

## The Scottish Feminist Judgments Project: A New Frontier

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### Abstract

This article lays out the inner workings of the new Scottish Feminist Judgments Project (SFJP). Against the backdrop of our discussions at the FJPs meeting in Oñati, May 2017, it considers the ways in which the SJP has evolved, including the interdisciplinary methodological and theoretical choices that have shaped the project so far. The SFJP is part of a collective and collaborative endeavour that forms part of a critical mass strategy for change. It also offers its own unique insights into the ways that issues such as national identity, as well as gender, can influence the extent to which feminist voices can challenge the legal cultures and traditions in a particular jurisdiction, and even our understanding of feminism itself. Although FJPs are only one way of challenging legal orthodoxy, they offer an opportunity for wide scale collective activism and critique across different legal jurisdictions and cultures that could help to bring legal cultural change.

### Key words

Feminism; judging; national identity; art; theatre of the oppressed; legal culture

### Resumen

El presente artículo expone los procesos internos del nuevo Proyecto de Tribunal Feminista Escocés (SFJP son sus siglas en inglés). El SFJP es parte de un esfuerzo colectivo y colaborativo que forma parte, a su vez, de una estrategia crítica en masa

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I am enormously grateful to the organisers of the Oñati meeting of *Feminist Judgments projects*, Bridget Crawford, Linda Berger and Kathryn Stanchi, who included me in the warm FJP embrace, despite the Scottish project being at that time, at a pre-embryonic stage. I would also like to thank the Universities of Edinburgh and Warwick, who have funded our work so far, and the Clark Foundation Trust who agreed to fund a crucial two-day workshop in April 2018. Thanks to the anonymous reviewers whose comments helped me fine tune the arguments and make clearer the vagaries and idiosyncracies of the Scottish legal and political terrain. As always, Gillian Calder's friendship and generosity have been central to my work in this area, and I am grateful to her for her conversation, and comments on an earlier draft of this paper. Enormous thanks are due to the wonderful Gavin Crichton and his colleague Liz Strange of Active Inquiry for facilitating our Theatre of the Oppressed workshop. Gavin's talent and unstinting dedication to this work has been consciousness shifting for me. Finally, although I attended the Oñati meeting alone, it has been my great privilege to learn from and be inspired by my co-organisers of the Scottish FJP – Vanessa Munro and Chloé Kennedy, who also commented on drafts of this paper. Without them, my fabulous feminist partners in crime, and Jill Kennedy-McNeil the coordinator of the creative strand of the project, none of this would be possible, and I thank them and all the judges, commentators, artists and others involved in the Scottish FJP for their excitement, enthusiasm and energy for the project.

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a favor del cambio. También ofrece sus propios enfoques sobre cómo algunos temas – identidad nacional, además del género – pueden influir la capacidad de las voces feministas para poner en entredicho las culturas jurídicas y las tradiciones de una jurisdicción concreta, e incluso nuestra forma de entender el propio feminismo. Pese a que los proyectos de tribunales feministas son sólo una forma de cuestionar la ortodoxia jurídica, ofrecen una oportunidad de activismo y crítica grupal a gran escala que une diferentes jurisdicciones y culturas, lo cual puede ayudar a cambiar la cultura jurídica.

**Palabras clave**

Feminismo; juicio; identidad nacional; arte; teatro del oprimido; cultura jurídica

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## 1. Introduction

In recent years, a number of jurisdictionally-specific 'feminist judgment' projects have been produced. These have created a space for re-imagining, through a feminist lens, the processes and outcomes of judging in key cases, paying more attention to issues of gender inequity and power dynamics. This includes taking into account, where relevant, intersecting inequalities such as class, disability, sexual orientation, gender identity, ethnicity and national identity. Projects have been undertaken, for example, in Canada, England and Wales, Northern/Ireland, Australia, and New Zealand, where 'missing' feminist judgments have been written, using the precedents and principles available at the relevant time period. These projects have culminated in edited collections of the 'missing' feminist judgements, often alongside commentaries on the cases by subject experts. These have provided a powerful teaching resource, and generated dialogue between academics, legal practitioners and others. Until now, there has been no equivalent project in Scotland.

