes in common law jurisdictions with analogous criminal justice systems, I set out a recommended framework in the Indian context and reflect on the merits and demerits of such establishment.

To this effect, Part II builds on Bovens' institutional accountability approach to provide an overview of the hierarchical accountability arrangement in the Indian criminal justice system. It further illustrates why the Supreme Court is an inadequate accountability forum because the existing remedies do not effectively prevent miscarriages of justice. Part III proposes the introduction of a fresh element of diagonal accountability in the form of a CCRC and puts forth recommendations for the Commission's establishment in India. It then proceeds to assesses the possible benefits and shortcomings of such a set up. Part IV concludes.

II The Indian Criminal Justice System: A Public Law Narrative

The Indian Constitution[8] fuses diverse and opposing features of select constitutional documents and theories of the world with variations "to remove the faults and to accommodate it to the needs of the country".[9] The result is a sovereign democratic republic that adapts the British parliamentary system of responsible government by superimposing it with an elected President following the Irish precedent.[10] It simultaneously embraces the American independent judiciary with the power of judicial review:[11] a necessary concomitant to constitutional supremacy.

This amalgam's bearing on the Indian criminal justice system is manifested in the machinations of its framework—its trappings particularly evident in the interpersonal accountability structure between all institutions in the criminal process and the existing remedies for miscarriages of justice.

[8] Constitution of India 1949 (India).
[9] Dr BR Ambedkar *Constituent Assembly Debates: Official Report (1946–1950) Volume XI* (Lok Sabha Secretariat, New Delhi, 2000) at 613, 616 as quoted and cited in Durga Das Basu "Outstanding Features of Our Constitution" in Hon'ble Mr Justice GB Patnaik and Yasobant Das (eds) *Introduction to the Constitution of India* (LexisNexis, Noida, 2015) 32 at 32, 49.
[10] See generally at 44.
[11] See generally at 40–42.

A The Hierarchical Accountability Arrangement

According to Bovens, the concept of "accountability" can be crystallised as a specific set of social relations that can be studied empirically:[12]

> Accountability can be defined as a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other. This relatively simply defined relationship contains a number of variables. The actor, or accountor, can be either an individual or an agency. The significant other, which I will call the accountability forum or the accountee,[13] can be a specific person or agency, but can also be a more virtual entity.

A bare perusal of the stages of the criminal justice system enabled by the criminal procedural rules[14] highlights that each institution in the process shares an accountor-accountee relationship with its immediate superior and subordinate, respectively.

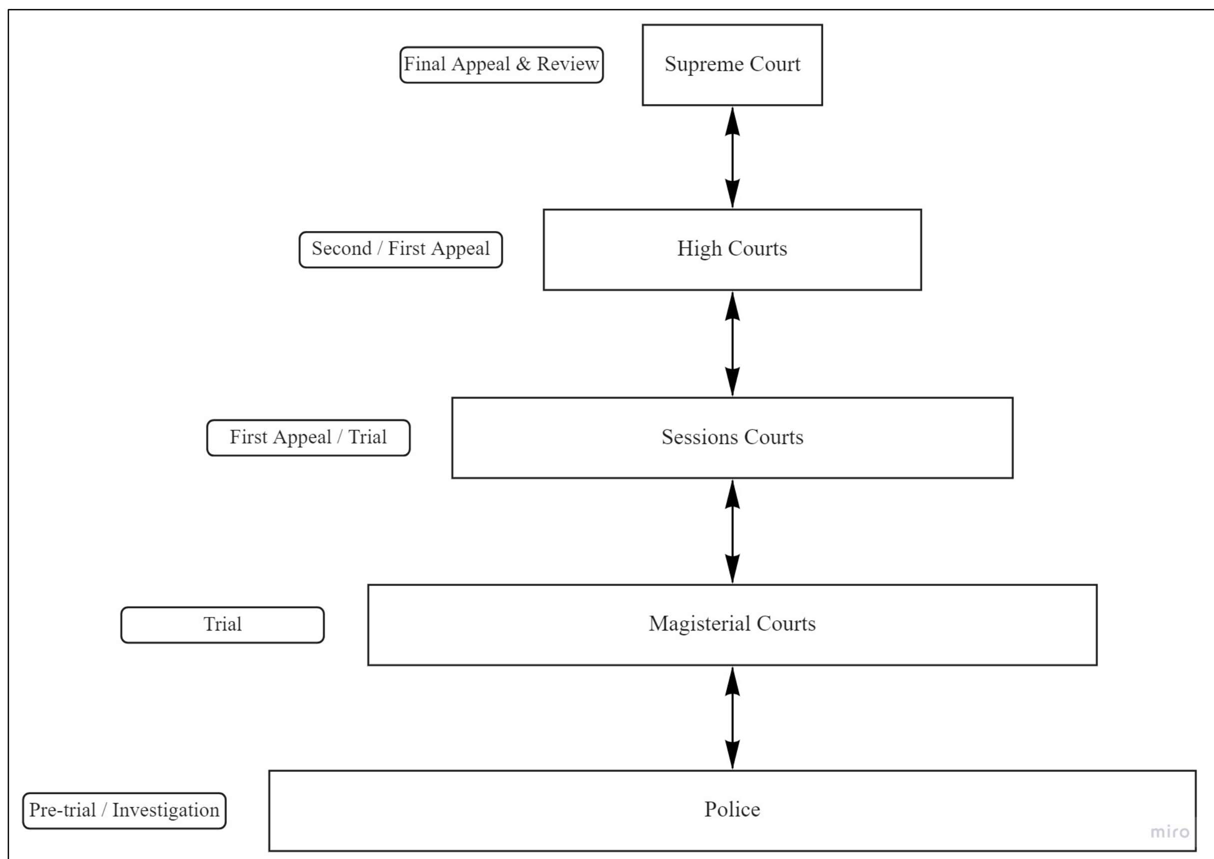

Figure 1: Stages and institutions in the Indian criminal justice system: Interpersonal legal accountability interwoven in the underlying hierarchical accountability arrangement.

[12] Bovens "Public Accountability" above n 3 at 183–185 (citations omitted).
[13] "The neologisms "accountor" and "accountee" are derived from Pollitt (2003: 89)." cited at 208.
[14] The Code of Criminal Procedure 1973 (India).

The Magisterial Courts, functioning as trial courts, are the preliminary accountees in the system. The Sessions Courts, depending on the seriousness of the committed offence,[15] function in dual capacity: as trial courts for serious offences, and as courts of first appeal for those offences that are triable by the lower Magisterial Courts.[16] The trial courts serve as accountees for the police based on their chargesheets and pre-trial investigations.[17]

After the conclusion of the trial stage with the pronouncement of the conviction and sentencing of the accused, the higher courts function as courts of appeal with the Supreme Court as the court of final appeal. The court of first appeal probes into the appreciation of evidence by the trial court.[18] The court of second appeal does that to a lesser extent; and by the time the case reaches the Supreme Court, the scope of review has narrowed down to only errors that are apparent on the face of the record.[19]

Zooming in on the interplay between the immediate institutions in the chain of command, the scrutiny by the superior court of its immediate subordinate in the criminal process is based on detailed criminal procedural rules prescribed by the Code of Criminal Procedure 1973 and the Indian Penal Code 1860. Since this relationship is founded in statutory responsibilities formally conferred upon the respective accountor-accountee institutions, it is "legal accountability"[20] that governs the interrelationship between successive institutions. Zooming out to a bird's-eye view, given that the scope of judicial assessment narrows as the case progresses up the hierarchy, the overall structure of the criminal justice system resembles a pyramid with several human participants administering the institutions in the criminal process. Bovens identifies this underlying schema as the "Weberian or British Diceyan monolithic system of hierarchical accountability relations".[21]

Recapitulating this paradigm into perspective, processes of accountability start at the trial courts, with the trial courts and the courts of first and second appeal serving in turn as accountor and accountee; but by the time the criminal case has progressed to the Supreme Court, the scope of review of the contributory acts and omissions of human participants in the lower echelons, such as the police, has become nearly impossible. Therefore, while the institutions

[15] See generally The Indian Penal Code 1860 (India).
[16] See generally The Code of Criminal Procedure, cc XVIII, XXIX and The Indian Penal Code, sch 1.
[17] See generally The Code of Criminal Procedure, cc XVI, XVIII–XXI.
[18] See generally c XXIX.
[19] See generally c XXIX and Supreme Court Rules 2013 (India), c IV.
[20] Bovens "Public Accountability" above n 3 at 187–188.
[21] At 196.

of the criminal justice system are inter se governed by legal accountability, the underlying accountability structure throughout the system is a pyramidical, hierarchical arrangement.

Traces of this hierarchical arrangement are also prevalent in the construction of the existing judicial and constitutional remedies for miscarriages of justice. As I will illustrate in the following sections, these remedies do not facilitate the Supreme Court to incise into issues that may have arisen in the initial stages of the criminal process, such as what evidence ought to have been brought on record during the trial, or what material unearthed during the pre-trial investigations—but left out in the chargesheet—ought to have been brought before the trial court.

