

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

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Photograph from Rose Comiskey's exhibition *Against the Tide*, which chronicles women's reproductive rights protests in Ireland during the 1980s and 1990s.

Some Questions From The Project:

- *What different legal outcomes might have been produced through feminist legal reasoning in leading Northern/Irish case law?*
- *What can feminist judging reveal about the techniques of identity politics as they appear in Northern/Irish case law?*
- *How can feminist legal theory contribute to a re-thinking of gendered judicial techniques and legal concepts in Northern/Ireland?*
- *How have Northern/Irish women used litigation to challenge the boundaries of membership in gendered religious, national and other groupings? What are the obstacles and limitations to such litigation?*
- *How have Northern/Irish feminist movements conceived of the role of the judge in approving or dissenting from judicial pronouncements?*

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The [Northern/Irish Feminist Judgments Project](#) is a collective of legal academics and practitioners who have written the 'missing' feminist judgments in a series of significant Irish and Northern Irish legal cases. By requiring participants to adhere to the rules of precedent and custom that bind practising judges, the Project has demonstrated that it is possible to reason and decide difficult legal cases in ways which take proper account of feminist concerns. Through this process of judicial re-imagining, the Project has focussed on Northern/Irish concerns in investigating how gender is shaped through judicial practices and how the Northern/Irish judiciary has contributed to the construction of gendered national identities across the island since the founding of the two jurisdictions almost a century ago.

This Briefing Paper explains what we mean by feminist judging methodology before detailing the scope of the [Northern/Irish Feminist Judgments Project](#). It then elaborates on the role of the judiciary in governmental national identity projects.

Feminist Judging Methodology

Feminist judging is a form of 'academic activism' that intervenes in academic and political discussions about law and its limits. It seeks to show how, in real terms, legal cases could have been reasoned and/or decided differently, in order to address feminist concerns. The process of rewriting a legal case as if one were bound by the same law, doctrinal constraints, conventions, temporal knowledge and evidence as the original decision-maker(s), requires feminist judges – usually legal academics, but sometimes also barristers and solicitors – to put feminist legal theory, knowledge and critique 'into action'. Rewritten judgments provide accessible and powerful models of alternative judicial practice, suggesting that other forms of judging that lead to different legal outcomes and potential social orders are possible.

By re-imagining key judgments, feminist judging makes an important intervention into judicial diversity debates, that have hitherto been focused on representation. While the methodology has of course in part been motivated by the ongoing lack of gender diversity in judicial and other legal circles, it makes the crucial point that it is not just 'more women on the bench' per se that will change the nature of law. Instead, it emphasises that what is required are more critically aware methods of judicial reasoning and decision-making, whether exercised by male or female judges. In other words, if female judges adopt the same conservative and patriarchal legal conventions as their male counterparts, judicial decision-making will make very little difference to women's lives.

The rewritten judgments succeed in demonstrating that such is possible by showing that even within the bounds of past and current judicial strictures and norms, there is considerable scope for feminist – and indeed other critical – reasoning and judicial techniques. The methodology therefore rejects the conceptualisation of judges as 'robot-like', objective tools of the law and instead accepts that impartiality, fairness and independence are not compromised by acknowledging that judges bring their



Carey Young

We The People (after Pierre Cavellat), 2013.
Photograph mounted on aluminium frame:
80 ½ x 54 ½ in. (204.5 x 138.5 cm)
Edition 1 of 5, 2 AP Aps.

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own lived experiences and identities to their decisions in such a way that impacts on lived social and political orders. In a sense, it exposes the contingencies of legal decision-making and highlights the choices that are made by judges as important decision-makers in society.

Feminist judges use a range of techniques in order to engage with the diversity of women's lives before the law, as well as other marginalised groups in society. Some examples of feminist techniques include:

- Adopting contextual and relational techniques of reasoning, rather than the adversarial and abstract approaches that we have come to expect, particularly in common law systems
- Making use of feminist 'common knowledge' as well as feminist scholarship and empirical research and/or being upfront about the moral and political quandaries of the case.
- Asking 'the woman question' or 'the power question' to focus on the effects of apparently 'neutral' liberal legal constructs and practices, or challenge gender bias in legal doctrine and judicial reasoning.
- Promoting substantive rather than formal equality.
- Challenging judicial distinctions between 'public' and 'private'.
- Reframing the narrative of the case and retelling the facts to make women's lived experiences more visible in legal discourse and the construction of legal rules.

