BOOK REVIEW

FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND TE RINO: A TWO-STRANDED ROPE

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The idea behind the Aotearoa Feminist Judgments Project is simple, yet powerful: "Imagine a feminist judge sitting on the bench alongside the original judge/s in a particular case. How might she have decided the case and written her decision?"[1] The collection consists of 25 judgments: 19 are feminist judgments (the Pākehā muka (strand)), and six came to be known during the project as the mana wahine judgments (the Māori muka). Carefully integrated and yet separate, together they create a strong and cogent two-stranded rope — *Te Rino*.

The collection is edited by Aotearoa legal academics Elisabeth McDonald and Rhonda Powell from University of Canterbury, and Māmari Stephens from Victoria University of Wellington. They are joined by international editor Rosemary Hunter, from Queen Mary University of London. Hunter brings to the project her wealth of experience from other countries' feminist judgment projects, including her leading role in the English[2] and Australian[3] projects, and providing support to the Northern/Irish, Indian and United States feminist judgment projects.[4]

The concept for *Te Rino*, as with the other countries' projects that preceded it, is that authors write their judgments within the constraints of the

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1 Elisabeth McDonald, Rhonda Powell, Māmari Stephens, and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Oxford, Hart Publishing, 2017) at 25.

2 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

3 Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford, Hart Publishing, 2014).

4 McDonald, Powell, Stephens and Hunter, above n 1, at 6, n 7.

"precedent, legislation, style and relevant legal and social science research, which existed at the time".[5] Within those limits, the judgments are then "exercises in imagination, designed to make us see possibilities in law that, arguably, the original judges in these cases may not have seen".[6] The judgments in *Te Rino* span 100 years, from the 1914 decision of *Waipapakura v Hempton*[7] to the 2015 decisions of *Taylor v Attorney-General*,[8] *Seales v Attorney-General*,[9] and *R v S*.[10] As anyone who is familiar with those decisions will recognise, the feminist judgments in this volume are not just those that "have historically been the focus of feminist critique, such as criminal, employment and family".[11] While the volume does contain judgments from those areas of law, it also encompasses judgments on civil rights,[12] social welfare,[13] medical law,[14] customary rights,[15] and the environment.[16] The focus of the feminist perspective ranges from female litigants (defendants and appellants), through to the environment in 'Justice' Wheen's ecofeminist approach to *Squid Fishery Management Company Ltd v Minister for Fisheries*,[17] and to Papatuaūānuku in *Bruce v Edwards*.[18] The project engages with judgments from all levels of our courts, as well as the Human Rights Review Tribunal. Each judgment is preceded by a commentary discussing the broader societal context of the original judgment and explaining the judgment writers' approach.

As the editors point out in Chapter 3, there are a number of unifying themes across the judgments.[19] First, anti-subordination — that is, "a concern

5 At ix.

6 At ix.

7 *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC).

8 *Taylor v Attorney-General* [2015] NZHC 1706.

9 *Seales v Attorney-General* [2015] NZHC 1239.

10 *R v S* [2015] NZHC 801.

11 At 8.

12 *Taylor v Attorney General*, above n 8; *Brooker v Police* [2007] NZSC 307.

13 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA); *Lawson v Housing New Zealand* HC Auckland M538/94, 29 October 1996.

14 *Seales v Attorney-General*, above n 9; *Hallagan v Medical Council of New Zealand* HC Wellington CIV-2010-485-222, 2 December 2010; *Re W [PPPR]* (1993) 11 FRNZ 108.

15 *Bruce v Edwards* [2002] NZCA 294; *Waipapakura v Hempton*, above n 7.

16 *Squid Fishery Management Company Ltd v Minister of Fisheries* CA39/04, 7 April 2004; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87.

17 At 361–384.

18 *Bruce v Edwards*, above n 15.

19 McDonald, Powell, Stephens and Hunter, above n 1, at 3235.

that legal rules should not perpetuate structures of male power and female subordination".[20] Second, a critique of the public/private distinction and recognition of the value of home, privacy and care. Third, a critique of the balancing of rights and the tendency to accord more weight to rights that are more important to men. Fourth, the feminist ethic of care, applied not only to people, but also to the environment and non-human animals.

There are reminders, as the editors note from the outset, that there is no single feminist approach: "feminism is not monolithic. There are multiple strands within feminist legal theory and the judgments do not take a uniform position".[21] This is illustrated by the judgment in *Seales v Attorney-General*,[22] which shows that, even within one strand of feminist thinking, diverse approaches might be taken. Citing academic Carol Gilligan's work, 'Justice' Manning applies the feminist ethic of care, observing:[23]

> As society's primary caregivers, many women tend to define themselves first and foremost in terms of their family's needs. When they become elderly or suffer from a debilitating condition or disability, and are themselves in need of care, they may find it difficult to accept the role reversal in being cared for. The inculcated response of self-sacrifice and the fear of being an emotional, financial and time-consuming burden to their families, whose interests they are used to putting first over a lifetime, makes them vulnerable to feel pressure to take the assisted dying option, even if they are initially ambivalent or they do not yet wish to die.