B Existing Remedies for Miscarriages of Justice

The existing remedies for miscarriages of justice are the judicial remedies of the "review petition" and the "curative petition", and the constitutional remedy of the "mercy petition". Since they are made available upon the conclusion of the final appeals process at the Supreme Court, these remedies rest on the hierarchical accountability arrangement of the criminal justice system. Consequently, none of them afford the Supreme Court the avenue for reviewing the merits of the case from its initial trial and pre-trial investigation stages. For instance, the judicial remedies are not blanketly available to all criminal cases and can be availed of only on specific grounds. Likewise, the presidential pardon, being a sovereign function, is exercised solely on humanitarian considerations to commute the sentence and does not exonerate the convicted accused.

Even if a case were to successfully pass through the sieve of the prescribed preconditions and be eligible to avail all three remedies, whether these remedies sufficiently aid the Supreme Court to call to account participants of the lower institutions in the criminal justice system—particularly those in the trial and investigations stages—is a question mark. A discussion at this juncture is necessary to explore the existing remedies for miscarriages of justice in their statutory, interpretive, and practical operative forms to evaluate how far they assist the Supreme Court in identifying and correcting a miscarriage that might have slipped under the radar in the early stages of the criminal process.

1 Judicial Remedies

Seated at the apex of the pyramidical criminal justice system, the Supreme Court constitutionally remains the court of last resort. Besides appellate jurisdiction,[22] the Court exercises inherent and plenary powers to entertain special leave petitions.[23] It is equipped with the American features of judicial independence and review; and therefore, the Supreme Court also has the distinct, concentrated power to review its own judgments and orders based on rules codified by itself.[24] This power is manifested in the successive judicial remedies for miscarriages of justice: the review petition and the curative petition.

(a) Review Petition

The first remedy available after the exhaustion of the Supreme Court's appellate jurisdiction is the review petition. The procedure for hearing review petitions is set out in the Supreme Court Rules 2013[25] which categorically state that the remedy is available only on the ground of "error apparent on the face of the record".[26]

Conventionally, the review petition is disposed of without any oral arguments; at best, only written arguments are allowed to be filed along with the petition.[27] Petitions that arise out of death sentence cases are carved out as a distinct category:[28] since an oral hearing in such cases is mandated by the constitutional right to life,[29] the right of a limited oral hearing is granted.[30]

The petition is usually filed before the same bench that passed the judgment or order that is sought to be reviewed, and questions of law are referred to a larger bench.[31] The Court may review and modify or reverse its earlier decision on the ground of mistake of law or fact.[32] But once this application is disposed of, no further review in the sense of the term is permissible.[33]

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[22] Constitution of India 1949, art 134.
[23] Article 136.
[24] Articles 137, 145.
[25] Supreme Court Rules 2013, c IV.
[26] Order XLVII r (1).
[27] Order XLVII r (3).
[28] *Mohd Arif v Supreme Court of India* (2014) 9 SCC 737 (FJCB) at 758.
[29] Constitution of India 1949, art 21.
[30] *Mohd Arif v Supreme Court of India*, above n 28, at 762.
[31] *Kantaru Rajeevaru (Right to Religion, In re: 9J) v Indian Young Lawyers Assn* (2020) 3 SCC 52 (NJCB) at 52.
[32] Supreme Court Rules 2013, order XLVII r (4).
[33] Order XLVII r (5).

In interpreting these Rules, the Supreme Court has held that review applications can be entertained only on the ground of a glaring omission or patent mistake in an earlier decision, and even if the petitioner were to succeed in establishing that there could have been another view possible on the conviction or sentencing, it does not merit a review of the decision on those grounds.[34] Clarifying the extent of this power of review, the Court has held that a review is not a rehearing of the original matter, and is certainly not the same kind as an appellate power that would enable a superior court to correct all errors committed by a subordinate court.[35]

(b) Curative Petition

Should the review petition fail, the second judicial remedy of the curative petition is a judicial creation. It was first propounded in 2002 in the case *Rupa Ashok Hurra v Ashok Hurra and Another*[36] on the basis that "the duty to do justice … [should] prevail over the policy of certainty of judgment"[37] inherent in the doctrine of precedent. The guidelines laid down in the case have been formalised in the Supreme Court Rules 2013.[38] Curative petitions require a much finer sieve compared to review petitions: they can be filed only in "the rarest of rare cases",[39] the contours of which remain undefined.

This petition is entertained only if the petitioner establishes that there has been a violation of the principles of natural justice, and the judge in the proceedings failed to disclose their connection with the subject matter or parties (giving scope for an apprehension of bias), and the judgment adversely affects the petitioner.[40] Moreover, the grounds taken in the curative petition must be identical to those of the review petition which should have been dismissed only by circulation on the board.[41]

The curative petition is circulated before the three senior-most judges together with the bench that passed the original order.[42] Similar to the review petition, the curative petition is also

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[34] *Vikram Singh v State of Punjab* (2017) 8 SCC 518 (FB) at 531 upheld in *Vinay Sharma v State (NCT of Delhi)* (2018) 8 SCC 186 (FB) at 195.
[35] *Kerala SEB v Hitech Electrothermics & Hydropower Ltd* (2005) 6 SCC 651 (DB) at 656 upheld in *Vinay Sharma v State (NCT of Delhi)* above n 34 at 193.
[36] *Rupa Ashok Hurra v Ashok Hurra and Another* (2002) 4 SCC 388 (FJCB).
[37] At 413.
[38] Supreme Court Rules 2013 (India), pt IV order XLVIII.
[39] *Rupa Ashok Hurra v Ashok Hurra and Another* (2002) above n 36 at 414.
[40] At 416, 417.
[41] Supreme Court Rules 2013 (India), order XLVIII r (2).
[42] Order XLVIII r (4)(1).

disposed of without any oral arguments and additional written arguments can be filed to supplement it.[43] If not dismissed, it is usually heard by the same bench.[44]

In summary, as the case progresses up the pyramid to the last stage of the final appeal, the appellate jurisdiction of the Supreme Court is exhausted once it upholds or pronounces the conviction and sentence. This operative decree can be reviewed only under a review petition or a curative petition to the Court. Once these avenues are expended there is no other judicial relief available: the case is considered "settled for eternity in the eyes of the law".[45]

2 Constitutional Remedy

The failure of the judicial remedies brings the Indian Constitution to provide for one final recourse in the form of a mercy petition to the executive heads of the governments: the union head, the President; and the state heads, the governors. Although the inclusion of the President as a titular head of a British parliamentary system of responsible government is inspired by the Irish Constitution, there is one significant departure so as to reconcile the Irish practice with the English convention.[46] The Indian Constitution does not authorise the President to exercise discretion on any matter, and instead mandates that the President act in accordance with the advice tendered by the Council of Ministers in the exercise of his or her functions.[47]

Sourcing the powers of the president from the American Constitution,[48] the grant of clemency is only limited to granting pardons, reprieves, respites or remissions of punishment, or suspending, remitting or commuting the sentence of the convicted petitioner.[49] The President's powers of granting mercy can be exercised in all cases of the death penalty and those relating to a matter over which the executive power of the union extends.[50] In contrast, the powers of the governors are limited to matters to which the executive power of the state extends.[51] This sovereign power of clemency is not exercised as an appellate jurisdiction over the apex court—it is exercised solely on humanitarian grounds and does not exonerate or overturn a conviction.

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[43] Order XLVIII r (4)(2).
[44] Order XLVIII r (4)(3).
[45] *Natural Resources Allocation, In re, Special Reference No 1 of 2012* (2012) 10 SCC 1 at 58.
[46] See Basu above n 9 at 44: " … the Irish President has an absolute discretion to refuse dissolution of the Legislature to a defeated Prime Minister, contrary to the English practice and convention."
[47] Constitution of India 1949, art 74.
[48] United States Constitution, art II, § 2.
[49] Constitution of India 1949, arts 72, 161.
[50] Article 72(1).
[51] Article 161.

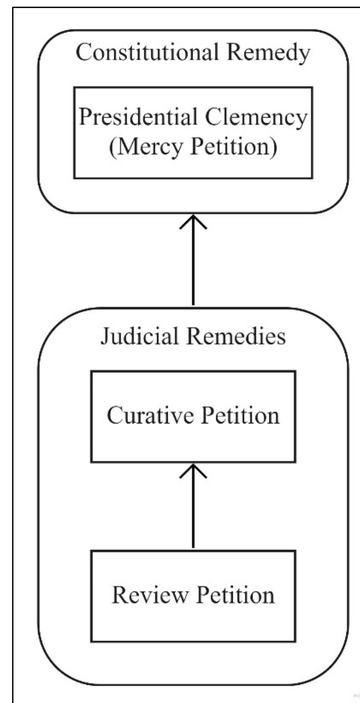

Figure 2: Existing remedies for miscarriages of justice.

