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Sex and Gender in Unfair Discrimination Cases: An Analysis of *King NO & Others v De Jager & Others* [2021] ZACC 4, 2021 (5) BCLR 449 (CC), 2021 (4) SA 1 (CC)

GINO FRANTZ & ROBIN CUPIDO

ABSTRACT: This article presents an analysis of the grounds of sex and gender as understood in the judgment of *King NO & Others v De Jager & Others.* The *King* judgment raises a number of interesting questions for the South African law of succession in the future, including whether the testator in a private will has the right to discriminate against certain groups due to the broad freedom of testation recognised in South African law. This article analyses the judgment's approach to gender discrimination, and how that reflects South African law's current approach to the concepts of sex and gender in private law interactions. The South African legal system, like many others, is based on a binary model that uses sex and gender as interchangeable terms when faced with cases of discrimination based on either of these grounds. This perpetuates an erroneous assumption that biological sex and gender identity are interchangeable, as opposed to intersectional.

KEYWORDS: constitutionality, binary model, intersectional grounds, succession

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I INTRODUCTION

King NO & Others v De Jager & Others[1] concerns the provisions of a will executed in 1902, with the interpretation of a fideicommissary substitution being in issue. The testators bequeathed their properties to their six children, instituting a *fideicommissum* providing that upon their children's death, the properties would devolve upon those children's sons.[2] The term further provided that upon the death of those sons, the properties would pass to any sons of theirs.[3] This provision served to keep the property in the family, but only through inheritance by male heirs after the first generation.

This *fideicommissum* was applied as stated until 2015, when one of the testator's grandsons passed away. His will provided that all his property was to be divided equally between his five daughters.[4] Such property included the fideicommissary property that had fallen into his estate. The deceased's daughters thus sought to inherit the fideicommissary property in accordance with their father's will, claiming that not allowing them to do so would amount to discrimination against them as female heirs.[5] To achieve this, the daughters approached the Western Cape High Court to challenge the enforceability of the fideicommissary clause, relying on the ground of unfair gender discrimination.[6] Their argument was countered by the deceased's nephews who claimed that, as the deceased had no male descendants, they were entitled to inherit the fideicommissary property in the place of the deceased's daughters.[7] The High Court balanced the constitutional right to equality with the common-law principle of freedom of testation and held that the Constitution was not directly applicable in this matter. The High Court further held that a testator's freedom to choose their heirs was a reasonable limitation of the right to equality and did not offend public policy despite the obvious discriminatory nature of the provision. The application was thus dismissed, but the matter was then taken on appeal. The Supreme Court of Appeal heard the matter on the same merits, and dismissed it without providing reasons for such dismissal.[8] Dissatisfied with this outcome, the applicants brought the matter to the Constitutional Court.

The Court took a different approach and agreed with the daughters' contention, holding that a clause that discriminated against beneficiaries based on their gender was unlawful and unenforceable.[9] This decision was especially notable as it concerned a private will, an area where South African courts have historically not been eager to intrude. This reluctance to interfere has always been based on the desire to protect the freedom of testation, allowing private testators to dispose of their property as they wish to. This principle of freedom of testation is rooted

1 [2021] ZACC 4, 2021 (5) BCLR 449 (CC), 2021 (4) SA 1 (CC) ('*King v De Jager*').

2 Ibid at para 3.

3 Ibid at para 4.

4 Ibid at para 6.

5 Ibid at para 113.

6 'There are three groups of claimants to the fideicommissary property. The first group comprises the deceased's daughters (second to sixth applicants) who contend that those provisions of clause 7 of the will which refer to "sons" and "male descendants" discriminate against them unfairly as members of the female gender. They seek the deletion and amendment of these provisions in clause 7 of the will thereby making them the heiresses to the fideicommissary property.' *King NNO v De Jager* 2017 (6) SA 527 (WCC) para 14.

7 Ibid at para 7.

8 'The applicants appealed to the Supreme Court of Appeal. Their appeal was heard and dismissed on 13 November 2018. That Court gave no written reasons for its order.' *King v De Jager* at para 13.

9 Ibid at paras 132–133.

in the constitutional values of freedom of disposition as envisioned in Section 25(1) of the Constitution and the right to human dignity contained in Section 10 of the Constitution.[10] Therefore, two conflicting constitutional values are in play: the right that testators have to determine how their property is disposed of, and the right of all South Africans to be treated equally, regardless of their sex or gender.[11]

The *King* judgment thus raises a number of interesting questions for the future of the South African law of succession, including whether the testator in a private will has the right to discriminate against certain groups due to the broad freedom of testation recognised in South African law. Of greater interest to us, however, is the judgment's approach to gender discrimination and how that reflects South African law's current approach to the concepts of sex and gender in private law interactions.

In this article we will thus investigate the meaning of the grounds of gender and sex and explore a different and more inclusive understanding of these grounds, with specific reference to *King v De Jager*, the private law of succession and the foundational constitutional values[12] that would support an understanding of gender and sex outside of the traditional binary. What makes this inquiry challenging is that sex and gender discrimination often take place in the private sphere,[13] and much emphasis is placed on individual freedoms in private law, a position confirmed by the High Court's judgment in *King NNO v De Jager*.[14] This makes the impact of the conflation between sex and gender less visible, and it is often difficult to see the lived consequences that arise from such conflation. The legal approach to sex and gender must thus be re-evaluated for our current constitutional dispensation. In this exploration, some recommendations will be made as to how future cases based on sex or gender discrimination should approach these concepts, given the relatively recent acknowledgement that gender and sex are more complex than originally thought.[15]

II THE INTERSECTION BETWEEN SEX AND GENDER

In *King v De Jager*, the original contention made in the High Court judgment was that the clause containing the *fideicommissum* was discriminatory on grounds of both sex and gender. The two concepts were listed separately, indicating some recognition that sex and gender are distinct grounds for discrimination, even though there is some relationship between them.[16]

[10] This understanding of the constitutional values underpinning the principle of freedom of testation can be found in *In re BOE Trust Ltd & Others NNO* 2013 (3) SA 236 (SCA) at paras 26–27.

[11] Constitution S 9(3).

[12] Section 1 of the Constitution provides that '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: a) [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms[; n]on-racialism and non-sexism; Supremacy of the constitution and the rule of law[; u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.

[13] I Currie & J de Waal *The Bill of Rights Handbook* (6th Ed, 2013) 228.

[14] 'Testation is a field where the courts will proceed, I would respectfully suggest, from the starting point that a *testator has maximum freedom* to dispose of his or her property upon their death as he or she sees fit subject to existing rules of law as set out in case law and any statutory constraints which exist' (own emphasis). *King NNO v De Jager* 2017 (6) SA 527 (WCC) at para 62.

[15] 'More recently, an expansive notion of "gender", as well as recognition of its capacity to fluctuate, reveals the lie in this widespread binary notion.' AR Chang & SM Wildman 'Gender In/Sight: Examining Culture and Constructions of Gender' (2017) 18 *Georgetown Journal of Gender and the Law* 43, 45.

[16] *King v De Jager* at para 8.

However, it is telling that the Court mainly refers to gender discrimination throughout the judgment as it explores whether discrimination against female heirs can be lawful.[17] Even though the discussion focuses on gender discrimination in name, it seems to encompass instances of sex discrimination as well. This indicates that the South African legal system, like many others, continues to treat sex and gender as interchangeable terms when faced with cases of discrimination based on either of those grounds. The continued occurrence of this perpetuates the erroneous assumption that biological sex and gender identity are the same thing – interchangeable as opposed to intersectional. The intersectionality of sex and gender must thus be explored in more detail, and could serve to provide insight as to how these terms overlap.

