Legal Studies (2019), **39**, 358–360
doi:10.1017/lst.2018.38

S·L·S
The Society of Legal Scholars

BOOK REVIEW

Debating Judicial Appointments in an Age of Diversity

by G Gee and E Rackley (eds). Abingdon: Routledge, 2018, 332 pp (£92.00 hardback). ISBN: 978-1-138-22535-0.

Byron Karemba

The Public Law Project, London, UK
Email: b.karemba@publiclawproject.org.uk

The lack of diversity within the judiciary is an issue which increasingly draws comment from the press in the UK.[1] Underlying this interest is a perception of a widening in the scope of issues amenable to judicial determination, and a concomitant increase in the constitutional power of the judiciary relative to that of the political branches in the contemporary British state.[2] It is within this context that *Debating Judicial Appointments in an Age of Diversity* provides timely commentaries on the twin issues of judicial appointments and judicial diversity across legal systems of the Commonwealth, including the three jurisdictions within the UK.[3]

Spawned out of a conference to mark the 10th Anniversary of the Judicial Appointments Commission (JAC), held at the University of Birmingham in 2015, the book is a welcome stock-taking exercise into what the editors aptly describe as the relatively 'new institutional terrain of judicial appointments'.[4] It is indeed true, as the editors observe, that 'the need for faster and more visible progress on judicial diversity [is] increasingly acknowledged across the ideological spectrum'.[5] Yet, notwithstanding this political consensus, a common theme sustained throughout the essays in this collection is that 'diversity' remains a comparatively insignificant consideration in the different systems of judicial appointment covered in this book. With this in mind, readers may be drawn to the five-point challenge posed by the editors to the authority responsible for appointments in England and Wales towards the end of the first chapter.[6] This desiderata includes the general proposition that the JAC should 'provide much stronger and more forceful leadership on diversity'.[7] Implied in this particular challenge is the practical concern over the extent to which the fragmented landscape of responsibility over judicial appointments impedes on the JAC's ability to assume the instrumental role on the issue of diversity which the editors envision.

The editors are to be commended for bringing together different institutional, comparative and professional voices to be bear on such a multi-dimensional topic. Each contribution is clearly anchored in the respective author's vantage point as an academic, practitioner, judge or civil servant. The collection has 14 substantive chapters touching upon different aspects of the discourses on judicial appointments and judicial diversity. In addition to this, it includes a text of a well-referenced extra-

[1]Eg see 'The Guardian View on Judicial Diversity: Time, Gentleman, Please' (*The Guardian*, 1 May 2017) available at https://www.theguardian.com/global/commentisfree/2017/may/01/the-guardian-view-on-judicial-diversity-time-gentlemen-please.

[2]For an overview of the contemporary debate on 'judicial power' in the UK see P Craig 'Judicial power, the Judicial Power Project and the UK' (2018) 36 UQLJ 355.

[3]G Gee and E Rackley *Debating Judicial Appointments in an Age of Diversity* (Abingdon: Routledge, 2018).

[4]G Gee and E Rackley 'Introduction: diversity and the JAC's first ten years' in Gee and Rackley, above n 3, pp 4–5.

[5]Ibid.

[6]Ibid, p 17.

[7]Ibid, p 19.

curial speech delivered by Lady Hale at the preceding conference, focusing on the ad hoc commissions convened for the purpose of appointments to the UK Supreme Court.[8]

The perspectives of those who have been involved with different aspects of judicial appointments are the book's unique selling point. The substantive chapter by the former Chairman of the JAC, Christopher Stevens,[9] the reflective notes by the former Permanent Secretary to the Lord Chancellor's Department, Thomas Legg,[10] and the 'reflections' by two former JAC commissioners, Frances Kirkham,[11] and Noel Lloyd,[12] all provide a nuanced gloss on the staple academic commentary on this subject. These insider perspectives shed light on the competing institutional, professional and territorial pressures which have been speculated to weigh heavily on judicial appointments.[13] Legg's twin confessions on how the former Lord Chancellor's Department 'fell short in respect of diversity' and how he 'became concerned over time about [the] evident failure to appoint enough women' are particularly noteworthy.[14] The former Permanent Secretary's views appear to have evolved given his previously stated misgivings on whether the agenda to improve diversity within the judiciary is reconcilable with what he termed a 'maximal' conception of merit back in 2001.[15]

The principle of merit itself and the meaning ascribed to it in this context is a theme which is subject to repeated analysis throughout the book. As Samreen Beg and Lorne Sossin comment in ch 7, the mechanistic manner in which the concept of merit has traditionally been constructed tends 'to overlook the reality that a person's qualifications are shaped by who that person is and what perspectives on society and justice he or she brings to the bench'.[16] In that vein, in ch 11, John Morison recommends 're-engineering' the principle of merit so that it captures the 'managerial' aspects of the contemporary judicial role.[17]