The statutory description so far draws attention to an obvious lacuna: these remedies, in their current prescribed form, do not encapsulate the scope to call to account human participants in the investigations and trial stages. The criminal justice system is then not as self-correcting as it is purported. From the outset, the Supreme Court appears to retain its position as the court of final resort: the judicial remedies only enable it to correct facsimile "error(s) apparent on the face of the record".[52] or take under consideration cases that it deems in its discretion "the rarest of rare".[53] Secondly, the constitutional remedy in its formulation is as emblematic as the titular seat that wields it. It would then seem as though these judicial and constitutional remedies are simply illusory.

What happens of those errors of justice, that have taken place in such early pre-trial and trial stages of the criminal process, that not only have slipped undetected, but have also been perpetuated in the trial and appellate stages to the extent that they are no longer simply "error(s) apparent on the face of the record"? Attempting to this question conclusively begs a reflection on the real-life operation of these remedies.

[52] Supreme Court Rules 2013, order XLVII r (1).
[53] *Rupa Ashok Hurra v Ashok Hurra and Another* (2002) above n 36 at 414.

3 *Pragmatic Operation of the Remedies: Case Studies*

Over the years, India has witnessed several high-profile cases of suspected miscarriages of justice, where the existing judicial and constitutional remedies proved to be of no avail and the conviction and sentence continued to be upheld even in the absence of conclusive evidence.[54] Since the foregoing discussion would benefit from a review of case studies, this part incises two of the high-profile cases: the Indira Gandhi assassination case[55] and the Parliament Attack case.[56]

(a) *Kehar Singh v State (Delhi Administration)*[57]

On 31 October 1984, the Prime Minister of India, Indira Gandhi was assassinated by two of her security guards, Satwant Singh and Beant Singh. Consequently, both assassins dropped their weapons and surrendered to the armed forces which oversaw the Prime Minister's security. After their surrender, Beant Singh was shot dead in custody.

Kehar Singh, an uncle of the deceased Beant Singh's wife, was arrested and charged with conspiracy on the grounds of indoctrinating Beant Singh and Satwant Singh to commit the murder. Another co-accused, a Delhi Police Sub-inspector, was similarly charged. The three accused, Satwant Singh, Kehar Singh and the Sub-inspector, were sent up for trial on charges of murder, criminal conspiracy, commission of a criminal act by a common intention, and for offences of misuse of their licensed weapons.

(i) Resolution

The trial court convicted and sentenced all three individuals to death. The High Court of Delhi upheld the conviction and the death sentence.[58] In its appellate and plenary jurisdiction, the Supreme Court acquitted the Sub-inspector of all charges on the ground of insufficiency of evidence but confirmed the conviction and death sentence of Satwant Singh and Kehar Singh.[59]

The prosecution's case against Kehar Singh was one of criminal conspiracy and indoctrination of the assassins and was based purely on circumstantial evidence. Since Beant Singh's was a

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[54] See for example above n 4.
[55] *Kehar Singh v State (Delhi Administration)* above n 4.
[56] *Mohammad Afzal v State (NCT of Delhi)* above n 4.
[57] *Kehar Singh v State (Delhi Administration)* above n 4.
[58] *Kehar Singh & Anr v State & Ors* (21 February 1986) Del HC Crl Writ No 26 of 1986.
[59] *Kehar Singh v State (Delhi Administration)* above n 4.

custodial death, credible and direct evidence regarding the conspiracy to murder the Prime Minister and the persons who could have indoctrinated him were lost to the investigation agencies in the pre-trial stage itself. The prosecution contended that Kehar Singh was a religious fanatic with an intense hatred for the Prime Minister after she had ordered the military to control the Sikh extremist movement in Punjab. Since he was related to Beant Singh's wife, it was argued that he was in a position to influence him and he converted Beant Singh, and through him, Satwant Singh, to religious bigotry. On the strength of these accusations, the prosecution sought to pin the charge of criminal conspiracy and indoctrination on Kehar Singh.

It is trite law that the standard of proof required in a criminal case is that the guilt be established beyond reasonable doubt. Where reliance is placed on pure circumstantial evidence, the prosecution must join all the links in the evidentiary chain in such a manner that no inference other than that of guilt of the accused can be drawn. Even if one of the links is broken or missing, the benefit of reasonable doubt must be given to the accused, and he cannot be convicted based on this evidence.

Yet, for the conviction and sentencing of Kehar Singh, the Supreme Court relied primarily on the testimony of the deceased Beant Singh's wife, who was declared a hostile witness. The bench, per Oza J, regarded the circumstantial evidence thus:[60]

> But as regards the other accused [Kehar Singh], having secret talks with the co-accused [deceased Beant Singh] was a very significant circumstance … The way in which they avoided the company of the members of the family and the manner in which they remained mysterious … in the house of the deceased [Beant Singh] earlier go to establish that the two were doing or discussing or planning something which they wanted to keep as secret even from the wife of the deceased Beant Singh. The circumstances of the case clearly indicated that Kehar Singh was a co-conspirator to the assassination.

The concurring judgment by Shetty J went a step further:[61]

> To sum up: [Kehar Singh's] close and continued association with Beant Singh; his deliberate attempt to exclude [the wife] from their company and conversation; his secret talks with Beant Singh followed by taking meals together with Satwant Singh; his keeping the gold *kara* [translation: religious bangle] and ring of Beant Singh; and his post-crime

[60] At 612 per Oza J.
[61] At 744, 745 per Shetty J (emphasis added).

> conduct taken together along with other material on record are *stronger as evidence of guilt than even direct testimony*.

Remedies for the miscarriage of justice were pursued, but the review petition filed against this verdict was dismissed. The device of curative petition had not been established until 2002. The writ petitions filed against the order dismissing the review petition were also dismissed. The constitutional remedy of the presidential pardon was also declined. Both accused were executed on 6 January 1989.

(ii) Criticism

Senior criminal lawyer, the late Ram Jethmalani, who defended the accused at the request of the Court, had time and again gone on record to state that the Supreme Court convicted Kehar Singh on an even lesser evidence than there was against the acquitted Sub-inspector.[62] He pointed out in an interview that according to him, on the basis of the evidence produced, Kehar Singh was innocent and that there was no evidence of any kind that could prove that it was he who had indoctrinated the assassins.[63]

The questionable nature of the resolution of this case has also been subject of a book published in 2019 by the then Law Officer of Tihar Jail, Sunil Gupta. He corroborates Jethmalani's opinion that Kehar Singh's conviction and sentencing was based on the flimsiest of evidence.[64] He also brings to light startling revelations about the manner in which the trial was conducted and several key features that the Supreme Court ought to have considered but failed to do so.

The unfolding of events in this case indicate that there was a serious likelihood that Kehar Singh was a victim of a grave miscarriage of justice, and that he was sent to the gallows on evidence that was possibly insufficient even to convict him. The case was tainted in its early stages when the prime accused, Beant Singh was killed in custody. But perhaps, what is more telling is the ineffectiveness of the then existing remedies for addressing the probable miscarriage of justice. In particular, the judicial remedy of the review petition was dismissed, which left no scope for a judicial reassessment. The outright dismissal could be attributable to the fact that consonant with the Supreme Court's concentrated power to review its own

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[62] Shreevatsa Nevatia 'Interview: "I Have Never Been Sorry That I Took Up That Case."' *Outlook India* (online ed, 3 November 2009) <https://www.outlookindia.com/website/story/i-have-never-been-sorry-that-i-took-up-that-case/262636>.
[63] Above n 62.
[64] See Sunil Gupta *Black Warrant: Confessions of a Tihar Jailer* (Roli Books, New Delhi, 2019).

judgments and orders as codified in its Rules, the review petition was put before the same bench that upheld and pronounced the original verdict. It is possible that the case could have fallen short of an impartial review.

(b) *Mohammad Afzal v State (NCT of Delhi)*[65]

On the afternoon of 13 December 2001, while the Indian Parliament was in session, five armed terrorists stormed into its complex to lay siege. A heavy gun battle ensued between the security forces and the terrorists, resulting in the death of all five terrorists among several other casualties.

(i) Resolution

An investigation into the crime showed the apparent involvement of Mohammad Afzal alias Afzal Guru as the alleged conspirator and mastermind of the attack. The trial was completed in a span of six months, and Afzal Guru was given the death penalty which was confirmed by both the High Court of Delhi[66] and the Supreme Court.[67]

During appellate stage at the Supreme Court, and even thereafter, a constant refrain on behalf of Afzal Guru was that his constitutional right to effective and competent legal representation was violated because the legal aid advocates appointed by the trial court allegedly failed in their legal duty to protect their client’s interests. It was argued that the advocate appointed on his behalf made serious concessions on the admissibility of material evidence which was relied upon for his conviction. Early in the proceedings, she also gave up Afzal Guru’s brief to defend another accused person in the case. Her junior advocate was then asked to conduct his defence.

When he objected to the new lawyer’s alleged incompetence at the cross-examination of the prosecution witnesses, the trial court appointed the junior lawyer as amicus curiae, leaving Afzal Guru with no one to represent him. The trial court recorded that while he had named four lawyers to represent him, according to the trial court, all four of them refused. The junior lawyer was continued with as the amicus curiae with Afzal Guru also being given the right to cross-examine witnesses.