Her solution is that, to protect women, suicide should continue to be criminalised.[24] This judgment illustrates that within a single branch of feminist theory, such as the ethic of care, it is possible for different conclusions to be drawn — in this case a kind of paternalism that many strands of feminism would reject.

Te Rino is feminist not only in content but also in the way in which it was produced. The project was collaborative, bringing together many authors and supporters, both individuals and organisations. There are 57 contributors to this volume: four editors, who also authored contributions, and 53 other authors, with "most senior women law academics in New Zealand" involved in

20 At 32.

21 At 32.

22 At 125.

23 At 137.

24 At 134–142.

some way, as well as practitioners and a number of junior women academics.[25] There are also several males among the contributors, including the unique contribution of retired Family Court Judge John Adams, who rewrote his own judgment.[26] This demonstrates, as Māmari Stephens observes, that to engage in applying different ways of looking at the law, "We don't need qualifications of learning or ethnicity or gender, so much as a commitment to being *open*".[27] Funding was provided by the New Zealand Law Foundation, which assisted the authors to meet face-to-face in workshops to engage in a "collaborative writing process, drawing on feminist (collective) methodology".[28]

The most distinctive contribution is the development of the mana wahine judgments. Māmari Stephens provides a fascinating glimpse into the production of these judgments in the first introductory chapter.[29] She writes about her experience in the Māori Women's Refuge and discovering the value of "Māori having space to do important things in Māori ways without needing the permission, oversight or approval of Pākehā women".[30] This insight is carried over into the development of the mana wahine judgments in *Te Rino*, which, although intertwined with the Pākehā judgments, sit separately. The mana wahine commentary and judgments are marked with shaded grey boxes to highlight the difference between this muka and the pākehā muka. It strives to be "a model for intersectionality in practice",[31] recognising that Māori women experience sexism and discrimination "based on ethnic or cultural identity, as well as deprivation and marginalisation based on the legacy of colonialism".[32] Stephens, discussing the purpose of the mana wahine judgments, suggests they "bring the complex and contradictory lives of Māori women to the fore" but also "legitimise Māori ways of thinking and cultural practice", not only for the benefit of Māori women, but "ultimately for all Māori".[33] The most significant

25 At 8.

26 *V v V* [2002] NZFLR 1105 (FC).

27 At 5.

28 At xi.

29 There are three introductory chapters in total: 1) an overview of the editors approach to the project; 2) explaining Māori legal concepts to any international readers; and 3) the history of the international feminist judgments project, and an overview of the judgments and the development of the mana wahine judgments.

30 At 5.

31 At 28.

32 At 42.

33 At 10.

contribution of this volume, in terms of its place internationally, is that it may "feed into the possibility, as yet inchoate, of an international indigenous judgments project".[34]

Another particularly local insight that the book provides is its discussion of the way that our judges are trained to write judgments. Margot Schwass provides training for the New Zealand judiciary on judgment writing, and she was employed to train the authors of the *Te Rino* judgments. The editors recount that the training focussed on writing "issues-driven judgment", as an "issues-based structure works well for writers and readers as it results in a clear, succinct and readable judgment".[35] This approach is, however, the antithesis of the feminist approach, as Rosemary Hunter notes:[36]

> … the emphasis on clear issue-identification, minimal factual description and parsimony in reasoning, militated against many of the things we were trying to achieve as feminist judges.

The feminist approach, as is illustrated in many of the judgments in this collection, begins with acknowledgment of the participants and a focus on the story at the outset of the judgment, not with legal issues.

Direct engagement with the people in court is part of feminist judging and is also a feature of therapeutic and procedural justice approaches to judging.[37] It is a method designed to involve people in the justice process and acknowledge them as people, rather than abstracting them to their procedural role — defendant, appellant, or victim, for example. The opening acknowledgment in *Ruka v Department of Social Welfare* is particularly illustrative of that approach. 'Justice' Stephens, after acknowledging her fellow judges in Te Reo and English, opens her judgment as follows:[38]

> My learned friends have recounted in some considerable detail the extraordinary extent of the abuse Ms Ruka experienced between 1974 or 1975 and 1992. I need not revisit those accounts in detail; but I hope that Ms Ruka will now have the opportunity to lead a very different kind of life to

34 At x.

35 At 10.

36 At 14.

37 Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack "Judging in lower courts: Conventional, procedural, therapeutic and feminist approaches" (2016) 12(3) Int J Law Context 337 1.