Put simply, 'intersectionality rejects the reduction of identity to singular, zero-sum labels.'[18] Scholars acknowledge that the work of Kimberlé Crenshaw gives a nuanced content to the term, introducing 'intersectionality' to analyse and redress the limitations present in the mono-categorical thinking about the categories of race, gender and class.[19] Crenshaw used the metaphor of an intersection to examine the ways in which systems of oppression based on distinct factors or traits overlap.[20] Intersectionality, in this context, works in multiple registers that acknowledge the significant impact of 'social structural arrangements of power, how individual and group experiences reflect those structural intersections, and how political marginality might engender new subjectivities and agency'.[21] Collins writes that intersectionality is increasingly functioning as a core conceptual metaphor for understanding social inequality because it points to the workings of power relations in producing social inequalities and the social problems they engender.[22]

Campbell highlights how intersectionality as understood by Crenshaw can be used to help us understand how disadvantage and discrimination occur in society, considering how some individual traits are prized while others are denigrated.[23] The individual identity is multi-faceted, and so is inherently intersectional, as our separate traits (including sex, gender, race, sexuality, class and many others) all overlap and combine to form our identities. The struggle occurs when trying to disentangle these traits to assess how they impact the individual's social position. Intersectionality allows us to acknowledge that it is sometimes the specific ways in which these traits intersect that determine whether an individual is marginalised or not. For example, someone could be cisgendered and heterosexual, which are privileged gender and sexuality categories. The intersection of these traits means that this individual occupies a stronger position in society than those who do not fall into these groups. However, this same individual could form part of the working class, which is not a privileged economic class, and so could be subject to discrimination in that sphere. Therefore, one's traits and identity are

[17] Ibid at paras 10, 37, 79 and 84. These paragraphs contain some examples of this usage.

[18] Aiden James Kosciesza 'Intersectional Gender Measurement: Proposing a New Metric for Gender Identity and Gender Experience' (2023) 23(3) *Feminist Media Studies* 750, 752.

[19] Patricia Hill Collins *Intersectionality as Critical Social Theory* (2019) 25.

[20] Ibid. Also see Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139–164; Kosciesza (note 18 above) at 1–16; Meghan Campbell 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11(2) *Revista Direito* 479–504.

[21] Collins (note 19 above) at 26.

[22] Ibid at 30.

[23] Campbell (note 20 above).

layered and nuanced, and the relationship between certain traits can lead to a greater social inequality than each of those traits would lead to individually. The relationship between sex and gender is one such 'compounding' intersection, an intersection further complicated by the human tendency to conflate these two ideas.

Valdes, writing on the relationship between sex, gender and sexual orientation, illustrates the potential conflation between the concepts in a triangle (Figure 1):

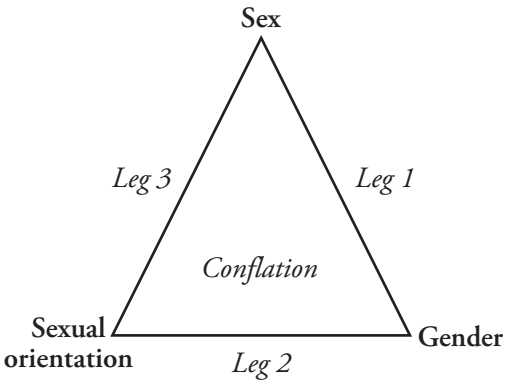

FIGURE 1 Representation of the conflation of sex, gender and orientation.

The triangle represents the common normative assumptions made regarding these concepts. The first leg conflates the individual's external genitalia and thus their apparent sex with their social personality.[24] Under this leg, gender is determined by biological birth. The second leg conflates sex-determined gender with sexual orientation. This leg presupposes that one's sexual orientation is a component of sexual gender.[25] The third leg considers the direct conflation of sex and sexual orientation. This considers genital configurations as determinants of sexual orientation identities.[26] Our focus in this article is on the first leg of the conflation, as sex and gender are the grounds being conflated throughout the *King* judgment and in the broader South African law.

As illustrated in the diagram above, there is an inherent difficulty in disentangling the meaning of the terms sex and gender. This difficulty chiefly arises from the way in which these terms interlink and overlap, exacerbated by our society's repeated conflation of them in our everyday language use. Whilst this conflation is a common thing, it is problematic and its impact must be examined closely. As Chang and Wildman point out, '[w]hile a connection exists between the two terms, equating sex and gender perpetuates the myth that gender is based on the narrow concept of anatomical sex – male or female.'[27] This myth must be demystified, as this narrow understanding of gender (and, indeed, 'anatomical sex') has had an effect on many aspects of society, including the law. We believe that a clear delineation of these terms is not possible, but an attempt will be made to set out the current understandings of sex and

[24] Francisco Valdes 'Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to its Origins' (1996) 8(1) *Yale Journal of Law & the Humanities* 161, 166.

[25] Ibid at 167.

[26] Ibid at 168.

[27] Chang & Wildman (note 15 above) at 45.

gender, highlighting the inherent conceptual difficulties[28] in providing concrete definitions of such fluid categories.

Most commentators agree that sex is a biological term, relating to various physical attributes that make up a person.[29] Based on markers like genitalia, hormones and chromosomes, sex has traditionally been accepted to be evident from birth, and is commonly considered to be inherent in a person.[30] Indeed, the current understanding of sex in South African law is that it is an immutable characteristic, an understanding that fails to account for individuals changing the sex assigned to them at birth. This is the biological determinant view of sex,[31] and the one that seems to permeate South African law and society. There is growing recognition that sex cannot be understood so simply, that is, classifying individuals into a male/female binary purely as a result of what they appear to be at birth.

In contrast to this biological determinant view of sex, gender has widely been regarded as a social construct,[32] designating people as being male or female based on 'environmental, social and cultural differences in roles and characteristics'.[33] It must be emphasised that these environmental, social and cultural roles and characteristics are not immutable facts. Rather, they are attributes that are socio-culturally constructed and based on society's assumptions of what constitutes masculine and feminine traits.[34] It has been said that 'our current gender roles have been socially constructed by females and males acting out their gender assignment throughout history.'[35] As a result of being determined by the *mores* of any given society, traditional gender roles and perceived gender differences tend to vary according to the culture perceiving the gender of any individual.[36] One would thus assume that fluidity would be part and parcel of gender determination, given that it is based on *mores* that differ between cultures and time periods. However, general society has tended to take a very strict binary view of gender, allowing only for masculine and feminine and ignoring other possible gender identities.[37] The binaries found in our understandings of both sex and gender have become established in our common-law system,[38] recognising people as male or female based on their

[28] 'In legal and social understandings of gender, sex has become synonymous with gender and gender with sex. A more accurate understanding of gender recognizes that sex is only one aspect of gender.' Ibid at 57.

[29] 'The dominant view of sex is the discourse of biological determinism.' L Grenfell 'Making Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 *Legal Studies* 66, 67.

[30] Chang & Wildman (note 15 above) at 57.

[31] D Nelkin & M Lindee *The DNA Mystique: The Gene as Cultural Icon* (1995) 197.

[32] The Psychological Society of South Africa defines gender as '[t]he socially constructed roles, behaviour, activities, and attributes that a particular society considers appropriate for either men or women'. CJ Victor et al 'The Psychological Society of South Africa Sexual and Gender Diversity Position Statement: Contributing Towards a Just Society' (2014) 44(3) *South African Journal of Psychology* 292, 298.

