

Beyond the Binary: A Capabilities Approach to Transgender Rights

Eleanor Wood

Eleanor Wood is a third year Juris Doctor student and professional opera singer. Earlier this year, she simultaneously completed her Equity & Trusts mid-sem and performed in *Orfeo and Euridice*.

Eleanor wishes to thank Professor Fleur Johns, Dr Marc De Leeuw and — especially — her dad, Dr Mike Wood, for their sage guidance in the writing of this article.

‘Biology gives you a brain. Life turns it into a mind.’
—Jeffrey Eugenides, *Middlesex*

In the High Court decision of *New South Wales Registrar of Births Deaths and Marriages v Norrie*,¹ French CJ, Hayne, Kiefel, Bell and Keane JJ held unanimously that the Registrar was empowered to record the sex of a person as ‘non-specific’ rather than ‘male’ or ‘female’.² In reaching this conclusion, the judgment opened with the statement, ‘not all human beings can be classified by sex as either male or female’.³ The decision has been described as a landmark ruling, attracting widespread media coverage.⁴ Furthermore, the recent ruling is part of broader developments in transgender rights, awareness and advocacy. I suggest that a rights-based approach to determining capabilities, as set out by economist Amartya Sen⁵ and further explored by legal theorist Martha Nussbaum,⁶ may offer a useful framework for interpreting these developments.

I. MOVING BEYOND THE BINARY IN SEX IDENTIFICATION

Up until recently, the majority of Australian law and policy has been framed around a binary system. There has been very little scope to identify as anything other than male or female. In *R v Harris*, the existence of a third gender was explicitly rejected.⁷ Mathews J stated that, ‘there was no place in the law for a third sex’, because ‘such a concept could cause insuperable difficulties in the application of existing legal principles’ and ‘would also relegate transsexuals to a legal “no man’s land”’.⁸

The decision in *NSW Registrar v Norrie* is significant because it challenges the male/female binary understanding of sex that has been entrenched in Australian law and culture. The decision is part of broader developments in Australian policy to create space for sex identities beyond the male/female binary in relation to government recordkeeping, identity documentation and

anti-discrimination legislation.⁹ Whilst the terms ‘gender’ and ‘sex’ are sometimes used interchangeably, for the purposes of expression, this article will refer to ‘sex’ in discussing biology and ‘gender’ in discussing social and cultural identity.

The restrictive male/female binary can have harmful effects on the wellbeing of sex and gender diverse people. James McGrath has argued that attempts to oversimplify the classification of a person’s sex can have troubling effects for those ‘who do not fit neatly into one of the two categories of male or female, and cause complications for others who do not conform to social roles expected of them. The law may be especially unkind to people who do not fit into one of these two ill-defined variables’.¹⁰

A recent study conducted by La Trobe University in September 2014 indicated that two thirds of gender diverse and transgender young people experienced verbal abuse because of their gender identity, and one in five of the participants surveyed had been physically abused.¹¹ Of the 189 participants surveyed, the study found half had been diagnosed with depression and nearly half had been diagnosed with anxiety.¹² As Theodore Bennett argues, law’s reliance on this binary paradigm ignores ‘the biological and lived realities of gender diverse people, marginalizes non-binary sex identities and trades on normative male/female bodies, sexualities and lives to unfairly restrict access to rights and recognition’.¹³

II. WHY A CAPABILITIES APPROACH?

The nature of the lives people can lead has been the subject of attention of social analysts over the ages.¹⁴ While economic criteria of advancement such as gross national product (GNP) or gross domestic product (GDP) have frequently been relied upon to measure human advancement, Amartya Sen argues that direct indicators of well-being and freedom are increasingly important in social assessment.¹⁵ He writes, ‘[i]n assessing our lives, we have reason to be interested not only in the kind of lives we manage to lead, but also in the freedom we actually have to choose between different styles and ways of living’.¹⁶

In a capabilities approach, individual advantage is assessed by a person’s capability to do things he or she has reason to value. According to Sen ‘[a] person’s advantage in terms of opportunities is judged to be lower than that of another if she has less capability – less real opportunity – to achieve those things she has reason to value’.¹⁷ The value of a capabilities approach is that it emphasises the plurality of different features that may be needed for human functioning: whether it be avoiding premature mortality, having access to education to pur-

sue professional ambitions or taking part in community activities in a meaningful way. A capabilities approach focuses on human life, not just economic criteria such as income or commodities that a person may possess, which are often taken to be the main criteria of success.¹⁸ Sen writes, ‘the idea of freedom also respects our being free to determine what we want, what we value and ultimately what we decide to choose’.¹⁹

However, one potential limitation of a capabilities approach is that it values outcome over opportunity for individual rights. I suggest both considerations are important in relation to policy decisions for transgender rights.

Martha Nussbaum has further explored the capabilities approach in considering social assessment and policy in relation to civil rights, relying on the language of liberty and freedom in fleshing out an account of the basic capabilities. She argues that rights play an increasingly large role in determining what the most important capabilities are, suggesting ‘legal guarantees of freedom of expression ... and of religious exercise’ are aspects of the general capability to use one’s own mind in a way that is directed by one’s own practical reason.²⁰ She also emphasises ‘guarantees of non-interference with certain choices that are especially personal and definitive of selfhood’.²¹ I suggest that these aspects of a capabilities approach are important to law and policy progressions for transgender rights, and should continue to inform decision makers in the future.