In many ways, it felt like we were latecomers to the feminist judgments party, and in that sense it was a relief to meet Jhuma Sen, coordinator of the new Indian Feminist Judgments Project at the Oñati meeting in May 2017. I imagined the Indian and the Scottish feminists wandering in belatedly to a family celebration, arm in arm, talking animatedly, while the other guests were getting their coats on, ready to go to the next feminist get-together. But having met the coordinators of many of the other FJPs in Oñati, it is obvious that the life and work of feminist judgments projects go beyond (and before) the moment of publishing feminist judgments as text. The incredible energy that was initially ignited by the wonderful Canadian initiative of the Women's Court of Canada (Majury 2006) has in turn sparked the ambitions of feminist lawyers across the globe, and this has extended not only to the written collections of judgments, but also to pedagogical interventions, academic and professional legal dialogue, artistic interpretations, and other dynamic conversations about what it means to be a feminist, a judge, and a feminist judge. Witnessing the range of feminist judgments projects and methods first hand at Oñati was a fantastically timely opportunity, coming as it did just before our first Scottish FJP meeting on 31 May, 2017.

In what follows, I will first outline what is distinctive about a *Scottish* FJP, including the political, legal and social context, before explaining our methodological choices, and the ways we have supported and developed the project from its first inception. I will emphasise the importance of integrating the artistic and academic work in producing a grounded and impactful feminist judgments project. The conclusion argues that individual feminist judgments projects are only one way of championing gender equity, but that the collective momentum of feminist and other critical judgments projects across the globe can effect real world change.

## 2. The Scottish context

It is true to say that the Scottish FJP has been a long time coming. It took the persistent efforts of one of my co-organisers, Vanessa Munro, to persuade me to undertake this project; like other FJPs we had many conversations about whether using court judgments to bring a feminist challenge to law would engage Audre Lorde's concerns about the impossibility of dismantling the master's house with only the master's tools (Lorde 1984, p. 112). However, the Scottish FJP has brought together a creative and dynamic group of people who are committed to showing how, as Hunter has said, feminist judgments can be 'taken seriously' and influence activists, lawyers and judges, 'and so, indirectly, to change the law or at least to contribute to its development' (Hunter 2012, p. 139).

Having the benefit of a feminist critical lens does not make the task easy, however, and, as discussed at length in Oñati, we are well aware that it may involve what Fitzgibbon and Maher (2015, p. 253) have called 'uncomfortable compromises with unjust gendered institutions'. This might be a particularly pertinent worry with

respect to whether 'to speak as a judge' (Berns 1999) can challenge normative forms of legal authority; that is, the extent to which it is possible to speak as 'other' with the full authority of the law (Berns 1999). But, as also emphasised at the meeting in Oñati, FJPs offer an exciting opportunity to harness the power of narrative, and to 'tell new stories about gender, justice and the law' (Fitz-Gibbon and Maher 2015, p. 254).

So what would a Scottish feminist judgments project look like?

As with other jurisdictions, there are particular areas of Scots law where women have campaigned for legal reform and policy shifts, in the hope of making women's lives better and allowing them more ready access to legal rights and protections. Domestic abuse, sexual violence and harassment, and abortion are all common sites of contestation, and feminist activism has often focused on these. It is unsurprising then that our project would also include cases dealing with these sorts of issues. For example, as one of our feminist judges, Claire McDiarmid, explores, the criminal law in Scotland allows for a defence of provocation in cases of sexual infidelity – a defence that in practice has been largely pled by men – and has been subject to sustained feminist critique (McDiarmid 2014). Laws relating to domestic abuse and sexual violence have also been historically criticised for their failure to capture the full range of harms suffered by their victims (see for example Connelly and Cavanagh 2007, Cowan 2010) and cases that illustrate the problems with such laws are also rewritten in our project.

The Scottish government has, since devolution, taken more of an interest in legislating in certain areas, including criminal law (Chalmers 2017). Recent reforms have been welcomed by feminist campaign groups who have spent decades campaigning for change. For example, the category of domestic abuse been expanded to include psychological abuse, or what has been called 'coercive control' (Domestic Abuse (Scotland) Act 2018), and in 2015 the Scottish Government published their 'Equally Safe' strategy for preventing and eradicating violence against women and girls. Likewise, in 2009, the Sexual Offences (Scotland) Act brought much needed consolidation and reform of sexual offences. Organisations such as Rape Crisis, Women's Aid and Shakti Women's Aid have been leading voices in the campaigns to enable these shifts. As part of our Scottish FJP activities, we invited representatives from such organisations to participate in a focus group discussion, designed to help us get a clearer sense of the uniqueness of the Scottish landscape for feminist reform and activism. During this discussion, it was acknowledged that it has been the post-devolution Scottish Government's acceptance of them as 'experts', and a burgeoning evidence base drawn from Scottish experience – as well as a change in personnel within key legal offices – that has made the path to reform easier than it might have been in the past.<sup>1</sup> Working together as organisations with a set of shared concerns has enhanced the likelihood of these groups being heard and respected, and given them more traction to prompt law and policy makers to consider new interventions. However, it is the implementation of these reforms, and ensuring that different parts of the legal system are 'in synch' (for example making sure that for a woman trying to leave a violent partner, family law, criminal law, and housing law protections are congruent) that can often be the greatest obstacle to real change.