[33] C Mayer & A Barnard 'Balancing the Scales of Gender and Culture in Contemporary South Africa' in S Safdar & N Kosakowska-Berezecka (eds) *Psychology of Gender Through the Lens of Culture* (2015) 327, 327.

[34] Ibid at 327.

[35] P Easteal, L Bartels & S Bradford 'Language, Gender and "Reality": Violence against Women' (2012) 40(4) *International Journal of Law, Crime and Justice* 324, 327.

[36] Mayer & Barnard (note 33 above) at 328.

[37] 'The dictionary definition requires an individual to pick a gendered or sexed category – either/or – usually male or female – which does not comport with everyone's lived reality.' Chang & Wildman (note 15 above) at 45.

[38] The court confirmed this binary model in *September v Subramoney NO & Others* [2019] ZAEQC 4, [2019] 4 All SA 927 (WCC) ('*September v Subramoney*') where the applicant sought to have her transgender identity recognised in a correctional facility, saying that the judgment 'is not about whether the binary model used

apparent sex at birth and assigning them as masculine or feminine based on that allotted sex.[39] The binary nature of the current societal understanding of the complex relationship between sex and gender is further explained by Grenfell in the following way:

> The dominant view of sex … posits that sex is biological, and gender is an effect of sex. In other words, social norms are, or ought to be, grounded on biological facts. No amount of social change will alter the fundamental biological nature of human beings. This is because biology is understood as a relatively fixed and unchanging given. This theory extends to the belief that biological facts express themselves in the social roles prevalent in their own society. This means that gender roles – behaviour and self-identity – are understood as products of underlying biology.[40]

It is argued that viewing sex and gender in this way, with society assigning gender as a result of the biologically assigned sex of an individual,[41] is unnecessarily limiting and fails to account for those whose gender identities and expression differ from the sex assigned to them at birth. A more flexible approach must also be considered. The social constructionist view of sex provides that 'the meaning of sex is historically and politically specific. Its meaning shifts across time and cultures according to particular political impulses. It therefore has no universal or ahistorical meaning.'[42] This broader approach to defining or determining sex acknowledges the complexity of the issue and creates room to engage with the concept outside of the traditional binary, allowing for the differences in environment and social *mores* that typically inform an individual's gender identity.[43] It also allows for the recognition of other genders and sexes outside of the masculine/feminine and male/female binaries, and thus bears further consideration.

In addition to exploring more inclusive definitions of sex and gender, we must also start to investigate the sometimes complicated intersection between sex and gender, as such intersectionality can lead to discrimination and a subsequent lack of legal protection for those whose identities fall outside of the sex and gender binaries. As Campbell states, when there is more than one intersecting identity, any discrimination based on such intersection becomes layered, being cumulative and complex.[44] This is especially relevant when we consider the patriarchal nature of most Western societies and legal systems, where androcentrism has been

in South Africa should be expanded to include a third gender, i.e. transgender. *This binary model is therefore unchallenged and still in force*' (own emphasis).

39 This conflation is present in the binary model provided for in the Births and Deaths Registration Act 51 of 1992, which requires a child's sex to be registered as either male or female. This is confirmed in *September v Subramoney* (note 38 above) at para 48 where the court discusses the provisions of the Identification Act 68 of 1997, highlighting the fact that South African citizens' gender is built into their identification numbers. Section 7(2)(a) of the Identification Act 68 of 1997 prescribes that '[a]n identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial, index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person to whom it has been assigned, namely (a) his or her date of birth and gender; and (b) whether or not he or she is a South African citizen' and s 8(b) requires a record in the population register which includes 'his or her surname, full forenames, gender, date of birth and the place or country where he or she was born.'

40 Grenfell (note 29 above) at 67.

41 '[G]ender typically refers only to the "behavioural, social and psychological characteristics of men and women". Thus, the gender which you are expected to identify with is more often than not informed by your sex.' R Sloth-Nielsen 'Failure to Recognise a Third Gender Option: Unfair Discrimination or Justified Limitation?' (2021) 25 *Law, Democracy and Development* 90, 94.

42 Grenfell (note 29 above) at 68.

43 AH Eagly *Sex Differences in Social Behaviour: A Social-role Interpretation* (1987) 39.

44 Campbell (note 20 above) at 480.

entrenched, setting men and maleness as the default. A consequence of this androcentrism is discrimination against those who do not conform to a typical masculine ideal, an androcentric sexism (or androsexism) that serves to favour male-identified persons and structures.[45] The rigid adherence to a binary construction of sex and gender has thus led to the exclusion and marginalisation[46] of those who do not fall within this construction. The approach that South African law takes to the conflation of sex and gender and any proposed discrimination on these grounds thus warrants further investigation, as the common law is bound to be developed in keeping with constitutional values.[47] As identified above, non-sexism is a founding value in the Constitution, and thus traditional common-law rules such as the discrimination allowed in the name of freedom of testation must be re-evaluated, much as the court did in *King v De Jager*.

III THE CONFLATION OF SEX AND GENDER UNDER SOUTH AFRICAN LAW

It is interesting to note that Mhlantla J, in considering whether there was indeed gender discrimination in *King v De Jager*, expressly acknowledges the South African law tendency to use the terms sex and gender interchangeably,[48] despite them being listed as separate grounds in Section 9(3) of the Constitution.[49] What follows is a brief exploration of specific examples of such conflation in both statute and common law, as well as a consideration of how such conflation could serve to marginalise affected individuals.

A Statutory conflation of sex and gender

Prior to the promulgation of the Alteration of Sex Description and Sex Status Act 49 of 2003, the courts believed that it was not possible to change one's sex, even in instances where someone had their sex altered. The belief in our earlier jurisprudence is that sex and gender are fixed. The judgment in *W v W*[50] applied an English standard from the case *Corbett v Corbett (otherwise Ashley)*,[51] adopting the so-called 'Ormod test'.[52] Ormod J, the judge in *Corbett*, found that 'the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by natural development of organs of the opposite sex, or by medical

[45] Valdes (note 24 above) at 162.

[46] 'Beyond the intimate relationship these terms have for the individual, society has historically used them as tools to identify and describe, but also to persecute and stereotype. By using the characteristics gender, sex, sexual orientation, and sexuality as tools to identify and describe, persons are inadvertently but inherently persecuted and stereotyped.' Herpolsheimer 'Third Option: Identity Documents, Gender Non-Conformity and the Law' (2017) 39(1) *Women's Rights Law Reporter* 46, 46.

[47] 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Constitution S 39(2).

[48] 'It is critical to mention that our courts have used the grounds of gender and sex interchangeably but it is nonetheless important to note that they are distinct.' *King v De Jager* at fn 69.

[49] This section provides that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

[50] 1976 (2) SA 308 (W).

[51] [1971] P.83, [1970] 2 All ER 33.

