1. Introduction: disciplining judges – exercising statecraft

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I THE PROJECT

Judicial discipline has long stood in the shadows of public law scholarship. While important examples of sustained attention to the subject can be found, and indeed have proliferated in recent years,¹ these have tended to focus on domestic regimes and controversies.² In contrast, judicial discipline systems have not been integral to trans-systemic inquiry into constitutionalism or the rule of law, or principles of good governance or public administration. Where the subject has attracted attention, it has been susceptible to reductive analysis centring on stylized tensions between judicial independence on the one side and judicial accountability on the other. Sustained inquiry into how independence and accountability are understood and defended across diverse judicial discipline regimes, what other legal values are engaged by this distinct public law form, and whether or how the various features of judicial discipline systems may be understood as either essential to legal ordering as such, or, alternatively, as deeply contingent expressions of distinct political projects over time, remains conspicuously absent.

¹ See for example William T Braithwaite, *Who Judges the Judges? A Study of the Procedures for Removal and Retirement* (American Bar Foundation 1971); K L Corr and L Berkson, *Literature on Judicial Conduct* (American Bar Foundation 1971); G Canivet and J Joly-Hurard, *La Deontologie du magistrat* (2nd edn, Dalloz 2009); S Shetreet and S Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013); J M Shaman et al, *Judicial Conduct and Ethics* (Lexis Law Publishing 1990); M Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council 1995) chs 5 and 6.

² But see A Naïs et al, ‘A Comparative Analysis of Disciplinary Systems for European Judges and Prosecutors’ (2012) 7 *Themis Competition*; J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practices* (BIICL 2015).

This book seeks to make a start on such inquiries. It endeavours to re-centre judicial discipline, if not as an essential feature of constitutionalism and the rule of law, then as an essential part of the story of late twentieth and twenty-first century public law – most recently, a story of rising populist dissent countered by intensified appeals to international norms. We suggest that attention to the diverse ways judicial discipline regimes have been constructed and reconstructed in recent history, across nations and at the level of international norm formation, lends new insights into the shifting power dynamics through which judicial, executive and legislative branches assert their distinctive forms of statecraft in efforts to secure institutional legitimacy and/or supremacy in the face of ongoing, complex local and global challenges.

In a previous project, *Regulating Judges: Beyond Independence and Accountability*,³ one of the co-editors of this book (Richard Devlin) argued that the design and implementation of a defensible governance regime for judiciaries is a complex challenge. It entails the creation of multiple institutions and procedures, and the careful calibration of a variety of norms tailored to the historical, political and cultural context of a particular jurisdiction. More specifically, six key norms were identified as salient: impartiality, independence, accountability, representativeness, transparency and efficiency. That project explored the many ways these norms have been deployed across diverse institutional mechanisms, protocols, conventions and procedures, including recruitment and appointment systems; training and education programmes; performance evaluations; appellate mechanisms; ethical support systems; rules for judicial immunity/liability; protocols to respond to the public; procedures for dealing with the media; and, finally, complaints and discipline processes. One of the key insights from that study was that designing a complaints and discipline regime for judges is an especially difficult task. Given the range of topics canvassed in that project, the contributors were only able to briefly analyse the challenges involved. Consequently, in this book we have invited scholars from 13 different countries to critically explore the complaints and discipline regimes in their respective jurisdictions in order to bring into focus some of the challenges and controversies implicated in the construction and roll-out of such systems.

The question of what to do about (alleged) misconduct by a judge is, of course, not a new one. It has troubled societies for millennia. It was addressed in Hammurabi's Code.⁴ It was highlighted on multiple occasions in both the

³ R Devlin and A Dodek, *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016).

⁴ Rev Claude Hermann Walter Johns, *Babylonian and Assyrian Laws, Contracts and Letters* (Charles Scribner's Sons 1904) ch II section 5. Thanks to David Michels for bringing this to our attention.

Old and New Testaments.⁵ It was considered by the prophet Mohammed.⁶ The Romans struggled with it⁷ as did the Gauls, Germanic tribes, Visigoths and the Franks.⁸ In modern times it has been a subject of study for academics in a variety of jurisdictions.⁹ It has even captured the imagination of artists, perhaps the most poignant being Gerard David's diptych *The Judgment of Cambyses* (1498) which serves as the cover for this book.

However, in the last decade or so, there have been significant developments in numerous jurisdictions which suggest that the issue of judicial discipline has taken on a particular urgency. Whether we are considering 'mature democracies' (for example, Australia, England and Wales, Canada, the United States, Italy, Japan, the Netherlands) or 'newly emerged democracies' (such as Croatia, Poland, South Africa, Nigeria, India) or one party systems (China), there has been significant attention focused on the institutions, mechanisms and procedures dedicated to judicial complaints and discipline systems. This attention, as noted, has included several rich nationally focused studies of such systems,¹⁰ but relatively little analysis on a larger, trans-systemic level.¹¹ Consequently, the goals of this book are twofold: (a) to bring together scholars from around the globe to critically analyse recent developments in a range of jurisdictions; and (b) to identify and reflect upon several challenges and controversies that politics need to address in the conceptualization and construction of a defensible disciplinary regime for judges.

In pursuit of these objectives, the remainder of this introductory chapter is structured as follows. In Part II we identify five themes that have emerged from the 13 case studies: (1) the need to reframe the traditional question from 'who guards the guardians' to 'how to guard the guardians'; (2) the institutional and political complexity of designing a judicial disciplinary regime and the diversity of potential options; (3) the sometimes-uneasy relationship between international norms and local conventions and practices; (4) the constitutional or other domestic legal status of disciplinary regimes; and (5) the distinction (or, potentially, a less clearly differentiated continuum) between formal and informal disciplinary procedures and mechanisms. Part III focuses on six

⁵ Deuteronomy 16: 18–20; Proverbs 31: 8–9; Micah 3: 9–11; Micah 7: 2–3; Luke 18: 2–5; Acts 23: 2–3. Thanks to David Michels for bringing these to our attention.

