TRANSSEXUALS' LEGAL SEXUAL STATUS AND SAME SEX MARRIAGE IN NEW ZEALAND: *M* v *M*

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One is not born, but rather becomes a woman.[1]

I INTRODUCTION

Essentialism is unfashionable today. Nonetheless, Aristotle's conception of the universe as a multiplicity of forms, each with an essence which could be isolated by establishing its nature and purpose, has long provided a reliable tool for legal analysis. Classically, we ask, "What is the nature of this agreement? Is its purpose to be legally binding?" And so forth. Postmodernist thought, however, regards any claims to isolating essences with profound scepticism. Notions of 'nature' and 'purpose' are seen as irresistibly embedded in the social and historical contexts which give rise to them, though perhaps still of use where this is consciously acknowledged.[2] The episodic and continuing narrative of conflict over the appropriate legal sexual status of transsexuals provides an interesting microcosm whereby a change from classical to postmodern legal assumptions about the nature of reality may be observed. Modes of legal categorisation appear to be changing. Increasingly, one's sex is being seen as able to be legally altered. Tests may now involve examining a cluster of characteristics, most of which are not fixed but may change: surgical intervention may amend the conformation of one's genitals, and one may learn how to manifest such inherently contingent social cues as 'feminine' ways of behaving. There has been a conceptual shift from a focus on essential characteristics to an examination of various evidential factors before the court which is still far from unproblematic, since the weighting of each factor within the cluster is crucial and so far inarticulated.

Should our legal system adopt cluster classification, then one's legal sexual status will be accepted as being able to be altered. And if we are to apply this technique to sex, it would seem illogical not to apply it also to marriage. Yet the essence of marriage has long been thought to be the union of man and woman. The point at issue here is whether the availability of cluster classification would help us conceptualise a change in the nature of marriage which we might observe empirically anyway. I shall consider this in relation to transsexuals' and homosexuals' capacity to mar-

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1 S de Beauvoir, *The Second Sex* (1970) 249.

2 For an extended consideration of this debate from a feminist perspective, see generally D Fuss, *Essentially Speaking: Feminism, Nature and Difference* (1990).

ry. Many transsexuals wish to marry as members of their chosen sex. Many homosexuals also wish to be able to contract a valid marriage with a same sex partner. Using cluster classification techniques, the capacity to marry offered transsexuals would logically be extended to homosexuals, given that single sex partnerships may share most if not all of the characteristics of traditional marriage apart from their involving a man and a woman. Classically, however, the union of man and woman has been regarded as the essential characteristic of marriage. Must this, too, change?

Legal systems considering transsexuals are hence caught in a bind. The problem of whether a transsexual may be regarded as having changed sex legally disappears if gender neutral legislation is enacted. Gender neutral legislation, however, allows marriage between persons of the same sex. This ceases to be problematic only if marriage can be redefined so as to allow same sex marriages. I shall consider the caselaw on transsexuals in this light, focusing particularly on *M* v *M* and the issues it raises.[3] Underlying themes will include the proper place (if any) of sexual division in law, the circumstances in which an individual might be regarded as having changed sex legally and the possible implications of *M* v *M* for the New Zealand legal system.

II BACKGROUND

Philosophers, psychoanalysts, social theorists and feminists have debated the deceptively simple question "what is a woman?" for years. It is now commonly seen as unanswerable or meaningless.[4] Leading cases concerning transsexuals, however, have come up with two possible definitions. The first was formulated in *Corbett* v *Corbett,*[5] the Commonwealth's leading case on transsexuals. It uses essentialist logic: if one is born a man one remains a man. In *Corbett* Ormrod J (as he then was) held that one could legally be described as a woman only in one of two situations. Either one must be born with congruently female chromosomes, gonads and genitals, or one must be born an intersex, with a mixture of both male and female attributes, whom medical personnel subsequently designate as female. A transsexual who identified psychologically as a woman, was accepted as one socially, whose gonads had been removed, and genitals and hormonal balance altered to resemble a woman's was then legally still a male. Despite severe criticism, *Corbett* has been followed throughout the Commonwealth until very recently.[6] A different means of arriving at a definition of an individual's legal sexual status using cluster classification has been adopted in New Jersey in *MT* v *JT,*[7] in Australia in *R* v

3 *M* v *M* [1991] NZFLR 337.

4 Cf T De Lauretis, "Eccentric Subjects: Feminist Theory and Historical Consciousness" (1990) 16 Feminist Studies 115; D Fuss, supra n 2.

5 [1970] 2 All ER 33.

6 Criticisms of *Corbett* include, inter alia, H A Finlay and W A W Walters, *Sex Changes: Medical and Legal Aspects of Sex Reassignment* (1988); I M Kennedy, "Transsexualism and Single Sex Marriage" (1973) 2 Anglo-Am LR 112; D Pannick, "Homosexuals, Transsexuals and the Sex Discrimination Act" [1983] Public Law 279; D K Smith, "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 Cornell LR 963.

7 3 SSA 2d 204 (1976).

Harris, R v *McGuiness,*[8] and now in New Zealand in *M* v *M*. Here one characteristic associated with men, the possession of XY chromosomes, is balanced against a cluster of characteristics associated with women: genitals, gender (ie psychological and social identity) and secondary sexual characteristics. The latter outweigh the former to establish the person in question as female. One may be born a woman or become one in the eyes of the law via sexual reassignment surgery to match one's 'core identity' or self-identification as a woman.[9] In deciding *M* v *M* using cluster classification, Aubin DCJ has become the first judge in the Commonwealth to hold that a post-operative transsexual may be recognised as having changed sex legally for the purposes of marriage: transsexuals in New Zealand may now be able to contract valid marriages in their chosen sex following sexual reassignment surgery.

(i) *M* v *M*

M, born a normal male in 1943, underwent sexual reassignment surgery in 1969 on psychiatric advice after changing her name by deed poll. She subsequently unsuccessfully requested the Registrar-General of Births, Deaths and Marriages to amend her birth certificate to show the sex as female. An application to the Supreme Court under the Declaratory Judgments Act for an Order determining and declaring her sex[10] also failed, for lack of jurisdiction. Her marriage to the respondent took place in 1977. It lasted over twelve and a half years, with sexual intercourse possible throughout. When the marriage ended, the applicant requested a declaration order under section 27 of the Family Proceedings Act 1980 that her marriage was invalid, on the grounds that the law of New Zealand requires a marriage to be between a man and a woman, and she was of the male sex at the time of the marriage and continued to be so. The applicant, thus, has applied twice to the New Zealand courts, once to be declared a woman and once a man. That both applications proved unsuccessful is unfortunately typical of the paradoxes characterising this area of the law.

Describing the proceedings as "coming down in the end to a definition of 'woman',"[11] His Honour concluded that[12]

> genetic considerations can be displaced by events occurring in the course of [a] person's life that cumulatively take that person out of the sexual category in which he or she was born through a state of limbo and into the haven of the opposite sex.