38 At 94.

that which led her here before us.

Kia hora te marino

Kia whakapapa pounamu te moana

Kia tere te karohirohi

Let the calm be widespread,

Let the ocean lie flat,

May it shimmer.

This is an affecting and powerful opening; a letting out of breath, a gathering in, a signal of hope. The acknowledgement and engagement of the participants in the justice process is also achieved by giving participants pseudonyms to humanise them. In *Re W [PPPR]*,[39] for example, the pseudonym "W" from the original judgment is replaced with the pseudonym "Katrina Williams", which helps to focus the judgment on Ms Williams, and counters the tendency to focus on the unborn baby or the opinions of the medical specialists.[40]

The judgments then, in general, pay close attention to women and to the story that culminated in a court case, rather than taking an issues-driven approach. As Rhonda Powell writes, "One of the ways in which a judge can be 'feminist' is by listening to women's stories, hearing the perspectives of woman litigants and recognising women's experiences in the way that they recount the facts of cases, so that these experiences also become legal truths".[41]

This is perhaps most plainly illustrated in the judgment in *R v Wang*, a case about a woman who killed her abusive husband while he was asleep. In producing the *Te Rino* version of *R v Wang*, the authors went beyond the original judgment, also accessing the court file and notes of evidence, which included facts omitted from the original judgment. Lexie Kirkconnell-Kawana and Alarna Sharratt, writing the commentary for the judgment, observe:[42]

> In the original judgment, the Court minimised the extensive history of abuse, reducing the description of the harm within the relationship to the one line that it was a 'loveless and coercive marriage'.

39 *Re W [PPPR]*, above n 14.

40 At 172.

41 At 35.

42 At 489.

The court file, however, recorded extensive additional evidence presented at trial, including Ms Wang's experience as a Chinese immigrant woman isolated in New Zealand, suffering from a major depressive illness, subjected to extensive and ongoing abuse, and whose attempts to seek assistance from friends had been rebuffed with advice to endure the abuse. This judgment, and many others in the volume, are stark reminders that judgments do not simply present neutral fact, but like all texts, are selective and performative pieces of writing.[43] The judgments demonstrate a method for paying attention to what might otherwise escape notice. As Glazebrook J and Judge Caren Fox note in the foreword/he kupu whakataki, the book can help judges to "recognise the possibility of bias and flawed decision making processes and do their best to eliminate them".[44] They then go on to sound a word of warning:[45]

> But judges must take care not to replace one set of biases for another. A judge's overriding duty is to decide cases according to the law, even if this leads to a result that is against their inclination.

This comment suggests that feminist judging might be a form of bias, rather than a way of ensuring equality. However, the judgments do not try to impose a feminist perspective at the cost of legal principle. Instead, they actively engage with lived experiences of women (and the environment), creating space to see cases in ways that we have been blind to and may be continuing to be blind to. In that sense, the feminist project has larger implications, showing us how to engage with facts in a different way, by letting those facts inform the law, rather than disregarding or ignoring them. It brings into sharp relief what it is that legal thinkers ignore when they engage with text. As academic Elizabeth Mertz has observed, when we use the phrase "thinking like a lawyer", we are "often implying that it involves a honing of general analytic ability".[46] Mertz argues that "thinking like a lawyer" is really:[47]

> … a very particular, culturally laden kind of thinking … [which] is socially and institutionally grounded in specific practices and power relationships.

43 Paul Atkinson and Amanda Coffey "Analysing Documentary Realities" in David Silverman (ed) *Qualitative Research* (3rd ed, Sage Publications, London, 2011) at 77.

44 At viii.

45 At viii.

46 Elizabeth Mertz *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, Oxford, 2007) at 98.

47 At 98.

> It asks some kinds of questions while neglecting others and makes sharp demands for proof in some places where elsewhere it accepts unproven assumptions.

The Te Rino judgments shine a bright light on these institutional practices while also providing a workable remedy to the problems they identify. The judgments and the commentary that precede them, are a powerful means of teaching us to see a legal case through a different lens, helpful both in the classroom and for established researchers, practitioners, and members of the judiciary.

As Māmari Stephens notes, there is much to learn from a generalist legal project such as this.[48] This collection offers an opportunity to step back and survey the land of the law, and to do so with fresh eyes — a valuable opportunity when many are practising or researching in highly specialised areas. Hopefully this is reason enough for anyone to purchase the volume, but if further motivation is required, royalties from the project will go to supporting Community Law initiatives that help women to access legal support and education. Nā tō rourou, nā taku rourou ka ora ai te iwi.

48 At 14.