Feminist Judgment: A Commentary on *Johnson v. Ramsden*

Anna Elisa Stauffer

Feminist Judgment Projects are collaborations of hundreds of feminist jurists who reimagine and rewrite key judicial decisions from a feminist perspective. Their aim is to reconsider judgments that have failed to address fundamental issues surrounding gender equality and sexual autonomy. In this article, after an introduction to the topic and the methodology of Feminist Judgments, the relevant sections of the Australian ruling in Johnson v. Ramsden [2019] WASC 84 are rewritten. The case concerned a woman who was pinched on the bottom by a stranger during a group photograph at a charity event. The judge maintained that the conduct in question did not amount to sexual harassment because a person's bottom is not considered to be a private part of the body that is ultimately associated with sexuality. In the rewritten version, the development of sexual harassment and abuse within society, as well as the role and meaning of the #MeToo movement, are considered. Finally, an outlook pleads for the introduction of Feminist Judgments in Switzerland.

1 Introduction

Are feminist issues, such as gender equality and sexual autonomy, sufficiently considered in current jurisprudence; and if not, how could they be addressed? Feminist Judgment Projects are an example of how a feminist perspective may be introduced into law through a feminist legal method. This article presents and explains this method based on a practical example.

The given example is a rewritten evaluation of the Western Australian judgment in *Johnson v. Ramsden*. The appellant – a woman participating in a sporting event for a charitable cause – was pinched on the bottom by the respondent, who happened to be a male police officer, while standing for a team photo. The respondent claimed that he simply wanted to be funny and catch the appellant's attention to the photograph being made, while telling her that he hoped she did not «take this the wrong way».[1] His hopes, however, were dashed; the charge brought was one of unlawful and indecent assault, contrary

1 Johnson v. Ramsden [2019] Western Australia Supreme Court (WASCA) 84, paras. 5–12.

to Section 323 of the Criminal Code of Western Australia.[2] This section, headed «Indecent Assault», states: «A person who unlawfully and indecently assaults another person is guilty of a crime and liable to imprisonment for 5 years.» The judge had to assess whether the assault in the case at hand was «indecent» and whether the act could be deemed «an inherently sexual act».[3]

The case was heard before the Supreme Court of Western Australia in March 2019 on appeal from the Magistrates Court of Western Australia.[4] The Supreme Court confirmed the Magistrates Court's finding that pinching the appellant on the bottom could not be considered sexual harassment because the bottom cannot be considered a private body part which is ultimately associated with sexuality.[5] One main argument of the Magistrate Court's decision was that in an «era of twerking», a pinch on the bottom is reminiscent of a «more genteel time».[6]

Before delving into a rewrite of the judgment, the concept of Feminist Judgment Projects will be introduced, since this does not yet exist in Swiss legal scholarship (section 2). In rewriting the judgment (section 3), the development of the offences of sexual harassment and abuse will be taken into consideration from a Swiss perspective. In order to appeal to a Swiss legal public, pertaining to universities and scholarship in general, scholarly opinions are also examined. The rewritten judgment further includes an assessment of how the #MeToo movement has influenced the understanding of sexual harassment and abuse. Finally, a brief outlook is given as to whether Feminist Judgments can and should be used in Switzerland (section 4).

2 Feminist Judgments in Theory

The first Feminist Judgment Project was launched in 2006 and concerned Canadian cases on the constitutional right to equality.[7] The group in question started out as the Women's Court of Canada, devoted to reimagining key judgments of the Supreme Court of Canada. Participants in these projects assume the role of the judge in question; based on the same evidence at hand and by means of legal methodologies, the cases are assessed from the angle of legal feminist scholarship. In rewriting the argument, the

2 Criminal law – with the exception of some criminal acts such as terrorism – falls under the jurisdiction of the states; cf. Gans, Jeremy, Modern Criminal Law of Australia, 2nd edn., Cambridge/Melbourne 2017, p. 8–10; McSherry Bernadette/Naylor Bronwyn, Australian Criminal Laws, Oxford/South Melbourne 2004, p. 5, p. 24–28.

3 *Johnson v. Ramsden*, paras. 10–11 and para. 29.