Characterising the definition of 'woman' as elusive, he nonetheless held that the applicant came within it for the purposes of, and at the time of the ceremony of, the marriage on 9 September 1977. His Honour took

8 (1988) 35 A Crim R 146.
9 Cf K O'Donovan's discussion of the legal construction of sex and gender in relation to transsexuals in her *Sexual Divisions in Law* (1985) at 64-80.
10 *Re T* [1975] 2 NZLR 449.
11 Supra n 3 at 348.
12 Idem.

pains to anchor his decision in the evidence before the court. The only medical evidence presented consisted of the reports originally tendered to support the applicant's unsuccessful application to the Supreme Court for a declaration to the effect that she was a woman. No expert evidence contradicted these. Other factors he found persuasive included the length of the marriage, the applicant's husband's acceptance of the applicant as a woman and as a marriage partner with full knowledge of her background, and the harmonisation of the applicant's body with her 'core identity' or psychological sex.

Until now in New Zealand the question whether a transsexual is a man or a woman in the eyes of the law, or whether this matters at all for the purposes of marriage, has been undecided. I propose to discuss the legislative and caselaw background to *M* v *M* before analysing in detail the case itself and its implications.

(ii) Legislative Background: The Marriage Act 1955 and The Births, Deaths and Marriages Registration Act 1991

The Marriage Act 1955 is ostensibly gender neutral. It nowhere specifies that marriage must be between a man and a woman. A marriage between any two people, be they men, women or transsexuals, who intended to marry each other might thus prove valid under New Zealand law. In *M* v *M* Aubin DCJ held that this was at least arguable, before thanking counsel for expressly not inviting him to pronounce on this matter. The case proceeded on the basis that the marriage would be declared invalid if the applicant was found not to be a woman.

Nor does the Births, Deaths and Marriages Registration Act 1991, allotted a commencement date of 1 January 1992, provide clear legislative guidance on transsexuals' legal sexual status. Despite submissions from the New Zealand Law Society, Parliament expressly left this open.[13] Under section 29, transsexuals may, upon presenting appropriate medical documentation, persuade the Registrar-General to amend their birth registration so as to conform with their surgically altered sexual characteristics. Some might think that section 29 thus enables transsexuals to choose the sex they wish to be in the eyes of the law. At the second reading of the Bill, at least one member assumed the effect of the Act would be to permit transsexuals to marry in their chosen sex.[14] However, under section 30, their sex for legal purposes is to be determined by an undefined 'general law of New Zealand'. The combined effect of sections 29 and 30 is to render transsexuals' legal sexual status in New Zealand obscure. When the Bill was originally drafted, section 30 apparently expressed an assumption, described by the Law Society as 'extraordinarily uncertain', that New Zealand courts would simply follow *Corbett*.[15] The Law Society was un-

13 Lawtalk, Newsletter of the New Zealand Law Society, issue 324 (5 April 1990); ibid, issue 328 (8 June 1990).

14 1991 NZ Parliamentary Debates 943-944. See also P F Tapp, "Transsexualism and the Births, Deaths and Marriages Registration Bill 1989 — The Legal Creation of an Ambiguous Status" [1991] NZ Recent Law R 144.

15 Supra n 13.

derstandably concerned that section 29 would therefore prove a 'cruel hoax' for transsexuals, who would thus be permitted to have their birth certificates amended to show their chosen sex under section 29, but remain their original sex under section 30 for the purposes of marriage. As Aubin DCJ commented, "if the proposed legislation were passed in its present form, or had been law in September 1977, it would not by itself have resolved the issue which is before this court."[16] The decision in *M* v *M,* then, may now be seen as representing 'the general law of New Zealand' to which section 30 refers, in the absence of any other considered or binding indigenous caselaw.

III THE CASELAW ON TRANSSEXUALS

(i) *Corbett*

The first case to consider the legal status of transsexuals in any depth was *Corbett.* Ormrod J, who had the benefit of medical as well as legal qualifications, was asked to annul a marriage between George Corbett and a transsexual, April Ashley, on the grounds that the marriage was a nullity as both parties were men, or, alternatively, on the grounds of non-consummation. Since the common law position was that marriage involved a man and a woman,[17] His Honour had to decide if April was a man. Medical evidence from nine experts established that the medical profession used four or five categories to allocate sex in ambiguous cases: chromosomal gonadal, genital, psychological and, sometimes, hormonal characteristics. Ormrod J found these criteria relevant to, but not necessarily decisive of, the legal basis of sex assignment, quoting Professor John Dewhurst's observation that "we do not determine sex – in medicine we determine the sex in which it is best for the individual to live".[18] His Honour held that the legal sex of a person for the purposes of marriage must be determined by biological criteria, since marriage was of an essentially heterosexual nature: "even the most extreme degree of transsexualism in a male or the most severe hormonal imbalances which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage."[19] A person born with congruence between chromosomal, gonadal and genital characteristics would remain the sex these indicated regardless of any incongruence with psychological or hormonal characteristics or any subsequent surgical intervention under His Honour's test. April Ashley, who was born with congruent male chromosomes, gonads and genitals, therefore legally remained a man for the pur-

16 Supra n 3 at 347.

17 Cf the famous dictum of Lord Penzance in *Hyde* v *Hyde & Woodmansee* (1866) LR 1 P & D 130, that "marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others". A Bradney describes this principle as having a mythical status in English law: that is to say it is widely cited, disregarding its inherent legal falsity. See his "Transsexuals and the Law" (1987) 17 Family Law 350.

18 Supra n 5 at 44.

19 Ibid at 106.

poses of marriage, despite the fact that her gonads had been removed and her genitals, psychology and hormones were now congruent as female, leaving only her chromosomes male. Chromosomes, then, formed Ormrod J's bottom line.

"The essential role of a woman in marriage," as envisaged by Ormrod J, seems to involve penetration of a vagina by a penis, where the couple involved have been endowed with those specific genitalia from birth. Despite April's testimony that she had had satisfactory sexual relations with at least one other man with her artificial cavity, she would thus by definition be incapable of consummating a marriage. Clearly, April could not marry as a man since her lack of male external genitalia would prevent her fulfilling the essential role of a man in marriage. Under Ormrod J's test of fulfilling the essential role of a man or a woman in marriage, no one who had undergone sexual reassignment surgery could marry as a man or as a woman. Ormrod J stressed that he was not concerned to determine the legal sex of a transsexual "at large" but merely for the purposes of marriage. He considered that April's treatment as a woman in other areas of her life, such as for national insurance purposes, confused gender (ie social and psychological identity) with sex, but accepted the possibility of transsexuals being treated by the law as men for some purposes where categorisation was based on the sex assigned at birth, such as marriage, and as women where it was based on gender. Marriage, for his Honour, was a relationship of sex, not gender.