While Scottish feminist activism is alive and well, Scotland has never had a leading feminist judge in the mould of Ruth Bader Ginsburg (Justice of the US Supreme Court), Claire L'Heureux-Dubé, or Bertha Wilson (Supreme Court of Canada Justices), Beverley McLachlin (appointed the first Canadian Supreme Court Chief Justice in 2000) or even Brenda Hale (UK Supreme Court President from 2017, and a member of the House of Lords from 2004). While it is worth remembering that not all female judges are feminist judges (Rackley 2013, Hunter 2015), the first female judge in

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<sup>1</sup> As our focus group participants reminded us, the very first committee bill of the Scottish Parliament became the Protection from Abuse Scotland Act 2001, which extended existing law that allowed a power of arrest to be attached to a matrimonial interdict against abusive partners.

Scotland was Lady Cosgrove, who joined the College of Justice in 1996. There has never been a female Lord President, the highest judicial office in Scotland, but the first female judge to be appointed Lord Justice Clerk – the second highest judicial office in Scotland – was Lady Dorrian, who took her post in 2016 at a time when there were 9 women from a total of 31 judges (29%; at the time of writing the figure is 10 from 35 judges, a slightly lower percentage).<sup>2</sup> The advancement of women judges in Scotland is relatively slow given the much earlier appointment of the female judges referred to above (Beverley McLachlin was appointed as the first female Canadian Supreme Court Justice in 1982).

Lady Cosgrove and Lady Dorrian have spoken publicly (as has Lady Hale, for example in 2012) about the importance of diversity in the legal profession as a whole, as well as within the judiciary specifically (Cunningham 2003, Evans 2017; see also Madam Justice Bertha Wilson's Osgoode Hall lecture in 1990). This is in the context of some troubling statistics. In 2014, UK jurisdictions had the lowest proportion of female judges in the EU: the Europe-wide average was 51% and only Azerbaijan (11%) had a lower percentage than Scotland and Ireland (both at 23%) and England and Wales (30%). More markedly, Scotland is in the category of countries where 90-100% of court presidents are men (alongside Andorra, Armenia, Azerbaijan, Georgia and Malta; see European Commission for the Efficiency of Justice – CEPEJ – 2016, pp. 21-22). As the CEPEJ point out, "[t]his fact reinforces the idea that, despite their number and their professional qualities, women face more difficulties than men in acceding to positions of higher responsibility" (CEPEJ 2016, p. 22).

Another particular issue that the Scottish FJP encounters is that Scotland is a small, relatively discrete jurisdiction. This has several implications. First, it might be thought that we are engaging in parochial conversations with each other, that have no relevance to law in other places. Scotland has a long history around nationalism, including an ongoing and intense debate about devolution of power from the London Westminster government, notwithstanding the recent *No* vote in the Scottish independence referendum of 2014. Even after the Act of Union between Scotland and England in 1707 that formed the state of 'Great Britain', Scotland retained its own legal and education systems, different from and largely separate from the rest of the UK. While civil matters can be appealed to the Supreme Court of the UK, other than in matters relating to human rights or competency, Scotland retains final judicial appellate jurisdiction over criminal matters – which is said to be a unique aspect of Scots law (Walker 2010, p. 12).

A distinctive aspect of the Scottish legal tradition is the historical reliance on (male) 'institutional writers', such as Baron David Hume, writing in the 17<sup>th</sup> and 18<sup>th</sup> centuries, who set out principles derived from the common law that judges could follow (Farmer 1992). This means that 'Scots law' has evolved quite differently from English law, leaving Scotland more closely connected to these historical canons. The close relationship between juridical discourse and 'institutional' principles is ongoing; even today in criminal law, we teach students definitions of concepts that were developed in the 17<sup>th</sup> and 18<sup>th</sup> century. That some of these principles are still enshrined in contemporary legal debates goes some way to explaining what some observers have noted as Scottish juridical conservatism, and one of creative contributors has responded to the continuing use of these ancient sources in her poem *The Institutional Writers*. However, Lindsay Farmer (1992, p. 35) has pointed out that this does not mean that Scottish judges blindly follow these historical sources, but rather the authority of institutional writers such as Hume can be

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<sup>2</sup> It should be noted that as well as the judges who are 'senators of the courts of justice' at the higher courts, the majority of first instance civil and criminal matters in Scotland are dealt with by Sheriffs. There are currently 142 Sheriffs, 28 of whom (20%) are women. See <http://www.scotland-judiciary.org.uk/36/0/Sheriffs> [last accessed 11 September 2018]. Lady Cosgrove was also the first female Sheriff in Scotland, from 1979. A significant number of cases are also heard across the UK by tribunal judges: see <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/fee-paid-judiciary-page-1/> [last accessed 11 September 2018].