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[65] *Mohammad Afzal v State (NCT of Delhi)* above n 4.
[66] *State v Mohd Afzal & Ors* (29 October 2003) 107 (2003) DLT 385.
[67] *Mohammad Afzal v State (NCT of Delhi)* above n 4.

The accused's fundamental right to receive legal representation seems to have been violated in the trial stages, which likely vitiated the entire trial proceedings. The timely opportunity of remedying this aberration in the trial proceedings in the appellate stages was missed: the conviction was upheld and so was the death sentence. All three remedies for miscarriages of justice were pursued in this case. The judicial remedies of the review and curative petitions in the Supreme Court failed. His constitutional clemency petition before the President was also rejected. He was executed on 9 February 2013. Contrastingly, in 2018, a full bench of the Supreme Court set aside a death penalty in a review petition, on the grounds that that accused were not given legal representation.[68]

(ii) Criticism

In the book *The Hanging of Afzal Guru and the Strange Case of the Attack on the Indian Parliament*, ex-Additional Solicitor General of India, Indira Jaising, in a her chapter "Meeting Afzal" wrote that her search of the trial records revealed nothing on record to indicate that the four lawyers named by Afzal Guru were even asked to defend him, let alone their refusal to appear for him.[69] From this revelation it appears that the erroneous judicial recording at the trial stage not only passed undetected and uncorrected, but also became further perpetuated as the case progressed up the pyramid to the appellate stages.

The trial court continued with the trial proceedings despite there not being an effective and competent legal representation of the accused. Jaising writes that Afzal Guru "had to cross-examine witnesses himself, all this without being provided with copies of the depositions that would have enabled him to point out the inconsistencies."[70] Arguing that a cross-examination by an accused facing a death penalty is no substitute for a cross-examination by a legally trained mind, she notes that this miscarriage of justice continued in all the three courts that heard his case at the trial and appellate stages.[71]

A former Supreme Court Judge, Ashok Ganguly also deplored Afzal Guru's execution, stating that his clemency petition was rejected on 3 February 2013 and his execution took place on 9 February 2013 without giving him his invaluable right to challenge it and without informing

[68] *Ambadas Laxman Shinde and Others v State of Maharashtra* (2018) 18 SCC 788 (FB).
[69] Indira Jaising "Meeting Afzal" in *The Hanging of Afzal Guru and the Strange Case of the Attack on the Indian Parliament* (Penguin UK, Kindle Edition, 2016) at pt 1 ch 14.
[70] At pt 1 ch 14.
[71] At pt 1 ch 14.

his family.[72] The apparent failures of justice in Afzal Guru's case persisted not only during the judicial proceedings but even up to the execution of the sentence.

In both these cases, the criminal legal system had been fully applied with the participation of all institutions in the criminal process. The accused pursued all available remedies for miscarriages of justice. But despite the blatant procedural failings in their journey through the pyramidical criminal justice system, their petitions were dismissed, and not once was a thorough judicial assessment made.

It would not be wrong to infer that it was the formulation of these remedies that abetted the miscarriages of justice to slip into and remain in a blind spot. The scope for incising into the contributory actions of the human participants in the lower institutions is narrowed to a pinhole for judicial remedies whereas the constitutional remedy does not make room for any judicial assessment at all. The criticism on the resolution of the cases also speaks volumes about the real and perceived efficacy of the remedies for such suspected miscarriages of justice. A possible reason why the condemnation of the Supreme Court is muted and surfaces only much later, as it did in both cases, is the fear of committing contempt of court.

With their narrowed scope, the existing remedies in their current prescribed form transpire to tread the same path charted by the pyramidical accountability structure. They render the possibility of remedying a deep-rooted miscarriage of justice ultra vires, thereby restricting the Supreme Court from being an abled accountee for all contributory human participants and institutions throughout the criminal justice system. This brings us to a deeper assessment of how the Supreme Court fares as an accountability forum, once again through the employment of Bovens' public accountability lens.

C The Supreme Court as an Accountability Forum

According to Bovens, the relationship between the accountor and the accountability forum usually consists of at least three elements or stages:[73]

[72] "Ex-SC Judge Raises Doubts Over Handling of Guru's Execution" *Outlook India* (online ed, 6 March 2016) <https://www.outlookindia.com/newswire/story/ex-sc-judge-raises-doubts-over-handling-of-gurus-execution/932652>.
[73] Bovens "Public Accountability" above n 3 at 184–185.

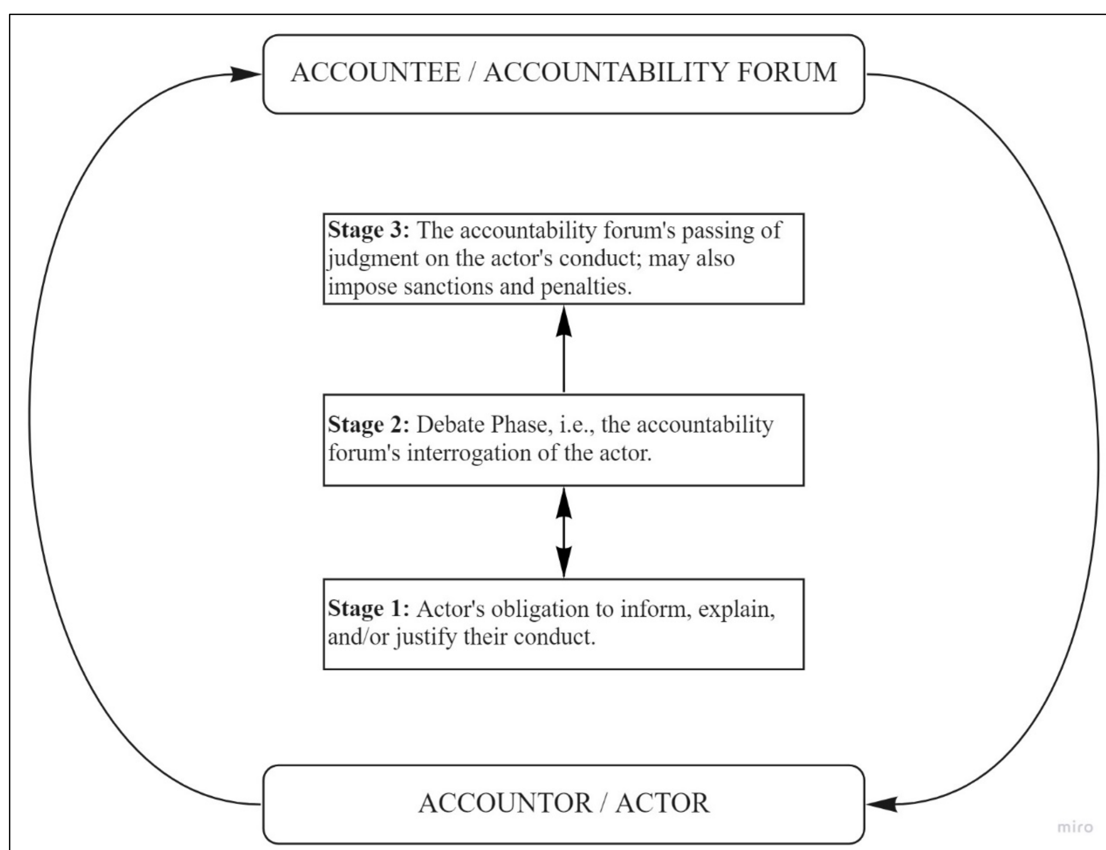

Figure 2: Mark Bovens' stages in the relationship between the accountor/actor and the accountee/accountability forum.

The question to be explored is not regarding the process of accountability, but whether the Supreme Court is able to embark upon these three stages in its relationship as an accountability forum with the subordinate institutions, viz., the high courts, sessions courts, magisterial courts, and the police, serving as accountors.

The intrinsic function of the remedies for miscarriages of justice as institutional accountability mechanisms is to identify and correct the miscarriage, irrespective of at which stage in the criminal process it occurred. This means that each of the contributory human participants in the criminal process must be effectively held to account. But as we saw previously, the arrangement set out by the remedies in their existing form severely restricts the Supreme Court to be able to revisit earlier stages of the investigations or trials where an undetected miscarriage is suspected to have taken place. Likewise, the remedies also place no formal obligation on the participants of the lower echelons of the criminal justice system to account for and justify their contributory acts and omissions to the Supreme Court.

The accountability relationship of the contributory human participants in the lower institutions (accountors) begins and ends with their immediate superior institutions (accountees) in the pyramidical structure. By way of illustration, the accountability of the police lies foremost and

squarely with their immediate superior, the trial courts, and does not extend to the appellate courts. Since the remedies do not facilitate the police's account-giving to the Supreme Court, the possibility of any further interrogation, debate, or even a passing of judgment on the conduct of the investigations also fails. Juxtaposed with the criminal justice system, the remedies appear to be in harmony with the Weberian or British Diceyan monolithic system of hierarchical accountability relations. This has resulted in a flaw in the institutionalised practice of account-giving because the remedies do not enable individual accountability of human participants in the criminal process whose acts and omissions have shaped the narrative of the case.

