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ARE WE 'PERSONS' YET? LAW AND SEXUALITY IN CANADA

By Kathleen A Lahey
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When rights are distributed, should law have regard to our biology (our age and our sex, for instance) and to our social membership, or should it be blind to these rough means of human classification? And indeed does justice reside in this blindness, as it is conventionally said to do? Should law treat us resolutely as individuals, as particulars, not as members of certain biological or social categories? These fundamental questions about the nature of just law are central to liberal legal theory and they are also at the heart of Kathleen A Lahey's volume, '*Are We 'Persons' Yet? Law and Sexuality in Canada*'. The groupings that most disturb Lahey are those of sex and sexuality, which she would no doubt regard as both biological and social forms of classification. More specifically, Lahey inquires into the rights and status of 'queers' as a social and legal category in Canada.

It is often said by feminists that law individualises too much: that it treats us as monads, as essentially private autonomous agents, as self-defining, rather than defined within our relations with others. To many feminists, law should pay greater heed to our social context and to the constituting nature of social relations. However feminists also admonish law for its countervailing and often unacknowledged tendency still to impose suffocating social and biological categories, which often work against our interests, and which group us in ways we do not choose and do not like. This is a decidedly illiberal characteristic of our supposedly liberal law here in Australia and also in Anglo-American as well as Canadian jurisprudence: its continuing practice of categorising rather than particularising persons. Nowhere is this latter legal tendency more pronounced than in the law of sex and sexuality, as Lahey makes plain in her sustained analysis of the legal position of gay persons in Canada. Lahey herself advocates greater, rather than less, individualisation in law, indeed she recommends a legal individualism of such purity that she would have

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law forget our sex and our sexuality when endowing us with rights and duties, and simply treat us all as (interchangeable) persons.

Lahey has good reason for this apparently extreme position, this strong individualism. As she demonstrates throughout her volume, 'sexual minorities in Canada start out with greater obstacles in life, are disproportionately burdened by discriminatory norms throughout their lives, have lower incomes, thereby accumulating fewer assets, and receive less legal, social, and economic support for their relationships or for their children'.[1] Lahey indicts what she calls the 'heterosexual economy', the social and legal system which confers on heterosexual couples a surprisingly broad range of legally-sanctioned financial and social advantages.

The compulsory sexing and then sexualising of gays have almost invariably worked against their interests, observes Lahey. These imposed categories of legal being have served as a means of denying gays what Lahey refers to as 'the full incidents' of personhood. She itemises among these incidents

> the right to enter the state, the right to participate in the state, the right to move freely, the right to structure a life without violence or appropriation of property, and the right to enter into legally recognized relations sanctioned by property law, contract law, and family law.[2]

Lahey provides convincing evidence in support of her claim that gays have suffered badly under Canadian law, with an extended and comprehensive account of the various ways in which Canadian law, both directly and indirectly, discriminates against gays, essentially by presupposing and then subsidising heterosexual relations. The social and legal presupposition that we pair across the sexes is demonstrated easily: whenever a woman and a man live in the same house the strong presumption is that they represent a sexual couple and hence a social, economic and legal unit. When persons of the same sex cohabit, it is assumed that they are not in a sexual relationship and the efforts of gays to insist otherwise and thus to derive the benefits of the heterosexual economy have usually proven ineffectual. And of course marriage, and its many benefits, remain the preserve of one legally-recognised man and one legally-recognised woman.

Lahey makes her case well against Canadian law, describing its homophobic ways in detail and persuasively. The jurisprudential weakness of her book, however, lies in her formal analysis of the concept of legal personality. In a fairly unreflective manner, Lahey tends to naturalise and essentialise the legal person — to assume

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1 Kathleen A Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto University Press, Toronto, 1999) p 342.

2 Ibid xv.

that it possesses a natural human substrate and that it must therefore assume a particular form, that it has a set nature. She thus reveals her colours as a natural lawyer. We see this in her statement that

> [t]he concept of "legal personality" is both an expression of the minimal content of "human dignity" and a description of what every human being needs in order to be able to function in state societies and the world at large.[3]

And it is these 'fundamental incidents' of personality which are denied to gay Canadians. What she fails to do is to reflect on legal personality as a term of art, as a legal abstraction comprising purely formal legal relations.

Lahey's way of looking at personality necessarily tends to hypostatise law's subject. It treats him (and her) as a natural and extra-legal being who, by dint of his human nature, is owed certain fundamental rights. If he is not afforded his proper complement of fundamental rights and duties, his nature is denied. Many jurists would disagree with this interpretation of legal personality — the reviewer included. They would say that it neglects the formal legal character of the person: the fact that 'he' can be regarded as pure legal artifice, a device of law comprising a shifting constellation of abstract legal relations of remarkable variety. Because he is a creation of law, he can be made and remade: he does not have to have a sex; or he can have more than one. There is nothing inherent to the concept of personality which fixes our sex although it is true that personality has, as a matter of practice, been used to sex us and in highly conventional ways, as Lahey well demonstrates.

In this other, more positivisitic account of law's person, the concept is therefore potentially far more abstract and fluid than Lahey would have it. According to this other view, to be a person in law, one does not have to possess a minimal set of natural rights and indeed one does not even have to be a natural person. Rather, rights and personality are always shifting and personality comes in degrees; its content depends on legal purposes (which have often been highly sexist, again as Lahey shows).

The necessary implication of Lahey's analysis as a natural lawyer, who believes in the fundamental and natural dignity of human beings, is that law must reflect this natural dignity if it is properly to recognise people as persons. And, for Lahey, law would do this best if it did not attach significant legal consequences to our natural sex and to our sexuality; it should forget about these distinguishing characteristics of persons and look to a common human nature. However, a more subtle analysis of personality would perhaps engage with the possibilities of the alternative, positivist account of personality. It would enter the debate between positivists and natural

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3 Ibid xv.

lawyers about what it is to be a person in law and it would explain to the reader just why one interpretation is better than the other.

The strength of the positivist account of the legal person is that it alerts us to the constructed nature of legal concepts. It also reminds us that law can re-make or reconstruct its conceptual devices, depending on what it hopes to achieve. This constructionist approach to the person is therefore highly amenable to feminist purposes, although it has yet to be deployed seriously in such a critical feminist manner. It is therefore unfortunate that an opportunity has been missed to do some much-needed feminist scholarship on this foundational legal concept — to tease out its legal and political possibilities. This said, Lahey's volume remains an important contribution to the jurisprudence of sexual status and she leaves us in no doubt about the legal misery of being gay.