Nussbaum stresses the dynamic nature of her list of basic capabilities, stating, ‘it is open-ended and humble; it can always be contested and remade’.²² The current list comprises life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation, friendship and respect; concern for other species; play; and control over one’s environment, both political and material.²³ Nussbaum’s capabilities are complete in and of themselves. Nussbaum states, ‘[t]he central capabilities are not just instrumental to further pursuits: They are held to have value in themselves, in making a life fully human’.²⁴

III. A STEP IN THE RIGHT DIRECTION

In *NSW Registrar v Norrie*, the reasoning of the High Court was that the current Act was supported by ‘express legislative recognition of the existence of persons of “indeterminate sex”’.²⁵ The Court held that while the Registrar was empowered to assess the veracity of an application, the Registrar’s function did not encompass ‘the making of any moral or social judgments’ or ‘the resolution of medical questions or the formation of a view about the outcome of a sex affirmation proce-



Illustration by Nour Tohamy

ture'.²⁶ This aspect of the decision raises a key question: what role, if any, should the state play in regulating our own sexual behavior and sexual identity?

While the High Court's reasoning turned largely on statutory interpretation, the New South Wales Court of Appeal appeared to give greater weight to changing moral values and the needs of individuals to flourish in a contemporary society. In discussing 'specific categories of sex other than male or female'²⁷ that might be contemplated by the Act, the Court of Appeal seemed to give weight to a naturalist sentiment that the law should allow the individual to flourish through self-evidently 'good' values. This notion of the individual being able to pursue human flourishing finds support in Nussbaum's capabilities approach.

The judgment of Beazley ACJ seemed to engage directly with the idea of the intersection between the law and shifting moral values held by the community. She states:

Matters such as gender identity and sexual preferences are often overlain with social, moral and religious considerations that may vary widely in different segments of the community. The law's role in the regulation of such matters may itself be controversial or, at the least, influenced by the different views within the community on such matters.²⁸

This passage seems to endorse Nussbaum's notion of basic capabilities as 'an ongoing cross-cultural inquiry' in which the law is informed by evolving community values.²⁹

III. CONCLUSION

Thanks to an increase in activism, public advocacy and ongoing academic attention, the rights of transgender people are increasingly recognised in contemporary society.³⁰ This is strengthened by recent examples of high profile celebrities publicly discussing their transgender identity, such as former Olympic athlete Caitlyn Jenner and television actor Laverne Cox. In the face of this growing recognition, law and government must consider developing 'a framework that does not compel subjects to live in one of two categories, and does not attempt to "freeze" sex and gender'.³¹ The key issue is no longer whether space should be opened up for non-binary sex identities, but rather *how* such a space should be opened up. As law and policy continues to grapple with transgender rights and identities, a capabilities approach offers a more dynamic framework that promotes the pursuit of individual rights and celebrates diversity.

REFERENCES

1. (2014) 250 CLR 490 ('*NSW Registrar v Norrie*').
2. *Ibid* 493 [2].
3. *Ibid* 492 [1].
4. Paul Bibby and Dan Harrison, 'Neither Man Nor Woman: Norrie Wins Gender Appeal' *The Sydney Morning Herald* (online) 2 April 2014 <<http://media.smh.com.au/news/nsw-news/norrie-wins-gender-appeal-5316581.html>>.
5. Amartya Sen, *The Idea of Justice* (Belknap Press, 2009).
6. Martha C Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273.
7. (1988) 17 NSWLR 158, 194.
8. *Ibid*.
9. Theodore Bennett, "'No Man's Land": Non-binary Sex Identification in Australian Law and Policy', (2014) 37 *University of New South Wales Law Journal* 847, 848.
10. James McGrath, 'Are You a Boy or a Girl? Show Me Your REAL ID' (2009) 9 *Nevada Law Journal* 368, 368.
11. Elizabeth Smith et al, 'From Blues to Rainbows: The Mental Health and Well-being of Gender Diverse and Transgender Young People in Australia' (Research Report, Australian Research Centre in Sex, Health and Society, September 2014) 12.
12. *Ibid* 12, 66.
13. Bennett, above n 9, 848.
14. Sen, above n 5, 225.
15. *Ibid* 227.
16. *Ibid*.
17. Sen, above n 5, 231.
18. *Ibid* 233.
19. *Ibid* 232.
20. Nussbaum, above n 6, 273, 277.
21. *Ibid* 277.
22. *Ibid* 286.
23. *Ibid* 286-8.
24. *Ibid* 286.
25. *NSW Registrar v Norrie* (2014) 250 CLR 490, 496 [18].
26. *Ibid* 495 [16].
27. *Ibid* 499 [34].
28. *Norrie v NSW Registrar of Births Deaths and Marriages* [2013] NSWCA 145, 65 [177].
29. Nussbaum, above n 6, 286.
30. Bennett, above n 9, 853.
31. *Ibid* 854.