Take for instance, the Parliament attack case.[74] Not only were the trial proceedings marred for want of legal representation but the judicial recording of the trial court of the communication with the four lawyers requested by Afzal Guru and their subsequent refusal to appear for him was also unfounded and possibly erroneous. The margin of error of justice in this case is patent as regards the lack of legal representation but is latent when it comes to the mistaken judicial recording. To incise an error not apparent on the face of the record, the Supreme Court would need to undertake the accountability process outlined by Bovens above. But with both the review and curative petitions being dismissed, there were no prospects for the trial court to be questioned and be answerable to the Supreme Court for its erroneous record that had gone undetected and uncorrected in the appellate stages to become deep-rooted and ultimately part of the case records.

The failure of the remedies for miscarriages of justice are similarly evidenced in the Indira Gandhi assassination case.[75] It was tainted at the very start in the pre-trial investigations stage with the custodial death of one of the prime accused. The weakness of the circumstantial evidence relied upon to execute Kehar Singh was apparent on the face of the record in the roundabout reasoning in the judgment, yet the review petition was dismissed. It is necessary to reiterate here that the remedy of the review petition does not envisage a fresh peer review but a review by the same bench that passed the impugned judgment. Therefore, the same bench plays both the accountor and the accountee. A strong possibility of bias is inbuilt in such situations. It is not difficult to fathom why the review petition was dismissed, or even why the writ petitions filed on the dismissal of the review petition were also dismissed.

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[74] *Mohammad Afzal v State (NCT of Delhi)* above n 4.
[75] *Kehar Singh v State (Delhi Administration)* above n 4.

The net result of every such instance of a suspected miscarriage of justice that has caused significant public unease is that it more often than not culminates in an aftermath awash with blame games and media trials rife with speculation for the sake of catharsis, in lieu of a formal, thorough investigation for resolution and closure. Suffice to say that the narrow scope of the existing remedies has rendered the Supreme Court an inadequate accountability forum for miscarriages of justice that have become deep-rooted from the early stages of a case. The Court is simply incapable of following through Bovens' three stages of the accountor-accountee relationship with the lower institutions to identify and remedy a possible miscarriage.

III Establishing a CCRC for India

What the status quo could benefit from is a modification aimed at curtailing the self-perpetuating nature of the criminal justice system and strengthening the Supreme Court to become a more incisive accountability forum for all contributory human participants in the criminal process. As a possible solution, I propose the creation of an independent statutory body that is established outside of the hierarchical accountability structure to keep its drawbacks in check. Such supplementary bodies have been pioneered by common law jurisdictions with analogous criminal justice systems. In these jurisdictions too, public criminal exonerations led to a disillusionment with the notion that common law criminal procedures can be failproof.[76] Reacting to the perceived lack of trust in the system for timely identification and correction of miscarriages of justice, the United Kingdom[77] in 1997–1999 and New Zealand[78] in 2020, have introduced an independent body in their respective criminal justice systems, the Criminal Cases Review Commission (CCRC).

The purpose of this Commission is to investigate into probable and alleged cases of miscarriages of justice and refer appropriate cases back to the courts for a fresh appeal. In carrying out its functions, the Commission is equipped with inquisitorial powers that enable an in-depth review of the case by sanctioning the Commissioners to retrace its history and retake evidence, where required. Additionally, the Commission need not be moved only on a formal

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[76] For example, in the United Kingdom: The Guilford Four: *R v Hill and others* (1989) The Times 20 October 1989, The Birmingham Six: *R v McIlkenny and Others* [1992] 2 All ER 417, The Maguire Seven: *R v Maguire* (1992) 94 Cr App R 133, Judith Ward: *R v Ward* [1993] 1 WLR 619; and in New Zealand: The pardoning of Arthur Allan Thomas: *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Royal Commission of Inquiry, H.6, 1980). See also Dr Malcolm Birdling "Correcting Miscarriages of Justice" (2013) NZLJ 413 at 413.
[77] Criminal Appeal Act c II and Criminal Procedure (Scotland) Act pt XA.
[78] Criminal Cases Review Commission Act.

application by the aggrieved person or their representative but it can also launch a preliminary inquiry on its own motion in cases where it suspects a miscarriage of justice. While making a referral back to the courts, the Commission supplements its findings with an investigation report that forms the basis for a reconsideration of the case.

The Indian criminal justice system could benefit from the establishment of a CCRC. It would make possible an incisive review of the case right from its pre-trial investigations stage through the final appeals process. Since the Commission is an independent body, it provides the avenue for an external, neutral, and impartial review. This section of the paper undertakes three lines of inquiry with regards to establishing a CCRC in the Indian context: its fit and purpose in the existing hierarchical accountability structure, its recommended set-up, and what this establishment could mean in the time to come for criminal cases and the criminal justice system.

A Introducing an Element of Diagonal Accountability

By design, the CCRC falls outside the classic Weberian-Diceyan monolithic system of hierarchical accountability relations. Its accountability relations with the other institutions in the criminal process would be a form of "diagonal accountability",[79] with CCRC on one hand and the entire hierarchical criminal justice system on the other. The latter would be obliged to account for their contributory acts and omissions to the CCRC when under investigation. This would be diagonal accountability in the true sense of the term, as the complete hierarchical chain, including the Supreme Court, is surpassed and the criminal justice system is directly accountable to the CCRC.

[79] Bovens "Public Accountability" above n 3 at 196: Bovens owes this term to Thomas Schillemans.

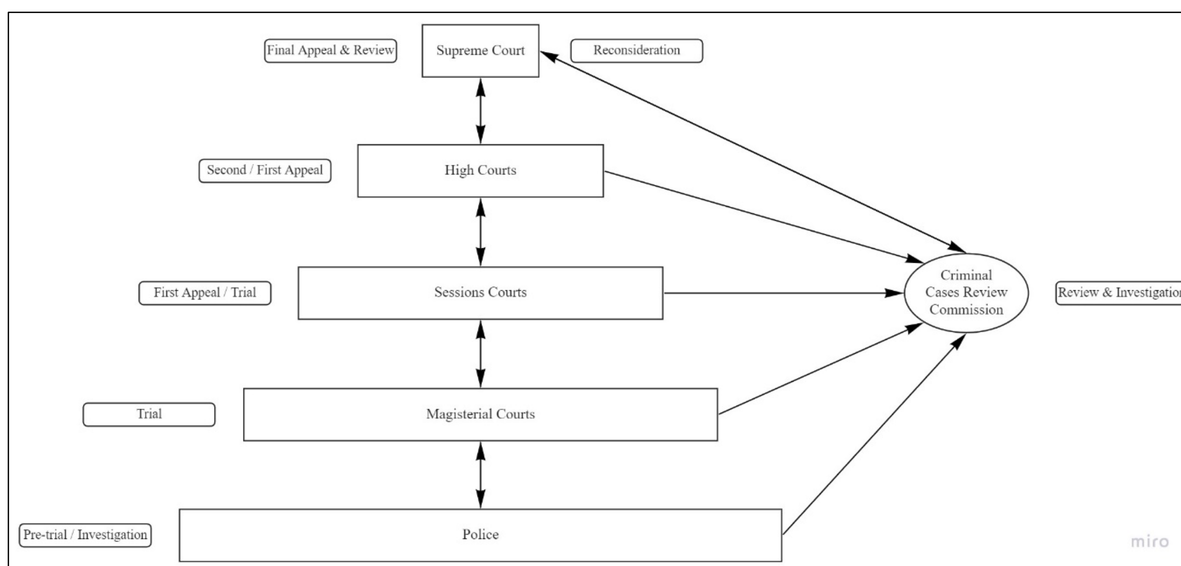

Figure 4: (Compare with Figure 1) Introducing the CCRC as an element of diagonal accountability in the Indian criminal justice system.

Within the criminal justice system, the accountability relationship that the Commission would share with all institutions in the criminal process is meant to foster the identification of miscarriages of justice; but the Commission would not be part of the original chain of command. It would function as an auxiliary form of accountability established to help the Supreme Court identify miscarriages of justice that could have taken place at any stage in the criminal justice process. A judicial decision to be made on the Commission's findings would rest solely with the Supreme Court and not the Commission. Hence the relationship is not horizontal, but diagonal.

As a supplementary remedy, an application to the CCRC for a complete review and investigation would be wedged between the judicial remedy of the curative petition and the constitutional remedy of the mercy petition. This supplementary avenue need not be made available only via an application for review. In instances where the Commission suspects a miscarriage of justice, it could also conduct inquiries on its own motion.