'managed': since they were referring to principles rather than rules, judicial discretion allows for flexibility rather than dogmatic adherence, while the 'ritual invocation' of their principles leaves their continuing authority unchallenged.

Since 1998 Scotland has re-formed its own Scottish parliament that introduces law and policy relevant to this jurisdiction (though the parliament in Westminster reserves the power to legislate for certain UK wide matters that affect Scotland, such as asylum and immigration, tax, and terrorist offences to name a few, as well as some issues devolved to Scotland, under the Scotland Act 1998 s 28 (7)). Scottish feminist activists who participated in the focus group discussion mentioned earlier identified devolution of power, and the relatively small size of our nation state, as bringing positive benefits in term of grounded and responsive initiatives, supported by centralised (rather than disparate or private) funding for women's groups.

While Westminster retains some responsibility for Scotland's governance, the long tradition of Scottish judicial legal development, and its separate legal system and distinctive socio-cultural identity means that Scotland has always seen itself as something of a nation apart, and sometimes one that defines itself in contrast or opposition to what goes on across the border with England. Indeed, as Walker (2010, p. 18) puts it: 'This deep well of difference helps to account for the resilient distinctiveness of the Scottish legal system both in formal and substantive terms'. Throughout the activities and outputs produced under the umbrella of the Scottish FJP, a concern has been to explore this distinctiveness, real and perceived, and to reflect on the relationship between legal and national identity, and legal and political nationalism.

Since the Human Rights Act 1998 and the Scotland Act 1998, case law and legislation in UK jurisdictions must be compatible with both the European Convention on Human Rights and EU law. Even more recently, the majority of people in Scotland voted to remain in the EU in the Brexit referendum of June 2016 (in contrast to a majority vote in England to leave the EU). This has emphasised the European-ness of Scotland, yet it has also prompted debates about whether the distinctive position of Scotland could – and should – be recognised not only in the UK but in broader political debates and at supra-national levels. All of this means that we needed to allow space in our project for our feminist judges to reflect on the degree to which there are legal traditions and issues unique to Scotland, as well as common values across borders, and to explore complex, ongoing questions of national and legal identity.<sup>3</sup>

### 3. How to make a Scottish feminist judgments project

For the project to be uniquely Scottish – the '*Scottish*' Feminist Judgments Project – we needed to reinterpret cases that have originated in Scotland (even where they go to appeal in courts with UK wide jurisdiction such as the UK Supreme Court or the Judicial Committee of the Privy Council). To do this our judges needed to be legal academics, who were sympathetic to a feminist perspective, with knowledge of Scots law, and an interest in and availability for this project. In fact, this was a relatively small pool of people, making it quite challenging to reach a realistic sample of feminist judges, with expertise across a range of legal subjects, and then persuade them to become involved. At the meeting in Oñati, a number of different methodologies for achieving this were suggested. For us, choosing a series of cases that needed to be rethought before inviting participants was not the right approach, since there may not be an available and suitably equipped individual to rethink that judgment. We were also convinced that a bottom-up approach, where judges chose their own cases in discussion with the whole group would make the project more participatory. Consequently, it made sense for us to reach out to feminist legal academics with Scottish legal knowledge and experience, and through snowballing, garner interest

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<sup>3</sup> Some of these issues were faced, albeit in a different form, by the Northern/Irish Feminist Judgments project (Enright *et al.* 2017).

in involvement, before deciding which cases to focus on. This has meant that we have involved some feminist judges who have the required familiarity with Scots law, but who are no longer living in Scotland.

For expert commentary on the feminist judgments, the next step was to reach out to feminist academics, including PhD students, as well as the legal profession, and to organisations and experts in Scotland dealing with relevant legal issues, such as Scottish Trans Alliance, Rape Crisis, Scottish Women's Aid, and Shelter. Commentators have been added incrementally and organically as those with relevant expertise and availability were identified. With the question of expertise and experience forefront in our minds, we were determined to involve people at various stages in their careers, and from as diverse a range of backgrounds as possible. Third sector organisations frequently suffer funding and resource challenges that make it difficult for them to participate in non-core activities; we are privileged to benefit from their valuable time and perspectives as expert commentators and advisors. As noted, representatives from some of these organisations also joined the academic coordinators for a focus group discussion of the historical and contemporary triumphs of and challenges for feminist activism in Scotland; this helped to contextualise and support our understanding of what was distinctly Scottish about our project, and the political climate within which this project takes place.

