

BOOK REVIEW

Northern/Irish Feminist Judgments Judges' Troubles and the Gendered Politics of Identity

Eds. Mairead Enright, Julie McCandless and Aoife O'Donoghue

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Ms. Justice Aileen Donnelly, High Court

It was not until 1963 that Ireland appointed its first woman judge when Eileen Kennedy was appointed to the District Court. Since the appointment of Mella Carroll to the High Court in 1980 “there has been an at first rather slow but swelling number of women on the Irish bench”. In Northern Ireland, the first women superior court judges (Siobhan Keegan and Denise McBride) were only appointed in 2015. During the War of Independence leading feminist activists and suffragists, such as Hanna Sheehy Skeffington and Maud Gonne McBride, served as judges of the Dáil Courts. In the absence of disseminated judgments, we can only speculate about how their feminism might have influenced their rulings and to what extent they brought a distinctly feminist perspective to the judicial process.

This thought provoking new book, inspired by projects in Canada, England and Australia, sets out to experiment with the impact feminist perspectives could have had on well known cases from both jurisdictions on this island. Through a process of judicial re-imagining, the commentaries and judgments explore how feminist judges, bound by the same law, doctrinal strictures, conventions, temporal knowledge and evidence as the original decision maker could have decided the case, or reasoned the case, differently. In common with other feminist judgment projects, there is a commentary before each judgment which explains the original decision and puts the case in its social context. These commentaries are essential features of this book and make these feminist judgments accessible to both lawyers and non-lawyers who may or may not be familiar with the original judgments.

The projects have been described as a form of “academic activism” which seeks to intervene in prevailing academic and political discourse around law and its limits. The editors of this book state: “While feminist legal theory has long warned against over-investment in the law - particularly judge-made law – as a site within which progressive social or political transformation might begin, feminist judgments are increasingly regarded not only as advancing critique of legal judgment, rules and doctrine, but also as uniquely accessible and powerful models of alternative judicial practice.”

Implicit within this feminist judgment project is that a woman judge is not necessarily a feminist judge and a feminist judge is not necessarily a woman judge; in this book both women and men write the re-imagined judgments. Rosemary Hunter, an editor of *Feminist Judgments from Theory to Practice* (Oxford, Hart Publishing, 2010), the book resulting from the English feminist judgments project, concluded that a more diverse judiciary could result in different decision making but that was not an inevitability as a number of factors may intervene. The presence of a diverse judiciary is however important symbolically, as well as in courtroom management and behind the scenes contributions. In her introduction to the Hunter et al edition, Baroness Hale of the UK Supreme Court pointed out that it is a given that all judges

have to work within their judicial oaths and cannot have an agenda, but feminist judges can certainly bring their own experience and understanding of life to the interpretation or development of the law or its application in individual cases.

The harmonious interlinking of themes in this volume reflects the creativity and collaboration that went into this project. Unlike previous feminist judgement projects, which involved academic and practising lawyers, Enright, McCandless and O'Donoghue have “troubled” legal judgment by asking it to engage with non-legal expertise and experience through a collaboration with feminist (and other) activists, litigants, poets, visual and performance artists and non-legal academic expertise. This assists in lending a very broad contextual understanding to the judgments. The title “Judges troubles” draws on Northern Irish history but is used to highlight the important role that judges have in societies marked by violent conflict and an associated unsettled politics around national identity. The editors have gone to enormous effort in choosing the phrase “Northern/Irish” which brings attention to the different jurisdictions without setting them in isolation from or in contradistinction from one another. As the editors observe the solidus/slash keeps in mind the contested relationship between the two jurisdictions in a nuanced way and they invite readers to see it as representing not a border, but rather a set of adjacent possibilities – an “either/or”.