As *Corbett* was not a test case brought for the purposes of determining the legal status of transsexuals but an acrimonious dispute over matrimonial property, it is unfortunate that Ormrod J's test has been allowed to hold sway as a general test for so long.[20] It is difficult not to view the entire judgment as coloured by his distaste for the situation as a whole and the proclivities of those involved in it. George Corbett was a divorced homosexual transvestite with children, a member of the British aristocracy who was "interested in sexual deviations of all kinds",[21] and "extremely prone to all kinds of sexual fantasies and practices".[22] April Ashley had had clandestine sexual reassignment surgery performed for a fee by a doctor in Casablanca who refused to provide evidence for the court; records of her medical history preceding this were unavailable or unsatisfactory.[23] His Honour described their relationship as an "essentially pathetic but almost incredible story"[24] which "had little or nothing in common with any heterosexual relationship which I could recall hearing about in a fairly extensive experience of this court."[25] Their sexual activity together over

20 Cf T Walton, "Why Can't a Woman?" (1984) 134 New LJ 937. The deleterious effects of *Corbett* are listed as penalising transsexuals in the areas of inheritance, title, national insurance, pensions and benefits, widows' pensions, equal pay, discrimination, rape, tax treatment, immigration and passports.

21 Supra n 5 at 37.

22 Ibid at 38.

23 Ibid at 45-47.

24 Ibid at 37.

25 Ibid at 38.

a period of three years consisted only of some kissing and several instances where Mr Corbett penetrated April, withdrew immediately saying "I can't, I can't", and burst into tears.[26] One can sympathise with his Honour's difficulties in seeing this situation in terms of a normal heterosexual marriage. No doubt its bizarre nature helped him decide that it did not constitute a bona fide marriage, although of course its validity ultimately turned on the issue of whether April could be regarded as a woman. Ormrod J also appears to have been preoccupied with what he saw as too great a similarity between intercourse involving penetration of an artificial cavity and buggery, then a criminal offence even within marriage: ". . . in my judgment it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres."[27]

The medical experts whose evidence was preferred by Ormrod J, Dr Ranell and Professor Dewhurst, can only have added to his Honour's obvious feeling that the whole business was somehow dubious and unsavoury. They stressed that sexual reassignment surgery was of doubtful therapeutic efficacy, only to be carried out very rarely to prevent further deterioration in patients' mental health. The consent form signed by their patients preceding the operation included the statement that "I understand it will not alter my male sex".[28] They considered the respondent, April, to be properly classified as "a male homosexual transsexual" and "a castrated male" respectively.[29] Those proferring the less favoured medical evidence would have classified transsexuals as cases of intersex.[30]

However, the conceptual underpinnings of Ormrod J's test cannot be seen as sound today. His Honour's conflation of chromosomes' immutability with their reliability as an indicator of biological sex is exposed as an inadequate foundation for a test of legal sex now research reveals that 1 in 20,000 otherwise normal males has XX chromosomes and 1 in 20,000 otherwise normal females XY chromosomes.[31] There hence seems even less reason why congruence at birth of chromosomes, gonads and genitalia should outweigh congruence at marriage of genitalia, gender and secondary sexual characteristics, considering that many validly married women lack female gonads for various reasons. Thus Ormrod J's conception of "the essential role of a woman in marriage"[32] can only be based on a simple biological determinism. It cannot refer to procreation, since many infertile women contract valid marriages. Ormrod J was of the opinion that "ordinary and complete intercourse" could not take place between an artificially constructed cavity and a penis.[33] Yet in *SY* v *SY*[34] Wilmer LJ

26 Idem.
27 Ibid at 49.
28 Ibid at 42.
29 Ibid at 43.
30 Ibid at 45.
31 L Roberts, "Zeroing in on the Sex Switch" (1988) 239 Science 21.
32 Supra n 5 at 48.
33 Ibid at 49.
34 [1963] P 37.

held that exactly such an artificial vagina if constructed for a woman whose abnormal sexual organs precluded intercourse would allow a natural act of intercourse to take place. Ormrod J's own medical examiners reported that there was no impediment on "her part" to sexual intercourse.[35] April herself testified that she had had successful sexual relations with at least one man using the cavity. The "essential role of a woman in marriage" thus appears to boil down to being a woman from conception or birth.

The conclusion embodied in *Corbett,* then, is that sexual division has a place in the law of marriage, and that a change of sex cannot take place. Those born with incongruent chromosomes, gonads and genitals whose sex is wrongly assigned at birth may have it legally amended, but such an alteration reflects an accurate ascertaining rather than an actual change of sex. *Corbett* was extended to English criminal law almost without debate in *R* v *Tan.*[36]

(ii) *MT* v *JT*

An opposing view was taken by the Appellate Division of the Superior Court of New Jersey in *MT* v *JT.* The court considered the validity of a marriage where the wife was a transsexual. Sexual relations had been satisfactory. The court concluded that there sex and gender were not the disparate phenomena Ormrod J had held them to be, but that[37]

> a person's sex or sexuality embraces an individual's gender . . . . For the purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinised. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.

Surgically harmonised congruence between gender and genitals thus allowed the transsexual to be considered a member of the female sex for marital purposes; her chromosomes and gonads were irrelevant. The validity of the marriage was upheld. The court saw this ruling as doing[38]

> no more than giving legal effect to a fait accompli based on medical judgment and actions which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness while in no way disserving any societal interest, principle of public order or precept of morality.

(iii) *Harris and McGuiness*

In *Harris and McGuiness* two transsexuals, one who had undergone sexual reassignment surgery and one who was awaiting it, appealed against convictions for, being males, attempting to procure another male to commit an indecent act. The Court of Criminal Appeal of New South Wales was asked to determine their sex. The majority (Street CJ and Mathews J, Carruthers J dissenting) held that a transsexual who had undergone

35 Supra n 5 at 41.
36 [1983] QB 1053, 76 Cr App R 300.
37 Supra n 7 at 209.
38 Ibid at 211.

sexual reassignment surgery was a woman for the purposes of the criminal law. The court was unanimous, however, that pre-operative transsexuals should be legally regarded as retaining their original sex.

The principal judgment was delivered by Mathews J. Her Honour declined to follow *Corbett,* preferring the approach in *MT* v *JT.* She regarded Ormrod J's conclusion that chromosomes should be permanently determinative of a person's legal sex as based not upon the medical evidence presented but on his Honour's personal opinion that sex is fixed at the moment of conception, except in rare cases of chromosomal abnormality. The real question, then, was whether the law should permit other factors to override the chromosomal test in the case of a post-operative transsexual. She concluded it should. The other factors she found persuasive were the irrelevance of the ability to procreate or the presence of internal sexual organs to a woman's legal identity as a woman, compassion for the plight of transsexuals, and advances in medical technology which pointed to a need for a greater flexibility in the law to enable it to come to grips with current reality freed from bondage to displaced historical circumstances.[39] Her Honour's stance was robustly pragmatic:[40]

> It is the relevant circumstances at the time of the behaviour to which we must have regard. And I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability. It is equally unrealistic, in my view, to treat as relevant the fact that the person has acquired his or her external attributes as a result of operative procedure. After all, sexual offences – with which we are particularly concerned here – frequently involve the use of the external genitalia. How can the law sensibly ignore the state of those genitalia at the time of the alleged offence simply because they were artificially created or not the same as at birth?