[52] A Barratt, R Denson, W Domingo, JD Mahler-Coetzee & F Osman *Law of Persons and the Family: Fresh Perspectives* (2023) 67.

or surgical means.'[53] The court in *W v W* reached this same conclusion, using a biological chromosomal basis for determining the sex of the person in the eyes of the law.[54] Nestadt J stated when deciding on the issue of sex alteration that

> [t]he issue is not whether, after the operation, the plaintiff was an effective male, nor whether she looked like a female (which she does), nor whether society has accepted her as a female, nor whether she is capable of having sex with a male … however desirable it may or may not be, for finding that a person in the position of the plaintiff was a woman ... Imitation cannot be equated with actual transformation.[55]

Simms v Simms adopted the same approach to determining sex.[56]

The Alteration of Sex Description and Sex Status Act,[57] assented to in March 2004, changed the legal position adopted by the pre-democratic courts. The Act allows 'any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed, to apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register'.[58] The legislative intervention was in response to the way in which the legal system denied individuals the dignity of having their gender identity reflected on their official documentation. The Act provides a definition of 'gender characteristics', recognising the social construction of gender through 'the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means'.[59] The implementation of the Act has not been without difficulty. *KOS & Others v Minister of Home Affairs & Others*[60] challenged the refusal by the Department of Home Affairs to register the altered sex of a number of people in terms of the Alteration of Sex Description Act.[61] The reasons provided for the refusal to alter their sex description was linked to the fact that all of the applicants were married in terms of the Marriage Act 25 of 1961.[62] The Department had advised some of the applicants that their

[53] *Corbett v Corbett (otherwise Ashley)* [1971] P.83, [1970] 2 All ER 33 at 104.

[54] *W v W* 1976 (2) SA 308 (W) at 314D.

[55] Ibid at 314D–E.

[56] 1981 (4) SA 186 (D). The court invalidated a marriage between a cisgendered man and a transgendered woman. The judge reasoned as follows (at 186G–H): 'the evidence satisfies me that the defendant has at all material times been a male person. The plaintiff, of course, is also a man. The evidence is to the effect that the defendant, who was previously a male in every respect, underwent a so-called "sex change" operation in 1970. As a result of this operation her genitalia were so altered that she assumed some of the attributes of a female. She has always had and still has male chromosomes. She has never had the normal sexual organs of a female, and what she has now been provided with merely simulates feminine attributes.'

[57] The stated purpose of the Act is '[t]o provide for the alteration of the sex description of certain individuals in certain circumstances; and to amend the Births and Deaths Registration Act, 1992, as a consequence; and to provide for matters incidental thereto.'

[58] Alteration of Sex Description and Sex Status Act s 2(1).

[59] Ibid s 1.

[60] [2017] ZAWCHC 90, [2017] 4 All SA 468 (WCC), 2017 (6) SA 588 (WCC).

[61] Ibid at paras 27–31.

[62] In this regard the court found that '[m]any might think that that is to state the obvious, but the literature on transgenderism describes that there is an all too common tendency to conflate sex, gender and sexuality, which is misconceived. The tendency is manifested in the reliance by the respondents, in explanation of their approach to the interpretation and administration of the Alteration Act in respect of persons married in terms of the Marriage Act who subsequently transition, on the reported widespread opposition to any amendment of the Marriage Act to permit the formalisation of marriages between homosexual couples.' Ibid at para 20.

altered sex could only be registered once they divorced their spouses and remarried under the Civil Union Act 17 of 2006. In one of the cases the parties' change of sex was registered, but all records of the parties' marriage were deleted from the population register.[63] The court found in this case that the Department of Home Affairs' conduct when dealing with the applications of these applicants under the Alteration Act was inconsistent with the Constitution and unlawful because it infringed on their rights to administrative justice, equality and human dignity.[64]

Legislative provisions are also made for intersex individuals under the Judicial Matters Amendment Act 22 of 2005.[65] Section 16(a) of the Judicial Matters Amendment Act amends section 1 of the Equality Act to include a definition of 'intersex', stating that it refers to people with 'a congenital sexual differentiation which is atypical, to whatever degree'. Although this amendment was introduced in 2005, this section does not appear to have become part of our legal discourse around sex. It is also noteworthy that no allowance or amendment is made regarding the recognition of gender identities that fall outside the binary. It is therefore still the case that intersex people find very little protection under discrimination rules aimed at promoting gender equality, as these rules specifically provide for equality between men and women.[66]

The conflation of sex and gender leading to exclusion from legal protection can be found in the Choice on Termination of Pregnancy Act 92 of 1996. This Act provides a 'woman' with the right to terminate a pregnancy,[67] assuming that the gender role of woman can only be held by somebody who is biologically female or assigned female at birth. This conflation is entrenched in the Act by the definition of 'woman' in section 1, which defines a woman as 'any female person of any age'.[68] By equating womanhood with female persons, and only extending legal protection to those whose gender presentation matches their sex assigned at birth, the law excludes other types of people who could be pregnant and seek pregnancy termination but do not fall under the definition of woman provided in the Act. For instance, someone could be designated a female person at birth based on an assessment of external factors such as genitalia but have a different gender identity, be it a masculine or non-binary identity. Would they then be treated as a female person for purposes of the Act even though they do not present as a woman? If someone identifies as a man and becomes pregnant, would they be regarded as a woman for purposes of the Act and be afforded the full protection available to women? The creation of these grey areas is but one consequence of the conflation between sex and gender in the law, and other consequences may have more permanent damaging effects on the lives of South African citizens.

[63] Ibid at para 24.

[64] Ibid at para 90.

[65] The Alteration of Sex Description and Sex Status Act also makes provision for intersexed persons to apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register. Section 1 defines 'intersexed' 'with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree'.

[66] Section 8 of the Equality Act begins by using neutral language ('No person may unfairly discriminate against any person on the ground of gender'), which is promising. However, each of the named examples in the section makes specific reference to discrimination against women, positioning men as the group in the position of power and aiming to redress the balance between men and women. This serves to exclude those who identify as both or neither.

[67] Choice on Termination of Pregnancy Act 92 of 1996 s 2.

[68] Choice on Termination of Pregnancy Act 92 of 1996 s 1(xi).

In a similar vein, the Children's Act 38 of 2005 purports to regulate some aspects of the surrogacy relationship, and in doing so defines a 'surrogate mother' as 'an adult woman who enters into a surrogate motherhood agreement'. It is interesting that the definition refers to someone whose chosen gender is feminine and no mention is made of their sexual classification, despite the fact that a biological function is the subject of the regulation. A person's gender is thus being conflated with their biological sexual attributes, with it being presupposed that women are always biologically female. The current definition therefore excludes those who are capable of conception and carrying a child, but who identify as something other than feminine, and leaves open the question of whether they would be able to participate in a valid surrogacy agreement; this is evidence of how the law's adherence to a strict binary could result in unfair treatment before the law and discrimination.

B The conflation of sex and gender in the common law

The conflation of sex and gender is not only evident in legislation. Common-law rules have also grown from a culture of patriarchy and androsexism. Indeed, the Court in *King v De Jager* highlights that the origin of our private law rules around freedom of testation is a patriarchal one, with Mhlantla J making explicit reference to this fact in the minority judgment.[69] It is further submitted by Mhlantla J that the Roman and Roman-Dutch approach to the law of testation was one of 'patriarchal manifestation'.[70] The Roman law of succession was interlinked with Roman family law and the Roman law of property,[71] and the main concern of Roman family law was the regulation of the impact that the family structure had for the holding and subsequent disposition of property.[72] Therefore, much of the Roman law of succession centred on the idea of each family having a male head, the *paterfamilias*. The *paterfamilias* owned all family property, including anything belonging to any of his descendants.[73] This position established the *paterfamilias* as the most powerful figure in the family, both socially and economically, and the Roman law of succession was designed to keep the family assets under the control of the *paterfamilias* or his designated heirs.[74] The *paterfamilias* was always male, and the family assets were typically passed down to male heirs. This system was carried over into Roman-Dutch law, which has shaped our modern South African private law as a whole.[75] Consequently, South African private law has continued to develop from this patriarchal and heteronormative bedrock. Mhlantla J confirms that this system is the one

[69] *King v De Jager* at para 53.