Finally, we made a conscious decision to have aesthetic perspectives woven through our project. One reason for doing this was our interest in showing how extra-legal, non-academic and non-textual images and interpretations of legal processes and decisions can help us understand the power and reach of law, as well as its ethical impact. We also wanted to challenge what Douzinas and Nead have described as law's pretence that it can 'close itself off from other discourses and practices, attain a condition of total self-presence and purity, and keep outside its domain the nonlegal, the extraneous, the other – in particular the aesthetic, the beautiful and the image' (Douzinas and Nead 1999, cited in Young 2005, p. 9). As Alison Young has put it: 'In (...) a co-implicated relation between jurisprudence and aesthetics, we find that which the legal tradition would prefer not to be revealed – uncertainty, affectivity, contingency, difference, the peripatetic and nomadic, the marginal, the image' (Young 2005, p. 12).

The methodological and pedagogical benefits of stepping outside the law, and/or outside text, in order to critique law, has been explored through Bankowski and Del Mar's Beyond Text Project, funded by the Arts and Humanities Research Council (Bankowski *et al.* 2012, Bankowski and Del Mar 2013). Their project brought together arts, the legal academy, and the 'moral imagination' in endeavouring to open up law to more critical, ethical scrutiny: 'the exclusive emphasis on textual resources, on languages and their manipulation, carries with it significant dangers. Such an exclusive focus can be restrictive in that it can result in law students and legal professionals never acquiring the skill of coming to see and recognise the ethical complexity of any given situation' (Beyond Text AHRC Project webpages, cited in Calder 2013, p. 217).

Including visual artistic representations also added a critical element to our project that was relevant for students, academics, practitioners and others, in the sense that Elaine Webster has suggested: '[T]he value of non-textual resources can be seen to lie in the provision of an enriched toolkit that can aid [us] to challenge seeming-objectivity, to confront one's own role within the legal system, and to cultivate a necessary confidence in creative interpretation' (Webster 2013, p. 87). The importance of developing these aesthetic strands of our project cannot be overstated. Artistic contributions are particularly beneficial in enabling exploration of how non-academic and/or non-textual interpretations of legal processes and decisions can help us understand the ethical complexity and impact of legal decision-making. Today's student lawyers are the practitioners of tomorrow. Artistic representations can form an important part of their legal education about the range of human experience, and

generate insights about the contingent nature of law, while instilling a capacity for empathy.

Our project includes both text based and non-textual creative work, such as poetry, photography and song. Each of the artists has responded to a particular case, or cases, or indeed to the feminist judgment project as a whole, to interpret and re-interpret the law, and to speak about the place of women in society. This strand of the project has taken on a life of its own, spawning research funding applications, and leading to exhibitions of the creative work, including one at the Scottish Parliament. In utilising artistic interpretations alongside traditional legal tools, and publicly exhibiting them, we have sought to engage a broader and more diverse public audience in conversations about law than could have been achieved via legal textual resources alone. This audience is not passive; our creative contributions provoke and implicate the viewer in asking them to interpret and 'judge' the image for themselves. Doing so allows us to prompt what Young (2005, pp. 14-15) calls 'the responsive *dance* that ensues between the artwork, the law and the spectator'. It has also allowed us 'to harness the power of non-verbal communication by combining visual images, our embodied selves and text as a means of connecting with our readers' (Adjin-Tettey *et al.* 2008, p. 9).

The SFJP is profoundly collaborative. Artists have worked together as a group, and in discussion with academic colleagues, ensuring that the different strands of the project 'speak' to each other. This has stimulated crucial debate and discussion about the disciplinary and personal challenges and opportunities for artists working in and on a 'legal' project, and for legal academics working with artists who can help to reconceive the supposedly 'natural' or 'logical'. Involving a range of artists has meant thinking innovatively about funding – and publication – for the project. These kinds of contributions or 'outputs' are not normally valued in traditional doctrinal legal projects (and are sometimes resisted by publishers). However, we have worked hard to ensure that the project's artistic contributions occupy an integral role, and are funded and exhibited as widely as possible.

#### **4. How to make a Scottish feminist judgment project bloom**

We are now three academic conveners and one creative coordinator, and 16 confirmed feminist judgment writers, from different stages in their academic careers, with commentators including lawyers, judges and colleagues from the third sector, alongside a group of artists – a theatre practitioner, a writer, a poet, a photographer, an illustrator, a song writer and a textile artist. Our cases range from the common core feminist concerns of medical and family law, through criminal law, asylum law, company law, human rights, devolution issues, property, employment and housing law.

