cognitio

studentisches Forum für Recht und Gesellschaft

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

ANNA ELISA STAUFFER

How to cite

STAUFFER, Feminist Judgment: A Commentary on Johnson v. Ramsden, in: cognitio 2022/LGS.

URL: cognitio-zeitschrift.ch/2022-LGS/stauffer

DOI: 10.5281/zenodo.6625806

Publikationsreihe in Kooperation mit F.Ius (Feministisch.Ius):
Legal Gender Studies in der Schweiz

cognitio

studentisches Forum für Recht und Gesellschaft

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

ANNA ELISA STAUFFER*

The 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 into the topic and methodology of Feminist Judgments, the relevant sections of the Australian judgment Johnson v. Ramsden [2019] WASC 84 are thus rewritten. The case concerned a woman who was pinched on the bottom by a stranger – in this case a policeman – during a group photograph at a charity event. The judge had maintained that the conduct in question does 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 of the #MeToo movement and its meaning are considered. Finally, an outlook pleads for the introduction of feminist judgments in Switzerland.

Table of Contents

I. Introduction

Are feminist issues, such as gender equality and sexual autonomy sufficiently considered in current jurisprudence, and if not, how could they be addressed? The Feminist Judgment Projects are an example of how a feminist perspective may be introduced into law

* MLaw, LL.M., PhD student and assistant to the Chair of Roman Law, Private Law and Comparative Law at the University of Zurich, anna.stauffer@rwi.uzh.ch.

The rewritten judgment in the present paper stems from an essay written during the LL.M.-year at King's College London.

through a feminist legal method. This article will present and explain this method based on a practical example.

The given example is a rewritten evaluation of the Western Australian judgment *Johnson v. Ramsden*. The case concerned the appellant, a woman participating in a sporting event for a charitable cause, being pinched on the bottom by the respondent, a male police officer, while standing for a team photo. He claims he simply wanted to be funny and catch the appellant's attention to the photograph being made, while telling her that he hopes she does not «take this the wrong way».[1] His hopes, however, were not fulfilled. The charge was of unlawful and indecent assault, contrary to section 323 of the Criminal Code of Western Australia.[2] Said 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 may be deemed «an inherently sexual act».[3]

The case was held 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 in the present case cannot 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 includes arguing that in an «era of twerking» a pinch on the bottom is reminiscent to a «more genteel time».[6]

Before delving into rewriting the judgment, the Feminist Judgment Projects will be introduced since they have not yet been established in Swiss legal scholarship (II). In rewriting the judgment (III), the development 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 examined. The rewritten judgment will also include an assessment of how the #MeToo movement has influenced the understanding of sexual harassment and abuse. Finally, a brief outlook will be given as to whether feminist judgments can and should be used in Switzerland (IV).

II. Feminist Judgments in Theory

The Feminist Judgment Projects first kicked off in 2006 with Canadian cases regarding the constitutional right to equality.[7] The group in question started out as the «Women's Court of Canada», devoted to reimagining key judgments from the Supreme Court of Canada. They would take on 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 an angle of legal feminist scholarship.

1 *Johnson v. Ramsden*, paras 5–12.

2 It must be noted that 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, pp. 8–10; MCSHERRY BERNADETTE/NAYLOR BRONWYN, Australian Criminal Laws, Oxford/South Melbourne 2004, p. 5, pp. 24–28.

3 *Johnson v. Ramsden* [2019] Western Australia Supreme Court (WASCA) 84, paras 10–11 and para. 29.

4 The judgment from 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, pp. 1307–1324.

In rewriting the argument, these 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 show deference to formal sources of law.[9] In this way, they want to expose biases of existing judgments and show how a feminist perspective of law may practically alter the legal outcome of a particular case.

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

These projects may be regarded as a reaction to feminist critique stating that the law in itself reinforced patriarchal structures and should therefore be deconstructed – or critically engaged with at the very least.[17] Through these projects, other 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 rather reinvent than replace the legal categories and regimes.