Though both Mathews J and Street CJ agreed that this test of sexual identity should apply only to the criminal law, the Chief Justice made it clear that consistency favoured a general test for all areas of the law, including marriage.[41]

Developments in Australian administrative law support the *Harris and McGuiness* approach. A recent majority decision of the Australian Administrative Tribunal chaired by Ms O'Connor held that a transsexual who had undergone sexual reassignment surgery should be classified as having changed sex for the purposes of the Social Securities Act, as an irreversible medical procedure had taken place, consolidating the transsexual's psychological choice.[42]

The only officially reported Commonwealth case other than *Harris and McGuiness* where the court declined to follow *Corbett* is *R* v *Cogley.*[43] Here the accused was convicted of assault with attempt to rape a post-operative transsexual. Cumming J, the judge at first instance, held that

39 Cf R Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life" [1985] Australian Journal of Forensic Science 61.
40 Supra n 8 at 180.
41 Supra n 8 at 149.
42 NZ Herald, 29 April 1991, 9.
43 [1989] VR 199.

a transsexual should be regarded by the criminal law as having changed sex once 'core identity' was established and sexual reassignment surgery had taken place. The Victorian Court of Criminal Appeal, called upon to decide whether the complainant was capable of being raped, held that the complainant's sex was irrelevant to the law of attempt, but commented that had it been relevant it would have been a question of fact to be left to the jury rather than a matter of law.

(iv) *M* v *M:* PROBLEMS

Aubin DCJ concluded that[44]

> [a] consideration of the cases, with the firmly expressed but markedly differing views and approaches adopted by various Judges, demonstrates clearly enough that it is in the last resort a very subjective procedure . . . . [B]ecause a particular approach can be categorised as traditional or conservative, it does not follow that it is not correct, any more than it must follow that an approach which might appear to reflect a combination of medical and psychological advances along with some change in social attitudes will necessarily be the correct one.

He then rejected the applicant's submission that *Corbett* should be followed unless there was legislative change or a court of higher jurisdiction considered its appropriateness to New Zealand in the 1990s, to favour the approach taken in *Harris and McGuiness:*[45]

> I find the judgment of Mrs Justice Mathews in *Harris and McGuinness* to be cogent and compelling, and in my view, in a given case, matrimonial as well as criminal, it is possible to conclude, as a matter of evidence, that the genetic starting point, the immutable biological factors, will not be determinative. Why should they be? Accepting that it cannot be a question to be decided merely upon sympathetic or compassionate grounds, nevertheless a consideration of the evidence may lead to the finding that the cumulative effect of the changes that have occurred is to have brought about a change of sex in a real sense, albeit that the chromosomal structure is perforce unchanged and the sexual organs are the work of man and not of any deity.

Aubin DCJ's reasoning exhibits both exemplary judicious caution and courage. The legislature had chosen to leave the matter of transsexuals' legal status to be resolved by the courts. There were many excellent reasons to decline to follow *Corbett.* Mathews J's pragmatic focus in *Harris and McGuiness* on the state of transsexuals' genitals rather than their chromosomes is also perfectly logical and highly persuasive in the context of sexual offences.

I shall argue, nonetheless, that Aubin DCJ's accepting Mathews J's assessment that the decision in *Corbett* was based on Ormrod J's personal opinion that sex is fixed at conception rather than on evidence before the court has rendered two aspects of his judgment in *M* v *M* problematic. The narrowing of judicial focus to the evidence before the court in *M* v *M* has led to the odd situation where under section 30 of the Births, Deaths and Marriages Registration Act 1991 *M* v *M* now represents the general

44 Supra n 3 at 347.
45 Supra n 3 at 348.

law of New Zealand, but fails to provide a general test for deciding transsexuals' legal sexual status. Transsexuals' general sexual status remains unclear. His Honour's evidentiary stance has also led to a consequent failure to consider transsexuals' legal sexual status together with the nature and purpose of our present marriage law. I shall consider these points in turn.

Aubin DCJ found that previous judicial stances on whether transsexuals should be able to change their legal sexual status were essentially "very subjective". Unfortunately this appears to have pre-empted any deep consideration of underlying issues such as the place of sexual division in law, the circumstances in which an individual might properly be deemed to have changed sex and how far this should be a concern of the state. This might also reflect a modest eschewing of such deliberations as more properly the prerogative of a higher court. However, if his Honour did not accept as decisive factors found persuasive in other judgments, such as compassion for transsexuals, varying medical definitions of sex and a postulated obligation for the law to keep up with medical advances and changing social attitudes, then his focus on the evidence before him was logical. Nonetheless, this focus has left the issue of the legal sexual status of transsexuals in general unresolved. If sexual division in law is to be retained so that the question whether one is a man or a woman remains legally relevant, a general test to determine transsexuals' legal sexual status is essential. *M* v *M* fails to provide this, since the weighting of each factor Aubin DCJ found persuasive is unclear. What sex would a transsexual be found to be by the law who had been married for a shorter period, had married a spouse unaware of the background, lacked supporting medical documentation or was still awaiting sexual reassignment surgery? How many of the factors his Honour found persuasive would need to be absent to prevent an alteration of legal sexual status? Or would a harmonisation of core identity and genitals by sexual reassignment surgery suffice?

Even this last test, taken from *MT* v *JT* and *Harris and McGuiness,* might prove problematic. Though the courts in both cases may be described as taking a pragmatic approach, their focus differs. In *MT* v *JT,* marriage was seen as a partnership based upon mutually desired heterosexual intercourse. If transsexuals' core identification as a man or a woman matched functioning genitals, this sufficed for a legal change of sex. In *Harris and McGuiness,* however, the surgically constructed vagina of the post-operative transsexual had closed over. Unless transsexuals use a glass dilator daily, the skin tissue fuses. Consequently, penetrative heterosexual intercourse would have been impossible. Hence, the indecent acts the two accused could have committed would, in fact, have been identical. Only performing fellatio or manual masturbation or being penetrated anally would have been possible, since the hormones taken by the pre-operative transsexual would have ensured impotence. Her Honour, despite this, held that a change of sex in the eyes of the criminal law would not be seen as having taken place unless sexual reassignment surgery had been performed, in order to prevent fraud. Self identification as a man or a woman and the absence of incongruent genitals, then, sufficed for the criminal law.

Mathews J, the Appellate Division of the Supreme Court of New Jersey and the Australian Administrative Appeals Tribunal, all emphasised the irreversible nature of sexual reassignment surgery in their reasoning. Nonetheless, a significant number of those who have received sexual reassignment surgery revert to living as members of their original sex.[46] Are those in this position to be regarded as having changed sex more than once? The submissions in *M* v *M* raise the issue of whether an accompanying criterion for a legal change of sex, core identity, may also be reversible. The facts do not disclose whether the appellant's core identity as a woman had altered to match her submission that she was, at the time of the marriage, and had remained, a man. It may be that this was a ploy to avoid matrimonial property division or a second attempt to have herself reassigned as a woman by the law. Yet as presumably those transsexuals who revert to living as members of their original sex may do so in response to a change in their core identity as a man or a woman, such a change is theoretically possible. Certainly transsexuals do revert to their original sex roles. If the danger of fraud is to prevent an alleged pre-operative transsexuals' being permitted to change sex legally, under what circumstances should post-operative transsexuals with regrets be legally seen as reverting to their original sex? Under the test in *MT* v *JT* since their emotional, psychological and physical capacities for heterosexual intercourse were no longer congruent they would no longer belong to their post-operative legal sex. Applying Mathews J's test, however, they would remain so.