⁶ Sunan Abi Dawud, 'The Office of the Judge', 24 The Hadith 3566 (English). Thanks to Loujayn Alhokail for bringing this to our attention.

⁷ See for example J M Kelly, *Roman Litigation* (Oxford 1966).

⁸ M J Hoeflich, 'Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages' (1984) 2(1) Law and History Review 79.

⁹ See above (n 1).

¹⁰ Ibid.

¹¹ See above (n 2).

more particular challenges and controversies relating to the design of judicial discipline systems: (1) setting (and justifying) the substantive limits on judicial conduct, including the level of specificity to be given to those norms; (2) establishing a system for screening complaints that will promote efficiency without unduly limiting access; (3) determining an appropriate degree of system transparency for all stakeholders, including but not limited to impugned judges; (4) deciding if, and to what extent, there should be lay participation; (5) defining what effectiveness might mean, in light of variables such as congruity, and timeliness; and (6) determining the nature and range of appropriate penalties and remedies. These challenges, and others, raise the question of whether it is possible to identify best practices or common standards for judicial discipline attract to broad agreement on either a regime-specific or trans-systemic basis.

II SOME GENERAL THEMES

Each of the chapters in this book provides a critical analysis of the complaints and discipline regime in the jurisdictions discussed. As such each chapter can stand alone. However, we have identified five general themes emerging from the chapters, viewed as a whole, that may assist in the task of designing and implementing a defensible regime.

II.1 Reframing the Question

Conventional approaches to the analysis of judicial complaints and discipline systems often hark back to Juvenal's classic question: *sed quis custodiet ipsos custodes?*, that is, who guards the guardians?¹² While this formulation of the problem captures some aspects of the challenges of designing and implementing an appropriate regime, the chapters in this book suggest that it is too narrow an approach. The problem with the *who* question is that it tends to focus on which actor or institution is best situated to discipline judges: is it the judges themselves, a legislative body, an executive body or some other bureaucratic institution? This, obviously, is a vital question but it is only one of several important questions. What are the ultimate objectives of a complaints and discipline system for judges? Which values/norms do we aspire to in designing such a system? What are the most defensible institutional structures, mechanisms, procedures and policies for giving effect to the identified goals and values? And how may we determine whether the system is working effectively? In light of these concerns, the better question is: *how* to guard the guardians: *quam custodiet ipsos custodies?* Such an approach includes the *who*

¹² See for example Braithwaite (n 1).

question, but it is more encompassing, and emphasizes the complexity of the challenge confronting contemporary polities.

II.2 Complexity and Diversity

Complexity and diversity is the second general theme that emerges from this book. At the normative level, there are a number of values that need to be carefully considered, and cautiously calibrated, in the design of a disciplinary system for judges. Some of these values are widely recognized while others might be more jurisdictionally specific.

- (a) *Independence* is usually the first value identified in efforts to meet the challenge of disciplining judges. This is unsurprising given the high premium placed on judicial independence both nationally and internationally.¹³ However independence is a complex phenomenon. In part, it is important to consider how a discipline regime may affect, or threaten, the independence of the individual judge. This has been identified as a key problem in a number of jurisdictions including China, the Netherlands, Nigeria and Poland. Distinct from this are concerns about the independence of the judiciary as a collective, as an institution. Some of the case studies argue that their discipline systems present threats in this larger sense (for example the Netherlands, Nigeria, Poland), rendering the judiciary vulnerable (or more vulnerable) to hostile political attacks. But institutional independence is also deployed in a different sense. In some jurisdictions the argument is made that the disciplinary body itself must be exclusively populated by judges because only judges have the legitimacy, authority and professional expertise to judge other judges (for example Canada, India, the US). However, this in turn raises the question of whether this particular instantiation of institutional independence might present threats to the independence of the individual judge (for example Canada, Japan, the Netherlands, Nigeria). Finally, in a few jurisdictions, some judges have become so concerned about their independence – both individual and institutional – that they have engaged in social and political activism (for example signing petitions, orchestrating media campaigns, participating in street protests), practices that historically have been anathema to the judicial role (see for example the Netherlands, Poland). This raises the question: how does such activism, in the social and political contexts in issue, fit with conventions of judicial independence and related doctrines on the separation of powers?

¹³ We explore the international backdrop in Section II.3.

- (b) Conventional analyses usually characterize *accountability* as the flip side of independence and, as such, it is understood to be of co-equal value. However, like independence, accountability is a complex phenomenon. Is a judicial discipline regime designed only to govern individual judges or should it also seek to ensure the accountability of the judiciary as an institution (for example China)? What different considerations might come into play when the latter objective is given priority? Moreover, is accountability best achieved by allowing judges to self-regulate or should other institutions or actors – legislative, executive, other bureaucratic bodies – play a significant role? If the latter, what limits should be placed on those other entities? The contributors identify a myriad of options for where disciplinary authority might lie: Court Presidents or Chief Justices; a collegium of senior judges; superior courts; a ‘vigilance cell’; a judicial council (the membership and mandate of which can vary radically); parliamentary institutions; the executive; the Minister of Justice; the Prosecutor General; the Procurator General; the Lord Chancellor; a judicial conduct commission; an anti-corruption agency; or a supervision commission. Indeed, in some jurisdictions, disciplinary authority might be shared by several bodies. All these options arguably have some merit, but all have significant weaknesses as well. There is also the question: accountability for what? Should judges be disciplined only for matters that directly relate to their judicial functions, or might they also be disciplined for conduct unconnected to those functions, for example, how they conduct their private lives (Canada, China, England and Wales, Italy, Japan, the US)? Even within the realm of judicial function, should a distinction be made between administratively problematic behaviour (for example, a below-par work ethic, dilatoriness, poor case management, or incivility) and misconduct (for example bias, corruption)? How is ‘ordinary’ bias or conflict of interest, properly dealt with in appellate channels, distinguished from more fundamentally destructive misconduct? And how should disciplinary accountability deal with incapacity or disability (Australia, Canada, Italy)?
- (c) *Impartiality* is a third value often prioritized in this book. It is closely connected to both independence and accountability. While, as noted, impartiality is among the fundamental objectives of judicial discipline, often shaping standards of accountability, a further primary concern is: how do we ensure that the body authorized to conduct the disciplinary process is impartial? This cuts both ways. On one hand, there is the desire to ensure that inquiry into, and prosecution of, a judge on grounds of misconduct is not driven by ulterior or clandestine motives (China, Croatia, the Netherlands, Poland). On the other hand, there is the concern that the mechanisms, procedures and institutions of judicial

