Book reviews

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

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Feminist judgments of Aotearoa New Zealand. Te Rino: A two-stranded rope (hereafter *Te Rino*) is a compilation of 25 historical and contemporary legal judgments that have been rewritten from a feminist or mana wāhine perspective. The contributors include not only legal academics but recent law graduates, legal professionals working in the private and public sector, PhD candidates, and barristers and solicitors. *Te Rino* is a meaty tome of 550 pages and is available in hardcover and electronically. It won the Australian and New Zealand Law and Society Association writing prize in 2017.

Te Rino canvasses a wide range of legal issues that impact upon women, both individually and collectively, such as abortion, climate change, employment, relationship property, and sexual offences. The cases are divided into three main areas: (1) rights, equality, and relationality; (2) land and natural resources; and (3) crime. There is also a glossary at the beginning listing a number of Māori terms and their English definitions as well as an overview chapter on law in Aotearoa/New Zealand for those unfamiliar with the subject matter.

Each chapter addresses a case and is written by a number of contributors, including the feminist judge or judges and those providing background information and commentary on the judgment itself. As noted above, both the feminist judges and the commentators are drawn from a wide range of legal professionals. No judgments were written by sitting judges.

Each chapter begins with a contextual summary of the original case as well as commentary on the feminist judgment. While the background information is critical, I noted that some of the contributors strayed into providing summaries of the feminist judgments, which in my view made the work repetitive. Each commentary is then followed by the feminist judgment itself. Some commentaries have a single author while others are co-written. In the same way, some of the feminist judgments are written by a single author, others are co-authored.

Te Rino essentially sets out to answer the question of whether a case before a New Zealand state court would have been decided differently if a feminist judge was determining it. While the obvious answer might be yes, it is important to note that each feminist judge is subject to the same constraints as those who delivered the original judgment. This includes the legislation and case law that was in place at the time, the facts as presented to the court, and the obligation to base their decisions on principles such as fairness, impartiality, and independence. *Te Rino* does not contain a definition of a feminist judgment though common themes emerge which I will consider in turn.

The decision of the four editors to consider legal cases from a feminist or mana wāhine perspective is novel to Aotearoa/New Zealand, though the same exercise has been undertaken in other jurisdictions such as Ireland, Canada, and Australia. Interestingly, Irene Watson, an indigenous contributor to the Australian equivalent of *Te Rino* (Watson, 2014), took the position that as a sovereign Indigenous woman, it was impossible for her take on the persona of a judge in an Australian legal system that denied her peoples' sovereignty. None of the authors of the mana wāhine judgments in *Te Rino* took this position, though it is acknowledged that Māori judging beyond the confines of the state legal system could be undertaken in future work (*Te Rino*, p. 47).

Te Rino adds to the growing jurisprudence of feminist judgments from other jurisdictions by providing an alternative way of viewing and deciding legal issues that are specific to Aotearoa/New Zealand. It allows the reader to reflect upon how the original judgments often fail to uphold fairness, impartiality, and equality because each judgment is coloured by the humanity of its judicial writers. Factors shaping the writers' judgments include their understanding of the context in which the legal issue arose (including social, political, and economic issues), their own life experiences which inform their understanding of what is reasonable and possible, and their inherent and oftentimes biased views of those who appear in their court rooms. *Te Rino* also demonstrates how law is a contestable discipline, and that even when judges are faced with the same set of facts and law, they can arrive at remarkably different outcomes. In my view, *Te Rino* allows the reader to see the differences that a feminist judgment might make.

While each judgment reflects the views and reasoning of its author, all of the judgments mirror a number of important elements. The feminist judges intentionally give voice and agency to women. This is accomplished in two specific ways. First, women who are not named in the judgments are given pseudonyms as opposed to simply a letter or reference to their geographical location. This has the effect of humanising the situation and respecting those involved, thus making visible those who oftentimes become secondary to the legal issues that the case is determining.

Second, the perspectives and experiences of women are prioritised and set out in greater detail than the original judgments. In the case of *Director of Human Rights Proceedings v Goodrum*, which considered sexual discrimination in the workplace, Selene Mize, who delivered the feminist judgment as one of four members of the Human Rights Review Tribunal, found that the published version of the original decision failed to include or even note the dissenting judgment of Leah Whiu who found in favour of the woman complainant. Selene Mize drew upon this 'hidden' information in arriving at her decision. Such an approach provides greater context to women's lived experiences and a much more nuanced understanding of why things happened the way they did. In my view, this enriches the judgments by giving weight to women's accounts and ensuring their distinct voice is heard and recognised. As a result, the judgments address the silencing of women's voices and their invisibility. The women's perspectives are honoured, and the judgments confirm that not only are their voices being listened to but that their perspectives are often the basis upon which the feminist judgments are made.