4 The judgment of the Magistrates Court of Western Australia cannot be accessed online. However, the judgment of the Supreme Court repeats what the magistrate's findings were in paras. 25–30. Hence, in the rewritten judgment, reference is made to these passages when analysing the magistrate's key findings.

5 *Johnson v. Ramsden*, paras. 83–85.

6 Ibid, para. 25.

7 In 2006, the rewritten decisions were published as a special issue of the Canadian Journal of Women and the Law. Cf. Réaume Denise, Turning Feminist Judgments into Jurisprudence: The Women's Court of Canada on Substantive Equality, in: Oñati Socio-legal Series 2018/8, p. 1307–1324.

projects also take into account the constraints that bind appellate judges. Hence, legal forms are neither questioned nor opened up.[8] Despite this, the projects challenge rather than defer to formal sources of law.[9] In this way, they seek to expose biases in existing judgments and reveal how a feminist perspective of law may practically alter the legal outcome of a particular case.

The first such project sparked international interest among many scholars in applying a feminist lens to key judicial decisions in their own jurisdictions, such as England and Wales,[10] Australia,[11] New Zealand,[12] the US,[13] Ireland[14] and Scotland.[15] The judgments in question are not limited to one particular area of law; they range from constitutional law to civil law and criminal law. Further projects stem from the field of international law.[16]

These projects may be regarded as a reaction to feminist critiques stating that the law in itself reinforces patriarchal structures and should therefore be deconstructed – or critically engaged with at the very least.[17] Through these projects, legal feminists opted for another way: they used the law as a key to demonstrate how it may be used to further the feminist cause.[18] In the words of Rosemary Hunter, the projects «represent a new and different kind of feminist intervention in law – a kind of hybrid form of critique and law reform project».[19] Thus, the idea is to reinvent rather than replace the legal categories and regimes.

Therefore, the methodology of the Feminist Judgment Projects is to present an alternative feminist analysis using the legal regimes and categories at hand.[20] There is no

8 Hunter Rosemary/McGlyyn Clare/Rackley Erika, Feminist Judgments: An Introduction, in: Hunter Rosemary/McGlyyn Clare/Rackley Erika (eds.), Feminist Judgments: From Theory to Practice, 2010, p. 5–6, 13–16.

9 Cf. Hodson Loveday/Lavers Troy, Feminist Judgments in International Law: An Introduction, in: Hodson Loveday/Lavers Troy (eds.), Feminist Judgments in International Law, Oxford 2019, p. 14.

10 Hunter Rosemary/McGlyyn Clare/Rackley Erika (eds.), Feminist Judgments: From Theory to Practice, 2010.

11 Douglas Heather/Bartlett Francesca/Luker Trish/Hunter Rosemary (eds.), Australian Feminist Judgments, Righting and Rewriting Law, Oxford/Portland/Oregon 2015. For more information, see the website of the University of Queensland.

12 McDonald Elisabeth/Powell Rhonda/Stephens Mamari/Hunter Rosemary (eds.), Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope, Oxford/Portland/Oregon 2017.

13 In the US, there is an entire series of feminist judgments, ranging from corporate law to trusts and estates. For more information, see the website of the US Feminist Judgment Project.

14 Enright Máiréad/McCandless Julie/O'Donoghue Aoife (eds.), Northern/Irish Feminist Judgments, Oxford 2017.

15 Cowan Sharon/Kennedy Chloë/Munro Vanessa E (eds.), Scottish Feminist Judgments, Oxford 2019. For more information, see the website of the Scottish Feminist Judgment Project.

16 Hodson Loveday/Lavers Troy (eds.), Feminist Judgments in International Law, Oxford 2019.

17 Smart Carol, Feminism and the Power of the Law, London/New York 1989.

18 Hunter Rosemary, The Power of Feminist Judgments, in: Feminist Legal Studies 201/20, p. 135–148, p. 135.

19 Ibid, p. 137.

20 Ibid.

single feminist theory, however, but rather various approaches, stemming from broader theories such as liberalism, relationalism and Marxism, to name but a few.[21] This variety of theories already shows that there is no single and determined way to write Feminist Judgments. Hunter thus highlights that «a good result for one woman may not serve the interest of all women».[22] This is also emphasised by the Feminist Judgments Projects, which concede that «feminism is not monolithic».[23] However, the law in itself is discursive and prone to contrary arguments that depend on the individual case. Therefore, Feminist Judgments do not really alter the discourse, but rather contribute to it. This, it may be argued, already provides a valuable insight. What stands out in the Feminist Judgment Projects is that cases are situated in a broader context of social, political and economic patterns, thus generally reflecting on «the processes that create and sustain inequality».[24]

In short, key decisions are rewritten from a feminist perspective, thus highlighting the differences in approach and mentality surrounding legal questions.