There are 26 feminist judgments in this book, most addressing central feminist concerns such as gendered roles including reproductive roles, women’s participation in society, autonomy and agency, identity, and citizenship. The judgments arise from cases originating in the courts in Ireland or Northern Ireland with one exception. Feminist judge Vicky Conway reports on “the case for a reopened inquiry into the “Kerry Babies” case”. Her review examines the Tribunal’s processes, especially its approach to witnesses and to Joanne Hayes in particular, highlighting the extremely personal questions she was asked. The adversarial approach of that Tribunal, rather than the inquisitorial approach demanded by the law on tribunals, is criticised. The absence of the female voice, usually a party to or the subject of the case, from the original judgment is a recurring theme. Mary Donnelly, in her re-imagined judgment in fictional proceedings brought by P.M., the wife of the applicant in *J.M. v The Board of Management of St. Vincent’s Hospital*, [2003] 1 IR 321, criticises the absence of a representative of P.M. in the original case brought by her husband for court orders for her blood transfusion and liver transplant despite her refusal to sign a consent based at least in part on her religious beliefs as part of the Jehovah Witness faith. In the feminist judgment greater emphasis is placed upon P.M.’s agency in decision making regarding herself. Interestingly, the feminist judge also rules that the orders for transfusion and transplant were correctly given although she does so for different reasons. The absence of women from the Northern Ireland Parades Commission gave rise to the decision *In Re White* [2000] NI 432. The feminist judgment of Catherine O’Rourke seeks to correct the “apparently gender-free image” and “prioritisation of ethno-national identity over gender” of the “community in Northern Ireland”, the statutory interpretation of which was at the heart of the original judgment.

Explicit and implicit focus by the law on the maternal role is highlighted in many of these feminist judgments. Flood J in *BJM v CM* [1996] 2 IR 574 described the wife in the nullity case as “having reached the zenith of all womanhood” by giving birth to children in the marriage. In the feminist judgment of Eoin Daly in *Flynn v Power*, the unacceptability of unmarried motherhood from the point of view of religious employers must be balanced against individual rights in a manner which weighs “the extent to which the employee...is engaged with the spiritual core or epicentre of the denomination...and the concrete effects the claimed exemption will have on [the employee]”. Each of the three feminist judgments in the book that deal with access to abortion, *Attorney General v X*, *Re Family Planning Association of Northern*

Ireland v Minister for Health and Society for the Protection of Unborn Children's Application for Judicial Review, assert that female agency in that sphere is constructed as a threat to national reproduction.

The book throws up some unlikely candidates for re-imagined judgments. The challenge, by two male Ulster Unionists, (*McGimpsey v Ireland* [1990] 1 IR 124) before the Irish Courts as to the constitutionality of the Anglo-Irish Agreement 1985 gives the opportunity to focus on the importance of women in the peace process and how locus standi requirements of a public life or public standing in the community may restrict women's access to such challenges. As Fiona Cooke, providing commentary to the feminist judgment of *Barnes v Belfast City Council* observes, "[i]t may not be readily apparent why a volume on feminist judging would include a case that generated a public outcry following the destruction of a pet dog by Belfast City Council under Northern Ireland's version of the much derided dangerous dog legislation." She points out that feminist scholars have often distanced themselves from animals in order to stake their own claims to being human. However, both the commentary and the feminist judgment of Marie Fox provoke consideration of the harm "the legal system perpetrates on women and animals where both have been socially configured as property, needing to be subdued and controlled".

In the area of teaching, feminist judgments are excellent tools to demonstrate to law students that there is no inevitable outcome regarding judgments. For practitioners, the feminist judgments present alternative constitutional, statutory and factual interpretations that can be argued before courts. Indeed, for me, the judgments highlighted that the approach lawyers take to the evidence and to legal submissions has an important bearing on the direction that a judgment will take. Imaginative lawyers are needed before an imagined judgment may become a reality.

This is an invaluable read for all those interested in the judicial role, the construction of judgments and how issues of gender have been considered by the judiciary in both jurisdictions on the island of Ireland. For judges there is much to be gained from this book. Judges may not agree with all, some or even any of the feminist judgments in this book but that is not the important point. The point is that these judgments make us think about the process we are engaged in, they remind us of the importance of what we do for the individuals before us and those not before us, that the language we use consciously or subconsciously reflects a history of legal and societal norms which can be contested and that even the most apparently straightforward decision can be reached by a variety of paths.