The oldest case in the project was decided in 1873, and relates to the question of whether the University of Edinburgh had the power to grant degrees to women – a question that arose from the desire of a group of women to study and graduate in medicine. Sofia Jex-Blake and six other women (collectively known as the Edinburgh Seven) passed the preliminary exams and began their studies in 1869 but were effectively prevented from being taught or graduating soon thereafter. Jex-Blake brought the University Senate to court, claiming she and all other women students had a right to study and graduate, but lost her case. One of our academic coordinators, Chloë Kennedy, has rewritten the case arguing that Jex-Blake (whom she describes as an 'indomitable pioneer') – and indeed all women – had a right to study and graduate from the University of Edinburgh. This is a landmark Scottish case that proved a turning point in the debate over women's education and access to professional vocations in the UK more generally. Eventually, the Government intervened, beginning a gradual process of reforming women's access to university medical education in 1875.

The case has become a cornerstone of the Scottish project not only because of its role in prompting social change, but because of an ongoing (but as yet unsuccessful) campaign to have statues of the Edinburgh Seven erected somewhere in the city, to celebrate and honour their efforts (in Edinburgh, there are currently more statues of animals than of women). Moreover, 2019 is the 150<sup>th</sup> anniversary of the Edinburgh Seven matriculating in the medical school and celebrations to mark that event are planned, which hopefully will coincide with the publication of the SFJP edited collection. For all these reasons, the case has become central to the project, and as well as the rewritten judgment, several of our artists have responded directly to the Jex-Blake story.

To breathe life into the project, we held one initial meeting, in May 2017, to introduce ourselves to each other and discuss the potential development of the SFJP; and a theatre workshop in August 2017. This was followed some interim meetings in December 2017, and, finally, a 2-day workshop to discuss judgment drafts in April 2018.

At our first meeting in May 2017, judges and commentators came together to debate the foundational issues that a project of this kind would need to address – questions about the objectives of the project as well as issues of methods, format, judgment crafting, and – of course – what we mean by *feminist* judging. As many of the other projects have pointed out, since there is no one feminism, it was inevitable that our project would provide a home for a range of feminist perspectives, and this issue has been revisited iteratively as the project has evolved. However, we agreed collectively that, although we should push the boundaries of form and content to reflect our feminist and critical perspectives, including the integration of artistic responses to the cases, we would not be overly experimental with the form of the re-written judgments, to ensure that they retained their impact for students and practitioners. As Rosemary Hunter has said, one powerful aspect of the feminist judgments projects is to show how the cases could have been reasoned or decided differently, given the law as it stood at the time of the decision (Hunter 2012, p. 5). Also, as alluded to above, given the historically conservative approach of the Scottish judiciary, we felt that having judgments in a format that mirrored conventional judgments, and reproduced in an edited collection, maximized the potential for the project to have intellectual and legal credibility to the legal profession.

Since we were not all entirely comfortable relying solely on text, part of the 'research bargain' we made here was also to have a website (<http://www.sfjp.law.ed.ac.uk>) and artistic exhibitions that showcase the creative methods and content, thus providing multi-media and non-text-based interventions to contextualise the more traditional written methods. Having decided to produce both an edited collection and a project website, we also agreed that we would include a space for reflection by judges on the task of rewriting the decisions, in the form of a short reflective statement that would appear after the rewritten judgment, accompanied by transcripts or videos of interviews with (some) judges on our project website. Judges can then engage openly with the challenges they faced and choices they made when stepping into the decision-maker's shoes, particularly with issues such as the art of crafting a plausible and contextually and temporally appropriate judgment that makes space for marginalised voices and perspectives. It is hoped these creative, multi-media features of the project will produce a more holistic and coherent SFJP than just written judgments and comments alone.

We spoke about the importance of addressing and engaging with the peculiar legal and political context in Scotland, and the issues around national identity and devolution, concluding that the book would need introductory chapters, including a discussion of how we went about the project, and to set the Scottish jurisdiction-specific context as well as reflect on the methodological challenges of feminist judgment writing. Research undertaken in the Glasgow Women's Library by the project's academic co-ordinators, and a research assistant, alongside discussions

with our focus group of representatives of feminist and women's activist/support organisations gave us an understanding of important social and political changes in Scotland in recent decades, which have shaped the environment within which women's claims to equality have been articulated and heard.

