

## Methods, Impact, and Reach of the Global Feminist Judgments Projects

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### Abstract

This collection of essays is the product of the workshop *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice* held at the International Institute for the Sociology of Law (Oñati, Spain) in May, 2017. The papers explain and explore the multiple global projects that attempt to rewrite judicial opinions by incorporating feminist legal reasoning or methods. Each essay grows out of the authors' experiences working with projects based in a particular socio-political, geographical, historical and jurisprudential context: Canada, England, Australia, Ireland, New Zealand, Scotland, and a multi-jurisdictional international law project. Collectively, the essays bring new insights, methods and challenges to the study of the feminist project of equal justice across the boundaries of culture, race, nation and gender.

### Key words

Feminist judgments; feminist methodology; jurisprudence; judging

### Resumen

Esta colección de artículos es producto del seminario *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice*, que tuvo lugar en el Instituto Internacional de Sociología Jurídica (Oñati, España), en mayo de 2017. Los artículos explican y exploran los múltiples proyectos globales que intentan reescribir opiniones judiciales incorporando razonamientos o métodos jurídicos feministas. Cada artículo proviene de las experiencias de las

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autoras en su trabajo con proyectos basados en un contexto sociopolítico, geográfico, histórico y jurisprudencial concreto: Canadá, Inglaterra, Australia, Irlanda, Nueva Zelanda, Escocia y un proyecto jurídico internacional multijurisdiccional. En conjunto, los artículos aportan nuevos enfoques, métodos y desafíos al estudio del proyecto feminista de justicia igualitaria, más allá de los límites de culturas, razas, países y géneros.

**Palabras clave**

Sentencias feministas; metodología feminista; jurisprudencia; juicio

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## 1. Introduction

Over the last fifteen years, nearly a dozen feminist judgments projects (FJPs) have been initiated around the world. Organized by collaborative groups of legal academics, practicing lawyers, a few judges, activists, artists, and other scholars, the purpose of the FJP has been to rethink and to show – by writing shadow or “missing” judgments – how important legal issues might have been decided differently by decision makers who applied feminist perspectives. Although their historical, cultural, and socio-legal settings differ, the projects shared similar methods. Each grapples with the facts and law as in existence at the time of the original opinion and shares a commitment to engaging participants who are more diverse and representative of the country’s population than real-world judges.

Beginning with the Women’s Court of Canada (WCC), the first organizing group of law professors and activists began their project in 2004 and published the first six rewritten decisions based on section 15 of Canada’s Charter of Rights and Freedoms in 2008 (Majury 2006).<sup>1</sup> That collection was followed in 2010 by the English collaboration, which included 23 rewritten opinions originally issued by the House of Lords, the Court of Appeal, or the Privy Council (Hunter *et al.* 2010). The next published feminist judgments project came from Australia, encompassing 24 opinions from courts ranging from trial courts to the High Court (Douglas *et al.* 2014). The U.S. feminist judgments project, rewriting 25 opinions of the Supreme Court of the United States, was published in 2016 (Stanchi *et al.* 2016). The Northern/Irish feminist judgments project (Enright *et al.* 2017) and New Zealand/Aotearoa followed a year later (McDonald *et al.* 2017). Under way are an international law feminist judgments project and projects in Scotland, India, Africa, and Mexico.<sup>2</sup>

By re-imagining the reasoning of judicial opinions through the added insight of feminist theories and methods, while bound by the precedent and facts of the time, the feminist judgment authors are able to adhere to the judicial voice and yet account for intersecting inequalities resulting from gender, class, disability, sexual orientation, gender identity, ethnicity, immigration status and national identity. The signature achievement of the FJPs has been to demonstrate that judicial decision making is rarely detached from personal background and experience and that judicial interpretation is never purely neutral and objective. These projects have inspired students and lawyers, proving their value as teaching tools and providing models of alternative approaches and arguments.

In this introduction, we introduce the articles that emerged from the May 2017 Workshop on *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice* at the Oñati International Institute for the Sociology of Law. We group them in three parts. The articles in Part I largely pertain to the methodologies of the FJPs, with an eye toward better understanding the relationship between methods and the purposes of the organizers of feminist judgments projects. The articles in Part II assess the impact of the FJPs, responding to the critique that these projects are creative writing exercises with few real-world effects. The articles in Part III explore the future reach of feminist judgments and similar endeavors.

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<sup>1</sup> Although the publication date is 2006, the judgments were published in 2008 because of a backlog at the journal.