3 The Rewritten Judgment

In the following paragraphs, the relevant section (paras. 31–85) of the decision in *Johnson v. Ramsden* issued by the Supreme Court of Western Australia on appeal from the Magistrates Court of Western Australia is rewritten, following the style and the structure of the judgment, including its titles and margin numbers. The ground of appeal is divided in two parts. First, the appellant claims that the magistrate failed to find that the assault was upon a part of the body that gave the assault a sexual connotation. Second, the claim is raised that the assault did indeed breach prevailing contemporary community standards of decency and propriety.[25]

3.2 Conduct with a presumptively sexual connotation

First, I shall assess whether her Honour failed to find that the assault in question was upon a body part that presumptively gives the assault a sexual connotation. As the appellant maintains, the bottom must be regarded as such an intimate and private part of the body that carries a sexual connotation if grabbed.[26]

Before delving into the aforementioned assessment, however, I will observe what factors are at play when analysing what kinds of conduct bear a presumptively sexual connotation. What does and does not bear a sexual connotation and what is considered *in-*

21 Cf. McSherry/Naylor (Fn. 2), p. 12, who further elaborate on the different feminist approaches to the study of crime and criminal behaviour. A rigorous overview of feminist theories can be found, in German, in: Emmenegger Susanne, Feministische Kritik des Vertragsrechts, Diss. Freiburg 1998, p. 12–27.

22 Hunter (Fn. 18), p. 140.

23 Ibid, p. 138.

24 Réaume (Fn. 7), p. 1310.

25 *Johnson v. Ramsden*, para. 10.

26 Cf. *Johnson v. Ramsden*, para. 11.

decent may vary and depend on the circumstances. Standards of decency and propriety must also be taken into account in cases of alleged sexual harassment.[27] It is, however, necessary to consider, prior to observing the analysis of an alleged sexual act in the light of contemporary community standards, the initial purpose and the importance of the punishable offence of sexual harassment. Section 323 of the Australian Criminal Code protects people from indecent assault – that is, sexual harassment. The purpose of such protection is to give due respect to the sexual autonomy of an individual.[28] This notion of protecting an individual's sexual autonomy is almost universal. A comparative analysis will hence be taken regarding Switzerland, which arguably shares most of Australia's values. In Switzerland, the analogous criminal offence is set out in Article 198 of the Criminal Code.[29] Said statutory offence protects the right to sexual self-determination and hence the right to decide freely about the «whether», the «when» and the «how» of sexual interaction.[30] In other words, at the core lies the need to protect an individual's sexual dignity. Therefore, if any unwanted conduct related to sex has the purpose or effect of violating someone's dignity, the protection under criminal law must hold.[31]

Whether or not a particular conduct has the purpose or effect of violating somebody's sexual dignity must be assessed on a case-by-case basis. One must rely on elements such as the context in which the conduct took place and the manner in which it took place.[32]

With regard to the latter, the nature of the touching is judged. Certainly, not all unwanted physical contact necessarily amounts to sexual harassment. A certain threshold must be met. This is the case where the aggressor has the intention of violating dignity or, if such an intention is lacking, where one's dignity is effectively violated. Such an effect may be achieved depending on the part of the body that has been touched. In the Australian case of *R v. Harkin*, Chief Justice Lee held that «there are some areas of the body upon which conduct constituting an assault would give rise to sexual conduct».[33] The relevant areas of the body are those deemed *intimate* and *private*, hence in themselves bearing a sexual connotation when touched.[34] Pre-determining crucial areas of the body as self-evidently bearing a sexual connotation and thus providing red flags for sexual harassment, depending on their «geographical» location, can also be found elsewhere. This has been addressed, for example, by the Swiss Federal Council and the Federal Supreme Court. It was held that minor harassments such as the direct touching of a person's pri-

27 Spiteri v. The Queen [2001] WASCA 82, para. 8; *Drago v. The Queen* (1992) 8 Western Australian Reports 488, paras. 497–503.