It is possible that harmonisation of core identity and genitals could be seen as providing a justification, rather than a prerequisite, for a legal change in sexual status. Documentation evidencing sexual reassignment surgery alone would then suffice. Since such operations can be obtained on the open market by anyone with the requisite funds,[47] and may soon no longer attract state subsidy in the public sector,[48] none of the other factors commonly cited in the caselaw as accompanying sexual reassignment surgery such as harmony with core identity would necessarily be present. Sexual reassignment surgery would simply replace chromosomes as the essential factor in a general test for changing legal sexual status. The move towards cluster classification would give way to a continued reliance on essentialism.

If the question whether one is a man or a woman is to continue to be seen as properly relevant in law, and it is recognised that a change in sexual status is possible, a legal test for determining one's sexual status at any one time becomes necessary. The present state of one's genitals pro-

46 Cf R Blanchard et al, "Prediction of Regret in Post-Operative Transsexuals" (1989) 34 Can J Psychiatry 417; L Lothstein, "Sex Reassignment Surgery: Historical, Bioethical and Theoretical Issues" (1982) 139 Am J Psychiatry 417. Some male to female transsexuals may revert for economic reasons: men usually earn more than women.

47 "Losing Her Virginity – Twice", People, 28 August 1991 21; Lothstein supra n 46.

48 NZ Dept of Health, *Mental Health Policy: Core Health Services* (1991), slide 11, suggests transsexualism as an example of conditions which will not be covered in core health services. Transsexualism receives the lowest ranking (761st) in a priority-ranked list.

vides a desirably simple means of doing this.[49] Some, however, would contend that sexual division in law is outmoded.[50] It is in this context I wish to argue that transsexuals' legal sexual status should ideally be considered together with the nature and purpose of our present marriage law.

V TRANSSEXUALS' LEGAL SEXUAL STATUS AND THE NATURE AND PURPOSE OF NEW ZEALAND'S PRESENT DAY MARRIAGE LAW

Legal systems considering the paradox of transsexuals' legal sexual status and marriage must resolve two separate issues (a) how does and how should the law define women and men? (b) who should be able to enter marriage? There are three options.

First, transsexuals may be seen as unable to change sex legally and hence unable to marry. This is the position taken in *Corbett* and subsequently upheld by the European Court of Human Rights in two cases, *Rees* v *UK*[51] and *Cossey* v *UK*,[52] where British transsexuals unsuccessfully argued that such a stance offended against Article 12 of the European Convention on Human Rights, the right to marry.

Secondly, transsexuals may be seen as able to change sex legally and so able to marry, but same sex marriages may be prohibited. An increasing number of countries have adopted this position.[53] It rests on the assumptions that sexual reassignment surgery is appropriate medical treatment to harmonise psychological identity and genitals, that it is irreversible and that transsexuals are conceptually distinct from homosexuals.

49 This option is far from problematic, however, for transsexuals in the final stages of male to female transformation who are sentenced to prison. They are particularly vulnerable to the threat of sexual assault from other inmates: cf L Bowker, *Prison Victimisation* (1980) 141.

50 Cf supra n 9 at 76-80. While the language used in recent legislation enacted in New Zealand is now consciously gender neutral, the question whether one is a man or a woman is still legally relevant in some situations in criminal and family law. Sex-specific offences under the Crimes Act 1960 include ss 67, 128, 131-4, 144, 148, 208, 210 and 226. Under the Crimes Bill 1989, however, only two sex-specific offences remain. Rape, defined as a male having sexual connection with a female occasioned by penetration of her genitalia under certain circumstances, remains a sub-category of sexual violation. Equivalent alternative charges could therefore be laid if there was any doubt concerning the legal sexual status of the complainant. The new s 124 is also sex-specific. It preserves the present s 178 in superficial form. Barring the highly unlikely scenario of a transsexual's being prosecuted under its aegis for killing her child while disturbed, the legal sexual status of transsexuals under the new Crimes Bill when it becomes law will not be an issue.

51 (1987) 9 EHRR 56.

52 ECHR Case 16 (1989) 176/232. The transsexual applicants in both *Rees* and *Cossey* claimed that the UK was in breach of two separate Articles on the European Convention on Human Rights: Article 8, the right to a private life, by refusing to allow transsexuals to have amended the sex shown on their birth certificate, and Article 12, the right to marry, by denying them this. The court held that since a complete change of sex was not medically possible, and that the right to marry applied only to a traditional marriage between persons of the opposite sex, the UK had breached neither Article. For a helpful discussion see K Norrie, "Transsexuals, the Right to Marry and Voidable Marriages in Scots Law" 1990 Scots LT (News) 353.

53 These include much of Europe and Scandinavia, and an increasing number of states in the USA.

These assumptions support the conventional model of the transsexual as a person of one sex trapped in the body of the person of another sex. I shall argue that this is not necessarily a coherent argument.

Thirdly, whether one is a man or a woman may be regarded as legally irrelevant. Gender neutral legislation would then become standard. Opposite and same sex marriages would be equally permissible. I shall argue that this possibility represents a likely future for New Zealand. It is congruent with our present commitment to gender neutral legislation. It would also acknowledge the diverse forms of family in which many New Zealanders now live. In the meantime, it seems likely that the second option will be adopted, ideally accompanied by a removal of the legal privileges offered opposite sex couples, or an extension of those privileges to single sex couples, on equitable grounds.

Such an expansion of our present concept of marriage to include both same and opposite sex marriages may at first appear rather odd, or even alarming. Nonetheless, it seems a logical extension of current developments. Certainly our Marriage Act appears to be gender neutral. It nowhere specifies that marriage must be between a man and a woman, nor does it define either 'man' or 'woman'. Even where it refers to 'wife' and 'husband', these categories would presumably simply follow the assignment of 'bride' and 'groom' on the Notice of Intention of Marry: it is nowhere stated that these categories must correspond with 'woman' and 'man' or 'male' and 'female'. As the Short Title of the Act purposes to consolidate and amend law relating to marriage, it is arguably a code, rendering nugatory the common law position that marriage must be between a man and a woman as outlined by Lord Penzance in *Hyde* v *Hyde & Woodmansee*.[54] Persons of the same sex, then, might be able to contract valid marriages provided the technicalities of the Act were observed. It is unlikely, however, that the intention of the Legislature in 1955 was to legalise same sex marriages by omitting to specify that a marriage must be between a man and a woman.