<sup>2</sup> See University of Leicester Law School, *Feminist International Judgments Project: Women’s Voice in International Law* (online): <https://www2.le.ac.uk/departments/doctoralcollege/researchimages/2016-competition/feminist-international-judgments-project-women2019s-voices-in-international-law> (last accessed 13 December 2018); *Feminist Judging: From Margin to Centre* (discussing Scottish, Indian, African projects) <https://socialandlegalstudies.wordpress.com/2018/11/21/feminist-judging-margin-centre/> (last accessed 15 December 2018); <https://www.sjfp.law.ed.ac.uk/> (last accessed 15 December 2018); <https://www.lawandglobaljustice.com/the-african-feminist-judgments-project/> (last accessed 15 December 2018); <https://fjpinindia.wixsite.com/fjpi> (last accessed 15 December 2018); see also email from Alma Luz Kadue Beltran Y Puga Murai regarding Mexican Feminist Judgments (7 July 2017) (on file with Kathryn Stanchi).

## 2. Methods in the Feminist Judgments Projects

For more than three decades, feminist scholars from diverse disciplines have theorized how to achieve gender justice. Starting with the Women's Court of Canada, various groups of international legal scholars in have engaged the question of gender justice in a more practical context by employing the feminist method of shadow opinion writing. Employing this method, participants ask two questions. Would judicial decision making on gender issues change if judges were informed by feminist theories and methods? Would the feminist judgments themselves would help illuminate the path to gender justice? The May 2017 Workshop at the Oñati International Institute for the Sociology of Law was designed to open a dialogue among the scholars leading these efforts. As organizers, we approached the workshop as a starting point for exploring and assessing how different socio-legal contexts might affect the various feminist judgments projects.

Workshop discussions re-emphasized that the feminist judgments projects are a kind of "academic activism" (Hunter *et al.* 2010) because they not only critique current judicial decision making, but also explore the theoretical and practical promise of feminist alternatives. Thus, one central mission of rewriting court opinions from a feminist perspective is to demonstrate that judges can apply feminist theory and use feminist methods to advance the goals of equal justice, while still deciding issues in ways that are consistent with their judicial roles. Initial results from the feminist judgments initiatives confirm that many of the rewritten feminist opinions demonstrate the unacknowledged role of embedded assumptions and stereotypes in judging. Similarly, as discussed in several articles in this volume, the authors of feminist judgments more often adopt contextual and relational approaches to legal reasoning. This approach contrasts with the more adversarial and abstract reasoning on display in many judicial opinions. The workshop served as a natural turning point for the then-completed projects as well as inspiration and guidance for several projects at the beginning stage, a time for reflection on the work that has been done and for thinking through the direction for future projects. The 2017 gathering was especially significant because most of the existing projects had completed their initial publications by then. The workshop provided an opportunity to more fully understand the distinctive intellectual traditions and historical forces of the relevant communities.

The FJPs demonstrate in different ways how a particular judicial opinion's result or reasoning could have been different were the judicial decision makers to apply diverse feminisms, feminist legal theories, and in particular, feminist legal methods. The first article in Part I on method is Loveday Hodson's article exploring collaboration in the form of small-group opinion writing. In *Collaboration as Feminist Methodology: Experiences from the Feminist International Judgments Project*, Hodson explains what happened when participants in the Feminist International Judgments Project brought to a small group (a judgment-writing chamber) their individual feminist perspectives on international law and sought to apply their knowledge and method to a highly collaborative judgment (re)writing process. Because international tribunals generally have multi-judge panels writing opinions, the project divided its forty-two participants into chambers of two to five people who worked together to produce a single group-authored judgment. In most cases, the members were not in pre-formed groups but were placed together in groups by the project coordinators.

While departing from the academic convention of writing alone and exploring the possibilities and limitations to be found in the collaboration and compromise of writing judgments (rather than focusing on individual viewpoints), participants found that their perspectives were challenged constantly. In their assessment of the collaborative process, many of the chambers' members said that they felt more constrained than anticipated by the traditions and norms of international law. Hodson thus pointed to the potential importance of collaboration in challenging the inherent assumptions and biases of international law. For the benefit of future projects,

Hodson's article also explores the practical challenges and solutions of collaborating across national and employment-related boundaries.

