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BOOK REVIEWS

Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, QC (eds.), *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press, 2010, 300pp., ISBN 978-0-19-958056-9, £60.00.
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The topic of the selection of international judges is a perennial hot potato. It is therefore surprising that it has not received more attention in the fast-growing literature on international courts. Although there have been a handful of academic studies on the election process at the International Court of Justice, the topic has generally been sorely neglected. As the authors of the book *Selecting International Judges* confirm, little information is available in the public domain about judicial selection. This book, co-edited by Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, begins to fill this gap. According to the authors, the book is 'one of the first attempts to gather detailed information on the nomination and election processes for international judges' (p. 33).

One of the obvious reasons for the existence of this gap in the literature is the discretion judges are expected to display. The principle of confidentiality of deliberations in chambers is taken seriously. This principle entails that ideas underlying the judgment and the controversies that may have been debated are kept secret.[1] This atmosphere of discretion and reticence also pervades the election processes. It is traditionally difficult to pierce the judicial veil so as to get information about judges and from judges. It is a universal phenomenon that few judges speak freely. Another reason for the silence surrounding the appointment of judges could be the (possibly excessive?) trust placed in the courts as well as the bodies appointing the judges. For this reason, the book relies on the empirical results of anonymous interviews with staff members of the Permanent Missions to the United Nations and other UN staff members. According to the authors, the objective was to interview people both within and outside the relevant processes, including candidates for judicial posts.

[1] T. ten Kate, 'Dissenting Opinion, a Background Sketch', in S. K. Martens et al., *Martens Dissenting: The Separate Opinions of a European Human Rights Judge* (2000), 12.

The research methodology of the editors is explained in an appendix to the text. The study focused on the International Court of Justice (ICJ) and the International Criminal Court (ICC). The project consisted of three phases: (i) a questionnaire on national nomination processes distributed to a wide range of international judicial and governmental actors; (ii) interviews conducted with staff members (based in New York) of the Permanent Missions to the United Nations of a range of countries; and (iii) nine country case studies in different regions of the world. This third phase consisted of interviews that were conducted in various parts of the world with actors selected by the authors to gather information about how candidates for judicial posts are selected. Whereas the study focuses on the ICC and ICJ, the book also considers the practices of other international courts. The editors stressed that the election of individual candidates was not reviewed; on the contrary, the project focused on the broader processes and issues raised by the nomination and election of international judges. This methodology can be commended, since, in light of the confidentiality concerns described above, it was probably the only way to elicit honest opinions and information from 106 interviewees.

A central concern has been the criteria applied for judicial selection. The book considers the criteria of geographical representation, representation of different legal systems, linguistic competence, gender balance, and specific expertise. The way the seats on the ICJ have been distributed has been strongly criticized. The authors make the point that geographical representation is strongly linked to the legitimacy of international courts. There can be no doubt that an institution that claims to be a 'World Court' needs to be representative in more than a geographical sense. But geographical representativeness is crucial. Whereas it is probably impossible to 'please everyone', few would describe the current geographical composition of the ICJ as truly representative. The underrepresentation of different regions in Asia seems to be a particularly serious concern. This is attributed partly to the lack of an effective Asian regional organization. The so-called P5 convention (whereby there is always one judge from each of the five permanent members of the UN Security Council on the ICJ bench) causes considerable controversy. Naturally, this convention creates the feeling on the part of non-P5 members that they are at a disadvantage as far as judicial representation is concerned. Whereas some interviewees accept the P5 as realpolitik, others agitate for democratization and an end to this particular kind of privileging.

It seems clear that, with regard to gender balance, the ICC election procedure laid down in the Rome Statute is more progressive than the rules of the ICJ. The ICJ Statute contains no requirements as to gender representation. The ICC Statute requires states, in selecting judges, to 'take into account' the need for fair representation of female and male judges.[2] The tendency to focus on gender balance is also increasingly evident in the practice of national courts. In South Africa, for example, the Judicial Service Commission (the body responsible for electing judges) has been criticized for paying lip service to greater gender representativeness. The debates about gender

[2] Rome Statute, Art. 36(8)(a)(iii).

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representations echo the arguments made in the Sotomayor confirmation debates in the United States. In this regard, the following quotation by the Democratic senator Kirsten Gillebrand of New York seems apposite:

> Sonia Sotomayor's ethnicity or gender alone does not indicate what sort of Supreme Court justice she will be. Rather, it is Judge Sotomayor's experience and record that more fully informs us. The breadth and depth of Judge Sotomayor's experience makes her uniquely qualified for the Supreme Court.[3]

The relationship between characteristics such as race or gender and quality is complex. It can also be asked: do the current criteria go far enough? The authors could have probed even further and could have asked whether an attempt should not also be made to achieve representativeness in areas such as sexual orientation or religion.