Therefore, the methodology of the Feminist Judgment Projects is to present an alternative feminist analysis but using the legal regimes and categories at hand.[20] There is, however, not a single feminist theory but various approaches, stemming from broader theories such as liberalism, relationalism or Marxism, to name but a few.[21] This variety of theories already shows that there is not a single and determined way to write Feminist Judgments. HUNTER thus highlights, that «a good result for one woman may not serve

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, pp. 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 from 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 for Feminist Judgments, ranging from Corporate Law to Trusts and Estates. For more information, see the website from the U.S. Feminist Judgments 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 Judgments 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, pp. 135–148, p. 135.

19 Ibid., p. 137.

20 Ibid.

21 Cf. MCSHERRY/NAYLOR (n. 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, pp. 12–27.

the interest of all women».[22] This is also emphasised by the Feminist Judgments Projects, conceding that «feminism is not monolithic».[23] However, law in itself is discursive and prone to contrary arguments that depend on the case. Therefore, the Feminist Judgments do not really alter the discourse but contribute to it. This, it may be argued, is already a step forward. What stands out in the Feminist Judgment Projects is that the 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 of approach and mentality surrounding legal questions.

III. The Rewritten Judgment

In the following, the relevant section (paras 31–85) of *Johnson v. Ramsden* held by the Supreme Court of Western Australia on appeal from the Magistrates Court of Western Australia will be rewritten, following the styke 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]

A. Conduct with a presumptively sexual connotation

1 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]

2 Before delving into the aforementioned assessment, however, I will observe what factors are at play when analysing what kind of conduct bear a presumptively sexual connotation. What does and does not bear a sexual connotation and what is considered *indecent* 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, i.e., 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 shares most of Australia's values. In Switzerland, the analogous criminal offence is article 198 of the Criminal Code.[29] Said statutory offence protects the sexual self-determination and hence the right to decide freely about the «if», the «when» and the «how» of

22 HUNTER (n. 18), p. 140.
23 Ibid., p. 138.
24 RÉAUME (n. 7), p. 1310.
25 *Johnson v Ramsden,* para. 10.
26 Cf. *Johnson v. Ramsden*, para. 11.
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 (n. 2), pp. 206–209.
29 Swiss Criminal Code of 21 December 1937 (311.0).

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]

3 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 of it.[32]

4 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 when the aggressor has the intention of violating dignity or, if such an intention is lacking, one's dignity is effectively violated. Such an effect may be reached 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 itself bearing the 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. It been, e.g., addressed by the Swiss Federal Council and Federal Supreme Court. For example, minor harassments such as the direct touching of a person's private parts can reach this effect on the sole basis of where the touching occurred.[35] Herein, the touching of breasts, bottom or even body parts close to the genitalia, such as the thigh or underbelly, has been found to amount to sexual harassment in Switzerland.[36]

5 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]

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

7 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]

8 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 rele-

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 edn., Basel 2018, para. 18 to art. 198.

32 ISENRING (n. 31), para. 19 to art. 198.

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

34 Ibid., p. 301.

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

36 ISENRING (n. 31), para. 18 to art. 198.

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 (n. 31), para. 19 to art. 198.

vant 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 stresses the particular location where the respondent was touched on the bottom.[41]

9 It depends, therefore, in which manner the act was conducted to amount 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 existing of an intrinsically indecent act depends on what is regarded to be 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 only amount to an indecent act where there is a sexual connotation, as pointed out by Burns J in *R v. Gillespie*.[43] In the case of the latter, a further assessment of the intention of the accused would be 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]

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

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

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

12 The magistrate maintains 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 notes that touching between the sexes has been greater than ever before.[48] The magistrate thus concludes that, in the case at hand, touching a woman's buttocks does not bear a sexual connotation. However, taking these considerations into account rather gives cause for alarm than laxness. A clear and swift protection of a person's sexual integrity is absolutely necessary since the sexual is subject to a progressive removal of taboos in our society and the borders of the still permissible «approach» threaten to blur more and more.[49]

13 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 groping the appellant's buttocks. Thus, he took into account that his behaviour is contrary to social decorum and can be deemed «indecent».