A feminist research approach to finding the missing facts of a lawsuit is discussed in the article by Elisabeth McDonald and Paulette Benton-Greig, *Accessing Court Files as a Feminist Endeavour: Reflections on 'Feminist Judgments of Aotearoa - Te Rino: A Two-Stranded Rope.'* Recognizing that most feminist case analysis is based on reported decisions or those available on legal or publicly accessible websites, the authors first explain why less attention has been paid to a systematic accessing of court files: the difficulty of identifying the relevant cases and the strictures in place regarding disclosure of court records to members of the public or researchers. The authors emphasize the significance of accessing court records for feminist initiatives, especially because of the ability to see how decisions are being made out of public view. For example, pre-trial admissibility decisions (unless appealed) are often unreported and therefore are never made available on legal databases. Material which provides the context for decisions about admissibility or the content of jury directions is also not usually available to researchers; it only becomes visible when it is referred to in what is published or otherwise in the public arena.

The authors conclude that their feminist judgment writing project demonstrated the significance of hearing women's stories as well as the importance of nuanced factual analysis that takes account of the lived experiences of women. Unexpected access to the court file by the authors preparing one of the rewritten judgments allowed the authors to explore relevant facts that were missing from the appellate decision. The authors were able to demonstrate that the original judgment and verdict did not reflect the appellant's full story. In the authors' rape trial research, access to court records made visible the complainant's evidence and the judge's response to her as a person. It also allowed inquiry into how the rules of evidence enacted for the protection of the complainant, such as non-disclosure of their occupation, actually worked in practice.

Feminist methods ought to extend to court procedure and court administration. In her article, *Women's Court of Canada Act and Rules*, Melina Buckley explores how a feminist court could operate through the device of a model statute and rules for the Women's Court of Canada. Buckley's model statute and rules attempt to describe practices that are consistent with the theory of deliberative democracy and an enlarged conception of legal processes for the protection and promotion of constitutionally protected equality rights. The proposed act consciously adopts an innovative litigation model to meet the purpose of the act: giving effect to the substantive equality of women in Canada. Buckley's rules of procedure are designed to give effect to a new non-adversarial model of consisting of deliberative, participatory and reflective practices. The procedures facilitate consideration of the underlying causes of women's inequalities and work toward processes and outcomes that are fair and consistent with equality norms.

Under Buckley's proposal, the Women's Court would develop flexible procedures tailored to individual matters; the "rules" would be flexible principles rather than categorical rules. In addition, the Women's Court registry and staff would work with and assist all interested parties throughout the initiation procedures, pre-hearing, hearing and post-hearing procedures. The Court would be accessible to all interested parties through liberal rules concerning party and intervener standing. The Court also would be responsible for communicating with the public; the Act conceives of the Court as not only a court of justice in individual cases but as a "motor for the promotion of women's substantive equality in the country". And the Court would be a "learning institution" that would regularly evaluate the effectiveness of its work by seeking advice from court users and members of the public and through research and exchange with other courts and equality bodies in Canada and internationally.

### 3. Measuring the Impact of Feminist Judgments

The articles gathered in Part II are early efforts to take stock of the feminist judgments projects and to look at the evidence of the real difference these projects can make. In her article, *Feminist Judging in the 'Real World'*, Rosemary Hunter reports the results of her empirical study of whether feminist judging actually makes a difference. After investigating the practices and listening to the accounts of real-world feminist judges, Hunter concludes that "a feminist perspective might be brought into judging in quite a staggering variety of ways." Her article discusses findings in three categories: "*How* refers to the feminist resources, tools and techniques judicial officers have drawn upon. *When* refers to the stages in the hearing and decision-making process at which these resources, tools and techniques have been deployed. And *where* refers to the areas of law in which they have been applied". Because Hunter's findings are based on careful case studies comparing the body of work of two judges with the opinions of their colleagues and on interviews with more than 40 Australian judicial officers, the article serves as a model for further research.

Among the differences Hunter found between the authors in the FJPs and her interviewees were that the FJP authors were more consciously informed by feminist legal theory; the interviewees faced limiting constraints in terms of law and evidence; and the interviewees relied on feminist arguments being made, but did not generate them. Hunter determined that the real-life feminist judges brought feminist perspectives to all aspects of their judicial roles, such as managing courtrooms, working with juries, fact-finding, and interacting with other judges. Although these tasks probably consume the majority of all judicial time, the same tasks have not entered into the feminist judgments projects to date. Despite these differences, Hunter concluded there was substantial overlap between imagined and real-world feminist judging, "certainly in terms of 'how' it is done – its epistemologies, values and practices". She reported, however, on one significant constraint on feminist judging in the real world: the ability to self-identify as a feminist. She reports that many feminist judges are wary of identifying as feminists in public or even suggesting that gender might be relevant to judging.