Feminist judges have at times adopted highly formal and positivistic approaches in order to give proper legal effect to the politically progressive impetus behind legislative or constitutional provision. At other times, they have 'called law out' by following its patriarchal impulses to logical conclusions and pointing out the costs to women's lives; even if that sometimes means an unfavourable result for an individual litigant. Some feminist judges have rejected the judicial form altogether, particularly when cases address the lives and concerns of indigenous women.

Feminist Judgments Projects have been characterised by a distinctively collective ethos whereby multiple feminist perspectives collaborate in an attempt to shift legal discourse and cultures. From the [Women's Court of Canada](#), to the [English Feminist Judgments Project](#) – which did much to establish the feminist judging methodology as a legitimate critical legal method – to sister projects in [Australia](#) and the [USA](#), and our cross-jurisdictional [Northern/Irish Feminist Judgments Project](#) – which itself involved over 100 participants – a wide range of legal cases have been rewritten in relation to substantive law,

court level, the timing of the original judgment and national jurisdiction. This demonstrates the wide applicability of the feminist judging methodology. Taken together, the various Feminist Judgment Projects are stirring a wider body of feminist thought by putting research 'into action'.

The Northern/Irish Feminist Judgments Project

The [Northern/Irish Feminist Judgments Project](#) takes this methodology in important and challenging new directions. As well as rewriting cases from new areas of substantive law – such as animal rights, children's rights, international law and policing – our Project is the first to include first instance decisions and judicial review of a Tribunal of Inquiry, further demonstrating the wide applicability and adaptability of this legal method. It is also the first cross-jurisdictional Feminist Judgments Project, bringing a unique perspective to the national contextualisation of the rewritten judgments.

Ireland and Northern Ireland are separate jurisdictions with difficult and overlapping political and legal histories. Since the two jurisdictions came into formation, the stability and authority of both legal orders have been subject to considerable contestation. Judges in Northern/Ireland have worked with an imposed colonial legal tradition, ensuring its persistence in the face of unique political, social and religious tensions. Considering both jurisdictions alongside each other mirrors a long tradition of cross-border feminist political activism and co-operation in Northern/Ireland. Our project showcases the usefulness of the feminist judging methodology for jurisdictions marked by separation and transition from colonialism, ethno-national conflict, and religious patriarchy. Indeed, the process of identifying feminist political themes and challenges across the two jurisdictions would not have been as illuminating if the jurisdictions had been considered in isolation from each other.

Our participants collaborated with academics from other disciplines working on women's engagement with law, judges and judgment, as well as performance and visual artists, political poets, feminist activists and litigants. This meant that our Project extended the critical purchase of the feminist judging methodology by bringing feminist legal theory into a much wider dialogue with other feminist expertise and experience. This broad collaboration has enabled a richly contextual understanding of the 26 rewritten judgments of the Project, as well as the wider Northern/Irish social, cultural, historical and political context. In doing so, we have 'troubled judgment' by requiring it to listen to non-legal expertise, struggles and experience. These cross-disciplinary and non-academic interventions were also crucial to the Project's theoretical focus on the role of judges in gendered national

identity projects. Although other Feminist Judgments Projects have touched upon the gendered political implications of judicial decision-making, they have not focussed on judges' political agency, a key dimension of which involves judges' entanglement with governmental politics of national identity.

The Role of the Judiciary in National Identity Projects

Judges are often regarded as 'custodians' of order – the rule of law – and guarantors of the continuity of national traditions, particularly in the context of inter-group conflict and social upheaval. As judicial decision-making typically steps in when social conflict can no longer be controlled by other means, judges therefore determine when contests over identity should cease. In doing so, they have defended law's preferred performances of identity by denying other identities; translating women's claims into law's own language; and marking them as deviant or deficient, or erasing them altogether. Women – and others – come to bear the idealised maternal, sexual, consuming or labouring identities which judges impose on them through law, with profound consequences for their lives and for the transformative potential of litigation. Women in particular come to bear the burden of imposed national and patriarchal identities because their very bodies are central to securing a stable communal identity: they produce and raise new members, holding them to the traditions that distinguish the nation from its outside. William Wall, one of the political poets to engage in the Project, has described this as the 'involuntary patriotism' which legal orders often demand of women, particularly in the context of the quest for self-governance.

