

Book Review: Scottish Feminist Judgments: (Re)Creating Law From the Outside In

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SHARON COWAN, CHLOË KENNEDY and VANESSA MUNRO (eds), *Scottish Feminist Judgments: (Re)Creating Law From the Outside In*. London: Hart, 2019, pp. 472, ISBN 9781509923267, £95 (hbk).

In a feminist judgments project, feminist scholars rewrite selected legal judgments, adapting established legal forms and demonstrating that important cases could have been decided otherwise. They show that there is always ‘room to maneuver’, even within the limitations of judicial practice (Hunter, 2019). In the process, they expose both the gendered underpinnings of liberal legal reasoning, and the coherence and radical potential of feminist alternatives. The ingenuity and creativity with which judgment authors rewrite past judgments means that the edited collections produced by past projects have attracted wide readerships.

Scottish Feminist Judgments demonstrates the maturity of feminist judging as a critical legal method. It is over 10 years since Hunter et al. (2010) published *Feminist Judgments: From Theory to Practice* and 14 since the Women’s Court of Canada began (Koshan, 2018). Feminist judgments projects, by now, have a core toolkit in common (Hunter, 2013). This book applies and adapts that familiar toolkit to a Scottish context, across a broad range of subjects. It includes judgments re-telling the stories underlying case ‘facts’¹; undoing gender blindness²; foregrounding the women to whom the law applies³; mounting relational challenges to fundamental legal boundaries⁴; contesting judicial statements of ‘custom’,⁵ common sense,⁶ and ‘objectivity’⁷; and making creative use of *obiter dicta*.⁸ Notably, Agomoni Ganguli-Mitra and Emily Postan rewrite one judgment of Lady Hale’s (*Greater Glasgow Health Board v Doogan & Another* [2014] UKSC 68) challenging this ‘real life’ feminist judge’s habitual (and often effective) strategy of taking the formalist path of least resistance, where a more substantive critical approach was available. Taken together, this collection of judgments is effective in identifying what is unspoken in law, and making it speak.

In this short review, my interest is less in the ways in which this book uses and adapts an established template to challenge mainstream judicial thinking, than in how it *re-imagines* the project of feminist judging as such. In their national contexts, feminist judgments projects have been concerned to demonstrate the value of feminist legal thinking with and against the mainstream, and to meet associated demands for ‘plausible’, ‘credible’, ‘useable’ (Munro, 2020; Sharpe, 2017: 420–421) counter-judgments that might influence law-makers, educators and students (Rackley, 2012). They have all leaned on core common law tools to do that; walking the line between pragmatism and

creativity. This has, arguably, been a successful strategy; reflected, for example, in the acceptance of feminist judgments on traditional law school syllabi. However, alongside this care for credibility, and within the growing collective of feminist ‘judges’ and their interlocutors, we can also observe continual processes of reflection, response and remaking, from one project to the next. For example, our Northern/Irish group used the tools of feminist judging to explore relationships between law, judgment and national identity, while in Australia (Hunter, 2017) and New Zealand (McDonald et al., 2017) scholars created (in very different ways) new spaces for distinctive engagement with colonisation and indigenous legal agency.

All feminist judgments projects aspire not only to be pragmatic, but prefigurative endeavours. What they lack in real world institutional authority, they might make up for in possibility (Sharpe, 2017: 422). They are, in many ways, exercises in ‘as if’ jurisprudence; drawing on the legitimacy afforded by their engagement with and fidelity to established law to generate new legal fictions that may leave their imprint; for example, by enabling participants to grapple practically with established problems, and learn new skills (Cooper, 2017). The resulting tension is, as Davies notes, between merely re-stating, re-reading or inflecting the existing law, and remaking it; ‘enacting possible legal futures in the present’ (Davies, 2017: 17). Cooper similarly draws a distinction between projects that *depict* how institutional practice could be otherwise, and projects that *show* through live and ongoing performance (Cooper, 2017).