[70] Ibid at paras 52–53.

[71] C Humfress 'Gift-giving and Inheritance Strategies in Late Roman Law and Legal Practice (Fourth to Sixth Centuries CE)' in O-A Ronning, HM Sigh & H Vogt (eds) *Donations, Strategies and Relations in the Latin West and Nordic Countries* (2017) 9–27.

[72] B Frier & T McGinn *A Casebook on Roman Family Law* (2004) 4. Zaal concluded that 'Roman Dutch law, like Roman Law upon which it was founded, was neither humanitarian nor egalitarian. In its gender bias, it was similar to other European systems of its time, and its effects on both the South African legal system and South African society have been enormous.' Zaal 'Origins of Gender Discrimination in SA Law' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 162.

[73] Humfress (note 71 above).

[74] N Krstic 'The Institute of Compulsory Portion as a Limitation on Testamentary Dispositions in Roman and Contemporary Law (English Language)' (2019) *Ius Romanum* 513, 518–519.

[75] For a discussion of the lingering effects of patriarchy on the law of property, see *Rahube v Rahube & Others* [2018] ZACC 42, 2019 (2) SA 54 (CC).

that has been imported into South African law, and specifically highlights the impact of this system on our approach to freedom of testation as 'it must be accepted that the genesis and development of freedom of testation have undeniable layers of patriarchy, deeply rooted in notions that women cannot own property as well as be commercially active, and thus cannot inherit property.'[76] This acknowledgement of the fundamentally discriminatory framework of South African private law is important, as it highlights the need for development of the law to achieve equality.[77]

Mhlantla J's statement goes beyond the rules of the law of succession and arguably raises questions about the legal framework itself. Even as the court acknowledges the pitfalls of the patriarchal system, there is an acceptance of the binary distinction between men and women and between male and female, with these terms sometimes being used as synonyms. As seen in the legislative examples and the *KOS* judgment, this simultaneous distinction and blurring has a muddling effect, excluding those who may not fall into the rigid categories envisioned by the law.

C The role of language in conflating sex and gender

One cannot discuss the conflation of sex and gender in South African law without including a consideration of the ways in which language is used to entrench the binary understanding of sex and gender evidenced by the legal rules outlined above.[78] Language has an effect on how the law is interpreted and applied, and thus '[l]inguistic imbalances are worthy of study because they bring into sharper focus real-world imbalances and inequities.'[79] Considering these linguistic imbalances will be instructive in understanding the potentially discriminatory effect of the South African approach to sex and gender as it is written into our law. It is hoped that this consideration will assist us in recommending a more equitable approach to the future development of more inclusive legal rules.

Language is one of the building blocks of law, creating the concrete expression of society's *mores* and values. However, the language selected to create the law often also gives expression to more subliminal societal understandings and norms, and the effect of the legal terminology used can be to cement a particular worldview.[80] Revell and Vapnek argue that 'language is intrinsically a vehicle of representation in a society; it can blur lines between genders or accentuate their differences.'[81] The way in which language is used thus reflects societal attitudes and serves to reinforce a societal hierarchy.

One aspect of this hierarchy that finds expression through language is a society's approach to questions of gender, as 'language use, language choices, and interpretations of language carry

[76] *King v De Jager* at para 55.

[77] This assessment of private law is also seen in other jurisdictions. In the European context, TS Len opines that '[p]rivate law is complicit in creating, maintaining and exacerbating social injustice.' TS Len 'Progress Towards What? On the Need for an Intersectional Paradigm Shift in European Private Law' (2022) 1 *European Law Open* 363, 363.

[78] Part II above.

[79] R Lakoff *Language and Woman's Place: Text and Commentaries* (2004) 69.

[80] M van Eck 'Achieving Gender Neutrality in Contracts' (2022) 43(1) *Obiter* 104, 105; DL Revell & J Vapnek 'Gender-Silent Legislative Drafting in a Non-Binary World' (2020) *Capital University Law Review* 103, 127–128.

[81] Revell & Vapnek (note 80 above) at 127–128.

gender implications and are not restricted to conversation.'[82] Language is never free from these gender implications, which influence and are influenced by people's lived experiences and their own views on their gender and identity.[83] From a grammatical perspective, gender has typically been classified into three sub-types, namely masculine, feminine and neutral. Using these categories indicates an understanding of gender as being linked to or flowing from biological sex, a convention that is deeply rooted across the English language.[84] The problem with using these linguistic classifications is that society attaches certain stereotypes to them,[85] imputing certain attributes and behaviours to the masculine or feminine individual.[86]

Interestingly, it has been suggested that there is a correlation between the levels of gender equality in a society and the language used by that society. Revell and Vapnek write that countries where the majority of citizens speak a gender-neutral or genderless language tend to rank higher in actual gender equality than those countries where citizens speak more gendered languages.[87] Grammatical gender in language thus reflects the particular society's perceptions of gender and the lives of those assigned a specific gender.[88] This is due to the fact that gender norms establish what is permitted for men and women, and can thus establish a system where those classified as male occupy a position of power over those in other gender groups. If this androcentric social system is confirmed in language, then 'legal rules (the more formal representation of societal institutions) may be built upon these social concepts, reinforcing them, rather than policing them to ensure equality and inclusion.'[89]

This reinforcement of gender roles and the binary is especially evident in the language used to construct South African private law. For example, in the context of the law of succession, the 'patriarchal past' referred to by Mhlantla J in *King v De Jager* is still evident in the language used when referring to the different actors in the testamentary process. The person who creates a will is a 'testator', which has been feminised to a 'testatrix'.[90] The person who carries out the provisions of the will is an 'executor', or, when apparently female, an 'executrix'.[91] The

[82] KJ Sneddon 'Not Your Mother's Will: Gender, Language and Wills' (2015) 98(4) *Marquette Law Review* 1536, 1537.

[83] P Easteal, L Bartels & S Bradford 'Language, Gender and "Reality": Violence Against Women' (2012) 40(4) *International Journal of Law, Crime and Justice* 324, 327.

[84] Sneddon (note 82 above).

[85] 'Because of the power of dichotomous thinking about gender and sex, most words in the English language and American culture reinforce binary female/male images. Consider your reaction to pink/blue, mother/father, sister/brother, ladies/gentlemen, girl/boy, or penis/vagina. Society gives a gendered meaning to these pairs of terms. The need to define gender in terms of this binary is so strong that the first question most people pose to new parents is, "Is it a boy or a girl?" As Marilyn Frye explains, most of us do not know how to relate to a person without knowing that person's gender. In the modern era, friends now ask that question to pregnant women. And when one does label a fetus with a particular gender, studies show that people interact with the fetus in different ways. Thus, people construct gender through social interactions.' Chang & Wildman (note 15 above) at 45.

[86] Sneddon (note 82 above); Easteal, Bartels & Bradford (note 86 above).

[87] Revell & Vapnek (note 80 above); JL Prewitt-Freilino, TA Caswell & EK Laakso 'The Gendering of Language: A Comparison of Gender Equality in Countries with Gendered, Natural Gender, and Genderless Languages' (2012) 66 *Sex Roles* 218.

[88] Revell & Vapnek (note 80 above).