Finally, we agreed that we would seek funding to hold a theatre workshop before we started drafting judgments, to work through some of the common issues we might experience in attempting to 'walk a mile' in the shoes of judges. The task of trying to change the way we see a set of facts, or the way we engage in reasoning and judging, is not always easy for lawyers, who have been taught to perceive – or at least to some extent support the trope of – facts and laws as neutral, and concepts such as objectivity and truth as incontrovertible, the very essence of a just legal system. As Julie Lassonde (2006) has said, 'people's senses are often put to sleep by their social habits'; we wanted to find a way of re-engaging people's senses, particularly their feminist sensibilities, about the legal world. We believed that engaging in theatre techniques would equip, enable and empower our participants to perceive well known cases from different perspectives. The aim here was not to 'perform' or present our cases to an audience, but to use theatre techniques to enable participants to feel more confident in striving to understand the role of a judge, and in expressing their own particular feminist perspective. Since a sample of feminist judges, commentators and creative contributors were all in attendance at the workshop, the relationship between text (judgment), theatre (movement) and art (visual) became symbiotic and iterative, and has in important ways enabled cross-project conversations and connections.

The particular theatre technique we turned to was Augusto Boal's Theatre of the Oppressed (TotO) [Boal 1985], which is a form of theatre developed by Boal in Brazil, using scripts and stories developed from participants experiences, to empower them to try to change their lives. For Boal, theatre, as much as law, can change the 'real' world, and is produced by and becomes part of that real world: 'Theatre of the Oppressed is located precisely on the frontier between fiction and reality – and the border must be crossed. If the show starts in fiction, its objective is to become integrated into reality, into life' (Boal 1992/2002, p. 276). Ann Elizabeth Armstrong's work makes explicit this connection between Boal's work and feminist projects that aim to construct positive strategies for change (Armstrong 2006). In that sense, TotO shares some of its aims with feminist *praxis*, whereby feminist theory is grounded in, and intimately connected dialogically with, practice and lived experience (Smart 1989, pp. 70, 72). As Adjin-Tettey and colleagues have argued, 'this call to couple an embodied, physical fight against oppression with intellectual and academic activism is frequently heard from women activists on the "front lines"' (Adjin-Tettey *et al.* 2008, p. 31). Embodying law and legal concepts through gestures and images can show how powerful legal norms and concepts are, or can become, powerful and persuasive – and ultimately open to challenge, resistance, and transformation. As academics are of course mostly 'in their heads', we also felt it was important to play with Boal's idea that 'the whole body thinks – not just the brain' (Boal 2002, p. 49).

To do this, we relied upon the skills of a local, Edinburgh-based TotO theatre company, Active Inquiry, who ran a workshop with us in August 2017, on the idea of feminist judgment. To begin with, we explored some of the ways in which being made to physically represent the variety of perspectives and power dynamics that surround us in various contexts (including when acting as a judge) could be valuable. We then used two TotO techniques chosen by our facilitator (or 'joker' to use Boal's term) for this project: 'image theatre' and 'rainbow of desire'. Image theatre is often used to explore abstract concepts (such as law and justice) and show attitudes and emotions about difficult topics. As such, it was well suited to developing a shared understanding amongst participants of what we meant by a Scottish Feminist Judgment Project. 'Rainbow of desire' techniques are intended to allow participants to identify the various 'voices' that influence us in different directions, and work through any

elements of 'internalised oppression'.<sup>4</sup> Again, identifying the voices that guide us in making judgments seemed a crucial exercise in comprehending the difficulties of judging.

In the image theatre exercises we were asked to form a circle facing outwards, and, using our bodies, make an image to represent concepts such as 'justice', 'truth', 'the criminal' and 'the judge'. We then turned into the circle to share these images with one another and discovered surprising levels of similarity: for example, images of justice often involved scales, and images of the judge were often quite negative. This provoked some interesting discussion about – amongst other things – the relationship between judging, judgments and being judgmental. We used a similar image-based technique to discuss images of feminism, and finally 'the judgment', based on a time in our lives when we had judged another person. Again this prompted conversations about our discomfort with judging, anxiety about the consequences for parties involved, as well as about the constraints of the judging process. Throughout the day, we returned to these reflections on the personal challenges of being a judge (finding a voice, being comfortable with that voice, taking responsibility for the decisions, dealing with the consequences of the decision, and so on).

We then engaged in 'rainbow of desire' techniques. Presented with a vignette of a legal case, we used these techniques to develop the character of a judge, as well as personify all the 'voices' that might influence her reasoning and judgment. These exercises allowed us to see and hear the background (and foreground) 'noise' that we have to sort through and filter when trying to make decisions.

Key questions that came up for all of us related to being mindful of who the judgment is being written for; what voices are and are not present and listened to as part of the process (and why); and the ways in which changes in process or substance can make different kinds of feminist contributions, even if not necessarily a distinctive feminist outcome. The theme of discomfort with the process of judging (in all senses of the word) was a recurrent theme, as was our ability to explicitly acknowledge that discomfort and its emotional impact on us as judges (see <http://www.sfjp.law.ed.ac.uk/2017/10/16/hello-world>). This chimes with Berns' insights on the way that feminist judges are being offered a terrifying moment of freedom to act, but must then take responsibility for that action (or failure to act) (Berns 1999, pp.51-57).