14 He could also not assume that the appellant agreed to his conduct. One can

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.

45 Ibid., para. 4.

46 ISENRING (n. 31), para. 28 to art. 198.

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

48 Ibid., para. 25(j).

49 Cf. ISENRING (n. 31), para. 19 to art. 198.

generally rule out a readiness for spontaneous sexual interactions in a professional relationship or between strangers.[50] In fact, one has to generally assume that sexually connoted physical contact from strangers or a distant acquaintance is *not* welcome.[51] Indeed, studies have shown that there is a consensus in Europe – that may also apply to Australia – as to which body parts people usually let other people touch and where not, whereas the intensity of the relationship with the touching person plays an important role.[52] RENZIKOWSKI, a leading German scholar in the field of criminal law relating to sexual offences, maintains that «there certainly are certain social conventions as to flirting. Pinching perfect strangers or work colleagues on the bottom definitely does not belong to this.»[53] Therefore, the appellant cannot be said to have agreed to a perfect stranger, as the respondent was, to grope her bottom. This can be drawn from the aforementioned consensus that a pinch on one's bottom by a stranger bears a sexual connotation.

15 In comparison to Switzerland, touching a person's bottom, breast, upper thigh or stomach can be considered as sexual harassment.[54] In one case, reaching under a trainee's shirt and caressing his back by his superior was deemed sexual harassment.[55] While these seem to regard minor sexual assaults, it must be stressed that the person affected perceives even such «minor» incidents as threatening and may even lead to serious mental health issues, 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]

16 There are several studies and cases which hint at a general assumption that touching a person's bottom has a sexual connotation. Thus, there is considerable authority indicating that the buttocks of a person 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 intent and purpose of the alleged attacker, may disprove said assumption. Also, the specific relationship between the touching person and the person on the receiving end can be relevant to disprove said assumption. For example, whether it might be typical for close friends to touch one another, but being touched in the same way by a perfect stranger is rather unusual. Thus, one may maintain that touching a woman's buttocks raises an inherent assumption that the touch has a sexual connotation.

50 SCHEIDEGGER (n. 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, pp. 356 ss., 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), pp. 13811 ss., p. 13815.

53 RENZIKOWSKI JOACHIM, in: Joecks Wolfgang/Miebach Klaus (eds), Münchener Kommentar. Strafgesetzbuch, 3rd edn., München 2017, para. 11 to § 184i [translation of the author].

54 Federal Council Dispatch 1985, 1093; Decision of the Swiss Federal Supreme Court 6B_966/2016 from 26 April 2017, section 1.3; Decision of the Swiss Federal Supreme Court 6B_702/2009 from 8 January 2010, section 5.5; ISENRING (n. 31), para. 18 to art. 198; SCHEIDEGGER (n. 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, pp. 401 ss., p. 412.

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

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

18 In her submission, the appellant put forth the #MeToo movement, stating that the movement has changed community standards of propriety and decency. Therefore, it manifests today's standards of decency of ordinary members of the public.

19 The #MeToo movement has emerged as a reaction to the Harvey Weinstein allegations, which unravelled an endemic issue of women and men being sexually harassed or assaulted in the movie industry. The idea was to motivate all the women who have been subject to sexual harassment or assault to write «Me Too» as their status, so that people may understand how great the problem is, and not solely a problem in the film industry. The reaction was immense and exposed how sexual harassment and abuse was, in fact, experienced all over the world by all kinds of people.[57]

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

21 There is indeed a wide discussion as to the relevance and significance of the #MeToo movement for shaping the perception of society on issues surrounding sexual abuse and harassment.[58] It is argued by legal scholars that the #MeToo movement is confined to consciousness-raising and that this alone does not equate to social, cultural and political change.[59] In the words of the feminist legal scholar BANET-WEISER: «Visibility is at best a tool for social change, not an end.»[60] This may be so on a broader scale, with regard to questioning the patriarchal structures in place and the endemic sexual abuse and harassment women are confronted with.