discipline may be excessively sympathetic to, and protective of, (some) judges (Australia, Canada, England and Wales, India, Italy, Japan, the US).

- (d) *Fairness* – for our purposes, signifying both participatory rights (due process/natural justice) and reasoned justification – is a fourth theme that preoccupies many of the contributors to the book. Again there are several dimensions. Aligned with the high priority often given to individual judicial independence, attention is frequently focused on the process rights accorded to an impugned judge. These include the right to notice, to be given disclosure sufficient to meet the case against one, to be heard and make representations, to be given reasons, and to appeal or seek judicial review (Australia, Canada, Croatia, England and Wales, India, Italy, the Netherlands, Nigeria, South Africa, the US). To these may be added the more substantive right to *responsive* reasons, adequately grounded in the law and facts as well as party submissions. The different jurisdictions explored herein apply these various rights in different ways and at different stages of the disciplinary process. In some jurisdictions, such protections are decidedly fragile (China, Nigeria, Poland).

But fairness is also a crucial issue for complainants: are complainants provided with sufficient information on the standards that can be applied to assess judicial conduct? Are complainants provided with (adequate/responsive) reasons if their complaint is screened out or dismissed? Can they seek reconsideration of a decision? Are they entitled to actively participate in the investigation process? Should the system allow for anonymous complaints if there are concerns about reprisals by judges (Australia, Canada, India, Italy, the US)?

- (e) The contributors emphasize that *transparency* is an increasingly significant norm that must be considered in the construction of a defensible disciplinary regime. Because of concerns about judicial independence and the desire to protect the reputation of individual judges (and by extension the judiciary as a whole), historically, discipline systems tended to be relatively closed. Confidentiality was the prioritized public good. Consequently, the standards of judicial conduct tended to be unarticulated or vague, the processes opaque, and the outcomes often unknown (Australia, China, England and Wales, India, Italy, Japan, the Netherlands, South Africa).

However, over the course of the last decade or so, there has been a shift in many – but not all (India, Japan) – of the jurisdictions explored herein, seemingly motivated by a (reluctant) recognition that a ‘trust us’ mentality is no longer adequate to maintain public confidence in the system. This has led to a variety of initiatives: the clearer articulation of

standards, increased use of websites, ‘consumer-oriented’ complaints procedures, the more extensive issuance of media releases/updates, the adoption of public rather than in camera inquiry proceedings, and the publication of annual reports (Australia, Canada, England and Wales, Italy).

- (f) *Representativeness*, like transparency, is a norm that seems to be on the upswing, at least in some of the jurisdictions. By representativeness we mean the participation of a broader array of decision makers than just judges. Once again, the pattern seems to be that when the value of judicial independence was positioned as hegemonic, the value of representativeness was considered marginal, if not irrelevant. It became relevant only at the latter stages of a disciplinary process such as an address to Parliament or impeachment. But in the majority of jurisdictions such proceedings were rare (England and Wales, Australia, Canada, Japan, the US, India, South Africa) and consequently so was the concern with representativeness.

However, in several jurisdictions, there has been some recognition that the public’s perception of a judicial ‘old boys club’ may undercut the perceived legitimacy of the system. This has led to increased representation of, for example, women (India) on judicial discipline bodies and some representation of lawyers and even laypersons (for example Australia, Canada, Croatia, England and Wales, Italy).

- (g) *Proportionality* – A further norm engaged in the design and application of judicial discipline regimes is the value, or principle, of proportionality. Proportionality has attracted much comment in public law scholarship over the past decade.¹⁴ Widely recognized as a norm inherent to legality or constitutionality, it has nonetheless functioned from time to time, in various jurisdictions, as a flashpoint for conflicts among legislatures seeking to impose standardized mechanisms of state accountability or social control and judges adhering to a constitutionalized conception of appropriate or just penalties. Such conflicts generate questions about whether or how proportionality (and the inherent structuring of legal discretion that it implies) fits with the further values of consistency and predictability also claimed to be immanent to legality or the rule of law. In the context of judicial discipline, the tensions instantiated by the norm of proportionality – that is, between standardization and responsive discretion – are further conditioned by the nesting of discipline regimes within the broader, open-textured objective of maintaining ‘public con-

¹⁴ See for example Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017).

fidence.’ The regimes explored grapple with the value of proportionality in different ways. Some codify a range of discrete orders or penalties, to be calibrated to the seriousness of the misconduct and/or contrition of the impugned judge (for example Croatia, Italy, the Netherlands). Other regimes leave such subtleties to informal internal administrative processes or policies, while reserving formal legal or constitutional authorization for the ultimate penalty of judicial removal (Canada, Nigeria, New South Wales). We return to these issues below in our discussion of remedial options.