One challenge for feminist judgments projects lies in resisting the stereotypical single judicial voice (Fitz-Gibbon and Maher, 2015). In earlier projects, a commentator (usually an academic who was not the author of the feminist judgment) produced a short response setting each feminist judgment in its wider socio-legal context and drawing out its feminist elements. This book innovates by adding a third part to that structure; a ‘reflective statement’ from judgment authors. This is a useful innovation; it allows the judgment authors to explain their writing processes and motivations and the choices behind their judgments. Other projects have made spaces for reflection. The Australian project does this as a collective exercise (Douglas et al., 2014) and the Northern/Irish project does something similar, but much more briefly in a separate piece (Enright and O’Donoghue, 2018). However, they have not permitted each judgment author an individual piece of this kind. The call-and-response strategy adopted in the Scottish project rounds out the conversation around the feminist judgments, their origins and impact. The reflections make feminist judicial deliberation transparent to some degree, while stopping short of making them wholly public. As Charlesworth notes elsewhere, commentaries of this kind can de-stabilise claims to determinacy, by laying the author’s uncertainties, regrets, ‘uncomfortable compromises’ (Cowan, 2018: 1389; Cowan et al., 2020: 2) and frustrations side-by-side with the judgments. I found the reflections by Ilona Cairns and Jane Mair and the joint reflection by Sharon Cowan and Vanessa Munro especially instructive in this respect.

More radically, the book aims to multiply law’s feminist voices by bringing artistic strategies into legal space. Cowan suggests that art might trouble law’s claim to ‘close itself off from other discourses and practices’ (Cowan, 2018: 1393), in part to conceal its own incoherence and contingency. Printed at the centre of the book are seven artists’ statements; images, texts and music. These pieces were exhibited in a range of legal and community spaces during the life of the project, and can still be viewed online.⁹ Like the

call-and-response structure of judgment, commentary and reflection, the project's incorporation of these artworks expands its conversation about law; activating new audiences (Cowan, 2018: 1394). At the same time, their artworks' separation from the interlocking judgment-commentary-reflection pieces speaks to gaps that the project was unable to fully address.

The project's directors hoped that art might enable them to access the 'subjective', 'non-textual' and 'non-legal' knowledge often excluded by law (Cowan et al., 2020: 3). However, they have reported that it was difficult to genuinely co-produce feminist judgments with artists, or to write judgments which were clearly marked by artistic engagement. For them, a division of labour remains between art and law. This division seems to be reflected in the seven artists' contributions. Some explore questions of presence and representation; the long-standing question of what it means for women 'feminist judges' to occupy space and wield tools traditionally held by men. So, Jo Spiller subverts techniques of traditional portraiture to depict the project's directors as judges, while Jill Kennedy-McNeill's 'Cailleach' replaces the judge with a mask of the renegade and mythic divine, assembled from multiple historical sources. In this book, we can read judgments by each of the feminist judges depicted in Spiller's portraits but are left to imagine the pleasures of what the Cailleach might write.

Other artworks seek to amplify or include elements of emotion (Cowan et al., 2020: 21) or personal experience which are largely missing from the original judgments. Jess Orr's story 'A Woman's Anatomy', written in response to *Jex Blake v Senatus of Edinburgh University* (1873) 11 M 784 takes us into the everyday oppressions borne by Jex Blake and other women who wished to train and graduate as medical doctors. Jill Kennedy-McNeill's immersive installation 'For the Relics', invites reflection on the devastating aftermath of *Salveson v Riddell* [2013] UKSC 236. Riddell committed suicide when he was evicted from land his family had farmed for a century. This artwork invites us to dwell with law's complicity in his death. Jay Whittaker's startling poems 'Provocation', 'Not Here' and 'Fragment', dwell on elements of violence, personhood and loss omitted from the judgment in *Drury v HM Advocate* 2001 SLT 1013; a judgment about sexual possessiveness and provocation. The project has used Whittaker's poetry in building new pedagogical tools; supporting students to use poetic methods to respond empathetically to the rewritten feminist judgments and their underlying stories (Cowan et al., 2020: 31). In the feminist judgments themselves – which are also responses to the same original judgments – however, there is no equivalent experimentation with form.