28 McSherry/Naylor (Fn. 2), p. 206–209.

29 Swiss Criminal Code of December 21, 1937 (311.0).

30 Cf. Scheidegger Nora, Das Sexualstrafrecht der Schweiz, Grundlagen und Reformbedarf, Bern 2018, p. 281.

31 Isenring Bernhard, in: Niggli Marcel Alexander/Wiprächtiger Hans (eds.) Strafrecht (StGB/JStGB), Strafgesetzbuch, Jugendstrafgesetz, 2 Bände, Basler Kommentar (BSK), 4th ed., Basel 2018, para. 18 to art. 198 CC.

32 Isenring (Fn. 31), para. 19 to art. 198 CC.

33 *R v. Harkin* (1989) 38 Australian Criminal Reports (ACP) 296, p. 301.

34 Ibid, p. 301.

vate parts can achieve this effect on the sole basis of where the touching occurred.[35] Thus, the touching of breasts, bottoms and even body parts close to the genitalia, such as the thigh or underbelly, has been found to amount to sexual harassment in Switzerland.[36]

However, the particular context of the touching must also be taken into account. Various situations may arise in which a particular behaviour seems objectively sexual but is not in fact so. This is illustrated in *R v. Jones*, where a paramedic who attended a female patient and touched her breasts in order to perform an electrocardiogram had no intention of sexually harassing his patient.[37]

Thus, under certain circumstances, touching somebody else in an intimate manner does not amount to inherently indecent touching. Therefore, a presumption of inherent indecent touching can be disproven if the context clearly points in the other direction.

Objective elements in particular must be considered when assessing whether the sole application of the touch to a certain intimate body part is inherently «indecent».[38] In doing so, one must also take into account the entirety of the offender's behaviour towards the victim.[39]

The judge of the Magistrates Court of Western Australia appears to have agreed with the respondent's argument that in *R v. Harkin*, Chief Justice Lee referred to the «anus» in specific when determining the relevant areas that give rise to a sexual connotation when touched. Thus, it was clearly distinguished from the buttocks as a much more intimate part of the body.[40] Therefore, the magistrate stressed the particular location where the respondent was touched on the bottom.[41]

It depends, therefore, on the manner in which the act was conducted as to whether it amounts to an intrinsically indecent act or one that further requires the motive or intention of the accused in order to determine an indecent act.[42] The existence of an intrinsically indecent act depends on what is regarded as decent or indecent by a right-minded person. Thus, a distinction is necessary between acts that are deemed to be unequivocally sexual and those that amount to an indecent act only where there is a sexual connotation, as pointed out by Burns J in *R v. Gillespie*.[43] In the latter case, a further assessment of the intention of the accused is required – particularly where the act was performed «as a joke rather than for his own sexual gratification or for sexual humiliation of the victim».[44]

However, in *R v. Gillespie*, Penfold J suggested that caution must be exercised when taking the intention of the accused into account. This does not entail an endorsement for assuming that a certain act is not indecent because the accused simply meant it as a

35 Federal Council Dispatch 1985, p. 1093; Decision of the Swiss Federal Supreme Court 6B_966/2016 from April 26, 2017 section 1.3.

36 Isenring (Fn. 31), para. 18 to art. 198 CC.

37 R v. Jones [2011] Queensland Supreme Court Court of Appeal 19 (2011) 209 ACP 379.

38 Cf. *Johnson v. Ramsden*, para. 31.

39 Cf. Isenring (Fn. 31), para. 19 to art. 198 CC.

40 *R v. Harkin*, p. 301.

41 *Johnson v. Ramsden*, para. 28.

42 Cf. *R v. Morton* (1998) 143 Federal Law Reports (FLR) 268, p. 276.

43 *R v. Gillespie* [2014] Australian Capital Territory Court of Appeal (ACTCA) 25; (2014) 283 FLR 327, paras. 19–26.

