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New Methodologies in Feminist Legal Studies: Legislative Drafting Project: Workshop Report

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***New Methodologies in
Feminist Legal Studies:
Legislative Drafting Project***

WORKSHOP REPORT

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and Ms Meghan Hoyt***

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Overview of the project

Following the significance of feminist judgment projects globally, feminist academics have increasingly turned their attention to legislative drafting as a new and innovative methodology. Efforts have been directed towards demonstrating how traditional legal methods, such as legislative drafting, can provide feminists with a valuable opportunity to rethink and rewrite the law from a feminist perspective thus bridging the divide between theory and practice.

Our project aimed to explore the potential of feminist legislative drafting within the context of Northern Ireland. Northern Ireland is a post-conflict jurisdiction where the legacy of the past can still be felt today, with the continued presence of paramilitary organisations within communities and the lingering strains of post-conflict patriarchy and religious conservatism that filter into the legislative and policy arena. In this jurisdiction, legislative reforms on key areas of feminist research have recently taken place or are presently being discussed (e.g. sexual offences, abortion, domestic abuse); longstanding and legacy concerns stand to be approached anew from feminist perspectives (e.g. the Northern Ireland Bill of Rights, the Northern Ireland Act); and emerging legislative areas can be viewed through a feminist lens (e.g. the new Climate Act). Northern Ireland thus represents an ideal case study for exploring the challenges and opportunities presented by feminist legislative drafting as a new methodology.

The overarching aims of the research were:

- a. To gain an insight into the views of academics, practitioners and activists on feminist engagement with the law and specifically the legislative process.
- b. To investigate what a feminist approach to legislative drafting might involve – both in the Northern Irish context and more generally – and what general guiding principles of this work might be.
- c. To make new connections between feminist theorizing and legislative practice which challenge and enhance the knowledge and skills of feminist academics as well as actors involved in the legislative process.

These aims were met through the following objectives:

- a. Arranging a half-day online workshop with feminist legal scholars who have engaged in legislative drafting to discuss their work and the potential for a feminist approach to legislative drafting.
- b. Arranging a half-day online workshop with feminist activists and legislative drafters in Northern Ireland to explore their role/contribution to the legislative process.
- c. Drafting guiding principles and methods related to the processes and outcomes of feminist legislative drafting.

This report provides an overview of the workshops, outlines key findings from the workshops and sets out some principles and methods of feminist law-making that the project team have drawn from the discussions.

The Workshops

A workshop entitled *New Methodologies in Feminist Legal Studies: Engaging with Legislative Drafting* was held online on Friday 22 October 2021. This workshop brought together feminist academics with an interest in feminist legislation. There were four formal presentations during the workshop, delivered by feminist academics from around the world who are involved in projects that engage in some way with legislative drafting, and the final session provided an opportunity for the organisers, presenters and attendees to reflect on feminist legislative drafting and feminist law reform projects more broadly.

A workshop entitled *New Methodologies in Feminist Legal Studies: Local Experiences of Engaging with Legislative Processes* was held online on Thursday 13 January 2022. This workshop brought together legal professionals, policy makers and feminist activists in Northern Ireland who have experience of engaging with the legislative process. Unfortunately we were unable to secure attendance from legislative drafters. Interestingly, this was in part attributable to drafters' feelings that they could not contribute to such a discussion as they considered their work to be 'behind the scenes'. This workshop was heavily discursive with participants being assigned to breakout rooms and the discussion in each room facilitated by a member of the project team. The final session provided the opportunity to feed back to the entire group on the key issues discussed.

Both workshops were small and invitation only, with approximately fifteen external participants attending each. The workshops were recorded as a means to capture the discussions. The recordings and their accompanying transcripts, available through Microsoft Teams, were reviewed and analysed by Megan Hoyt to draw out themes to inform this report.

Findings

Diversity of academic projects

This project began as an exploration of legal drafting in particular. However, following the workshops it became clear that it would be difficult to focus on legislative drafting in isolation, and that it is important to evaluate the processes that lead up to the text and to think about how they relate to one another. Relatedly, throughout both workshops, several different terms were used, seemingly interchangeably, to describe what was being discussed e.g., feminist law-making, feminist law reform, feminist legislating, feminist legal drafting, pre-figurative law reform and imagining feminist parliaments or institutions. Throughout this report 'feminist law-making' is used as an umbrella term to capture these different projects.