Courts considering similar legislation and same sex marriages in the United States have taken the stance that marriage inherently involves a man and a woman.[55] Under the present law in New Zealand, however, this may not be the case. Speight J, in *L* v *L*,[56] a case in 1982 concerning

54 Supra n 17.

55 The attempt by a law student who was also a member of Gay Liberation to marry his partner under similarly non-sex-specific legislation in Minnesota was rejected in the Supreme Court of Minnesota in *Baker* v *Nelson* 191 NW 2d 185 (Minn 1971). The court turned down the petition to grant a writ of mandamus against the rejection by the Clerk of the District Court of their request for a marriage licence, dismissing arguments that the legislative intent had been to legalise single sex marriages, and that prohibiting a single sex marriage denied the petitioners their constitutional rights under the Ninth and Fourteenth Amendments to the US Constitution. The court held that "the institution of marriage is a union of man and woman, uniquely involving the procreation and rearing of children, as old as the book of Genesis". For a review of US courts' approach to same sex marriage, see H Schwarzschild, "Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly" (1988/89) 4 Berkeley Women's LJ 94 at 112-117.

56 [1982] NZ Recent Law 11.

the marriage of two men, questioned whether there was a legal way of declaring that a marriage must be between a man and a woman without legislative amendment. He was able to declare the marriage voidable on the grounds of non-consummation, but since the Family Proceedings Act 1980 this ground is no longer available. Under s 31(1)(a)(iii) of the Family Proceedings Act mistake can absent consent, rendering a marriage void ab initio. However, operative mistake is restricted to two kinds: a mistake as to the nature of the ceremony, as in *Valier* v *Valier,*[57] or a mistake resulting in one party's failing to marry the specific individual whom they intended to marry, as in *C* v *C.*[58] A marriage between any two people, be they man, woman or transsexual, who intended to marry each other, might thus prove valid under New Zealand law.

Sections 4 and 19 of the New Zealand Bill of Rights Act 1990 appear to support a reading of the Marriage Act which would permit same sex marriages. Section 19 forbids discrimination on the grounds of sex or marital status. Section 4 provides that, while a statute which conflicts with any provisions of the Act cannot therefore be seen as invalid, statutes are to be read so as to conform with the Act. As the legislature explicitly left the legal sexual status of transsexuals to be determined by the courts in section 30 of the Births, Deaths and Marriages Registration Act 1991, there could be no objection that such a reading could constitute inappropriate judge made law. Same sex marriages, then, could achieve legal recognition simply as a matter of minority rights.

The agreement of counsel in *M* v *M* that the case would proceed on the assumption that the marriage would be declared to be invalid if the applicant were found not to be a woman may have precluded Aubin DCJ's considering transsexuals' legal sexual status together with the nature and purpose of our present marriage law. One of the strengths of Ormrod J's decision in *Corbett,* however, was his Honour's recognition of this issue. Ormrod J's focus on the technicalities of consummation and his view of marriage as essentially a state institution licensing penetrative heterosexual intercourse were entirely appropriate given the significance of these for the validation and dissolution of marriages under English law at the time. The English legal system's model of marriage had long had as a central theme its being a reliable means for both property transfer between families and the procreation of legitimate heirs.[59] Given this conception of marriage, his view of gender as secondary to sex was entirely apposite.

This model seems inappropriate for New Zealand today. The legitimacy of children has become legally irrelevant to inheritance rights.[60] Nor is penetrative heterosexual intercourse an essential component of a valid or non-voidable marriage. Non-consummation is no longer grounds for marriage dissolution, as the sole requirement is now irrevocable breakdown

57 (1925) 133 LT 830.
58 [1942] NZLR 336.
59 Kennedy supra n 6; L Stone, *The Family, Sex and Marriage in England* 1500-1800 (1977) 85-93 particularly.
60 Status of Children Act 1969.

followed by two years living apart.[61] Recently enacted legislation in the field of family law is consciously gender neutral.[62] The understanding of 'family' around which our family law is built has moved from the traditional model of the one working man, one housewife and at least two children family to the more flexible, broader, more culturally sensitive concept of the family group embodied in section 2 of the Children, Young Persons and Their Families Act 1989. Areas where the law fails to reflect the diversity of family circumstances in which many New Zealanders now live are being challenged in the courts. Applications concerning adoption,[63] custody,[64] access[65] and guardianship by those falling outside the rather narrow groups of family members considered eligible in the Adoption Act 1955 and the Guardianship Act 1968 are now relatively common.

Taken together, it is difficult to predict at this stage whether these factors amount to merely the first straws in the wind or to rather more solid signposts pointing towards a fundamental broadening of our present concept of marriage. Two choices for our legal system seem to emerge. We could move quite consciously towards explicitly allowing same sex marriage on the grounds that the current trend towards a family law which is both gender neutral and accepting of diversity should logically extend to marriage. Alternatively, we could recognise that as de jure marriage is only one of a range of accepted relationships which share many common features, it may be inequitable to accord married couples automatic privileges unless these are also available to those involved in similar relationships. I shall consider these choices in turn.

VI Same Sex Marriages

From an essentialist perspective, regardless of how ostensibly gender neutral any legislation might appear, only marriages between men and women would be accepted as legally valid. Even where a marriage is stripped of a connection with children and the Christian religion, as indeed many marriages are today, essentialists would contend that marriage itself consists of a union between a man and a woman. Compliance with the technical requirements of the marriage ceremony alone would not ensure a valid marriage: if we would unhesitatingly accept that such a union between a man and a robot would not constitute a marriage, surely an

61 S 39 of the Family Proceedings Act 1980.

62 Cf our Matrimonial Property Act 1976, Family Proceedings Act 1980, Domestic Protection Act 1982, Children, Young Persons and Their Families Act 1989. Gender neutrality in family law is also recently a concern of the courts: cf P F Tapp, "Family Law" [1990] NZ Recent Law 102.

63 *Re Adoption 17/88* (1989) 5 FRNZ 360. (Application by a Maori paternal grandmother to have an interim adoption order set aside was dismissed on the grounds she had no standing to bring the application.)

64 *M & B* v *H & S* (1989) 5 FRNZ 636. (An application by a Maori maternal grandmother for custody of a child was rejected in favour of granting custody to foster parents, with whom the child had been for two years.)

65 *Re Applications Concerning H* (1986) 4 FRNZ 312. (A Maori father and his parents sought guardianship and custody of an adopted ex-nuptial child. They were appointed guardians.)

equivalent union between a man and another man should be seen as equally falling outside the limits of what a marriage might encompass?

This view of the nature and purpose of marriage as fixedly heterosexual, or fixed at all, however, may not be justified. Certainly in principle no one feature of a marriage between a man and a woman would necessarily distinguish it from one involving two men or two women. The absence of penetrative sexual intercourse would not invalidate a marriage now non-consummation is no longer a prerequisite for validity. Inability to procreate does not preclude the infertile from marrying. Medical techniques may soon offer alternative means of childbearing to all.[66] The sharing of emotional and financial resources in a supportive partnership is surely comparable in both types of union.