44 Ibid, para. 4.

joke.[45] Jokes can hurt a person's bodily autonomy as well. In view of the protected legal right of self-determination, it cannot be easily accepted that the perpetrator did not assume that his victim would feel harassed by his action. A similar notion when it comes to jokes can be found in Swiss scholarship.[46]

Hence, the intention of the accused may be factually relevant, but only when the act is not deemed to have a presumptively sexual connotation.

3.2 Does touching a woman's buttocks raise an inherent assumption that the touch has a sexual connotation?

The magistrate maintained that «in an era of ‹twerking› [...] and grinding, simulated sex and easy access to pornography, the thought of a pinch on the bottom is almost a reference to a more genteel time».[47] She also noted that today, touching between the sexes is more common than ever before.[48] The magistrate thus concluded that in the case at hand, touching a woman's buttocks did not bear a sexual connotation. However, taking these considerations into account gives cause for alarm rather than negligence. The clear and swift protection of a person's sexual integrity is absolutely necessary since the sexual has been subject to the progressive removal of taboos in our society and the borders of what constitutes a still-permissible «approach» have become increasingly blurred.[49]

If we take the motive and purpose of the attacker into account, the respondent's behaviour may be regarded as, in effect, accepting that the appellant's bodily autonomy might be violated. One cannot fail to notice that the respondent was conscious of how his behaviour could be perceived and acknowledged this by saying, «I hope you don't take this the wrong way» while pinching the appellant's buttocks. Thus, he took into account that his behaviour was contrary to social decorum and could be deemed «indecent».

He also could not assume that the appellant had agreed to his conduct. One can generally rule out a receptiveness to spontaneous sexual interactions in a professional relationship or between strangers.[50] In fact, one must generally assume that physical contact with sexual connotations from strangers or a distant acquaintance is unwelcome.[51] Indeed, studies have shown that there is a consensus in Europe – which may also apply to Australia – as to which body parts people usually let other people touch and which they do not; in this regard, the intensity of the relationship with the touching person also plays an important role.[52] Joachim Renzikowski, a leading German scholar in the field of criminal law relating to sexual offences, maintains that «there certainly are certain social

45 Ibid, para. 4.

46 Isenring (Fn. 31), para. 28 to art. 198 CC.

47 *Johnson v. Ramsden*, para. 25(g).

48 Ibid, para. 25(j).

49 Cf. Isenring (Fn. 31), para. 19 to art. 198 CC.

50 Scheidegger (Fn. 30), p. 287.

51 Hörnle, Tatjana, Der Irrtum über das Einverständnis des Opfers bei einer sexuellen Nötigung, in: Zeitschrift für die gesamte Strafrechtswissenschaft 2000/112, p. 356 et seq., p. 374.

52 Suvilehtoa Juulia et al., Topography of social touching depends on emotional bonds between humans, in: Proceedings of the National Academy of Sciences 2015/112(45), p. 13811 et seq., p. 13815.

conventions as to flirting. Pinching perfect strangers or work colleagues on the bottom definitely does not belong to this».[53] Therefore, the appellant could not be said to have agreed to allow a perfect stranger, as the respondent was, to pinch her bottom. This can be drawn from the aforementioned consensus that a pinch on one's bottom by a stranger bears a sexual connotation.

In Switzerland, touching a person's bottom, breast, upper thigh or stomach can be considered as sexual harassment.[54] In one case, a superior who reached under a trainee's shirt and caressed his back was found guilty of sexual harassment.[55] While these sexual assaults may appear minor, it must be stressed that the person affected may perceive even such «minor» incidents as threatening and may even suffer serious mental health issues as a result, as studies have shown: «Sexual harassment, even at relatively low frequencies, exerts a significant negative impact on women's psychological well-being and, particularly, job attitudes and work behaviours.»[56]

Several studies and cases hint at a general assumption that touching a person's bottom has a sexual connotation. Thus, there is considerable authority indicating that the buttocks can be considered an intimate and private part of the human body, to which any touch of any kind carries the assumption of a sexual connotation as an objective criterion. As described above in the case of the paramedic in *R v. Jones*, subjective criteria – such as the particular context or the intent and purpose of the alleged attacker – may disprove said assumption. Also, the specific relationship between the touching person and the recipient can be relevant to disprove said assumption. For example, it might be typical for close friends to touch each other in a certain way, but unusual to be touched in the same way by a perfect stranger. Thus, one can maintain that touching a woman's buttocks raises an inherent assumption that the touch has a sexual connotation.