In this respect, some projects discussed during the first workshop engaged with legal realities, while others sought to imagine future legal utopias. Some projects were also situated in the space 'in-between'. This gives rise to a tension that sits at the heart of feminist law-making: a desire to both harness and reject the power of the law. For feminist legislating projects, this has specific ramifications. If the desired outcome is to produce a specific piece of legislation that is legally workable and convincing, then we are constrained, to some extent, by the traditional law-making process. If the desired output is more speculative or utopian, the limits of legal reality become less constraining, however, other issues arise. For example, participants engaged in more speculative projects struggled to decide where the boundaries of the project should be located or how to deal with contested visions.

The 'messiness' of feminist law-making

Many of the participants in the first workshop expressed feelings about the messiness or uncertainty of their projects. This messiness can be linked to the emergence of a new methodology and the development of the field, and thus, as one participant noted, as 'part of the process'. Other participants explained 'the more we engaged with the idea of legislative drafting, more questions came up' and 'our methods, and our questions of methods, are continuing to evolve'. A similar theme of 'messiness' was identified in the second workshop in respect of the various sites of the law-making where feminists attempt to make an impact, these can include working with legislators to improve Bills; litigation; activism; legal research and data gathering; contributions to consultations/giving evidence. The central point being, that feminist law-making does not exist simply in formal legal spaces.

Within this context, a key topic of discussion in both workshops was the multiplicity of feminist approaches. While some may be process based e.g., thinking about values and norms, others may be subject based e.g., specific to a certain issue. It was also noted that, as there is no single feminist approach, there will be contestation amongst feminists and that we should turn our attention to 'how might different feminist approaches be in conversation with each other' and 'how do we disagree better'? Some of the feminist legislation projects addressed this by making space for multiple outputs to compliment the 'multiple visions'.

Labour and resources

Themes surrounding labour and resources came up prominently in the second workshop. Participants reflected that the more informal or radical forms of feminist engagement with the law are often unpaid, undervalued and unappreciated and require considerable resilience by those who engage in it. The Covid-19 pandemic was also noted as having a significant impact on the ability of many activists to engage with legislative developments in Northern Ireland due to caring responsibilities and intensified workloads. Indeed, some of the activists who were invited to attend our workshop were unable to participate due to the demands of their full-time jobs.

Formal feminist engagement with the law also places a disproportionate burden on those who engage. Within the context of Northern Ireland, it was noted that there were 40 consultations in past two years with very little change. As noted by one participant: 'those processes, like the consultation process, create a sense of disenfranchisement because you engage with a bunch of women at a working-class community centre and you will do the process and then six months later nothing happens, and then something else similar comes out again'. There were strong feelings that, rather than providing a platform to facilitate inclusive law-making, consultation processes rely on the labour of the underfunded voluntary sector to provide a form of legitimacy. The gendered nature of this reliance was also noted, with women making up a large percentage of the workforce in the voluntary sector, and one participant suggesting that those in power 'know the women will do it' but also that they will not ultimately listen to them. In this respect, it was noted that consultations fail to follow existing good practice [guidelines](#) on promoting women's participation in public consultations.

Many in the second workshop were highly critical of the lack of resources provided to ensure the role out of pieces of feminist law-making that had made their way through the legislative process. This served to further compound the feeling that the government lacked real commitment on tackling these issues, examples were given of legislation on abortion and domestic abuse being passed with no budget attached to them. More broadly, there was an overarching awareness that feminist law-making should not separate poverty and vulnerability from law-making. For feminist law-makers, these issues are linked, as cuts to public services, welfare, the health service, mental health services and rehabilitation programs, harm the most vulnerable and serve to compound existing gendered inequalities.

The limits of the law

Discussions during both workshops highlighted feminism's uneasy relationship with the law. As noted earlier, for feminist law-making projects that seek to create legally plausible outputs, the constraints of the traditional legislative process and accurate statutory drafting are limiting. For more speculative projects the apparatus of law, the authority of law, the structure of legal institutions and law's 'colonising tendencies', proscribe the limits of what new vistas are reachable through law. Feminist scholars participating in the workshops were acutely aware of the tension created by engaging with the law and legislation. As one participant commented, 'we are choosing to use the tools that have brought systematic harm and that is problematic, and we have all had to make compromises...'

However, it was noted that by using the law to achieve principles of feminist law-making and through the use of feminist law-making methods, feminist law-making troubles foundational concepts of legal authority and legitimacy.

Through inviting collaboration and participation into the law-making process (methods discussed later in this report), feminist law-making projects ask profound questions about who can make law and what law is meant to do. In this respect, feminist law-makers work with the law from a position of critical ambivalence, mindful of the tensions that this position creates. A helpful concept that was developed through the first workshop to describe this position is 'sceptical pragmatism'.