- (h) The final general norm that emerges from the case studies is *efficiency* and it too seems to be gaining significant prominence. The increased emphasis on norms such as procedural fairness, transparency, representativeness and proportionality is regarded by many of the contributors as an improvement to the various systems. However, there is a potential downside as enhanced attention to these values has resulted in regimes that are more complex, cumbersome and expensive (Australia, Canada, England and Wales). As a consequence, there are signs that efficiency is increasingly understood as a norm that must also be factored into the mix (Australia, Canada, England and Wales, Italy). This can be particularly challenging for federal systems where the jurisdictions can be quite small.
- (i) *Jurisdictionally Specific Norms*: In addition to the eight more generic norms discussed above, particular jurisdictions may seek to embed some more culturally/politically specific values in their disciplinary regimes. In India it is *dharma*; in China it is ‘clean governance’ and ‘orderly linking’ between the values of the Communist Party and the goals of judicial regulation; in South Africa it is the separation of powers and racial equality; in the Netherlands it is new managerialism; in Nigeria it is anti-corruption and geopolitical inclusion; in Croatia it is the nurturing of a post-communist politico-legal culture; in England and Wales it is the depoliticization and pluralization of accountability; and in the US it is constitutional democracy filtered through the prism of legal process values.

Stepping back, this plurality of values – generic and specific – generates the following observations. First, the creation of a disciplinary regime is a complex task of institutional design in the public interest. It requires a nuanced and context-sensitive calibration of a number of values that might well be in tension with, and even contradictory of, each other. Second, this complexity suggests that the establishment and implementation of a discipline process for judges is not just a technocratic or managerialist project. Rather it is very much about allocating and distributing power within the polity – along lines

that, again, require choices among competing values as well as interests. The judiciary is a fundamental institution in most societies, functionally, politically and jurisprudentially. Thus, why, how and by whom judges are potentially disciplined is a profound responsibility; it is an act of statecraft. Third, this plurality of norms generates significant diversity in the various disciplinary regimes. In each case the political history and cultural sensitivities of a jurisdiction mean that it has calibrated the various norms (and transformed them into institutions and processes) that tend to be context specific. Consequently, even jurisdictions that might seem to have a similar lineage – for example Commonwealth countries such as Australia, England and Wales, Canada, South Africa and Nigeria – have very different disciplinary systems. The same is true for civilian systems such as Italy, Croatia and the Netherlands. Such diversity makes us cautious about making generalizations about such disciplinary regimes. Finally, all the contributors agree that the ultimate objective is to promote public confidence in the disciplinary system, and that everywhere it is still very much a work in progress.

II.3 International Norms and Local Practices

A third general theme that emerges from the case studies is the relationship between international norms regarding judiciaries and the particular practices of various jurisdictions. There are numerous international and regional documents and declarations that address judge's rights and responsibilities. Some of these have legal pedigree¹⁵ but many emerge from international meetings of judges' associations, or other interested parties.¹⁶ All of these documents

¹⁵ See for example UN Basic Principles on the Independence of the Judiciary, endorsed in GA Res 40/32 and GA Res 40/146, UNGAOR, 40th Session, UN Doc A/CONF.121/22/Rev.1 (1985) 59 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> accessed 30 May 2020; Council of Europe, European Charter on the Statute of Judges (1998) DAJ/DOC (98) 23; The Bangalore Principles of Judicial Conduct (2006) ECOSOC 2006/23, UN Doc E/RES/2006/23 <https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf> accessed 30 May 2020.

¹⁶ See for example International Association of Judicial Independence and World Peace, New Delhi Code of Minimum Standards of Judicial Independence (adopted by the 19th IBA Biennial Conference 22 October 1982) <<https://www.jiwp.org/new-delhi-declaration>> accessed 15 May 2020; Universal Declaration on the Independence of Justice (Montreal Declaration), adopted by the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) 10 June 1983 <<https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf>> accessed 15 May 2020; Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, Beijing, 19 August 1995, as amended at Manila, 28 August 1997 (adopted by the 6th Conference of the Chief Justices of Asia and the Pacific)

emphasize the foundational significance of judicial independence and itemize the conditions necessary to the achievement of that goal. Many of them identify several ethical principles that should guide judges in the performance of their tasks. A number explicitly address judicial discipline and advance a variety of propositions including:

- that the investigatory body be independent of the executive, and the preferred form be a judicial commission or council;
- that the investigatory body be predominantly composed of judges;
- that the judges subject to disciplinary proceedings be entitled to procedural fairness (including representation);
- that the standards of judicial conduct and disciplinary procedures should be clearly articulated;
- that initial proceedings should presumptively take place in camera;
- that proceedings should proceed expeditiously;
- that proceedings be subject to independent review by, or appeal to, a court;
- that sanctions must be proportional;
- that the outcome of any complaints should be communicated to the complainant;
- that judgements should be published;
- that removal is only warranted if a judge is either unfit to discharge judicial duties or ‘mentally incapacitated’; and
- that jurisdictions establish ethics advisory committees to provide guidance to judges.

In addition to these international and regional documents, there are also judgements from international and regional courts that bear on judicial discipline.

<https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html> accessed 15 May 2020; International Association of Judges, The Universal Charter of the Judge, adopted by the IAJ Central Council 17 November 1999 and updated 14 November 2017 <https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf> accessed 12 May 2020; Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), CCJE (2010)3 Final, Strasbourg, 17 November 2010 <<https://rm.coe.int/16807482c6>> accessed 10 May 2020; International Association of Judicial Independence and World Peace, Mount Scopus International Standards of Judicial Independence, approved 19 March 2008, consolidated 2015 <<https://www.jiwp.org/mt-scopus-standards>> accessed 14 May 2020; International Association of Judicial Independence and World Peace, Bologna and Milan Global Code of Judicial Ethics, approved at the International Conference of Judicial Independence, June 2015 <<http://www.jiwp.org/global-code-of-judicial-ethics>> accessed 10 May 2020.

For example, in *Olujic*¹⁷ and *Ramos Nunes de Carvalho e Sá*,¹⁸ the European Court of Human Rights found that both Croatia and Portugal had breached Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms by denying a judge access to an independent and impartial tribunal, and a public hearing. Similarly, in the Polish context, the Court of Justice of the European Union, and several other European institutions, have been extremely active.