For these reasons, I am satisfied that the error identified in the first ground of the appeal could be made out.

3.3 Did the magistrate err in failing to find that the unlawful act complained of offended against contemporary community standards?

In her submission, the appellant cited the #MeToo movement, stating that this has changed community standards of propriety and decency. It thus reflects today's standards of decency among ordinary members of the public.

#MeToo emerged as a reaction to the Harvey Weinstein allegations, which exposed an endemic issue of sexual harassment and assault in the movie industry. The idea was to

53 Renzikowski Joachim, in: Joecks Wolfgang/Miebach Klaus (eds.), Münchener Kommentar, Strafgesetzbuch, 3rd ed., Munich 2017, para. 11 to § 184i [translation of the author].

54 Federal Council Dispatch 1985, p. 1093; Decision of the Swiss Federal Supreme Court 6B_966/2016 from April 26, 2017 section 1.3; Decision of the Swiss Federal Supreme Court 6B_702/2009 from January 8, 2010 section 5.5; Isenring (Fn. 31), para. 18 to art. 198 CC; Scheidegger (Fn. 30), p. 284.

55 BGE 137 IV 263 E. 3.2.

56 See Schneider Kimberly/Swan Suzanne/Fitzgerald Louise, Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence From Two Organizations, in: Journal of Applied Psychology 1997/82, p. 401 et seq., p. 412.

motivate all those who have been subject to sexual harassment or assault to adopt #MeToo as their status, to highlight how severe the problem is – and not just in the film industry. The reaction was immense and revealed how sexual harassment and abuse are experienced all over the world by all kinds of people.[57]

The magistrate acknowledged that the #MeToo movement has provoked discussions and debate within the current community regarding sexual harassment and abuse as to where the line is drawn. However, her Honour contended that this does not suggest that the action in question must be inherently indecent.

There is indeed wide discussion on the relevance and significance of #MeToo in shaping the perceptions of society on issues surrounding sexual abuse and harassment.[58] Legal scholars argue that the movement is confined to raising awareness and that this alone does not equate to social, cultural and political change.[59] In the words of feminist legal scholar Sarah Banet-Weiser: «Visibility is at best a tool for social change, not an end.»[60] This may be the case on a broader scale, when it comes to questioning the patriarchal structures in place and the endemic sexual abuse and harassment that women are confronted with.

However, one must also address the narrow and particular question of whether the #MeToo debate has changed what society perceives to be accepted or tolerated societal conduct. It may be argued that #MeToo has manifested how people on the receiving end of such treatment really feel; and has thus raised awareness of the deplorability and pain that it has caused and still causes.[61] Fifty years ago, for example, women were regularly exposed to types of work conduct that we nowadays regard as unacceptable. Adopting the magistrate's methods of argumentation – which reflect on access to pornography and on modern dance moves – one can also observe modern perceptions through popular media. The celebrated series *Mad Men*, for example, which is set in 1960s New York, illustrates how women faced rampant sexism in the workplace –something that modern audiences usually view with disgust or shame towards the past.[62] The «more genteel times» to which the magistrate alludes were not, in fact, genteel. They were times drenched in machismo, when women routinely endured denigrating sexual harassment from their bosses and/or co-workers and were unable to speak up out of fear.[63] In brief, the past was not necessarily more genteel to women.

The magistrate's argument that #MeToo has not led to any changes in community standards regarding the indecency of touching some parts of the body partly coincides

57 See, for example, Fox Kara/Diehm Jan, #MeToo's global moment: the anatomy of a viral campaign, in: CNN from November 9, 2017.

58 Fileborn Bianca/Loney-Howes Rachel, A New Day Is on the Horizon?, in: Fileborn Bianca/Loney-Howes Rachel (eds.), #MeToo and the Politics of Social Change, p. 335 et seq., p. 335.