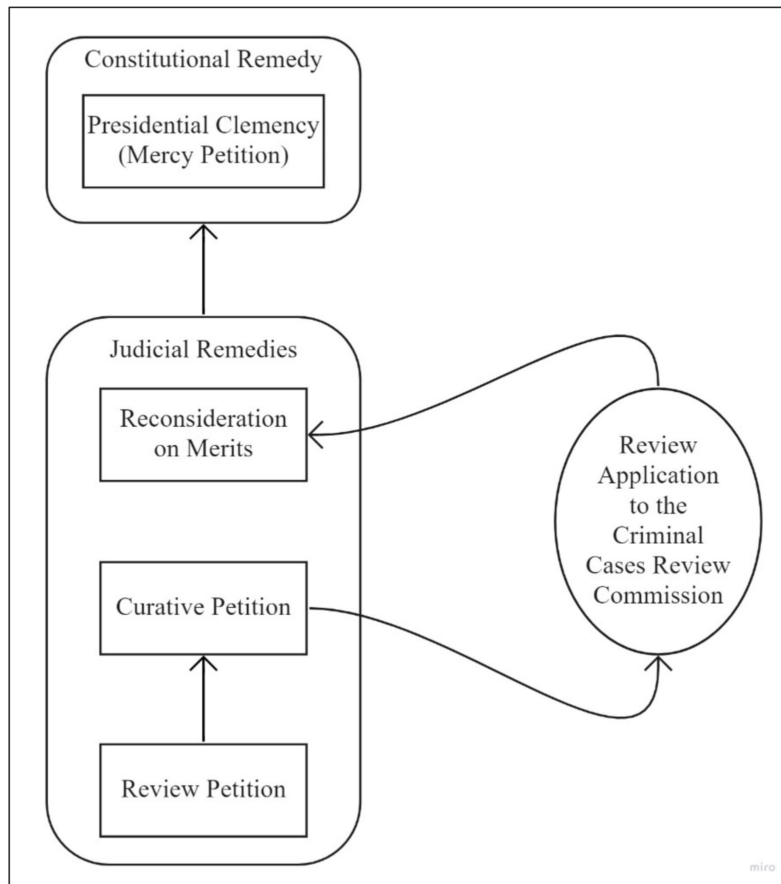

Figure 5: (Compare with Figure 2) Introduction of the CCRC as a supplementary remedy for miscarriages of justice.

Locating the Commission within the doctrinal separation of powers, it would be a quasi-legal forum sitting next to courts and exercising independent and external oversight, but no control. The nature of accountability would thus be similar to that of the administrative accountability exercised by auditors, inspectors, and controllers.[80] The CCRC would function as an independent investigatory authority that refers the case back to the Supreme Court for a reconsideration while providing it with the necessary inputs through its reasoned investigation report. Although some exercise of discretion could be authorised in the carrying out of its functions, such exercise would not be arbitrary but founded in a specific statute and prescribed norms.

As an element of diagonal accountability in an otherwise hierarchical arrangement, the foremost function of the CCRC remedy would be to identify the miscarriage of justice by holding to account each contributory participant and institution in the criminal process. At the end of the line of the new diagonal accountability relationship is the Supreme Court which would continue to remain the final judge of the human participants and institutions in the

[80] At 188.

criminal justice system based on the Commission's investigation report. The Court could then adjudicate on sanctioning the participants for their contributory acts or omissions in the miscarriage of justice while reconsidering the conviction and sentence of the accused. The CCRC remedy would then become a necessary precondition for identifying deeply embedded miscarriages of justice. It would provide the Supreme Court with the key inputs for judging the timeliness, fairness, effectiveness, and efficiency of the criminal process for that particular criminal case—something that the Court is unable to achieve by itself in the status quo.[81]

Secondly, the CCRC's presence could function as a check on the integrity of the entire criminal justice system.[82] The scope of account-giving to the CCRC is wide because it would be a safeguard against deep-rooted miscarriages of justice caused by incidents of human frailty. This function however rests on the assumption that the establishment of an independent body exercising external oversight would deter the human participants in the criminal process from secretly misusing their powers and that the CCRC will be provided with timely, essential information to trace miscarriages of justice. As a concomitant to this function, the establishment could also serve to improve performance of the entire criminal justice system. The human participants who may have contributed to the miscarriage of justice through intentional acts and omissions would be aware that they will be held professionally accountable by the standards and procedural codes of conduct they are mandated to hold to. They would also be aware that they will be called to account a second time, equally strictly, by the CCRC even if their immediate accountee in the hierarchical pyramid missed the opportunity to remedy the miscarriage and hold them accountable. The establishment of the CCRC as a supplementary remedy therefore casts its shadow way beyond the handful of incidents of miscarriages of justice that it would investigate, prompting the human participants in similar positions working on different cases to abide by their procedural standards and maintain clearer records.

The aim of remedying miscarriages of justice is to ensure that an innocent person is not wrongfully convicted and sentenced. An ideal criminal justice system would be one that is successfully able to self-correct and uphold the truisms of the rule of law: "innocent until proven guilty beyond reasonable doubt" and "the right to a fair trial". Accountability then is not only about control, it is also about prevention.[83]

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[81] See generally Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13:4 European Law Journal 447 at 452.
[82] See generally at 464.
[83] At 193.

B A Supplementary Remedy for Miscarriages of Justice: Statutory Recommendations

While the foregoing discussion has sketched a basic idea of the Commission's place and purpose in the existing schema, conceiving a CCRC for India requires deeper detailing. Based on the pioneering Commissions of the United Kingdom[84] and New Zealand,[85] key recommendations for an Indian counterpart are outlined below.

1 Establishment

The CCRC must be established as a statutory, independent, quasi-judicial body along the lines of the Central Vigilance Commission that is responsible directly to the Parliament.[86] To ensure independence, appointments of members to the CCRC should be made by the President on the recommendation of the Prime Minister, the Minister of Law and Justice, and the Leader of the Opposition in the House of the People.

2 Composition and Qualification of Members

At least one-third of the members must be persons who are legally qualified;[87] and at least two-thirds must be those who have knowledge, experience, or expertise of aspects of the criminal justice system, particularly in the investigation of offences and treatment of offenders.[88] The enabling statute must also make provision for ad hoc appointment of qualified persons to assist the Commission with its functions and duties as specialist advisors on cultural, scientific, technical, or other matters that require particular expertise.[89] This will ensure that there is not only legal opinion forthcoming on the conduct of the trial proceedings or appeals processes, but also expert appraisal of the pre-trial stages and procedures of police investigation and forensic evidence.

[84] Criminal Appeal Act, c II and Criminal Procedure (Scotland) Act, pt XA.
[85] Criminal Cases Review Commission Act.
[86] National Informatics Centre "Frequently Asked Questions" Central Vigilance Commission < https://cvc.gov.in/faq>.
[87] See Criminal Appeal Act s 8 sub (5), Criminal Procedure (Scotland) Act pt XA s 194A sub (5) and Criminal Cases Review Commission Act, s 9 subss (3) and (5).
[88] See Criminal Appeal Act s 8 sub (6), Criminal Procedure (Scotland) Act pt XA s 194A subs (6) and Criminal Cases Review Commission Act, s 9 subs 4.
[89] See Criminal Cases Review Commission Act, s 10.

3 Functions

The primary function of the Commission should be to investigate into possible miscarriages of justice and review convictions and sentences to assess whether they should be referred back to the Supreme Court as a fresh appeal. Being a supplementary remedy that is wedged between the curative petition stage at the Supreme Court and the presidential mercy petition, the threshold for an application to the CCRC by the convicted accused or their representatives[90] is already determined: applications to the Commission for a full review and investigation of the case can be made only after the curative petition has been dismissed by the Supreme Court.

Whether a conviction or sentence should be referred to the Supreme Court for a reconsideration should be determined based on a test after reviewing the application and representations made to the Commission. Taking a leaf from the United Kingdom[91] and New Zealand,[92] the test must weigh the following factors:

(a) The Commission believes that a miscarriage of justice may have occurred at any of the stages of the criminal process.
(b) It is in the interests of justice that a reference should be made.
(c) The extent to which the application relates to the argument, evidence, information, or a question of law raised or dealt with in the trial proceedings.
(d) Specifically, the Commission considers that—
    (i) in the case of a conviction, verdict, or finding: because of an argument, or evidence not raised in the trial proceedings, or on any appeal, or any application for leave to appeal against it, or
    (ii) in the case of a sentence: because of an argument on a point of law, or information, not so raised,

    an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.

Conversely, the Commission may decide to not take action on the application if the convicted accused no longer wishes to proceed, or in the Commission's opinion, the application is

[90] See Criminal Appeal Act s 14 sub (1) and Criminal Cases Review Commission Act, ss 21 and 23.
[91] See Criminal Appeal Act s 13 and Criminal Procedure (Scotland) Act pt XA s 194C.
[92] See Criminal Cases Review Commission Act, s 17.

frivolous, vexatious, or mala fide; or for any other reason that leads the Commission to believe that it would be unnecessary or inappropriate to take any further action on the application.[93]

4 Powers

Reinforcing the CCRC's independence, it must be granted powers to regulate its own procedures[94] to carry out its primary function, so long as the procedures are consistent with the Indian Constitution and principles of natural justice.