Also of some significance is the UN Special Rapporteur on the Independence of Judges and Lawyers. This position was created by the Commission on Human Rights in 1994, in response to ‘both the increasing frequency of attacks on judges, lawyers and court officials and the link which existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights’.¹⁹

Several of the contributors explicitly highlight the significance of this international and regional context in their particular case studies (China, Croatia, Italy, the Netherlands, Poland). In other jurisdictions the influence of such norms is less apparent, although this is not to suggest that it is not there (Australia, Canada, England and Wales, Nigeria, South Africa). Arguably, it is in contexts where the judiciary has come under particular pressure from the executive and/or populist political movements that the appeal of an international community of jurists (judicial solidarity), together with values asserted to have transnational moral and potentially legal authority, have been most marked (China, Croatia, Poland).

II.4 (In)Formality

A fourth key theme is the distinction between formality and informality in the various disciplinary regimes. Traditionally, analyses of judicial accountability have tended to focus on formal disciplinary systems for judges.²⁰ However, several of the contributors indicate that informal administrative mechanisms also play a very important role in judicial discipline. In most jurisdictions, judges tend to be part of a small, highly socialized, relatively homogeneous

¹⁷ *Olujic v Croatia* No 22330/05 ECHR, (2009) 52 EHRR 26.

¹⁸ *Ramos Nunes de Carvalho e Sá v Portugal* [GC] No 55391/13, 57728/13 and 74041/13 (ECHR, 6 November 2018).

¹⁹ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, ECOSOC, 51st Session, UN Doc E/CN.4/1995/39 (6 Feb 1995). See also the many reports generated since 1995 on the homepage of the UN Special Rapporteur <<https://independence-judges-lawyers.org/reports/>> accessed 30 May 2020.

²⁰ See for example Friedland, Shaman et al, Shetreet and Turenne, and Canivet and Joly-Hurard (n 1).

elite subset of society. The closeness and familiarity this breeds arguably generates expectations and norms that steer judges' behaviour (Canada, England and Wales, Japan). If these informal norms do not work effectively, they can be backed up by 'a quiet word in the ear' or 'pastoral care' by a senior judge (Australia, England and Wales, the US), or even a little bit of 'naming and shaming' (South Africa).

This dynamic between formality and informality also manifests in a distinction between *ex ante* and *ex post* discipline processes. In bureaucratic judiciaries, where judging is a lifelong career path up the judicial hierarchy, the evaluation/promotion/demotion/reappointment/transfer system tends to work as a *de facto* discipline process. Judges who are perceived to be problematic simply do not get promotions (Italy, Japan) or they may get reassigned to a different court (Italy, Poland) or a court that is undesirable either in the sense of geographical location or mandate (India, Japan). *Ex post* disciplinary processes are designed to respond to allegedly inappropriate conduct and tend to be much more formalized and standardized (Australia, Canada, England and Wales).

II.5 The Legal Pedigree of Discipline Regimes

The foregoing discussions of complexity, diversity and (in)formality dovetail with a fifth general theme: the legal pedigree or status of a discipline regime. As is obvious, the more informal the process the less it will have legalized characteristics, although that does not necessarily mean it is less effective in achieving its goals (Japan).

However, where discipline processes are legally formalized – and usually of the *ex post* variety – there are significant differences in their legal pedigree. Some jurisdictions explicitly address judicial discipline in their constitutions (China, Croatia, Japan, Nigeria, South Africa, the US). In other jurisdictions, aspects of the judicial discipline regime are said to be connected to their unwritten constitutional principles, for example the separation of powers doctrine (Australia, Canada, England and Wales). The benefit of constitutionalizing discipline procedures is that it reflects the importance of the independence of the judiciary in the polity. However, there are several downsides: it may freeze the system; it may be too blunt an instrument to respond to the potentially wide range of misconduct; it may be cumbersome; and it may become highly political (India, Japan, the US).

Legislation is the second mechanism of legal authority for elaborating discipline processes. In some jurisdictions, statute law is used to elaborate judicial discipline norms or processes, broader norms or values located in the constitutional regime (Canada, China, Croatia, India, Japan, Nigeria, Poland, South Africa, the US), whereas in other jurisdictions, statute law is the source of disciplinary authority (Australia, China, England and Wales,

Italy, the Netherlands). The benefit of statutory codification is that it reinforces the transparency of the system, not only for the public, but also for judges. However, one downside is that legislative regimes, while not stated at as high a level of generality as constitutional regimes, nonetheless tend to be quite skeletal (Canada, China).

Therefore, in most jurisdictions, the mechanics of the discipline regime – the institutions, the actors, the procedures, and so on – are established via regulations, by-laws, policies, protocols, etc. (Australia, Canada, China, England and Wales, Nigeria). Despite the executive/administrative origins and relatively low legal pedigree of such instruments, this is often where the realities of the system unfold, and where we come to recognize the particularities – and idiosyncrasies – of each regime. The benefit of such instruments is that they tend to reflect the normative predispositions and administrative practices of each regime. A potential disadvantage is that the processes for creating such instruments are rarely inclusive of a wide range of stakeholders, but rather are dominated by insiders (Canada, China, India).

III SOME PARTICULAR CHALLENGES

The contributors to this book have identified a wide range of issues that should be carefully considered in the establishment and implementation of a disciplinary regime for judges. It is not possible to catalogue all of these within the confines of this Introduction. Instead, we highlight some of the most challenging issues generated by the various case studies. Again, this overview reinforces our opening observation that the best way to approach the act of statecraft involved in designing a judicial discipline regime is to consider not only the ‘who guards the guardians’ question, but also the ‘how to guard the guardians’ question. There are six challenges that appear to be especially difficult.

III.1 Articulating the Standards

In order for a discipline regime to meet basic expectations of legitimacy, both the public and the judges need to be aware of the standards of judicial conduct. This observation might seem trite, but the case studies reveal that this is more problematic than one might think. There are at least three aspects to this challenge.