The project's directors explain elsewhere that it proved difficult, within a feminist judgments project, to disrupt the sense that 'real' law is a body of familiar forms, traditional sources and text-based rules. The internal constraints of a feminist judgments project were difficult to overcome; in particular, the judicial demand for a single, certain decision (Cowan et al., 2020: 21) and the alienating qualities of judicial language. The project directors concluded, with some regret, (Cowan et al., 2020: 3) that art can speak *about* law, but may not be able to speak *to* it; that law (or at least the very specific form of 'plausible' common law judgment) struggles to make space for that speaking. The artworks discussed here are all speaking about cases which are re-written as part of the collection, but along distinct and separate channels.

There is a sense in which the risks of artistic engagement were outside many feminist judges' comfort zones, or at least difficult to reconcile with the judicial personae inhabited for the purpose of the project. For example, the project turned to Boal's Theatre of the Oppressed to encourage those rewriting judgments to 'physically embody' law through gestures and images, (Cowan et al., 2020: 3) but this was a semi-private experiment, which leaves few explicit clues on the surface of the eventual book. The project's subsequent artistic outreach work with law students is doubly important if it helps with unlearning some of the legal cultures producing this discomfort. However, the split between Boal and the book of judgments might raise a question for future feminist judgments projects; around how the embodied and experimental parts of feminist writing processes are made shareable with a wider public.

This book's subtitle is *(Re)Creating Law From the Outside In*. As Margaret Davies writes, of course, in law there are no simple outsiders or insiders; in the context of feminist judgments we are all both (Davies, 2012). At the same time, as this project's efforts to bridge differences between art and law demonstrate, inside/outside boundaries have surprisingly persistent ways of reproducing themselves, stubbornly resisting efforts to turn insides out. This Scottish project, in the honesty and openness of its feminist methods, and in its willingness to pluralise the feminist languages of law, both brings us a little closer to feminist legal futures and identifies some of the blocks that keep us from achieving them. Feminist judgment has not run its course as a provocative legal method, but this collection shows what is at stake in holding it open to further experimentation and exposure.

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Notes

1. See, for example, Cowan and Munro's feminist judgment in *Ruxton v Lang* 1998 SCCR 1; McHarg and Nicolson's rewrite of *Salvesen v Riddell* [2013] UKSC 236 and Kennedy's judgment in *Jex-Blake v Senatus Academicus* (1873) 11 M 784.
2. See, for example, Mair's rewrite of *Coyle v Coyle* 2004 Fam LR 2 but contrast Harding's commentary on Norrie's feminist judgment in *White v White* 2001 SC 689.
3. See, for example, feminist judgments by Cairns on *Smith v Lees* 1997 SCCR 139; Agomoni Ganguli-Mitra and Postan on *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
4. See, for example, feminist judgments by McCarthy on *Rafique v Amin* 1997 SLT 1385; Belcher on *Commonwealth Oil and Gas v Baxter* [2009] CSIH 75; McHarg and Nicolson on *Salvesen v Riddell* [2013] UKSC 236.
5. See, for example, Kennedy's feminist judgment in *Jex-Blake v Senatus Academicus* (1873) 11 M 784.
6. See, for example, Gray's feminist judgment in *R and F v UK Application* 35738/05 2005.
7. For example, Cowan and Munro rewriting *Ruxton v Lang* 1998 SCCR 1; Busby rewriting *Rainey v Greater Glasgow Health Board* [1987] AC 224, HL.
8. For example, Kagiarios rewriting *Rape Crisis Centre v SSHD* 2000 SC 52.
9. Available at: <https://www.sfjp.law.ed.ac.uk/virtual-exhibition/>.

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