[89] Chang & Wildman (note 15 above).

[90] This feminised term is still being used in the courts, evidenced by the SCA judgment in *W v Williams-Ashman NO & Others* [2023] ZASCA 44, 2023 (4) SA 113 (SCA).

[91] A recent example of the usage of this term by the SCA can be found in *Municipal Gratuity Fund v Pension Funds Adjudicator & Another* [2023] ZASCA 116.

problems with this are twofold: first, it positions the masculine form of the word as the norm and, second, confirms that someone can be only masculine or feminine.[92] Although it could be argued that 'testator' or 'executor' could be construed to mean anyone, there is still the problem of positioning the masculine as the default and everything else as the 'other'. This problem is seen throughout private law, with terminology serving to reinforce the binary, even in the most recent Constitutional Court judgments.

King v De Jager is an example of such a judgment, where the terminology used by the judges in constructing their judgments serves to reinforce the perceived interchangeability and binary nature of sex and gender. This judgment thus gives us renewed cause to examine the continuing conflation of sex and gender in the South African law of succession, and whether this is truly the best approach to take in a constitutional dispensation in which equality, dignity and freedom are so highly prized.

IV GENDER AND SEX CONFLATION: THE APPROACH IN *KING V DE JAGER*

A A general constitutional approach to sex and gender

As we shift from the common-law interpretation of sex and gender to a constitutional interpretation, our point of departure is the founding provisions of the Constitution.[93] The Republic is founded on '1(a) human dignity, the achievement of equality and the advancement of human rights and freedoms, (b) non-racialism and non-sexism'.[94] There is a clear commitment to the principle of non-sexism throughout the Constitution and the Bill of Rights. Non-sexism is directly implicated in the equality clause.[95] Section 10 is unequivocal when affirming the inherent dignity of all persons and the right will be implicated in any form of unfair discrimination. The attainment of non-sexism is also present in section 12, the right to freedom and security of the person, which further guarantees bodily and psychological integrity.[96] In protecting freedom of expression, the Constitution also expressly excludes the 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.[97] In addition to these rights, the Constitution establishes Chapter 9 institutions aimed at strengthening constitutional democracy.[98] The Commission for Gender Equality is one of these institutions, functioning to promote respect for gender equality. To

[92] Sneddon (note 82 above) at 1574.

[93] Note 12 above.

[94] Constitution S 1(b). Andrews argues with regard to non-racialism and non-sexism that the Constitution places sex or gender on the same footing as race for the purposes of eliminating discrimination. Penelope E Andrews 'From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa' (2000) 26(3) *North Carolina Journal of International Law* 693, 699.

[95] Constitution S 9.

[96] 'Everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be to medical or scientific experiment without their informed consent.' Constitution S 12(2).

[97] Constitution S 16(2)(c).

[98] Under Section 181 independent impartial institutions, subject only to the Constitution and legislation, are established to 'exercise their powers and perform their functions without fear, favour or prejudice'. The Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission are all established under Chapter 9.

further this aim, the Commission is empowered to 'monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality'.[99]

Within this constitutional scheme, the Constitution also provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.[100] Some attention must thus be paid to international instruments which purport to promote gender equality. The most well-known instrument in this regard is undoubtedly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), an international treaty adopted in 1979. This instrument is often described as the international bill of rights for women, and is thus aimed at providing legal protection and empowerment for all women and girls, working to achieve gender equality in this way.[101] Article I of CEDAW states that

> [f]or the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It must be noted that CEDAW does not engage with what women or sex means in this context, and therefore it seems to protect people only against sex-based discrimination.[102] However, the CEDAW committee has made provision for protection on the ground of gender as well, stating that gender 'refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences in hierarchical relationships between women and men in the distribution of power and rights favouring men and disadvantaging women'. Although it is admirable that an intersection between sex and gender is recognised, each concept is still framed as a binary instead of a spectrum, and it remains to be seen whether CEDAW will be interpreted to include those individuals falling outside of the binary.

The Rome Statute of the International Criminal Court provides that 'the term "gender" refers to the two sexes, male and female, within the context of society.'[103] It is defined in this way in the context of crimes against humanity, specifically persecution against any identifiable group or collectivity on various grounds, including gender as defined above.[104] This instrument adopts the biological determinant view of gender, where one's gender is defined by one's biological sex as assigned at birth.

The Yogyakarta Principles developed in 2006 are further international guidelines that must be considered when determining how to give content to the right to sex and gender equality in South African law. These guidelines aim to provide a useful and nuanced framework for States to use when deciding how best to realise human rights in relation to sexual identity and gender identity.[105] The drafting committee of the Principles took particular care to develop clear

[99] Constitution S 187.

[100] Constitution S 39(1)(b).

[101] United Nations Entity for Gender Equality and the Empowerment of Women, available at https://www.un.org/womenwatch/daw/cedaw/.

[102] 'There is no provision in CEDAW that refers to the interaction of sex and gender and other markers of identity.' Campbell (note 20 above) at 486.

[103] Rome Statute of the International Criminal Court art 7(3).

[104] Ibid at art 7(1)(h).

[105] 'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which

guidelines because '[m]any States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves.'[106] Although not formally adopted by the United Nations, the Yogyakarta Principles can still be useful as they provide practical steps for signatory states to use when addressing human rights violations based on the grounds of sexual identity and gender identity.

The principles that would be most relevant when discussing the approach taken to issues of sex and gender in South African private law are Principles 3 and 30.[107] Principle 3 provides for the right to recognition before the law, stating that '[p]ersons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life' and '[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom'.[108] An important aspect of this principle is the statement that no other status (for example marital status) may be used to prevent the legal recognition of the individual's gender identity,[109] limiting the ways in which States can try to avoid recognising people's self-reported gender identity. The duties placed on States under this principle emphasise that all individuals are afforded legal capacity in civil matters and can exercise their capacity when concluding contracts, managing property and inheriting, regardless of their gender identity.[110] To achieve the realisation of the principle, States must take the necessary legislative and administrative measures to 'legally recognise each person's self-defined gender identity'.[111]

may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.' International Commission of Jurists (ICJ), *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007), available at https://www.refworld.org/docid/48244e602.html.

[106] Ibid at 6.

[107] Principle 30 was introduced in the Yogyakarta Principles Plus 10, and in some ways extends the right to recognition before the law found in Principle 3. Principle 30 imposes a duty of protection on States, requiring them to protect persons, regardless of their gender identity, gender expression or sex characteristics, from all forms of violence, discrimination and harm whether perpetrated by the government or private actors. Part of this duty is for the state to '[e]nsure sensitivity training of judicial and law enforcement officers and other public officials on issues relating to sexual orientation, gender identity, gender expression and sex characteristics'. This is an important requirement because many judicial officers are not well versed in matters of the continuum of sex and spectrum of gender. Although this requirement addresses a step that is necessary for change, it is submitted that the practical implementation of Principle 30 will not be without its challenges. The main concern is that it is difficult to find people to provide training for judicial and law enforcement officers that would be effective in reaching them in their respective contexts. As seen from the discussion in this article, the relationship between sex and gender is complex, and so explaining these concepts, their overlaps and the differences between them in a way that addresses the nuances and makes it relevant to the officials' work takes a very specific combination of knowledge and skills.

[108] Ibid Principle 3.

[109] 'No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity.' Principle 3.

[110] These legislative and administrative measures include '[ensuring] that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity'; States must further '[e]nsure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy'. Ibid.

[111] Ibid.