First, there is the generality/specificity question. A number of jurisdictions have chosen very general and open-ended standards (Australia, Canada, China, England and Wales, Japan, the Netherlands, the US). The virtue of such an approach is that it provides for flexibility and responsiveness to changing norms and expectations. There are, however, a number of drawbacks: judges

themselves are uncertain concerning the expectations to which they must adhere; aggrieved parties do not have a basis upon which to decide whether their concerns fall within the jurisdiction of disciplinary bodies; those responsible for making decisions have very little guidance and therefore exercise wide discretion; and the general public might fear that the system is opaque, arbitrary and open to (subconscious) biases.

At the other end of the spectrum, some jurisdictions have chosen to adopt a set of quite detailed standards (Croatia, Italy, South Africa). But unsurprisingly, that generates a number of competing concerns: that the system is too didactic and prescriptive; that such lists tend to be exclusive and therefore potentially underinclusive; and the specificity of the standards means that they are insufficiently nimble to respond to changing circumstances and expectations.

The second aspect of the standards question relates to codes of conduct. Again, there are a number of sub-issues. Some jurisdictions have adopted codes of conduct and rely on them to serve as the basis for sanctionable conduct (Croatia, Italy). Other jurisdictions employ codes of conduct for some of their judges, but not others (the US). Still others are resistant to the very idea of a code of conduct for judges, suggesting that all that is required are ‘guidelines’ or ‘suggestions for best practices’ (for example Australia, Canada, the Netherlands, South Africa). Still others characterize their codes as guidelines but allow them to be used as part of a disciplinary process, where appropriate (for example England and Wales, India). One jurisdiction, Japan, rejects completely the utility of a code of conduct. These different approaches arguably reflect the background tensions between specificity and generality noted above in relation to legal standards, while adding to this the further complexity of whether or how institutions other than the legislature (whether judicially led or more squarely executive or administrative) should have the power to devise the relevant norms.

Third, there is the issue of the scope of the conduct that falls within the realm of potential discipline. Does it only encompass behaviour that is related to the performance of judicial functions, or might it also relate to a judge’s private life (for example Australia, Canada, China, Croatia, England and Wales, Japan, the Netherlands, Nigeria)? Often such controversies centre on an ‘integrity’ requirement. The challenge is further complicated if the impugned conduct relates to behaviour prior to a judicial appointment (Australia, Canada, India). Finally, there is the question of whether judges might be subject to other regulatory mechanisms, for example, codes of conduct for all public officials and civil servants, and if so, which body has jurisdiction to enforce such codes (China, the Netherlands, Nigeria).

III.2 Filtering Processes

A fundamental challenge for all discipline regimes is how to facilitate, and manage, incoming complaints about potential judicial misconduct. On the one hand, in order to promote public confidence in the legitimacy of the process, it is desirable to have a system that is accessible and open. However, on the other hand, given the nature of the judicial role which in large part is about determining winners and losers, there are likely to be a large number of disgruntled parties who might be tempted to blame the outcome on a malfeasant judge. The case studies indicate that most jurisdictions adopt a ‘filtering’, ‘sifting’ or ‘funnelling’ process to resolve this challenge. On one level this seems sensible, even necessary. It is a practice that is endorsed by international associations of judges.²¹ However, there are a number of potential challenges here. The first is who should be responsible for this gatekeeping function: chief justices (for example Australia, India, the US); a committee of judges (Canada, Nigeria); the Prosecutor General (Italy); or an independent bureaucratic agency (England and Wales)? Second, what are the criteria for filtering in or filtering out? For example, it is sometimes suggested that the key criterion involves distinguishing complaints about the merits of a judgement (more properly the subject of an appeal and therefore funnelled out) from complaints about unethical conduct (funnelled in). The obvious question is: are there not situations where a judicial judgement might itself qualify as misconduct (Australia, Canada, Italy)? Third, there is the issue of whose interests – complainants’ or judges’ – are being served by this filtering process? Several of the case studies (for example Australia, Canada, Italy, Japan and the US) indicate that the vast majority of complaints (90–95 per cent) tend to get filtered out. However, in the other jurisdictions the rate of preliminary screening is significantly lower (England and Wales: 70 per cent). It also seems that very few jurisdictions audit their filtering process (but see England and Wales). This concern might be intensified in jurisdictions which are witnessing increasing numbers of self-represented litigants in the courts, who, when unsuccessful, may file complaints that then are characterized as trivial, frivolous or vexatious – or simply outside the regulator’s jurisdiction (Australia, Canada). Furthermore, there is the question of whether decisions to reject a complaint at this early stage need to be supported by (detailed) reasons. Finally, and closely connected, it does not seem to be a common practice that those parties whose complaints are rejected at the sifting stage can request a reconsideration of the decision.

²¹ Section II.3 above.

III.3 Transparency

There is significant diversity with regard to transparency across the various systems. Once again this is driven by competing concerns. On the one hand, in order to protect the reputation of a judge (and perhaps the judiciary more generally) there is a desire to keep the system relatively closed until there is at least a *prima facie* case against the judge (Canada, England and Wales, India, Italy, Nigeria, the US), or even later (Japan). On the other hand, if the public are to have confidence in the system, then it is necessary to have some degree of openness. The challenges are when and how? While some jurisdictions favour an almost completely closed system, even to the extent of not revealing that a judge has been disciplined (for example India), most jurisdictions appear to be gradually moving towards enhanced transparency. Measures might include: accessible websites with information on the process; a ‘consumer oriented’ complaint filing process; publishing educational anonymized case studies; keeping complainants informed about the progress of their complaint; notifying the public that an inquiry process has been triggered; publicizing results of initial inquiries; making hearings open to the public; publicizing final decisions; and issuing annual reports with relevant statistics, types of complaints and budgets. Despite this overall trend towards greater transparency, all of the authors indicate that there is room for significant improvement in each of their respective jurisdictions.