The Commission must be vested with the same investigative powers as those vested in a civil court in the Code of Civil Procedure Act 1908[95] in respect of summoning and enforcing the attendance of any person and examining him on oath or affirmation; requiring the discovery and production of documents; and receiving evidence on affidavits.[96] Subject to the Indian Evidence Act 1872,[97] it must also be able to requisition any public record or document or copy of such record or document from any office.[98] Disclosure of information obtained by the Commission must be allowed only for those purposes that are authorised under the enabling statute.[99]

Along with its primary function, the Commission must be empowered to initiate and conduct inquiries on its own initiative in the public interest.[100] Investigations must commence only after the Commission procures the convicted accused's informed consent.[101]

In the course of performing its primary function, if the Commission identifies that a certain practice, policy, procedure, or any other general matter relating to the conduct of the participants in the criminal process is the common denominator in cases involving a miscarriage of justice or shows the potential of contributing to a miscarriage of justice, the Commission must be empowered to conduct thematic inquiries in this regard.[102] A written

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[93] See Criminal Cases Review Commission Act, s 24.
[94] See s 15.
[95] Code of Civil Procedure 1908 (India), pt II.
[96] See Criminal Appeal Act s 18A, Criminal Procedure (Scotland) Act pt XA s 194H and Criminal Cases Review Commission Act, ss 31–34.
[97] The Indian Evidence Act 1872 (India), ss 123 and 124.
[98] See Criminal Appeal Act ss 17 and 18 and Criminal Procedure (Scotland) Act pt XA s 194I.
[99] See Criminal Procedure (Scotland) Act pt XA ss 194J, 194K and 194M and Criminal Cases Review Commission Act, s 36.
[100] See Criminal Procedure (Scotland) Act pt XA s 194D sub (1) and s 194F and Criminal Cases Review Commission Act, s 27 sub (1).
[101] See Criminal Cases Review Commission Act, s 27 subs (2) and (3).
[102] See Criminal Cases Review Commission Act, s 12 subs (1) and (2).

report on this inquiry containing the Commission's findings and recommendations could be submitted to the Minister of Law and Justice, who may then present it to the House of the People for considering amendments in the existing law.[103]

5 Duties

Upon making a decision on the application, the Commission must notify the applicant or their representative with a reasoned decision in writing[104] and make this decision publicly available.[105] When referring a conviction or a sentence to the Supreme Court, the Commission must give the Court a reasoned referral in the form of an investigatory report.[106] The Court must then hear and determine the matter as if it were a first appeal against the conviction or sentence.[107]

The Commission must carry out activities to make its functions known to, and understood by, the public and prisoners.[108] It must also raise public awareness of its procedures and make them available.[109] Lastly, the enabling statute must mandate the Commission to act independently, impartially, and fairly in performing its functions and duties and exercising its powers.[110]

A set-up such as the one delineated above would go a long way in counterbalancing the concentrated power of review of the Supreme Court that is manifested in the existing judicial remedies for miscarriages of justice. The CCRC remedy makes possible a fresh, external review without the likelihood of bias. Constituted by Commissioners with expertise in criminal fields beyond the legal would mean higher accountability not only for the human participants of judicial institutions, but also for those in the investigations stage such as the police.

Even if the errors of justice are not patent but buried deep within the initial stages of the case, the CCRC remedy would not be denied to an applicant so long as the case passes the test, the threshold of which is reasonably much lower than "error(s) apparent on the face of the

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[103] See s 12 subs (3) and (4).
[104] See Criminal Appeal Act s 14 sub (4) cl (b) and sub (6), Criminal Procedure (Scotland) Act pt XA s 194D sub (5) and Criminal Cases Review Commission Act 2019, s 26 sub (1).
[105] See Criminal Cases Review Commission Act, s 26 sub (2).
[106] See Criminal Appeal Act s 14 sub (4) cl (a), Criminal Procedure (Scotland) Act pt XA s 194B sub (1) and Criminal Cases Review Commission Act, s 19.
[107] See Criminal Appeal Act s 14 subs (4A) to (5), Criminal Procedure (Scotland) Act pt XA s 194B sub (1) and Criminal Cases Review Commission Act, s 20.
[108] See Criminal Cases Review Commission Act, s 13.
[109] See s 15 sub (4).
[110] See s 16.

record".[111] or "the rarest of rare cases".[112] If it succeeds in becoming an effective remedy for miscarriages of justice, the CCRC remedy would also encourage recourse to a formal thorough investigation instead of speculative media trials for an appropriate resolution of the case.

C Stocktake: A Balance Wheel, Not an Antidote

The outlined procedural powers allow the Commission greater scope for a detailed review than the Supreme Court can afford with the current remedies in their existing form. The CCRC brings an inquisitorial element in an otherwise adversarial criminal justice system. As time goes by, this can prove to be a double-edged sword. While it can work wonders for enhancing accountability in the entire system, it could also contribute heavily to procedural delays and lags for justice. An assessment of how the CCRC's establishment in the Indian criminal justice system could unfurl would be fruitful.

1 Potential Benefits

The numbers for the pioneering CCRC for England, Wales and Northern Ireland are inspiring. In its 23-year run, it has received 26,635 applications.[113] Of the 749 cases that it has referred back, 677 have been heard by the courts, and about two-thirds have been allowed in appeal.[114] In 2017, Laura Tilt observed that "… the CCRC has done some high quality investigations and has a high success rate—with the Court quashing almost 70% of referred convictions".[115]

Establishing a similar statutory body to introduce an element of diagonal accountability in India's hierarchical criminal justice system could accrue three chief benefits that I can identify. First, being established as an independent statutory body, it does not threaten the constitutional supremacy nor disrupt the existing status quo of the doctrinal separation of powers. It is a remedy that precedes the final constitutional presidential clemency. The President continues to retain the symbolic power to grant pardons, as envisioned by the Indian Constitution, in the event the avenue of the CCRC fails.

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[111] Supreme Court Rules 2013, order XLVII r (1).
[112] *Rupa Ashok Hurra v Ashok Hurra and Another* (2002) above n 36 at 414.
[113] "Facts and Figures" (31 August 2020) Criminal Cases Review Commission < https://ccrc.gov.uk/case-statistics/>.
[114] Above n 113.
[115] Laura Tilt "Tackling Miscarriages of Justice: Twenty Years of the Criminal Cases Review Commission" (20 November 2017) University of Oxford, Faculty of Law Blog <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2017/11/tackling-miscarriages-justice-twenty-years>.

As a quasi-judicial body with only powers of review, investigation, and referral, it is empowered to assess the procedural aspects of the criminal process and identify nonconformities such as those pervading the Indira Gandhi assassination case[116] and the Parliament Attack case.[117] The Commission can hold to account all contributory participants of the criminal process and submits its referral to the Supreme Court supplemented by an investigatory report. However, it has no power or authority to determine substantive issues such as the guilt or the innocence of the convicted accused or culpability of persons responsible for contributing to the miscarriage of justice. That remains wholly with the Supreme Court. Therefore, not only does it retain the hierarchical structure of the criminal justice system, with the final judgment still resting with the apex court, it also does not undermine the independence of the judiciary. The CCRC fits snugly in the existing constitutional and hierarchical criminal justice system framework by counterpoising it with an element of diagonal accountability, akin to the balance wheel in a clock.

[116] *Kehar Singh v State (Delhi Administration)* above n 4.
[117] *Mohammad Afzal v State (NCT of Delhi)* above n 4.