In line with these insights, one of our judges, Jane Mair, has chosen the theatre workshop as the focus of her reflective statement, describing how these theatre exercises shifted her perspective on the role of judging. Using our bodies to express ideas, concepts and emotions, which is not what we academic lawyers usually do, left her feeling exposed, and she speaks of how this helped her to empathise with what a 'real' judge might face: 'I reflected frequently on the exposure of the real judge: exposure to her peers, to the legal profession, to the parties, to the possibility of appeal, to the would-be feminist judges. I was protected from such exposure and grateful for that luxury. It is easy to be a brave feminist judge within the safe space of role-play and I offer my feminist judgment (...) not in criticism but in solidarity; very conscious that care and caring, how it is given, received, valued and compensated remains a shared and complex challenge for us all.' These sorts of reflections will no doubt continue to emerge as our judges redraft their judgments, and both commentators and judges respond to the the rewritten judgments.

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<sup>4</sup> This is a very simplified explanation of what is a complex set of 'therapeutic' theatre techniques that, amongst other things, set these internal influencing voices in the context of wider societal and institutional structures of oppression, and that are shared by others, as well as having individual effects. The technique is intended to allow space for reflection about possible transformation, but also to foster understanding and empathy. For discussion see Boal 1994.

## 5. Conclusion: Future Scottish feminist judgments adventures

Feminist judgments projects are not the only ways to challenge laws and legal decision making (and judges are not the only law makers). But, clearly, being taken seriously by the law – and by those who study, make, practice and apply the law – is one way for feminists to engage in legal critique and critical legal pedagogy: it is ‘a form of academic activism, an attempt to tackle power and authority not from the distance of critique but on their own ground’ (Hunter *et al.* 2010, p.8). Margaret Davies has pointed out that this might involve what I would call ‘outjudging the judges’: ‘In some cases, this may take the form of holding others to legal account – in a sense making the law more legal and judgment more impartial, especially where its interpretation has been noticeably distorted by stereotypes or by some reasoning process conventionally regarded as beyond the boundaries of law’ (Davies 2012 p. 173). In this sense, the Scottish FJP, like its companion projects, is doctrinal in nature but also goes beyond doctrine to engage and apply feminist and other critical literatures, including knowledge produced through socio-legal and philosophical approaches, as well as the humanities. Unlike most of the others, however, it also brings performative and artistic perspectives to bear upon legal concepts and rules, and the question of what constitutes a feminist judgment.

The Scottish FJP held a two-day workshop in April 2018, where all the judges, commentators and artists came together to discuss work in progress, and more finalised drafts of judgments. Members of the Scottish judiciary and legal profession were also invited. The workshop allowed us to hear a broad range of perspectives on how we want our project to evolve. We are now in the final stages of editing and collating the judgments, commentaries and reflective statements. In this age of multi-faceted social media, our new twitter account (<https://twitter.com/ScottishFemJP>) has attracted a range of followers, and prompted interest from judges, academics and others, and we are populating our website with photos, videos, blogs and other updates, including a list of cases, judges, commentators and artists. Every research project now has some obligation to show impact on the world beyond the academy, especially if it is to be successful in research funding applications. There is clearly potential for the project to provide a variety of innovative platforms for conversation and change, not only pedagogically, but more broadly amongst and between different communities of legal practitioners, decision makers, policy makers and the third sector. Learning from the feminist judgments projects that came before us, we aim to bring different voices together to allow diverse perspectives and new strategies for change to emerge. For our project, this means not only publishing an academic text but showcasing the work of our artistic contributors. It includes a planned SFJP ‘tour’ of law schools in 2019-20, spreading the word – as the pioneering Women’s Court of Canada did – to law students and teachers across Scotland.

All the feminist judgments projects presented in Oñati are transformative in their own ways, and we hope we have brought this spirit of creativity, confrontation and critique to Scottish shores. Importantly, it is not only the contribution of each project that matters, but what Davies (2012, p. 178) has called ‘sustained critical-mass practices’ that can ‘bring new meanings, and new directions to legal culture’. The Feminist Judgments Projects (and other critical judgments projects such as Appleby and Dixon, 2017, and Smith and colleagues, 2017) offer an opportunity for wide scale collective activism and critique across different legal jurisdictions and cultures that could help to bring social change. Ultimately, though, feminist judgments projects can only be one – albeit important tool – in the ever-evolving endeavour to resist oppressive legal norms and processes, and craft a collaborative, creative and sometimes productively conflictual space in which to rebuild the master’s house.

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