The constitutional dimension to the process of judicial appointments is an element which comes to the fore in Alan Paterson's contribution.[18] Paterson approaches the issue from the paradigm of 'power' and adopts Steven Luke's three-pronged conceptual framework to show how the exercise of power in this context can variably do three things.[19] First, the exercise of power can limit the 'universe' of acceptable candidates for judicial office; secondly, the exercise of power by certain institutional actors can have the 'essentialising' effect of prescribing the 'attributes' considered indispensable for judicial office; and finally, the exercise of power can set 'the paradigm within which judicial appointments are made such that no one considers that any other paradigm is possible'.[20] With the increasing use of independent selecting commissions such as the JAC throughout the Commonwealth, in ch 4, van Zyl Smit reveals that the noteworthy set of institutional actors who have come to exercise immense power over different aspects of judicial appointments in these countries are the judges themselves.[21] In England and Wales for instance, the creation of the JAC may have inadvertently created scope for the judiciary, in particular the senior judiciary, to exercise 'power' over appointments with perhaps detrimental effects on the universally affirmed goal of attaining a more diverse judiciary.[22]

[8]Lady Hale 'Appointments to the Supreme Court' in Gee and Rackley, above n 3, ch 15.

[9]C Stevens 'The JAC first ten years' in Gee and Rackley, above n 3, ch 2.

[10]T Legg 'Reflection' in Gee and Rackley, above n 3, pp 25–31.

[11]F Kirkham 'Reflection' in Gee and Rackley, above n 3, pp 142–145.

[12]N Lloyd 'Reflection' in Gee and Rackley, above n 3, pp 146–151.

[13]Eg in her reflective note, Kirkham comments on the JAC's 'early hard battles with the senior judiciary, ministers and the MoJ', above n 11, p 144.

[14]Legg, above n 10, p 27.

[15]T Legg 'Judges for the new century' (2001) PL 62 at 70.

[16]Beg and Sossin in Gee and Rackley, above n 3, p 121.

[17]J Morison 'Beyond merit: the new challenge for judicial appointments' in Gee and Rackley, above n 3, pp 236–237.

[18]A Paterson 'Power and judicial appointment: squaring the impossible circle' in Gee and Rackley, above n 3, pp 32–59.

[19]S Lukes *Power: A Radical View* (London: Palgrave, 2nd edn, 2005).

[20]Paterson, above n 18, p 33.

[21]J van Zyl Smit '"Opening up" Commonwealth judicial appointments to diversity? The growing role of commissions in judicial selection' in Gee and Rackley, above n 3, pp 75–76.

[22]Paterson, above n 18, pp 47–48.

https://doi.org/10.1017/lst.2018.38 Published online by Cambridge University Press

Readers will do well to read Paterson's chapter as a prelude to engaging with the substantive chapter by Graham Gee himself on 'judicial influence'.[23] Gee's scheme is not far removed from the preceding conceptualisation of the idea of power by Paterson. According to Gee, judicial influence over appointments can be thought of as either 'conduct-shaping', and or 'context-shaping', conditioning what he identifies as the 'inputs', 'throughputs' and 'outputs' of appointment processes.[24] Gee's contribution is a must-read for those engaged in judicial studies generally beyond the subjects of appointments and diversity. The chapter provides compelling evidence for the claim that the judiciary emerges from the reforms first implemented by the Constitutional Reform Act 2005 as an institutionally autonomous and powerful arm of the state, capable of exercising 'influence' over other spheres of public policy, beyond what may strictly be considered as matters relating to 'judicial policy' – ie appointments and diversity.[25]

Lastly, given that most of the essays in this book start from the proposition that there is now broad-based consensus behind the need for a diverse judiciary, read as a whole, this collection does, however, leave the reader unsure what the benchmarks are by which to measure progress. If the argument for a diverse judiciary has indeed been won, as the contribution by Rackley and Webb asserts,[26] then the parameters by which progress is measured are clearly the new frontier in this debate.

[23]G Gee 'Judging the JAC: how much judicial influence over appointments is too much?' in Gee and Rackley, above n 3.
[24]Ibid, pp 164–170.
[25]G Gee et al *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015) pp 92–95.
[26]E Rackley and C Webb 'Three models of diversity' in Gee and Rackley, above n 3, p 282.

https://doi.org/10.1017/lst.2018.38 Published online by Cambridge University Press