

Transgender Jurisprudence: Dysphoric Bodies of Law

Andrew N Sharpe

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In this groundbreaking book, Andrew Sharpe claims to offer:

for the first time, a sustained, integrated and comparative critique of transgender/law relations across common law jurisdictions and legal subject matters and [to] situate those relations within contexts of law's relationship with medicine. [The book] aims, through taking legal doctrine seriously, to tease out, map and make (non)sense of the multiple themes and subtexts that comprise this nascent jurisprudence. (pp 2–3)

These large claims are amply realised in the chapters that follow. Sharpe's comparative gaze ranges from Australia to the United States, Canada, the United Kingdom and New Zealand. The legal subject-matters he covers include a substantial focus on marriage law and anti-discrimination law, but various other aspects of both criminal and civil law are also referred to.

As Sharpe makes clear, however, this is a book about legal reasoning and legal doctrine. It is not about the sociology, psychology or empirical experience of transgender, nor is it about transgender politics or activism in the traditional sense. Rather, it is all about discourse — legal, and related sociological, psychological, and medical discourses, or knowledges, about transgender — and the discursive politics they create. In this way, Sharpe distinguishes his project from both 'traditional legal [transgender] scholarship', which 'has tended toward preoccupation with legal determination of the sex of post-operative transgender persons for purposes such as marriage, gendered criminal offences, sex discrimination and social security claims' (p 3), and reformist transgender arguments, which attempt to liberalise the test for determining sex for legal purposes. Both of these strands of the literature, Sharpe contends, are embedded within, and therefore fail effectively to critique, existing medico-legal discourse and forms of regulation. Further, both tend to highlight the repressive nature of legal decisions (pp 3–4). By contrast:

recognising law as a site of cultural production, [this] book aims to take law reform activism into the very texts of law itself, where legal decision or legal ruling represents only one portion of those texts. Moreover, in emphasising law as a site of cultural production the book serves to heighten what is at stake politically when the choice is made to engage law. The book aims, therefore, not merely to render transgender people more visible within the domain of law but also to contest and problematise the medico-legal conditions upon which transgender people have been granted a limited presence within law and to consider their discursive effects. (p 4)

The book is organised into three parts and 10 chapters. Chapter 1, the Introduction, sets out the book's aims and themes. The themes include law's production of sexual identities, the implications of that production for feminist politics, the act/identity dyad, the interrelationship between medical science and law, and law's bodily aesthetics. The dominant theme, however, is that of judicial anxiety over the homosexual body. Throughout the book, Sharpe repeatedly highlights judicial efforts to separate the transsexual from the taint of the homosexual. Among other things, as the author points out, this has worrying implications for the prospect of political solidarity among sexual minorities.

Part I (Chapters 2–4) establishes the parameters of the discursive field. Chapter 2 undertakes a genealogy of psychological and medical discourses on transgender, beginning with nineteenth century sexology, which saw homosexuality as one of a number of transgendered forms. This was followed by the erasure of transgender in Freudian psychoanalysis, which figured all such tendencies as homosexual. The concept of transgender was then recuperated in the 1950s in the context of new surgical techniques (especially for male-to-female transsexuals), accompanied by particular ascribed characteristics of the transsexual, particular notions of who should qualify for surgery, and the requirement of particular psycho-social narratives, especially concerning the direction of sexual desire (with post-operative heteronormativity being firmly inscribed). The current concept of gender dysphoria grounding the desire to realise one's 'real' or 'authentic' sex is a further development from these earlier discourses. The chapter ends with a section on transgender politics which deals with resistances and challenges to medical orthodoxy on transgender. Although the rest of the chapter gives a thorough and fascinating account of constructions of transgender, this section on its deconstructions is frustratingly brief and could have been further elaborated.

Chapter 3 examines the cases — mostly English — that have insisted that legal sex is determined by biology at birth. The chapter shows the incoherence of this standard, given the indeterminacy of biology in some instances, and the fact that in cases of uncertainty, it is genital sex (bodily aesthetics) that tends to be privileged. While the chapter is exhaustive in scrutinising the reasoning in these cases, the facts of the cases — the particular issues that gave rise to the legal reasoning — are not always fully explained. Perhaps it was assumed that these cases are all so notorious that their facts are well known. Chapter 4 provides a critique of reform jurisprudence, pointing out that legal recognition of the sex claims of transgender persons may serve to reinforce the binary gender order more effectively than their denial: 'it may be that the reproduction of gender polarity is better achieved through giving legal effect to the medical incorporation ("normalisation") of sexed "ambiguity", thereby blocking off individuality and difference' (p 57). Sharpe also notes the privileging of sex reassignment surgery in reform jurisprudence, although more than mere surgery is required. Recognition has also depended on the capacity for post-operative heterosexual sex (albeit with different standards

applying to post-operative penises and vaginas), and an autobiography that signals transgender 'authenticity'.