22 However, one must 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 stated that #MeToo has been able to manifest how people on the receiving end really feel, and thus raised consciousness as to the deplorability and pain that it has caused and still does.[61] Fifty years ago, e.g., women were regularly exposed to types of work conduct we nowadays regard as unacceptable. By means of the magistrate's argumentation methods – which reflect on the access to pornography and on modern dance floor moves –, one could also observe modern perceptions through popular media. The airing of the famous series «Mad Men», for example, which takes place in 1960s New York, illustrates how women were facing a sexist working place, something the modern viewers usually view with disgust or shame towards the past.[62] The

57 See for example FOX KARA/DIEHM JAN, #MeToo's global moment: the anatomy of a viral campaign, in: CNN from 09 November 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, pp. 335 ss., p. 335.

59 E.g. ibid, pp. 336–337.

60 BANET-WEISER SARAH, Popular Feminism: #metoo, Los Angeles Review of Books from 27 January 2018.

61 Cf. MACKINNON CATHARINE, Where #MeToo Came From, and Where It's Going, The Atlantic from 24 March 2019.

62 FERRUCCI PATRICK/HEATHER SHOENBERGER/ERIN SCHAUSTER, It's a mad, mad, mad, ad world: A feminist critique of Mad Men, in: Women's Studies International Forum, 2014/47, p. 93 ss.

«more genteel times» the magistrate hints to were, in fact, not genteel. They were times drenched in machoism, with women on the receiving end of denigrating perpetual sexual harassment by their bosses and/or co-workers and unable to speak up out of fear.[63] In brief, the past was not more genteel to women.

23 The magistrate's argument that the #MeToo movement has not lead to any change in community standards regarding the indecency of touching some parts of the body partly coincides with the findings of some feminist legal scholars, who maintain that while the movement increases 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» BANET, a feminist legal scholar, states.[65] However, for the objective of assessing these standards, I believe that the #MeToo movement proves to be an ideal tool for identifying what kind of conduct is tolerated or perceived by a society as indecent, to say the least. Consciousness-raising can manifest how a community perceives sexual harassment and abuse as frequent, collective and dehumanizing, and how it also promotes empathy for the persons concerned.[66] Some feminist scholars argue that the same can be said of the #MeToo movement.[67] However, the movement takes a particular stance, since it not only raises awareness of how prevalent sexual harassment and abuse is but reveals a fact and proves a point.[68]

24 Nevertheless, it remains to be seen where the #MeToo movement will lead us or whether it will eventually recede. Legal scholars tend to be cautious in this regard and contend, while acknowledging the ample opportunities the #MeToo movement provides for social change, that the long-term effects and ultimate impacts of the movement on our social and political environment are yet unclear.[69] However, it cannot be contested that the movement has transgressed from a movement kicked off by actresses from the U.S. to a transnational feminist movement and therefore does not lack global representativeness.[70] The #MeToo movement 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 the #MeToo movement has not in itself resulted in a change of community standards, it has in fact revealed that a change has already taken place as to which conducts should be deemed «indecent». The movement is therefore reflective – at the very least – of how sexual harassment and abuse is perceived today.

25 The fact that the magistrate misidentified current community standards is furthermore manifested in some of her contradictory findings. Her Honour reasoned that while in the past touching a woman's buttock had a sexual connotation, this is no

63 MACKINNON (n. 61).

64 E.g. BANET-WEISER (n. 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), pp. 730 ss., p. 735.

67 GASH ALISON/HARDING RYAN, #MeToo? Legal Discourse and Everyday Responses to Sexual Violence, in: Laws, 2018/7(2), pp. 21 ss., 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), pp. 236 ss., p. 244; GASH/HARDING (n. 67), p. 33.