III.4 Lay Participation

Dovetailing with the transparency question is the lay participation issue.²² The case studies suggest that many judges are deeply uncomfortable with lay participation in the complaints and discipline process. They are concerned that this might be: (a) a threat to judicial independence because lay participation may be a filter for partisan political interference with the judiciary (Croatia); or (b) that lay participants do not have the experience or expertise to be able to legitimately pass judgement on a judge (Japan, the US). The counter-arguments are that: lay participation actually enhances judicial independence because it reinforces the integrity of the process, thereby boosting public confidence (Australia); that judges (like everyone else) tend to see the world from their own perspective and that this can generate solipsism, perceptions of favouritism (England and Wales) or a ‘guild mentality’ (the US); and that while legal expertise is important, judgement on the appropriateness of judicial behaviour

²² A further issue is whether lawyers (either professional or academic) should play a role in the complaints and discipline process.

can be enhanced by a plurality of perspectives drawing upon a variety of experiences and a diversity of expertise. The case studies reveal that there is very slow progress, if any, being made with enhanced lay representation (Canada, Australia, Italy, Japan, Nigeria, the US). England and Wales, and Victoria (Australia), seem to have gone the furthest, but even in these jurisdictions there are reservations about how much impact lay representatives might really have.

III.5 Effectiveness

A central question that unites all the case studies is ‘How effective is the system?’ The problem is that ‘effective’ is a highly indeterminate term and perhaps even an essentially contested concept.²³ Effectiveness is, of course, dependent upon the goals that are set for the system and, as we have seen in Section II.2, judicial discipline engages a complex alchemy of potentially competing values. With this caveat in mind, there are several variables to effectiveness that merit analysis, including efficiency (achievement of results with a minimum of time and expense) and congruity (system outputs match system objectives).

The first requisite of efficiency is timeliness. In the context of judicial discipline we immediately encounter a potential tension between several goods: the public’s desire to have complaints dealt with relatively expeditiously to ensure that malfasant judges do not continue their inappropriate behaviour; a judge’s desire to have the issue resolved so that they can focus on their assigned responsibilities; a judge’s entitlement to procedural fairness; and the decision-making body’s desire to fulfil its mandate (this last circling back to ‘congruity’). While some countries have strict timelines (Italy), several of the case studies indicate the proceedings can go on for very long periods of time, even decades, without resolution (for example Canada, England and Wales, South Africa). There can be several reasons for this: disciplinary bodies seem to be unable to get their act together and act with alacrity (England and Wales, South Africa); impugned judges are experts at playing the delay game (Australia, Canada, India, South Africa); and there are unresolved constitutional/legal disputes over the authority and responsibilities of the disciplinary body (Australia, Canada, India, Nigeria).

Compounding the problem of timeliness is the issue of expense. Inevitably, because judicial discipline requires the establishment of a bureaucracy, it is a draw on the public purse. Again, there are tensions – this time between fiscal constraint, the expectations of the public that they be able to access a reme-

²³ W B Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings Aristotelian Society* 167.

dial process, and the aspirations of impugned judges to be treated fairly. The foregoing discussions of filtering and timelines are, obviously, underpinned by concerns about costs. But other issues have also come to the fore in several jurisdictions, including whether a judge who is facing a discipline process: (a) can continue to sit as a judge, and if so, until what stage of the disciplinary process (for example preliminary investigations, formal inquiry, ultimate decisions); (b) is entitled to receive a salary even if they are not sitting as a judge; and (c) will be fully financially supported for their legal (and related) fees throughout the proceedings (Australia, Canada, South Africa)?

Finally, each of the above issues has a bearing also on congruity, and so on alignment of express system norms and values (both substantive and procedural) with the practical functioning and outputs of the system. Where processes and outcomes differ significantly from stated norms, public confidence is impaired (Canada, Nigeria, South Africa, the US).

III.6 Remedies

Much of the foregoing analysis has focused on the procedural dimensions of the various disciplinary regimes. Equally important, however, are the potential penalties/remedies if the judge has been found to have engaged in misconduct. Once again there is wide diversity across jurisdictions. Here we will highlight just two issues: the potential remedial options, and the situation of retired/resigned judges.

Some jurisdictions seem *prima facie* to have only two options: no discipline at all, or removal from office (Canada, New South Wales). The rationale for this seems to be the high premium that is put on judicial independence: because judicial independence is so fundamental, only egregious behaviour sufficient to merit removal from office or incapacity should be disciplinable. Other jurisdictions prefer a spectrum of remedies ranging from private counselling, pastoral care, mandatory education or apologies, to inclusion on a watch list, warnings, reprimands or admonishments (private and/or public), to suspensions (with or without pay), transfers, prohibitions on promotion, fines, demotion – even imprisonment for contempt of court – to compulsory retirement or the ultimate penalty, expulsion/removal (see for example Australia, Croatia, India, Italy, Nigeria, the Netherlands). As an interlocutory matter in the context of an investigation or inquiry, some jurisdictions may further require that an impugned judge submit to a medical examination (Australia, India). By instituting a spectrum of interlocutory and/or remedial powers, judicial discipline regimes are able to convey respect for the value of independence while also advancing other values such as rehabilitation, professional competency, proportionality and (thereby, potentially) public confidence. As noted, in some jurisdictions, a continuum of options is expressly codified in law (Croatia,

Italy, the Netherlands), while in others the disciplinary body itself generates what it considers to be the most appropriate remedy as an expression of its discretionary powers (Canada, India).