The Women's Court of Canada project is the only one to focus on one discrete body of law, section 15 of the Canadian Charter of Rights and Freedoms. Denise Réaume's article, *Turning Feminist Judgments into Jurisprudence: The Women's Court of Canada on Substantive Equality*, builds on this unique quality by assessing whether the singular focus has resulted in the development of a competing theory of equality rights. If so, that theory might be used to systematically critique the real jurisprudence and produce lines of argument capable of redirecting the real law.

Réaume concludes that study of the Canadian feminist judgments as a body of jurisprudence – just as any judicial interpreter would do with real-world judgments – reveals a counter-jurisprudence with the power to inform arguments in real cases. Such counter-jurisprudence represents the beginnings of the development of a compelling theory of substantive equality. The counter-jurisprudence also demonstrates the importance of giving careful and rich attention to context in order to develop an understanding of substantive equality. Réaume suggests that future projects may wish to duplicate this approach of addressing a specific topic in the law over time. Because of its singular focus, the Canadian feminist judgments project systematically may have sown the seeds of an alternative approach to constitutional equality rights.

Jennifer Koshan's article assesses the impact of the Women's Court of Canada project in a way different from Réaume. In *Impact of the Feminist Judgment Writing Projects: The Case of the Women's Court of Canada*, Koshan looks to the citation history of the WCC judgments, which were first published in 2008. Her research shows that although the judgments themselves have not been cited very extensively, the overall project has been cited in the academic literature in a range of disciplines and

jurisdictions, and the judgments are being downloaded, read and studied. One reason the WCC judgments might be cited infrequently is the relatively small number of authors and judgments, and the judgments' relatively narrow focus on Canadian equality rights. The article concludes with suggestions for increasing citations in various forums.

#### 4. The Reach of Feminist Judgments

Although all the workshop discussions focused on the future reach of feminist judgments, the articles included in Part III relate most specifically to future planning by organizers and activists. In their article, *'Benchmarking' a Supreme Court and Federal Court Judge in Australia*, Francesca Bartlett and Heather Douglas conclude that improved and expanded data are needed in order to begin to strengthen diversity on the bench. Their article focuses on the backgrounds and career trajectories of judicial officers presiding over the Federal Court and Supreme Courts, two of the highest courts in Australia. Bartlett and Douglas found that overall, the most likely picture in the Australian senior judiciary is of a relatively educationally and ethnically homogenous group. To widen the pool of potential appointees, they advocate a renewed willingness to consider merit defined not solely by seniority at the private bar (a definition that seems to impose structural barriers for many "others"). They point to the dearth of information about the most senior judges and argue that the necessary first step is to collect and examine data about the reality of diversity in this arm of the government.

In the final article, *The Scottish Feminist Judgments Project: A new frontier*, Sharon Cowan describes the process of initiating the distinctively Scottish FJP in the immediate wake of the 2017 Oñati Workshop's discussions. Her article is a useful guide for others contemplating new FJPs and considers the ways that a distinctive feminist judgments project can evolve.

The judges and commentators in the Scottish project have been working collaboratively with seven artists – a theatre practitioner, writer, poet, photographer, textile artist and song writer – who are creating artistic interpretations of individual cases or of the project as a whole. These contributions are designed to show how non-legal and non-textual images and interpretations can aid in understanding the power and reach of law as well as its real-world impact. The Scottish project has faced unusual challenges because it is a small, relatively discrete jurisdiction with a shortage of female judicial role models and because debates about devolution, independence and the retention of a Scottish identity remain very important issues that are tied to the ongoing development of a separate legal system. The project's feminist judges, commentators, and artists have reflected on complex, ongoing questions of national and legal identity as well as the issues commonly faced in other feminist judgments projects.

#### 5. Conclusion

As the discussions at the Oñati workshop and in this volume demonstrate, every FJP shares common ground, but each project encounters its own challenges and constraints and will influence the future differently. Through continued conversations among the participants, the projects offer an avenue for concerted scholarly work, activism, and progress across nations and peoples. The initial FJPs were conducted within post-industrial democracies. This workshop, and the resulting journal publications, set the stage for longer-term consideration of how the concept of feminist judgments will may continue and develop when taken up in diverse cultural, legal, economic, and political settings. As a result of the conversations begun at Oñati and continued in this volume and in many other forums, we hope to be better able to advance the long-term effort to envision and enact the feminist vision of equal justice across the boundaries of culture, race, nation and gender.



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