59 For example, ibid, p. 336–337.

60 Banet-Weiser Sarah, Popular Feminism: #metoo, in: Los Angeles Review of Books, January 27, 2018.

61 Cf. MacKinnon Catharine, Where #MeToo Came From, and Where It's Going, in: The Atlantic, March 24, 2019.

62 Ferrucci Patrick/Shoenberger Heather/Schauster Erin, It's a mad, mad, mad, ad world: A feminist critique of Mad Men, in: Women's Studies International Forum 2014/47, p. 93 et seq.

63 MacKinnon (Fn. 61).

with the findings of some feminist legal scholars, who maintain that while the movement has increased visibility and awareness of sexual harassment and abuse, this in itself does not represent social change.[64] «Simply becoming visible does not usher in sweeping change,» states Banet-Weiser.[65] However, I would argue that #MeToo proves to be an ideal tool to identify the kinds of conduct that are tolerated or perceived by a society as indecent, to say the least. Raising awareness can expose how a community perceives sexual harassment and abuse as frequent, collective and dehumanizing; and can also promote empathy for the persons concerned.[66] Some feminist scholars argue that this can also be said of #MeToo.[67] However, the movement takes a particular stance, since it not only raises awareness of the prevalence of sexual harassment and abuse, but also reveals a truth and proves a point.[68]

Nevertheless, it remains to be seen where the #MeToo movement will lead us or whether it will eventually fade away. Legal scholars tend to be cautious in this regard and contend – while acknowledging the ample opportunities #MeToo affords for social change – that the long-term effects and ultimate impacts of the movement on our social and political environment as yet remain unclear.[69] However, it cannot be contested that #MeToo has evolved from an initiative launched by actors in the US to a transnational feminist movement with global representativeness.[70] #MeToo has in fact resulted in various contextualised and localised manifestations all around the world.[71] I therefore think it is appropriate to argue that while #MeToo has not in itself resulted in a change in community standards, it has revealed that a change has already taken place as to which types of conduct should be deemed «indecent». The movement is therefore reflective – at the very least – of how sexual harassment and abuse are perceived today.

The fact that the magistrate misidentified current community standards is further manifested in some of her contradictory findings. Her Honour reasoned that while in the past, touching a woman's buttocks had sexual connotations, this is no longer the case.[72] The reason for this, she found, is that in the 1970s and 1980s, women were regularly oversexualised as reflected in popular media. Groping a woman's breast and pinching her bottom were immediately seen as overtly sexual, naughty and inappropriate.[73] The magistrate's reasoning therefore seems to be that the more oversexualised women are, the

64 For example, Banet-Weiser (Fn. 60), with further references.

65 Ibid.

66 Kelland Lindsay, A Call to Arms: The Centrality of Feminist Consciousness-Raising Speak-Outs to the Recovery of Rape Survivors, in: Hypatia 2016/31(4), p. 730 et seq., p. 735.

67 Gash Alison/Harding Ryan, #MeToo? Legal Discourse and Everyday Responses to Sexual Violence, in: Laws 2018/7(2), p. 21 et seq., p. 30.

68 Ibid, p. 31.

69 Mendes Kaitlynn/Ringrose Jessica/Keller Jessalynn, #MeToo and the promise and pitfalls of challenging rape culture through digital feminist activism, in: European Journal of Women's Studies 2018/25(2), p. 236 et seq., p. 244; Gash/Harding (Fn. 67), p. 33.

70 Ghadery Farnush, #MeToo – Has the 'sisterhood' finally become global or just another product of neoliberal feminism?, in: Transnational Legal Theory 2019/10(2), p. 252 et seqq., p. 273–274.

71 Fox/Diehm (Fn. 57); cf. Ghadery (Fn. 70), p. 268–273.

72 *Johnson v. Ramsden*, para. 25(e).

73 Ibid, para. 25(f).

less touching the community will accept. However, this is not where her argumentation leads to.