Another key issue that arises under the rubric of remedies is whether judges who have resigned or retired are subject to judicial disciplinary processes and penalties. One line of thought proposes that, once gone, the judge can no longer be subject to discipline, even though the alleged misconduct occurred while the judge was on the bench (Australia, Canada, England and Wales, Italy, the US). The logic seems to be twofold: a judge who has resigned or retired is no longer subject to the jurisdiction of the disciplinary body and the mischief no longer exists as the public is no longer vulnerable to the alleged misconduct.²⁴ The contrary line of thought argues that judges who have retired or resigned should continue to be subject to disciplinary processes arising out of misconduct or alleged misconduct while on the bench (China, England and Wales, Nigeria). The arguments here are that: to allow judges to go quietly into the night leaves complainants without a resolution, thereby undermining public confidence in the fairness of the system; it incentivizes impugned judges to strategically prolong proceedings until their retirement date; and it allows malfeasant judges to reap ongoing benefits from the public purse (for example a pension) with no consequences (Canada, England and Wales, India, Nigeria, the US).

IV CONCLUSION

We have identified some of the most common themes and values surveyed in the chapters that follow. Our intention in assembling this book has not been to extract from the rich canvas of the combined chapters a singular, determinative set of norms or best practices for the design or implementation of judicial discipline regimes. Still, the values we have highlighted – which include independence, accountability, impartiality, fairness (both participatory rights and reasoned justification), transparency, representativeness, proportionality and efficiency – are all reflected and refracted in the various chapters, in ways that urge us to remain mindful of the distinct, sometimes radically divergent historical, political and cultural contexts through which the aims and institutions of judicial discipline have been (and continue to be) fashioned.

Arguably, the diverse and sometimes divergent ways these values have been engaged and ranked in the regimes discussed are best understood not only in light of nation-specific political and constitutional histories and trajectories,

²⁴ In the US if a judge is promoted to the Supreme Court, all discipline proceedings are terminated.

but also, and more generally, contemporary geopolitical tensions. These include tensions between, on the one side, growing populist movements supporting authoritarian executive rule and, on the other, counter-mobilizations of liberal cosmopolitanism and international judicial solidarity; and communist or post-communist orders including the Party-led ‘socialist democracy’ that is the face of China’s vast political and economic power, and on the other, the judicially empowered/empowering forms of constitutional democracy that continue to dominate (at least discursively) among Western powers/the Global North – themselves not untouched by the forces of populist dissent and the rise of executive power.

We have variously used the terms ‘transnational’ and ‘trans-systemic’ to describe the patterns and interrelationships of ideas flowing from the various chapters in this book. Our intention in convening the book was, above all, to spark a conversation – not (or not simply) a charting of similarities and differences among judicial discipline regimes, but rather a cross-cultural encounter with ‘the other possible’²⁵ i.e., with other normative as well as positive orders, so as to better equip ourselves and others to question and evaluate received normative and institutional structures. In this we adopt Giorgio Resta’s thesis on the primary function of comparative (and in the more thoroughgoing legal pluralist tradition, trans-systemic) legal inquiry, as that of ‘questioning and challenging received wisdom, and therefore fostering a dialogical, non-hierarchical and polycentric model of legal ordering’.²⁶ With Resta, we consider such inquiry to be ‘a necessary vehicle for a deeper understanding of the law and a more just ordering of human relations’.²⁷

While the focus of the chapters collected here remains state law, the contributions are all, to a greater or lesser extent, engaged with a wider array of sources of normativity. By this we mean that the authors engage not only with the formal legal rules and policies constituting judicial disciplinary regimes, but also, and often in probing and illuminating ways, with the informal, sometimes tacit cultural and political norms that give those regimes their particular character.²⁸

²⁵ Francois Jullien, *Essere o vivere. Il pensiero occidentale e il pensiero cinese in venti contrasti* (Feltrinelli 2017) 7–10; id., *L’Écart et l’entre* (Éditions Galilée 2012), as cited in Giorgio Resta, ‘Transsystemic legal education and the comparative method(s)’ (10 August 2017) 1–21, 17–18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050495> accessed 12 May 2020. See also Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2019).

²⁶ Giorgio Resta (n 25) 17–18.

²⁷ Ibid, 17.

²⁸ See for example, Martha-Marie Kleinhans and Roderick A Macdonald, ‘What Is a Critical Legal Pluralism?’ (1997) 12 CJLS 25–46.

That said, our book is for the most part engaged with political and legal dynamics of institutional design, and as such does not give close examination to the experiences of individuals or communities directly affected by judicial misconduct and attendant discipline processes. Where there is such a narrowing of the focus, the object of attention tends to be the affected or impugned judge, not the complainants or wider communities of interest bringing complaints. They, by comparison, are thrown into the shadow as the disciplinary process is executed by an array of state-backed officials.

We hope that our own and others' future contributions to this field may further explore how the public values and traditions instantiated in judicial discipline regimes interact with the diverse individuals and communities – including but not limited to the communities in which judges themselves are situated – positioned at different sites or vectors of socio-political vulnerability as well as influence. Such inquiries may attend further, for instance, to the effect of identity-based and socio-economic privilege and oppression – for example gender, race, indigeneity, sexuality, poverty – on what 'public confidence'²⁹ and/or access to justice in the arenas of judicial discipline means.

Ultimately, our hope is that the insights generated by this book's engagement with judicial discipline regimes across an array of political, social and legal contexts will spur further inquiry into this significant institutional expression of constitutional ordering – of statecraft. The fascination of judicial discipline systems rests in no small part in their complex institutional positioning at the nexus of judicial, executive/administrative and legislative branches, and moreover their complex positioning of judges as objects rather than authors of judgement. This arguably makes such systems potential barometers for more general social and political trends of stabilization or alternatively destabilization of the hierarchies structuring state power. We look forward to continuing conversations about how judicial discipline regimes interact with an array of social, cultural, and political forces in the ongoing work of constituting public values and wielding or channelling public power.

²⁹ Compare with Arthur Selwyn Miller, 'Public Confidence in the Judiciary: Some Notes and Reflections' (1970) 35 *Law and Contemporary Problems* 69–93.