Although the founding values, certain rights in the Bill of Rights, the establishment of state institutions under Chapter 9 and international instruments have been instrumental in working to achieve non-sexism and eradicating forms of gender discrimination, this goal remains elusive. This is unfortunate but not surprising, given that the foundation of our system of law, one of our core social institutions, has been instrumental in both creating and reinforcing gendered hierarchies that favour patriarchal power.[112] However, there are encouraging signs that the judicial attitude towards discrimination against particular groups is changing.

In the context of succession, the Court has already indicated that a rule of intestate succession that has the effect of discriminating against particular groups will not pass constitutional muster. The Court in *Bhe & Others v Khayelitsha Magistrate & Others* decided three cases heard together at the direction of the Chief Justice.[113] Central to all three cases was the constitutional validity of the parallel system set up under section 23 of the Black Administration Act 38 of 1927. The Act directly gave effect to customary law in instances of intestate succession of African deceased estates.[114] The rule central to the customary law of succession is primogeniture. Under the rule only males related to the deceased can qualify as intestate heirs.[115] In considering the constitutionality of this rule, the Court considered the rights of dignity and equality and the rights of children, as all were implicated and impacted by the impugned provisions of the Act and the customary law rule.[116] The majority of the Court found that the selected provisions of the Black Administration Act were inconsistent with the Constitution and thus invalid. The Court thus ruled that the traditional customary

[112] Discussion at part III above. Akala argues that '[p]atriarchy puts males at the centre of decision making, headship and occupation of the political and production spaces' while acknowledging 'that patriarchy transcends all race groups in South Africa and therefore it is not a preserve of African cultures as many have come to believe. But rather it runs across Afrocentric and Eurocentric mythologies and civilizations globally.' B Akala & JJ Divala 'Gender Equity Tensions in South Africa's Post-Apartheid Higher Education: In Defence of Differentiation' (2016) 30(1) *South African Journal of Higher Education* 1, 5.

[113] The three linked cases were *Bhe & Others v The Magistrate, Khayelitsha & Others* ('*Bhe*'); *Charlotte Shibi v Mantabeni Freddy Sithole & Others* and *South African Human Rights Commission and the Women's Legal Centre Trust v The President of the Republic of South Africa* (at paras 5–6). *Bhe* followed a decision by the Magistrate of Khayelitsha and was on appeal from the Cape High Court. It involved a mother seeking relief on behalf of her two minor daughters, in addition to bringing a public interest application 'in the interest of the female descendants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate' (at para 10). *Charlotte Shibi v Mantabeni Freddy Sithole & Others* concerned the finding by the Magistrate of Wonderboom, which was later successfully challenged in the Pretoria High Court. The applicant in the case challenged the Magistrate's decision which resulted in one of her male cousins being appointed as representative of her deceased brother's estate, an appointment which was later withdrawn after evidence was brought relating to the cousin's misappropriation of estate funds, and the other male cousin being awarded the remaining asset as the sole heir to the estate. The High Court set this decision aside on appeal and declared Ms Shibi the sole heir (at paras 21, 24 and 27). In the third case, *South African Human Rights Commission and the Women's Legal Centre Trust v The President of the Republic of South Africa*, the parties initially applied to the Pretoria High Court for relief, including the constitutional invalidation of the whole of s 23 of the Black Administration Act. However, instead of proceeding in the Pretoria High Court, the applicants applied for direct access to the Court for the relief initially sought. *Bhe & Others v Khayelitsha Magistrate & Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 6–7.

[114] Ibid at para 2.

[115] Ibid at para 77.

[116] Ibid at para 47.

law rule of primogeniture is inconsistent with our constitutional dispensation insofar as it excludes women and extra-marital children from inheriting.[117]

B The treatment of sex and gender in *King v De Jager*

Whilst the *Bhe* judgment addressed the constitutionality of discriminatory rules in the customary law of intestate succession, the *King* judgment was more focused on the common-law rules of testate succession, seeking to determine whether an individual's freedom of testation could be curtailed if the exercise thereof had an unfair discriminatory effect. Mhlantla J in this regard comments that '[t]he facially neutral principle of freedom of testation as it currently stands reinforces patriarchal and outdated ideas concerning sex, gender, property, ownership, family structures and norms.'[118] As seen above, this reinforcement serves to entrench the Roman-Dutch approach to private law relationships.[119] While it is encouraging that the Court in *King* acknowledges the broader context of the freedom of testation, the traditional conception of family and the aim of the former to reinforce outdated ideas of sex and gender roles, it must be remembered that such engagement is still happening within the normative binary. The Court also interrogates its role in developing the common law within the transformative constitutional framework but does so without engaging with the linguistic nuance and the implications of blurring the grounds of sex and gender and reinforcing sex determinism. The judgment in *King* must thus be examined more closely to see how this adherence to the normative binary has affected the application of the law of succession, and whether effect was truly given to the constitutional value of equality.

Sloth-Nielson asserts that '[t]raditional norms relating to sexual orientation, family life and expression of identity are being challenged. With these previously ignored and marginalised groups coming out, changes have been, and continue to need to be, made in the legal landscape to make the law accommodating and inclusive of these minorities.'[120] Achieving this change has been incremental within the South African legal system,[121] but has continued to be frustrated by the entrenched common law and linguistic conflation,[122] codified in national legislation.[123] This is evident in the way that the Equality Act frames gender in particular, using the term 'woman' in section 8(c) to identify a group that the Act aims to protect, but then defining it in relation to biological sex and construing women as anybody born biologically female. Each of the judgments in *King* (minority, majority and concurring) serve to illustrate how the language of the binary is pervasive throughout the law, as each of the three opinions enforce the binary and view sex and gender interchangeably.

[117] Ibid at para 136.

[118] *King v De Jager* at para 79.

[119] *Bhe & Others v Khayelitsha Magistrate & Others* at para 50.

[120] Sloth-Nielsen (note 41 above) at 91.

[121] The case of *September v Subramoney NO & Others* [2019] ZAEQC 4, [2019] 4 All SA 927 (WCC) illustrates the limitations of a binary legal system. In this case an incarcerated transgendered woman brought an application to express her gender identity while in a men's prison. The applicant was born male and was anatomically male, but identifies as a woman. Both judgments display the courts' adherence to the binary system, but also the courts' readiness to engage with issues of sex and gender in a more nuanced way than they previously have. The impact of a rigid application of the binary was also illustrated in the facts that resulted in the case of *KOS & Others v Minister of Home Affairs*, discussed at part III above.

[122] Discussion of specific legislation and common-law rules at part III above.

[123] Discussion at part III above.

From the facts of the matter it is clear that the *fideicommissum* clause directly discriminated against female born descendants. This discrimination appears to have been premised on the testator's presupposition that female born descendants would play a specific gender role within their families, complying with and reinforcing the societal expectation that only men would manage the family's property and wealth. The presupposition here is thus already based on a conflation of sex and gender, as the biological sex of the descendants at birth is used to determine their performed gender roles. The differentiation in the complaint was thus brought on the conflation of grounds of sex and gender, within a legal system that was designed to maintain patriarchal roles that men and women play in society. This raises the intersectional discrimination on the grounds of gender and biologically assigned sex. The Equality Act, as argued above, has served to reinforce this conflation. The minority judgment by Mhlantla J draws our attention to the grounds of discrimination resulting from the clause on the intersecting grounds of sex and gender,[124] and indicates that the courts have in the past used the grounds interchangeably. Although it is a positive sign that Mhlantla J expressly highlights the importance of distinguishing between these grounds,[125] the Court still draws such a distinction based on a binary understanding of both sex and gender.[126] The differences quoted emphasise the socio-cultural and biological differences between men and women without engaging with the nuance, spectrum and continuum of these intersecting grounds.