Part II (Chapters 5 and 6) deals with marriage law, similarly first discussing cases in which transgender sex claims have been denied for the purposes of marriage, and then discussing cases in which claims have been accepted. Sharpe argues that the denial of claims is inextricably linked with homophobia, as judges tend to conflate marriages in which one party is a transsexual with homosexual coupling. This argument is rather overdone in Chapter 5. The point is made effectively without having to be repeated over and over. Of more interest in this chapter are some extraordinary judicial propositions about what marriage requires, and why transgender bodies are not capable of performing it. Needless to say, cases in which sex claims have been accepted for marriage purposes also demonstrate the homophobia of law, as pre-operative transgender bodies are figured as monstrous/homosexual, while post-operative claims must be accepted precisely in order to avoid a finding of homosexuality. Further, in these cases, the pre- and post-operative binary deriving from medical discourse is once again maintained.

Part III deals with anti-discrimination law, and the ways in which transgender has or has not been included under the grounds of 'sex', 'sexuality' and 'transgender' in various jurisdictions. In Chapter 7, Sharpe criticises the fact that in the United States and Europe, prohibitions of discrimination on the ground of 'sex' have been interpreted so as not to include transsexuals. But this begs the question of how transgender should be included under the ground of 'sex' — as male, or female, or as an extra sex? The argument here is never made clear. Sharpe suggests that transgender could be included if 'sex' is understood to mean 'gender', but this doesn't solve the problem, just rephrases the question — which gender? Transsexuals are not discriminated against because they are male, or female, or masculine or feminine. Rather, discrimination occurs because transsexuals radically split sex from gender in a way that others can find disturbing and threatening. To my mind, attempting to produce transgender discrimination as a form of sex discrimination misrecognises the problem.

Chapter 8 discusses Australian anti-discrimination law, and notes some of the interesting departures that law represents. For example, the New South Wales, Victorian and ACT legislation does not confine its recognition to post-operative transsexuals. And while it does still construct a group 'outside' its protection, by requiring permanent identification as a member of the opposite sex as distinguished from transitory cross-dressing, cross-dressers do enjoy some level of protection by the inclusion of 'presumed' transsexuality as a prohibited ground of discrimination, thus emphasising 'the interplay of performance and gaze' rather than fixed identities. Nevertheless, the Victorian *Equal Opportunity Act* in particular is subject to wide exceptions, including the requirement to 'confess' transgender status in order to enjoy certain protections. Again, though, the argument in this chapter is not as well developed as in some others. Sharpe's interpretation and critique of the South Australian legislation is speculative because there has been no case law on the subject, but this point is not acknowledged. Likewise, the claim that

transsexuals can only bring a claim of discrimination on the ground of their (new) sex in jurisdictions that give legal recognition to sex changes, or that include presumed sex as a ground of discrimination, is also speculative, and by no means beyond question. If asked, I would probably have reached the opposite conclusion — that is, that courts and tribunals would tend to give recognition, at the very least, to post-operative sex in the anti-discrimination law context. Finally, it is odd that the chapter includes no analysis of *Menzies v Waycott* (2001) EOC 93-129, the only Australian case of discrimination against a transsexual that has actually been heard and reported. This case certainly does not fit neatly into Sharpe's schema in Part III, since discrimination was found on the ground of disability (gender dysphoria). But that is no reason to ignore it; and an argument clearly could have been made around the influence of medical discourse in the characterisation of transsexuality as a disability.

Chapter 9 presents a case study of transgender law reform in Western Australia. The chapter returns to the 'homosexual anxiety' theme, and also weaves in the themes of the privileging of the post-operative transgender body, and the requirement of a 'true' narrative of gender dysphoria. The chapter very effectively makes its point about the costs of reform — to transgenders in the compromises accepted in order to get the legislation passed, and to gay men and lesbians whose cause was set back in the process (transgender law reform was achieved at the expense of sexuality law reform, with the Bill for the latter eventually lapsing).

Sharpe concludes that it is 'not my aim to tell activists what strategies to use' (p 196), and acknowledges that decisions about reform strategies always take place within particular contexts and in circumstances of constraint. Nevertheless, he does issue a fairly clear warning of the dangers of identity-based politics, and advocates instead the adoption of a coalitional politics of reform. Ultimately, however, his concern is to suggest strategies of discursive resistance, to 'assist activists and theorists alike in contesting legal representations of transgender, and other, bodies, practices and desires as "unimaginable", "incoherent" and "impossible"' (p 197). He expresses the hope that the book has made an important contribution to that project. That it has done so is beyond doubt.

Indeed, it has provided more than a contribution: Sharpe has comprehensively reshaped and redefined the field of transgender jurisprudence. As a pioneering work, the book inevitably suffers from the odd flaw, as identified above. Neither is it an 'easy read'. It is quite dense, and requires careful concentration. But the end result is a book which is not only sustained, integrated and comparative, but which introduces a set of original and sophisticated arguments that will provide an indispensable grounding for subsequent work in the field for some time to come.

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