Allegations have consistently been made that some of the appointments made at the international courts (particularly the ICJ) have been the result of excessive lobbying and political pressure from various UN member states.[4] Abi Saab saw the ICJ election process as inherently political. According to Abi Saab, what is important is not to eliminate politics from elections, but to improve and widen the range of nominations so that political choice can be exerted from among a sufficient number of highly qualified candidates.[5] Whereas it is interesting to make comparisons with the election processes followed by the US Supreme Court, it can be asked whether this is appropriate. One interesting conclusion is that, in contrast to the US Supreme Court (which is famous for its highly 'politicized' election procedure), the process of electing international judges is almost completely lacking in public scrutiny and accountability. The authors make the strong statement that this 'potentially toxic' combination threatens the long-term stability, effectiveness, and authority of international courts.

And then there is the vexed question of striking the correct balance between judges from practice and judges with academic or diplomatic backgrounds.[6] On the one hand, the authors recognize that academic independence could be seen as a potential barrier to nomination. Academics might not be seen as close enough to government to win a nomination, or might be 'perceived to be unpredictable' (p. 53). On the other hand, the authors acknowledge (relying on the results of the interviews) that a clear advantage of selecting academics as judges is that academics can make an important contribution to a balanced bench by assisting judges with backgrounds as practitioners or diplomats to understand the underlying theory of the arguments being made.[7] A recurring concern in the interviews was that national judges lack substantive knowledge of international law. The question of reparations is raised in Chapter 2 of the book. It is well known that the ICC takes the rights of

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3 See www.pbs.org/newshour/bb/law/july-dec09/sotomayor_08-05.html.

4 See O. Eldar, 'Vote Trading in International Institutions', (2008) 19 EJIL 3, at 23.

5 See his chapter 'Ensuring the Best Bench: Ways of Selecting Judges', in C. Peck and R. S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 184.

6 For an interesting historical account, see O. Spierman, *International Legal Argument in the Permanent Court of International Justice* (2005), especially Chapters 5–7.

7 Ibid.

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victims seriously and aims to award reparations to victims. This raises the question of whether judges with experience in criminal courts will necessarily have the required experience and expertise in calculating damages or financial compensation.

A number of important questions remain unaddressed in the book. The term 'legitimacy' is used at various points throughout the book (a geographically representative bench is described as more legitimate, for example – p. 25), yet the term 'legitimacy' is not critically analysed or defined. The same applies to the term 'political'. If the politicization is repeatedly mentioned as a problem in selecting international judges, a sophisticated analysis of what 'politics' means in this context would have been meaningful. Although it is one of the virtues of the book that it takes a critical look at the selection of judges, it can be argued that it is not critical *enough*. Having said that, the book makes an important contribution to the literature and does much to cast some light on this important topic.

The concerns that are highlighted in the conclusion are the politicization of the courts, the lack of transparency, and the difficult balance between geographical and other selection criteria. Lack of transparency is a particularly serious concern; a bench is not a secret society.

Ultimately, the value of the book lies in the honesty and openness of the interviewees. The anonymous nature of the interviews contributes to the credibility of the information obtained through the interviews. Another strength of the book is that it is (in the words of Lord Woolf) 'non doctrinaire'. The book succeeds in revealing and probing the multitude of tensions informing the selection process – the tensions between civil law and common law, national law and international law, East and West, South and North, to name but a few. Chapter 5 of the book is devoted to questions of reform. A range of reforms including publicly advertising judicial vacancies and increasing the independence of judicial selection processes (e.g., by establishing national bodies tasked with making nominations) are currently being considered by a wide range of bodies. For example, the Parliamentary Assembly of the Council of Europe (the body that elects judges to the ECtHR) has imposed a requirement that states 'issue public and open calls for candidatures'.

Referring to the work of international judges, Geoffrey Nice wrote 'the work is so important and the real difficulties are so great that only the very best people should be recruited to do this work'.[8] The importance of judicial selection cannot be overestimated. It could be said that the legitimacy of the entire system of international justice is at stake. It is to be hoped that this project and its results will serve as a catalyst for further reform.

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8 G. Nice, 'Trials of Imperfection', (2001) 14 LJIL 394.

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