70 GHADERY FARNUSH, #MeToo – Has the 'sisterhood' finally become global or just another product of neoliberal feminism?, Transnational Legal Theory, 2019/10(2), pp. 252 ss., p. 273–274.

71 FOX/DIEHM (n. 57); cf. GHADERY (n. 70), pp. 268–273.

longer the case.[72] The reason for this, she finds, 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 was immediately seen as overtly sexual, naughty and inappropriate.[73] The reasoning of the magistrate therefore seems to be that the more oversexualised women are, the less touching the community accepts. However, this is not where the argumentation of her Honour leads to.

26 In her Honour's words, «in an era of twerking […], simulated sex and easy access to pornography», the past must be considered a more genteel time and therefore must have sexualised women less. This is, however, diametrically opposed to her Honour's finding that the past oversexualised women more. Hence, community standards surely must have gotten stricter regarding sexual harassment and abuse and not simply, in light of the situation actually worsening, slackened. 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]

27 Indeed, the objectification of sex may have led to a big change in the perception of sexual images and pornography. However, as the German legal scholar BRÜGGEMANN pointed out, this has actually led to an awareness-raising towards certain conduct between men and women, moving away some patriarchal structures from all sexual criminal offences, rendering them more strict and less lenient with old perceptions of how women can be treated.[75]

28 The mention of the sporting field by the magistrate as a special place where slaps on the bottom have an entirely new dimension also seems amiss in the evaluation of a situation that did not occur on a sporting field, but during the taking of a team photograph after a wheelchair basketball charity event. Especially the magistrate's description of the meaning of a slap on the bottom as a congratulation, commiseration or encouragement fails to catch in what way this fits into 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 worsens it.

29 The analogies that her Honour draws from «popular media» and the sporting arena to reach her conclusion are therefore flawed and led her Honour into error.

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

D. Conclusion of the Judgment

31 In my respectful opinion, her Honour erred in finding that the touching of the complainant's buttocks was not inherently sexual nor amounting to a touching capable of being of a sexual character, considering prevailing community standards of decency and propriety.

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

33 For these reasons, I found the appellant's proposed grounds of appeal reasonable and satisfactory. Accordingly, I formed

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

73 Ibid., para. 25(f).

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.

the opinion that leave to appeal should be granted. I make orders to that effect and permit the appeal.

IV. Conclusion and Outlook: Feminist Judgments in Switzerland

The rewritten judgment shows how the original Australian judgment *Johnson v. Ramsden* can be reconsidered and even alter the legal outcome of the case. The different approach and mentality gives way to new arguments that, it may be argued, were not sufficiently 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. To date, there is also no Swiss Feminist Judgment Project. Writing judgments is usually confined to the courts and doing so outside of them could disrupt their exclusive authority over legal decision-making. However, rewriting key judicial decisions from a feminist perspective has the potential to reflect on traditional notions about womanhood, gender-rights and sexuality. Certainly, the case of *Johnson v. Ramsden* might have been decided differently in Switzerland. As referenced in the rewritten judgment, Swiss scholars to date do not relativise touching a person's buttock due to the alleged increased exposal to twerking and easy access to pornography, as the Australian judges did. Nevertheless, there is plenty of room for improvement in areas particularly affected by society's view of sexuality and gender.

BIGLER-EGGENBERGER, the first female judge to sit in the Swiss Federal Supreme Court, already hints at some judgments of the Federal Supreme Court that may have been decided in favour of gender-equality.[76] The maybe best-known case is that of Emilie Kempin-Spyri who fought for her right to practice as a lawyer. In 1887 the Federal Supreme Court dismissed her claim, arguing that an understanding of the right to equality also encompassing 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 consider more the concrete circumstances of people's lives when passing judgment.[78] *How* exactly to better these cases, may be exposed by rewriting these cases in the vein 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 (n. 76), pp. 325–329, 353–356.