Some judges and legal commentators believe that law and its associated techniques of reasoning are largely autonomous from questions of identity, mainly because the judge's power to impose order relies on citational practices which evoke the authority of the law, rather than the judge's person or politics. In other words, judges merely give effect to prior legal authority. However, in rewriting legal cases from a feminist perspective, this Project has made visible judicial efforts to uphold Northern/Irish governmental projects of identity formation, at the expense of women's individual freedoms and the legal visibility of feminist movements. In our examination of the selected legal cases, we have made clear that judges in both jurisdictions have projected particular nationally distinct legal identities, whether explicitly or integrated with a broader liberal legalist ethos; and whether solicitous of or resistant to the demands of the majority. We have also highlighted how judges have responded to feminist engagements with law. As women have come before the courts they have contested the boundaries of 'involuntary patriotism' by demanding accountability

for the harms done to them by past laws and attempting to assert their own subjectivities. Judges have often responded to these efforts with judgments valorising particular jural subjects and thus asserting the boundaries of national identity.

As texts, legal judgments reveal a great deal about how judges articulate the role and purpose of law, as well as the idealised identities to which women are expected to conform. Our Project has shown that judges are active, if sometimes overlooked, political figures and agents in the policing of women's bodies and lives. It has also shown how female legal subjects formed in earlier judgments continue to influence contemporary judges, emphasising the mutually constitutive relationship between citational practices and the construction of national identities. The Project has also highlighted how their presence is still felt in modern projects of law reform, particularly in the constitutional convention in Ireland and 'bill of rights' proposals in Northern Ireland.

We argue that an awareness of this political dimension to judging is hugely important, not just for legal scholars but also for practising judges and other legal professionals. The Northern/Irish Feminist Judgments Project, in providing tangible models of alternative judicial practice which takes into account feminist concerns, is an invaluable resource for judicial and other legal training. The rewritten judgments and other Project resources can be readily used, in Northern/Ireland and beyond, to challenge common misperceptions about the judicial role and to advance a better understanding of the operation of judicial impartiality and the role judges play in national identity projects.

REFERENCES

Enright, McCandless and O'Donoghue (eds) *Northern Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing: forthcoming January 2017)

Hunter, McGlynn and Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing: 2010)

Further details of the Project, including information on Project participants, the cases we have rewritten, comment and reflection pieces, recordings of feminist judges and commentators discussing their cases are available at: www.feministjudging.ie

If you are interested in our Project and would like to get involved, contact details are overleaf. We particularly welcome communications from students, teachers and legal practitioners, as we are currently developing a Teaching Toolkit and a Legal Practice Toolkit.



L-R, Máiréad, Julie and Aoife
outside the historic Green Street
Courthouse, Dublin.

JULIE MCCANDLESS

Julie McCandless is an Assistant Professor in the Department of Law at LSE. Julie's research focuses on the legal regulation of gender, particularly in relation to human reproduction, parenthood and civil registration. For the Northern/Ireland Feminist Judgments Project, she rewrote a case involving clinical negligence in the provision of assisted reproduction services in a Northern Irish fertility clinic. She is currently one of the Coordinating Editors on the Editorial Board of *Feminist Legal Studies*; co-convenor, with Linda Mulcahy, of the Department of Law's Empirical Socio-Legal Forum; and co-convenor, with Ed Kirton-Darling of the nascent Registering Registration Network.

MÁIRÉAD ENRIGHT

Máiréad Enright is a Senior Lecturer at Birmingham Law School. Máiréad's research focuses on the legal regulation of culture and religion, with a special interest in the regulation of cultural and religious membership in Ireland, especially as it relates to nationalist politics of belonging. For the Northern/Ireland Feminist Judgments Project she rewrote a case challenging restrictions imposed by the Irish state on access to contraception. Actively involved in women's reproductive rights campaigning in Ireland, Máiréad makes regular media interventions on issues such as abortion and symphysiotomy. She is currently legal consultant to Sarah Browne and Jesse Jones' performance art project, *In the Shadow of the State*.

AOIFE O'DONOGHUE

Aoife O'Donoghue is a Senior Lecturer at Durham Law School. Her research focuses on public international law with a specific interest in global governance, constitutionalism and feminism. For the Northern/Ireland Feminist Judgments Project, she rewrote a case where two Unionist brothers from Northern Ireland challenged the legitimacy of the Anglo-Irish Agreement 1985 in the Irish Courts. Aoife is also working on a project surrounding the impact of UK constitutional changes on Northern Ireland including repeal of the Human Rights Act and the impact of Brexit. Aoife is also part of a network of international legal feminists working on the future of feminism within international law. Aoife has published a number of op eds in Irish newspapers and political blogs, as well as taking part in two programmes for Near FM relating to women, social justice and the 1916 Irish Rising and the Northern/Ireland Feminist Judgments Project.

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