During the second workshop, many participants felt that the legal agenda was already set by those in elite spaces and, building on the theme of labour and resources, that there was reluctance to fully engage with issues raised at consultation stage or through written/oral evidence. In this respect it was noted that 'feminist principles and practice are up against a regressive political context'. This context can be formal and informal e.g. formal in the way politicians debate the issues and informal in terms of the specific context of Northern Ireland where certain issues are silenced as a result of paramilitary intimidation. While acknowledging the limits of the law, participants in the second workshop explained that the 'law has a stronghold' and many of them spoke about a sense of duty they felt to continue engaging with the law as a means of addressing key issues affecting women's lives.

Principles of feminist law-making

Accessibility

Accessibility, both in terms of ensuring key stakeholders are given the opportunity to engage with the law-making process and ensuring that any subsequent legislation is easily understood by those it is designed to affect, should be a key principle of feminist law-making. Participants in our workshops spoke about the need to de-mystify law, to write law in plain language and to bring other kinds of knowledge and experience into the law-making process. While in the context of legislative drafting the technicalities involved in this process can cause difficulties, the injection of feminist methods can help, such as the inclusion of 'voice' (see more in methods below).

Meaningful engagement and respect

Meaningful engagement and respect for those who engage with the law-making process should be a key principle of feminist law-making. When new legislation or reform to existing legislation is being considered, key stakeholders should be identified and engaged with at the early stages, even before a formal consultation is launched. Pre-determined agendas should be minimised and there should be an openness to change. While engagement with stakeholders and public consultations can be time and resources intensive, they are essential to build trust and ensure any legislation put forward responds to the needs of society. Within this context key components of procedural justice can be met, such as providing the opportunity for voice and transparency. Plans should be developed for how disagreements will be handled, rather than ignored, and there should be a mechanism in place for explaining to those who engage with the process how their ideas/suggestions have been considered. In this respect, there needs to be space within the process to embrace tensions and acknowledge what is uncomfortable.

Improving the lives of women

Improving the lives of women should be a key principle of feminist law-making. In this respect, participants emphasised the need to adopt an intersectional approach and to think about how the category of 'woman' intersected with other forms of oppression. There needs to be a broader culture of understanding gendered harm, and this needs to go beyond simply increasing the number of women representatives in parliament, although that can be important. Any legislation that is passed should be passed with adequate resources to ensure there is societal awareness of the legislation and that the correct mechanisms are in place for the legislation to work.

Methods in feminist law-making

Lived experience

A key feminist method identified throughout the workshops was incorporating the lived-experience of women into the law-making process. This can take different forms and will depend on whether the project is grounded in traditional legal methods or is more utopian in nature. It might be through story-telling, participation in workshops, interviews, oral evidence or informed commentary from those with direct experience of the law. Legislative processes should build in mechanisms that listen to women's lived experiences and encourage a re-evaluation of the law from that perspective.

Collaboration

A method closely related to the one above is collaboration. In the context of an academic project, regular meetings for those involved is key, as collaboration brings rigor. Meetings should be used to test ideas and challenge one another in a safe space, with respect and empathy for other opinions at the centre. Collaboration can also help build a mentoring culture. Processes of law-making themselves should be collaborative in the sense that stakeholders should be engaged with early on in the process e.g., in the design of consultations, and they should be included in any oversight/evaluation. Participants drew attention to the debate stage of the law-making process as a point where collaboration can occur, however it was noted that in reality changes are rarely made at this point and that 'feminist legislation can only emerge from a process distinct from the adversarial culture of Parliament'.

Creativity

Creativity and/or imagination is an important method in feminist law-making. This methodology requires us to think about all of the intuitions connected to law, more than just the text of legislation. Linked to the point above, feminist legislation cannot be divorced from feminist institution building. In the context of the academic projects discussed during the first workshop, creativity took many forms and embraced non textual forms such as visual art, poetry, dance and jazz. Those following a more utopian vision sought to create spaces that allowed people to detach from dominant debates thus allowing new ideas to develop. Those engaged in legislative drafting projects required creativity to step forward and imagine themselves as a law-maker.

Voice

Establishing a voice within legislation or the law-making process was identified as a potential method of feminist law-making. This method was the point of much discussion due to, in particular, the difficulties with finding a voice within the text of legislation. However, it was noted that it is a construct that legislation has no voice, because people have written it, and there are invisible drafters and processes which usually happen behind back doors. The job of feminist scholars is therefore to name this and create spaces for the voices behind the text to be found. In practical terms, projects could build voice into the legislative process at the second reading stage of the legislative process and into the legislation itself via guiding principles or through the commentary attached to the text. In the more experimental projects it was also noted that care should be taken to avoid our legal identities silencing other voices.

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