While the majority of cases have a woman or women as key protagonists, this is not the case for all the judgments. In *R v Sturm* the victims were men; the case concerned sexual violation as well as issues of consent and intoxication by drug consumption. Despite the key protagonists being male, the authors of this judgment continue to employ the same approach of naming those involved and prioritising the views of those most affected.

Given the breadth of cases that are canvassed in *Te Rino*, it is not surprising that many feminist judges approach their respective cases from a perspective that often laments the failings of the judicial system. The judgment of *Brooker v Police* demonstrates how the rules relating to what issues may be appealed can lead to outcomes which deny women's rights. In this case,

which involved Mr Brooker protesting outside the home of a female police officer whom he considered was harassing him, two legal issues were at play: freedom of expression and the right to privacy. In the district court, the trial judge decided to amend the original criminal charge from one of intimidation to disorderly behaviour. This decision meant that while the *Te Rino* judge Janet McLean believed the original charge of intimidation to be appropriate, she could only consider the specific appeal question before her of whether a conviction for disorderly behaviour could be upheld.

Te Rino also illustrates the conservative nature of the original judgments and the reluctance to tackle issues that are considered political in nature and therefore beyond the scope of the courts. In the case of *Lawson v Housing New Zealand*, Natalie Baird addresses the charging of market rents for state housing and its negative impact upon those on fixed incomes. Mrs and Mr Lawson challenged the decisions of Housing New Zealand and the Ministers of Housing and Finance to increase rent for state housing to market values. While the government argued that such decisions are of a commercial nature and therefore should not be reviewed by the courts, Baird challenges this assumption by refusing to view the decision-making process as simply contractual or commercial in nature. Drawing upon public law, the Crown's social objectives in providing housing, human rights to housing, and the vulnerable position of people like the Lawsons, she explains that such decisions are not beyond the realm of the courts to determine. Given the impact that such decisions have on the most vulnerable, justice demands that such matters be subject to judicial review.

Te Rino also tackles historical cases that relate to Māori rights. For example, Emma Gattey considers the case of *Waipapakura v Hempton*, regarding a Māori women's right to fish in the Waitara River. Gattey affirms Māori customary rights, drawing upon fisheries legislation, the Treaty of Waitangi, and common law understandings of customary rights while deftly dismissing the infamous case of *Wi Parata*, which considered the Treaty of Waitangi a simple nullity. *Waipapakura* confirms that in 1913, state law existed to protect and uphold Māori rights but such laws were not recognised or applied. Gattey allows the reader to imagine a different kind of legal system that could have evolved, where Māori rights were honoured not in their breach but in their implementation. Other cases discussed in *Te Rino* that draw from Māori sources of law include *Taylor v Attorney-General*, *West Coast ENT Inc v Buller Coal Ltd*, and *Police v Kawiti*.

My overall view is that *Te Rino* is likely to affirm how inherently biased and oftentimes disconnected original judgments are from the lives and experiences of those to whom these judgments relate. *Te Rino* speaks to the highly technical and overly complex state legal system that exists in Aotearoa/New Zealand and how the people most detrimentally affected by court decisions are often secondary to the machinations of the system itself.

Te Rino also highlights the dire lack of feminist thought and reasoning within judicial decisions and makes a sound case for legal reasoning that is far more reflective and responsive of those it seeks to serve. This is perhaps most starkly evidenced in those judgments where practical solutions are as important if not more so than the legal issues that are being addressed, such as in *Caldwell v Caldwell*, a case concerning a mother's desire to relocate to Western Australia with her four children in order to receive support from her Australian family, and *Bruce v Edwards*, a case concerning the change of status of Māori freehold land to general land in order to affect a sale to a Pākehā couple. In *Caldwell*, Ruth Ballentyne unpacks assumptions about parenting obligations based solely on gender as well as the power imbalance borne out of the traditional division of parenting roles. While in *Bruce*, Kerensa Johnston and Mariah Hori Te Pa grapple with the complex and woeful history of the treatment of Māori land, the impact of colonisation, and the courts' own bias and prejudice. The original judgment failed to

acknowledge and implement the then new Te Ture Whenua Māori Act 1993, which distanced itself from previous legislation addressing Māori land by having an express objective of retaining Māori land in Māori hands.

In conclusion, *Te Rino* successfully shows how feminist and mana wāhine perspectives can provide different legal outcomes. It also reveals how uncomfortable and disconcerting it is to see judges failing to hold a critical lens to the actions of individuals and institutions that wield power over others and their lack of insight into their own prejudices and bias. In my view, this concern is best captured by Sarah Croskery-Hewitt in *R v Strum* where she notes, 'The law must protect the vulnerable, rather than facilitate their exploitation, irrespective of whether a victim's vulnerability was a result of their own actions' (p. 457).

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Reference

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