Foreword

The role of judges and of the judiciary is central to the relationship between the state and its citizenry. This is true both in democratic and authoritarian societies. In the former, the rule of law is the dominant force that protects the ruled from the rulers. In the latter, it is a more tenuous relationship in which the judiciary is an arm of the executive. Crucial to all systems of government is the manner in which the judiciary is regulated either by outside bodies or by self-regulation. There are as many systems for the regulation of judges as there are states and, indeed, in federal systems there are many different systems that operate within the same country.

It is too infrequently recognized that to appreciate and understand one’s own system of laws one needs to examine and study others. That is the value of comparative jurisprudence. In this book, Devlin and Dodek have succeeded admirably in developing a tool that facilitates a comparison of the ways in which different states across continents and legal systems seek to regulate judges and the judiciary. That tool is a ‘pyramid’, the sides of which consist of a number of variables. As they state in their Introduction, they ‘provide for possible descriptions, analyses, assessments, critiques and even potential reforms of discrete judiciaries’. This pyramid has four sides, namely values, processes, resources and outcomes. As the editors correctly point out, the consideration of these elements provides for a more meaningful analysis than the more traditional reliance on independence and accountability.

The excellent chapters cover 19 jurisdictions that include the principal legal systems – the common law, civil law and socialist law. Sensibly, the editors did not oblige the authors to adhere strictly to the ‘pyramid’ approach. Some certainly have done so. However, the analysis of all of them has clearly been influenced by the approach embraced by Devlin and Dodek.

As far back at 1788, Alexander Hamilton in Federalist No. 78 said that the judicial branch of the proposed government would be the weakest of the three because it had ‘no influence over either the sword or the purse’. That remains true to this day. It is the principal reason that the judiciary has to rely for its efficacy upon its fulfilling the public trust placed in it.
To that end, the judiciary in every nation requires forms of regulation that do not detract from the independence of the institution or its individual members. The many forms of regulation appear from the chapters that make up this book. Some overlap and some are contradictory. The comparison is both a revelation and a guide to the many improvements that might be of benefit to all systems of law.

The thesis put forward in this book is that regulation of judges and the judiciary is a given. The debate should be about forms of regulation that enable judges to provide the outcomes that are most conducive to a society ruled by laws and not by men and women. In establishing that thesis and in furthering that debate Devlin and Dodek succeed admirably.

Justice Richard Goldstone
Former Justice of the Constitutional Court of South Africa