One can be initially disconcerted by the suggestion that the move towards eschewing sexual division in law be carried as far as extending the capacity to marry to single sex couples. The idea may appear less odd if one considers it together with the changing nature of marriage as a social institution and the present pressure from non-traditional families for recognition by Western legal systems. I shall discuss these in turn.

We tend to forget how profoundly the institution of marriage may change in response to social needs. Take medieval Europe. During the early Middle Ages Frankish noblemen and kings routinely kept principal and secondary wives, along with concubines; most of the clergy of the time accepted this as perfectly respectable.[67] Each type of marriage corresponded with differing property arrangements between the families of the bride and the groom.[68] The secular definition of marriage in medieval times effectively reduced it to a sexual relationship with the families' consent.[69] Many couples regarded as married maintained a household together and conceived children during the period prior to the public ceremony.[70] Marriage was seen as constituted by an agreement between the families, the wedding as a public celebration which might or might not take place without affecting the validity of the marriage.[71] Even once the church took increasing control of marriage, dissolution was approached pragmatically largely in terms of procreation and property. The complicated rules governing incest, the most frequently asserted grounds for divorce, ensured that "virtually anyone could find an impermissible relationship if they wanted a divorce".[72] Wives slow to produce sons were set aside, and trial marriages routinely terminated as late as the fourteenth century by

66 Australian National Bioethics Consultative Committee, *Developments in the Health Field with Bioethical Implications, Discussion Papers Prepared for the Australian Health Ministers' Conference: Transsexualism and Abdominal pregnancy, C-11.* 2v. Transsexuals, homosexuals and infertile women may be able to bear children through abdominal pregnancies at some time in the future.

67 J Schroeder, "Feminism Historicised: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence" (1990) 75 Iowa LR 1135 at 1163 n 83.

68 J Brundage, *Law, Sex and Christian Society in Medieval Europe* (1987) 128-129.

69 G Duby, *The Knight, The Lady and the Priest* (1983) 124-128.

70 Supra n 67 at 1166.

71 Ibid at 1167.

72 Ibid at 1169.

the bride and groom's becoming godparents to the same child, thereby falling into a degree of forbidden relationship.[73]

Notions of marriage and the family may be beginning to become similarly flexible in Western societies at present as demographic changes reflect a move away from traditional nuclear family living arrangements.[74] The essentialist notion of marriage as inherently involving the union of a man and a woman forms the basis for the traditional legal model of the family. As non-traditional families have become more common, there has been increasing pressure on Western legal systems to afford them legal protections presently limited to those families recognised as such by the law. Those supporting same sex marriage do so in this context.[75] Non-traditional families are beginning to gain recognition where courts have adopted a functional analysis of terms such as family, spouse and parent. This has legitimised non-nuclear relationships which share the essential characteristics of traditional relationships but do not possess the ties of blood, adoption and marriage associated with traditional nuclear families.[76]

Our idea of marriage is likely to become more flexible, then, as our commitment to recognising diverse forms of family continues. While this sensitivity has been extended by the legislature and the courts to different cultural groups,[77] however, it has not progressed as far as offering same sex and de facto couples legal privileges afforded married couples. The majority of the government body most recently appointed to consider New Zealand family law, the Working Group on Matrimonial Property and Family Protection, considered that legal marriage was a special relationship involving public commitment and interdependence. Its protections were not to be extended lightly to de facto couples or same sex couples, despite the fact that the functions fulfilled in these latter partnerships were very similar. An essentialist rather than cluster classification view of marriage thus appears to be favoured by our legal system at present.[78] Extension of the capacity to marry specifically to same sex couples may not take place in the short term future.

What we are seeing, then, are two types of pressure being placed on our present notion of marriage to render it more flexible. As more transsexuals change their sex and marry in the sex of their choice, we will inevitably come to consider marriage as an institution which responds to social developments. If de jure marriage also loses some of its unique legal status whereby the privileges presently automatically extended to married couples become available to those in similar relationships, then marriage

73 Supra n 68 at 436-437.

74 S Seligman, "Variations on a Theme: the Twenty-First Century Family" [1990] Newsweek 38.

75 A Friedman, "The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family" (1987/88) 3 Berkeley Women's LJ 134; Note, "Looking for a Family Resemblance: the Limits of the Functional Approach to the Legal Definition of Family" (1991) 104 Harvard LR 1640; L Zimmer, "Family, Marriage and the Same Sex Couple" (1990) 12 Cardozo LR 681.

76 Note supra n 75 at 1641.

77 Cf Tapp supra n 62.

78 NZ Working Party on Matrimonial Property and Family Protection, *Report* (1990) 66-68.

comes to have an increasingly symbolic significance. It then becomes more difficult to justify withholding the capacity to marry to those in same sex partnerships.

Nonetheless, some may be able to accept the prospect of transsexuals marrying without wishing to countenance same sex marriage. The assumption here is that transsexuals and homosexuals are conceptually distinct. According to the more prevalent medical model of transsexuality, homosexuals experience no incongruity between their chromosomes, gonads, genitals and gender, but simply have a preference for sexual relationships with members of their own sex. The incongruity experienced by transsexuals between biological characteristics and gender means that their desire for sexual relationship is indeed ostensibly with members of their own biological sex, but only as members of the opposite sex. Male homosexuals want to have sex with men as men; male-to-female transsexuals want to have sex with men as women.[79] In practice, however, the distinction may not be quite so neat. Certainly many transsexuals are not homosexual, and most homosexuals are not transsexuals.[80] Research indicating a higher incidence of transsexuals in homophobic societies suggests many transsexuals may be homosexuals seeking greater social acceptability.[81] Homosexuality in pre-operative transsexuals is now accepted as a reliable indicator of post-operative satisfaction.[82] The operation may also be requested for pragmatic reasons: in most Western countries three times as many men as women receive sexual reassignment surgery but in Eastern Europe five times as many women as men receive it. Local experts attribute this quite

79 There is a wealth of medical literature on the subject. See, for example, H Benjamin, *The Transsexual Phenomenon* (1966); Finlay and Walters supra n 6; R Green and J Money (eds), *Transsexualism and Sex Reassignment Surgery* (1969); L M Lothstein "Sex Reassignment Surgery", Am J Psychiatry 139 (1982) 417; W A W Walters and M W Ross (eds), *Transsexualism and Sex Reassignment* (1986). Legal writers have tended to accept the conventional medical model uncritically, arguing in favour of legal recognition of transsexuals' change of sex on this basis. See, for example: Bradney supra n 17; G Brent, "Some Legal Problems of the Post-Operative Transsexual" (1972-3) 12 J Fam L 405; Kennedy supra n 6; S L Kopka, "Legal Status of the Post-Operative Transsexual" (1983) Medical Trial Technique Quarterly 456; M Ottowski, "The Legal Status of a Sexually Reassigned Transsexual: *R* v *Harris and McGuiness* and beyond" (1990) 64 Aust LJ 67; J Taitz, "Judicial Determination of the Sexual Identity of Post-Operative Transsexuals" (1987) 13 Am J Law Med 53.

