AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW

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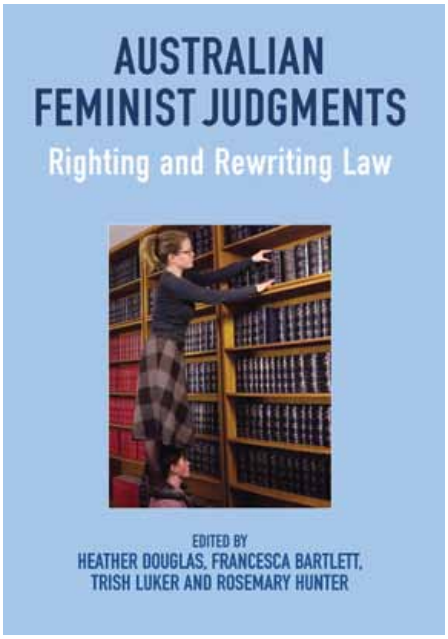
AUSTRALIAN FEMINIST JUDGMENTS – RIGHTING AND REWRITING LAW PRESENTS IMAGINED JUDGMENTS WRITTEN BY ACADEMICS WHO APPLY A FEMINIST LENS TO 25 REAL CASES SPANNING 80 YEARS. THE BOOK EXAMINES GENDER-BIASED OUTCOMES IN SEVERAL CRIMINAL AND DISCRIMINATION LAW CASES, AS WELL AS CASES IN MORE SURPRISING AREAS SUCH AS TORT, EQUITY, TAX AND CONSTITUTIONAL LAW.

The Australian Feminist Judgments Project originated at a legal theory reading group in Brisbane in 2010, inspired by similar projects in Canada and the United Kingdom. The Australian project is modeled more closely on the English one, which looked at how cases in a range of different areas could have been decided differently if approached from a feminist perspective.

The Australian project aims to 'test new and enduring questions about the relationship between law and feminist ideas, approaches and objectives'. The under-representation of women in the Australian judiciary (women make up a third) has clearly been an important catalyst, but the editors suggest that 'simply adding women and stirring' is unlikely, on its own, to encourage judges to apply a 'feminist consciousness' in decision-making. They refer to United States study that suggests the more women there are serving on a court, the less compelled a woman judge may feel to 'articulate "a woman's point of view"'.

The critical question that comes to mind when picking up *Feminist Judgments* is – what does it mean to bring a 'feminist consciousness' or a 'woman's point of view' to previously decided cases? There is not one answer to that question, as explained by the editors in the early chapters. The authors of the alternative judgments are given considerable latitude in determining what their feminist perspective would be. They allow their individual backgrounds in feminist activism or practice to inform their approach to the litigants, facts, evidence and legal rules.

For instance, in *JM v GFQ* [1998] QCA 228, Anita Stuhmcke applies a different



interpretation to an anti-discrimination law in order to reach a fairer outcome for a gay woman seeking access to assisted reproductive technology (ART). A doctor had refused to provide ART treatment on the basis that JM did not meet his preferred definition of 'infertility' (a requirement for receiving the treatment), being the inability of a couple to conceive after 12 months of intercourse without contraception. The Queensland Court of Appeal held that there was no discrimination because JM had not been treated differently because of her lawful sexual activity – she had been treated differently because of her heterosexual *inactivity*. Stuhmcke reaches the opposite finding, by applying a purposive approach to interpreting the statute. She relies on the High Court decision in *Waters v Public Transport* [1991] HCA 49 which held that 'the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights' (per Mason CJ and Gaudron J at 21).

A very different example of a feminist consciousness in action is the alternative judgment for *R v Middendorp* [2010] VSC 202. Kate Fitz-Gibbon, Danielle Tyson and Jude McCulloch increase Luke Middendorp's original sentence for defensive homicide for killing his ex-partner Jade Bowndes from the original 12 years to 17 years. The rewritten judgment puts greater emphasis on the need to denunciate homicide committed within the context of family violence and in violation of an intervention order. It also addresses the lack of reality around Middendorp's argument that he feared for his life, as Bowndes was almost half Middendorp's size.

The writers' real challenge is to produce a plausible alternative decision, in judicial prose and by application of the law in force at the time the case was originally considered. The writers attended workshops run by serving judges and their final products read authentically. Indigenous writer Irene Watson is a notable exception – her alternative judgment to the case of *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 powerfully rejects the methodology of the project, because 'the rewriting needs to be done from "another space", outside the jurisdiction of the Australian common law and the sovereignty of the Australian state'.

Each alternative judgment is preceded by a short commentary on the original decision, written by another academic. This device works well in allowing the new judgment to speak for itself. However, more interesting would have been an explanation by each revisionist of her approach and the experiences that informed it. This would have served in itself a feminist purpose – by expressly acknowledging that a judge's background is a powerful influencing factor in the decision-making process.

Australian Feminist Judgments is academic but accessible, and it is sure to spark many debates on the role of feminist jurisprudence and the contentious 25 cases selected for revision. The work is refreshing in that it does not seek to promulgate a single feminist theory, but rather invites the writers to be sensitive to the female experience in a way that respects the letter of the law. It reminds us that change within existing legal frameworks is possible. ■

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