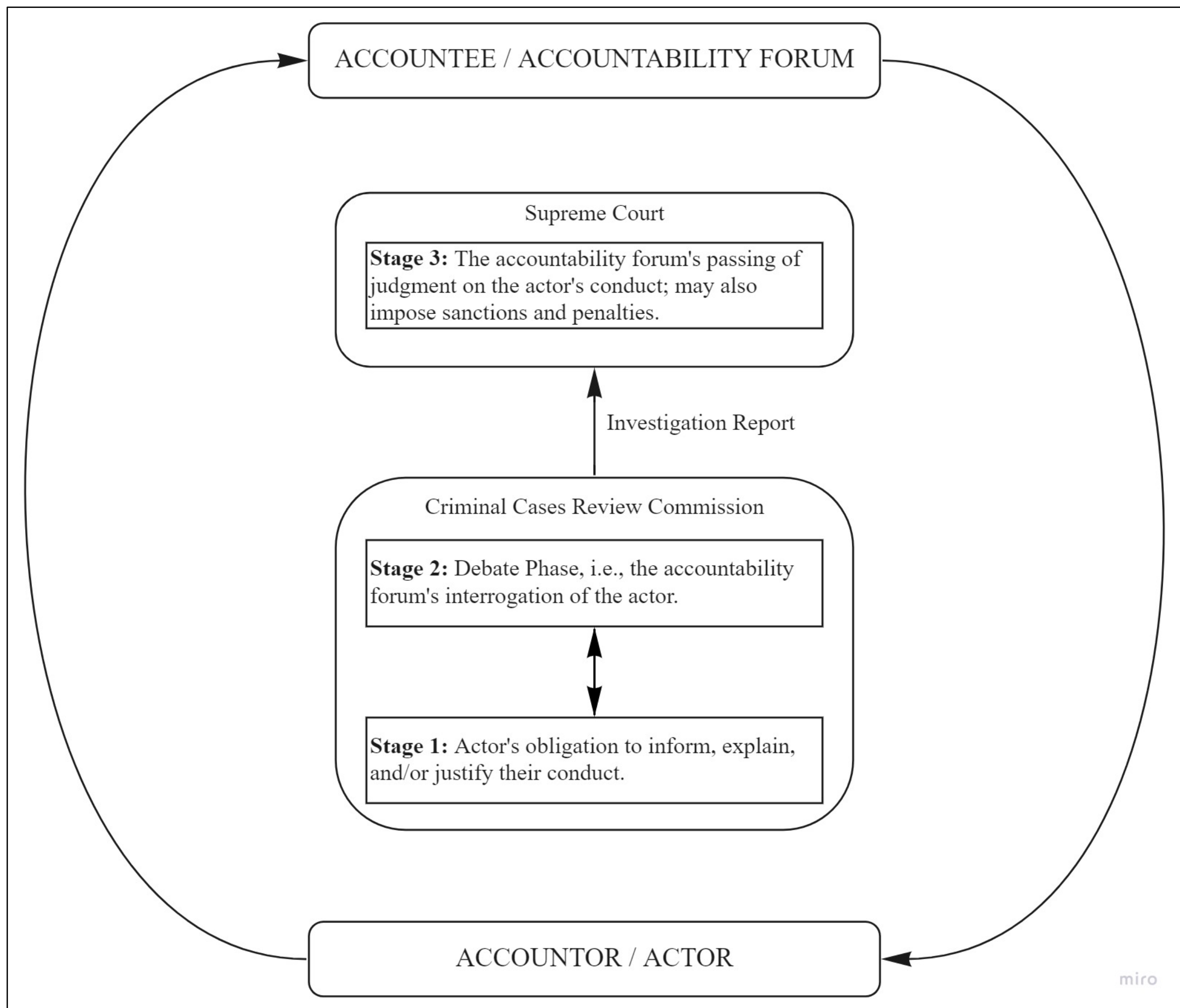

Figure 6: (Compare with Figure 3) Accountability process in the CCRC Review as a supplementary remedy.

Second, by virtue of its diverse composition and qualification of members outside of the legal field, the CCRC could also foster professional accountability for contributory participants, such as the police, in the criminal process. The Commission operates on individual account-taking rather than hierarchical accountability as a strategy for identifying miscarriages of justice. It has the power to comprehensively retrace the progression of the case and summon the individual contributory participants for questioning and taking evidence. Each official would be interrogated in so far as, and according to the extent to which, they have personally contributed to the miscarriage of justice. The CCRC will thus also be able to hold to account participants in the lower institutions of the pyramid, such as the police. Unlike the Supreme Court, the Commission will not be satisfied with and stop at the official view of the lower courts. Providing the Supreme Court with a thorough investigative report would also enable the Court to hold accountable participants of the lower echelons in the criminal process, that it is unable to do in the existing remedies. This in turn would enhance the Supreme Court as an accountability forum.

As an independent and neutral body, the CCRC could operate to enhance accountability in the entire criminal justice system by eliciting self-critical and effortful thinking in the contributory participants. As Lerner and Tetlock conclude from their extensive literature review:[118]

> … the participants will learn prior to forming any opinions that they will be accountable to an audience [the CCRC] (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well informed, and (e) who has legitimate reasons for inquiring into the reasons behind the participants' judgments.

Third, the CCRC could help even those criminal cases that are not high-profile enough to warrant and benefit from wide publicity and debate that the two cases in this paper received. Such cases need not suffer because of a lack of public outcry or public criticism on their resolution by eminent persons. The CCRC would be a remedy available to all convicted accused left with no further judicial remedy to exhaust.

2 Possible Concerns

Equally, three red flags that can be raised with the establishment of the CCRC. First, its establishment could create the "problem of many eyes"[119] in the criminal justice system. The participants and institutions in the criminal process now face an additional accountee. However, as seen in Part II, the current hierarchical accountability structure has a lacuna in the system to correct deep-rooted miscarriages of justice. The existing remedies do not facilitate the identification and correction of a miscarriage in the investigations and trial stages that has slipped under the radar and tainted further processes. The CCRC fills that deficiency. This has been corroborated by the experience of the CCRC established in England, Wales, and Northern Ireland. Its Commissioners have gone on record to state that in the applications that they receive "police misconduct and failure to disclose exculpatory evidence are two of the most common points raised by the applicants".[120] The Commission is therefore not superfluous, but a necessary element in the system for reopening and revisiting such instances.

The CCRC is granted administrative discretion within statutorily defined limits. It is in turn an accountor for the Supreme Court through its reasoned investigative reports submitted at the

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[118] Cited in Bovens "Public Accountability" above n 3 at 195.
[119] At 186.
[120] Tilt above n 115.

time of referral. It functions as an independent agent on the lines of an amicus curiae for the original legitimate accountability forum, the Supreme Court, to review the criminal case from start to finish and assist the Court with the relevant evidence in the form of investigation report. The judgment on the guilt or innocence of the accused person or the culpability of the contributor to the miscarriage of justice continues to rest with the courts. This means there is not much scope left for there to be an accountability excess.

Second, the CCRC in turn could face the "problem of many hands"[121] and excess workload. The Commission faces multiple accountors. As an outsider, it would be particularly difficult for the Commission to unravel who has contributed to the miscarriage of justice, in what way, and to what degree. Because so many participants administer the institutions in the criminal justice system it would be difficult even in principle to identify who is responsible for the miscarriage of justice. The CCRC for England, Wales, and Northern Ireland has been found to be suffering from this problem. While the Commission aims to complete a minimum of 80% of cases within a 12-month time frame, there are over 500 cases under review at any given point in time.[122] Given the limited number of Commissioners, conducting a comprehensive review of each of these cases means that there is a heavy workload overburdening the available resources.[123]

Lastly, the CCRC cannot be an antidote to the systemic problems in the criminal process. The CCRC can only aid in identifying miscarriages of justice. If it is impeded in its functions or is administered by persons who do not possess the integrity that the Commission necessitates, it will slip into a defunct state for the purpose it was established. Therefore, it is not a panacea, but only operates as a balance wheel in the clockwork of the hierarchical chain of command.

IV Conclusion

Remedies for miscarriages of justice are not only the hallmark of rule of the law but are also a *sine qua non* for the rule of law. If they do not afford the scope to assess the possibility of miscarriages of justice from the bottom up, they are reduced to a rhetoric conveying an image

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[121] At 189.
[122] Above n 113.
[123] Owen Bowcott "Miscarriage of Justice Body's Funding Cuts Criticised as Workload Grows" *The Guardian* (online ed, United Kingdom, 9 September 2018).

of "accountability" and "remedy" for miscarriages of justice but being nothing more than paper procedures in practice.

In the absence of effective remedies, the miscarriages are effectively shielded from Supreme Court scrutiny because there is no scope to question all the contributory participants in the criminal justice system regarding their conduct. Moreover, as seen in Part II, the case is also usually brought before the same bench, giving scope to a bias to uphold the sentence and conviction. The Supreme Court even at its apex position in the hierarchical chain of command currently has far fewer powers of oversight and control and can look into a case of possible miscarriage of justice only if the "error(s) apparent on the face of the record".[124] or in "the rarest of rare cases".[125] The President has also only retained a ceremonial power of condonation.

This gap to effectively address miscarriages explains the need for an element of diagonal accountability and causes a pressure for the creation the CCRC. Hence, all participants involved in the initial pre-trial/investigation and trial stages are also made directly accountable to the CCRC along with the higher courts. They may appear before the CCRC or be subject to questions and scrutiny by it. The establishment of a CCRC does not weaken or threaten the constitutional supremacy or the hierarchical status quo as seen in Part III. As an independent quasi-judicial body, it does not disrupt the rigid scheme of separation of powers and the checks and balances between the organs in the Constitution. It functions as an enhancement of the criminal justice system.

Introduction of a supplementary remedy in the form of a complete review and investigation by the CCRC will no doubt lengthen the criminal process that is already riddled with inordinate delays in the resolution of cases. But if the miscarriage of justice is not identified and corrected and an innocent person is implicated in the process, it is unjust to the innocent convict. This is also a greater injustice to the victim and their family since the real perpetrator has walked scot-free. The remedy of a CCRC enables innocent persons who have been wrongfully convicted and sentenced to become accountability seekers rather than remaining accountability victims.

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[124] Supreme Court Rules 2013, order XLVII r (1).
[125] *Rupa Ashok Hurra v Ashok Hurra and Another* (2002) above n 36 at 414.

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