In the magistrate's words, «in an era of twerking […], simulated sex and easy access to pornography», the past must be considered a «more genteel» time in which women were less sexualised. However, this is diametrically opposed to her Honour's finding that in the past, women were more oversexualised. Hence, community standards must surely have become stricter regarding sexual harassment and abuse, and not simply have slackened as the situation worsened. In any event, whatever difference her Honour found between the community standards of the past and present, her initial finding that there has in fact been little change in the views of the community regarding the indecency of touching some parts of the body is contradictory.[74]

Indeed, the objectification of sex may have led to a big change in perceptions of sexual images and pornography. However, as the German legal scholar Johannes Brüggemann points out, this has actually raised awareness of certain types of conduct between men and women, removing some patriarchal inferences from sexual criminal offences, rendering them stricter and less tolerant of old perceptions of how women could be treated.[75]

The magistrate's mention of the sports field as a special space in which slaps on the bottom have an entirely new dimension also seems amiss when evaluating a situation that occurred not on a sports field, but rather while a team photograph was being taken after a wheelchair basketball charity event. In particular, the magistrate's description of a slap on the bottom as a sign of congratulation, commiseration or encouragement fails to explain how this sits with the respondent's conduct during a team photograph with the intention of catching the appellant's attention. Furthermore, in my opinion, such conduct does not transcend the male and female divide, but rather exacerbates it.

The analogies that the magistrate drew from «popular media» and the sporting arena to reach her conclusions are therefore flawed and led her Honour into error.

For these reasons, I was satisfied that error as alleged in the second ground of the appeal could be demonstrated.

3.4 Conclusion of the Judgment

In my respectful opinion, the magistrate erred in finding that the touching of the complainant's buttocks was not inherently sexual and did not amount to an act which was capable of having a sexual character, considering prevailing community standards of decency and propriety.

Her Honour wrongly took into account the applicable principles that the touching of the appellant by the respondent was not indecent.

For these reasons, I find the appellant's proposed grounds of appeal reasonable and satisfactory. Accordingly, I have formed the opinion that leave to appeal should be granted. I will make orders to that effect and permit the appeal.

74 Cf. ibid, para. 25(b).

75 Brüggemann Johannes, Entwicklung und Wandel des Sexualstrafrechts in der Geschichte unseres StGB, Die Reform der Sexualdelikte einst und jetzt, Baden-Baden 2013, p. 493, p. 503.

4 Conclusion and Outlook: Feminist Judgments in Switzerland

The rewritten judgment shows how the original Australian ruling in *Johnson v. Ramsden* can be reconsidered and even alter the legal outcome of the case. The different approach and mentality give way to new arguments that, it may be argued, were insufficiently considered in the original case. Hence, the Feminist Judgment provides a critical response to a court decision by suggesting an alternative, while preserving the form and methodology of a judgment.

Swiss scholarship appears to be unfamiliar with the idea of Feminist Judgments and to date, there is no Swiss Feminist Judgment Project. Writing judgments is usually confined to the courts and writing judgments outside this forum could disrupt the courts' exclusive authority over legal decision making. However, rewriting key judicial decisions from a feminist perspective has the potential to cast traditional notions about womanhood, gender rights and sexuality in a different light. Certainly, *Johnson v. Ramsden* might have been decided differently in Switzerland. As referenced in the rewritten judgment, Swiss scholars to date do not relativise the touching of a person's buttocks due to the alleged popularity of twerking and easy access to pornography, as the Australian judges did. Nevertheless, there is plenty of room for improvement in areas that are particularly affected by society's view of sexuality and gender.

Margrith Bigler-Eggenberger – the first female judge to sit in the Swiss Federal Supreme Court – has already hinted at some judgments of the Federal Supreme Court that may have been decided in favour of gender equality.[76] Perhaps the best-known case is that of Emilie Kempin-Spyri, who fought for her right to practise as a lawyer. In 1887, the Federal Supreme Court dismissed her claim, arguing that an understanding of the right to equality that also encompassed women was both new and bold («*ebenso neu als kühn*»).[77] Bigler-Eggenberger's analysis shows that the Federal Supreme Court places greater emphasis on formal equality under the law than on the actual realisation of gender equality. In her mind, the courts should give greater consideration to the concrete circumstances of people's lives when passing judgment.[78] *How* exactly to improve these cases may be revealed by rewriting the decisions from the perspective of a feminist judge.

76 Cf. Bigler-Eggenberger Margrith, Justitias Waage – wagemutige Justitia?, Die Rechtsprechung des Bundesgerichts zur Gleichstellung von Mann und Frau, Basel/Genf 2003.

77 BGE 13 I 1 E. 2 S. 4.

78 Bigler-Eggenberger (Fn. 76), p. 325–329, 353–356.