80 In 1948 an estimated 4% of American white males were exclusively homosexual: A Kinsey et al, *Sexual Behaviour in the Human Male* (1948) 650-651. This percentage has apparently remained stable: cf Zimmer supra n 75 at 683 n 14. Those who have received sexual reassignment surgery are far fewer in number, approximately 1:30,000 of the population: Finlay and Walters supra n 6 at 29.

81 Cf Lothstein supra n 46; see also M W Ross et al, "Stigma, Sex and Society: a New Look at Gender Differentiation and Sexual Variation" (1978) 3 J Homosexuality 315; A Brzek and S Hubalek, "Homosexuality in Eastern Europe: Mental Health and Psychotherapy Issues" (1990) 15 J Homosexuality 193.

82 Blanchard supra n 46.

simply to the fact that women's lives in Eastern Europe are overwhelmingly more difficult than men's.[83]

Thus the assumptions underlying any decision to extend the capacity to marry to transsexuals, but not to same sex couples, may not be sustainable. Sexual reassignment surgery is not always simply appropriate medical treatment, those who receive it may revert to living as members of their original sex and the categories of transsexual and homosexual are not always distinct. The fact that a person has had sexual reassignment surgery need not, then, necessarily imply that any other factors found persuasive in the case law, such as congruence with core identity, need be present.

VII Legal Privileging of the Married State

Recent trends in family law which aim to render it legally irrelevant whether one is a man or a woman, and to give legal recognition to diverse forms of the family may at some time in the future coalesce into legislation enabling same sex couples to marry. Until this time, legal privileges offered opposite sex and same sex couples should be equitably adjusted.

De facto and same sex couples lack legal redress compared to married couples in the areas of property division upon dissolution of the partnership, inheritance, and matters concerning children. De facto couples can be taken to have exercised a choice not to marry. If same sex couples are unable to choose to marry each other, such disadvantaging is inequitable. While both de facto and single sex couples may dispose of their individual and joint property by drawing up agreements and wills, matters concerning children prove more complex. Under section 4(3) of the Adoption Act 1955 only spouses may place a joint application to adopt. Same sex couples are also significantly disadvantaged where children are concerned on relationship dissolution. Though the partner who is not the biological parent may play an equal part in child rearing, the law affords the same sex co-parent/child relationship no legal protection.[84] Access rights under sections 15 and 16 of the Guardianship Act 1968 are unlikely to apply to them. Same sex couples are also denied access to the orders available under the Domestic Protection Act 1982 and to Family Court services as couples.

83 Brzek and Hubalek, supra n 82; A Godlewski, "Transsexualism and Anatomic Sex Ratio Reversal in Poland" (1988) 17 Archives of Sexual Behaviour 547; L Gooren, "Comment" (1989) 18 Archives of Sexual Behaviour 537. There is as yet no consensus on the worth of sexual reassignment surgery. It can be seen as valid treatment for a psychiatric condition, as unjustified medical empire building and as inappropriate psychosurgery for the casualties of sexual stereotyping. In the circumstances, courts asked to pass judgment on sexual crimes or on the validity of marriages might well prefer to eschew the wider issues and focus on the evidence before them. See, however, R. Mackenzie, *Anomalies Down Under: Transsexuals' Legal Sexual Status and Single Sex Marriages in New Zealand,* unpublished dissertation, University of Otago (1990).

84 *In the matter of the Adoption Act 1955 and an application to adopt Joshua James Charles Taylor,* unreported, Family Court, Porirua, 22 March 1989, A7/88, Carruthers J; *In the matter of the Adoption Act 1955 and in the matter of an application by Faye Lesley Taylor to adopt Joshua James Charles Taylor,* unreported, High Court, Wellington, 20 February 1992, AP55/89, Ellis J; "Lesbian parents court adoption law recognition", Dominion Sunday Times, 8 September 1991, 1.

Courts in the United States have begun to remedy the way in which non-traditional families are legally disadvantaged by taking a functionalist approach to legislation.[85] Cluster classification techniques are used to read such terms as 'spouse', 'family' and 'parent' widely so that non-traditional families fall within their aegis.[86] This functionalist approach has been particularly successful in areas such as tenancy. It is likely to prove even more powerful in areas of family law where advances in medical technology and concerns for social justice coalesce, as, for example, in transsexual marriage and in access, custody and adoption rights of same sex partners of biological mothers of children conceived via artificial insemination.

Sections 4 and 19 of the New Zealand Bill of Rights Act 1990 would support a broad reading of the statutes governing these areas of family law on the same grounds as the wide interpretation of our Marriage Act canvassed above. As mentioned previously, section 19 forbids discrimination on the grounds of sex or marital status. Section 4 provides that, while a statute which conflicts with any provisions of the Act cannot therefore be seen as invalid, statutes are to be read so as to conform with the Act. The systematic disadvantaging of non-traditional families might begin to be remedied in this way. If, however, those in a non-traditional partnership must demonstrate to a court that it meets functional criteria before it is granted legal recognition, those in such partnerships are being marginalised by being treated differently from those in traditional unions.[87] Hence I have argued in favour of extending the capacity to marry to same sex couples.[88]

VIII CONCLUSION

The issue of how the law should define a man or a woman where transsexuals are concerned may be solved by cluster classification or essentialist techniques. Courts' use of cluster classification techniques to hold that transsexuals have changed sex legally on evidential grounds leaves the legal sexual status of transsexuals in general unresolved, since the weighting of each factor is unclear. *M* v *M* exemplifies this. Essentialist general tests which state either that sexual reassignment surgery cannot alter a transsexual's legal sexual status, or that those who produce documentation evidencing sexual reassignment surgery may change sex legally provide the desirable clarity.

85 Note supra n 75.

86 The New York Supreme Court held that two cohabiting homosexuals constituted a family for the purposes of New York City rent control law in *Braschi* v *Stahl Associates* 74 NY 2d 201, 543 NE 2d 49, 544 NYS 2d 784 (1989), a typical decision exemplifying this approach. The court justified this on the grounds that the two men had held themselves out as partners for eleven years and had shared social lives, domestic duties and financial obligations.

87 Cf Note supra n 75; D J Penas, "Bless the Tie that Binds: a Puritan-Covenant Case for Same Sex Marriage" (1990) 8 J Law & Inequality 533, arguing that Puritan theology would support same sex marriage.

88 Many, however, may choose not to marry as they view marriage as an oppressive institution, cf Note supra n 75 at 1658.

The issue of whom the law should allow to marry is conceptually distinct from how the law should define a man or a woman. I have argued that transsexuals' ability to marry is best considered together with the present growing presence for legal recognition that non-traditional families created by demographic changes now place on Western legal systems. The New Zealand legal system exhibits an increasing recognition of cultural diversity and a commitment to gender neutral legislation. Taken together, these developments suggest same sex marriage may be legalised at some time in the future. Until then, the present disadvantaging of non-traditional families in our legal system should be remedied.