Mhlantla J states in this regard that 'the immutable characteristic at issue here is womanhood; the testator excluded future female descendants unknown to them simply because they are women.'[127] The Court appears to regard the construct of womanhood as immutable and therefore incapable of change, equating being born female with being a woman, and all that that entails in terms of socially constructed gender roles within society. This position is problematically narrow and fails to account for the fluidity and intersectionality of sex and gender. Throughout *King* the Court's engagement with questions of sex and gender is based on the presumed immutability of the characteristics listed.[128] It is necessary to consider this assumed immutability with circumspection. To argue that all of the listed grounds are fixed and incapable of change reinforces a normative binary that excludes people that do not fall within its boundaries. The claim that gender is an immutable characteristic reinforces the fallacy of sex determinism and that both gender and sex exist on a binary.

The majority judgment by Jafta J also conflates the two grounds, using the language of sex and gender interchangeably. However, no mention is made of the nuance that is needed to create a proper understanding of these grounds and the intersectionality inherent in sex and gender. The approach taken to discrimination is therefore more limited than that in the minority judgment, focusing solely on the issue of gender discrimination. This is evident in the language of the judgment: 'the applicants' father received it as such heir and condition that upon his death it will pass to his male children.'[129] In this regard Jafta J comments further that '[i]t is not in dispute that clause 7 limited inheritance of the fideicommissary property to male descendants, to the exclusion of female descendants of the testators.'[130] The clause had the

[124] *King v De Jager* at para 37.
[125] Ibid at fn 69.
[126] Ibid.
[127] Ibid at para 84.
[128] Ibid at paras 36, 49 and 84.
[129] Ibid at para 160.
[130] Ibid at para 135.

effect of preventing female born descendants from inheriting property.[131] The testator intended the benefit to pass to those born male, the ground of biological sex and the ground of gender intersecting in this instance. It is notable that this judgment uses the term testator with some neutrality,[132] but this is limited to a binary inclusion.[133]

Victor AJ's concurring judgment provides a robust interpretation of the Equality Act and the aims of transformative equality.[134] Victor AJ cautions that a failure to do so will continue 'the historical and insidious unequal distribution of wealth in South Africa … along various fault lines such as in this case, gender'.[135] This judgment, as in the majority, does not engage the difference or the nuance in the grounds of discrimination. Victor AJ uses the language of sex while explaining the core problem, '[i]n this case only male descendants will benefit. In the absence of a male descendant other males will benefit. Female descendants are excluded simply because of being female.'[136] The analysis provides a multi-layered perspective on the role that freedom of testation plays in perpetuating 'stark inequalities based on gender' and is linked to and 'sustains class hierarchies inherited from the colonial and apartheid legacy and frustrates the establishment of a society based on equality and in particular gender equality'.[137] It is worth noting that Victor AJ appears to take an intersectional approach when considering discrimination on grounds of sex and gender, having regard to the impact of class and racial categories as well. Victor AJ further explains that an unfettered approach to freedom of testation 'sustains the unearned privileges in society such as male privilege'[138] and 'threatens the achievement of substantive equality for those groups who are systematically disadvantaged based on their sex, gender or other characteristics'.[139] The two grounds are identified within the judgment, but the use and limitations of the conflated binary once again result in an interchangeable use of the terms.

The Court interprets *King v De Jager* on the basis that the *fideicommissum* clause in the will had the impact of discriminating on the ground of gender, contravening section 8(1)(c) of the Equality Act, which states that '[s]ubject to section 6, no person may unfairly discriminate against any person on the ground of gender, including (c) the system of preventing women from inheriting family property'.[140] The impact of the language and specified grounds in the Equality Act further complicates the binary conflation. One of the core reasons for the emphasis placed on the ground of gender in *King v De Jager* is the interpretation and application of the provisions of the Equality Act. The challenge against the provisions of the *fideicommissum* was specifically brought in terms of section 8(1)(c) of the Act. The emphasis on addressing gender discrimination in the Equality Act is thus arguably based on the same conflation and hetero-patriarchal legislative framing, further entrenching the common-law foundation and understanding of these distinct and intersectional grounds. The Equality Act prohibits unfair

[131] Ibid at para 129.
[132] Ibid at paras 123, 125 and 144.
[133] Jafta J uses the pronouns 'his or her': 'I do not think that freedom of testation empowers a testator to violate the rights of members of his or her family by unfairly discriminating against them.' Ibid at para 153.
[134] Ibid at para 167.
[135] Ibid at para 168.
[136] Ibid at para 198.
[137] Ibid at para 207.
[138] Ibid at para 208.
[139] Ibid at para 217.
[140] Equality Act s 8(1)(c).

discrimination in both general and specific terms. The Act generally stipulates that no person may unfairly discriminate against another person.[141] It expressly identifies three of the listed grounds in the Act (race, gender and disability), expanding on these grounds by providing a list of bases for these grounds of discrimination. The section makes it clear that the specific sections are subject to the general provision in section 6. The Court does not engage with the aspect of sex discrimination as an intersectional ground because the Equality Act specifically deals with systems that prevent women from inheriting. The Act is arguably based on the same normative binary assumption that those born male or female will naturally be men or women.

This interpretation of the Act serves to confirm that the binary approach to sex and gender is woven into South African law and society. This is deeply problematic, as a legal normative order based on the binary model is unnecessarily limited. This limitation is evidenced by the presupposition that legal subjects will fall into either category without due consideration for the implications on the lived experience of individuals. It is important that the limitations of the conflation of sex and gender be further interrogated to understand the impact that it can have on the lived experience of South African citizens.

V IMPACT OF THE CONFLATION

From the discussion above it is evident that the conflation of sex and gender has been entrenched in South African law through case law and legislation, and has a practical effect on the way people live their lives. This conflation is thus not neutral, as it effectively creates and perpetuates an androcentric hierarchy in law and society,[142] privileging those individuals who are closest to an imagined cisgender, heterosexual ideal.[143]

The law is then shaped in accordance with this hierarchy, incorporating it into legal rules and processes and creating room for discrimination against individuals who fall outside the binary. Although the South African Constitution has entrenched equality as a human right, including equality between the sexes, this proposed legal protection is still premised on a binary understanding of sex and gender.[144] Further complicating matters is the deeply personal nature of sex and gender, as they are both integral aspects of an individual's personhood. Private law in particular operates in these personal spaces, and it must thus be questioned whether a more inclusive understanding of sex and gender will also find its way into private law rules and their enforcement.

Sachs J acknowledges this predominantly private nature of sex discrimination and gender discrimination, commenting in *Volks NO v Robinson* that '[f]or all the subtle masks that racism

[141] Equality Act s 6.

[142] Seger and White assert that 'even men on the lowest rung in the social hierarchy believe in their inherent superiority to women. No matter how humiliated and degraded a man may be in public life, his usual expectation is that at least he can be master with the private family sphere, where women and children will always remain hierarchically inferior.' J Seger & C White 'Constructing Gender: Discrimination and the Law in South Africa' (1989) 4 *Agenda: Empowering Women for Gender Equity* 95, 98.

[143] Valdes explains this socio-legal impact of the binary well, stating that 'this conflation is a highly problematic contrivance that exerts a divisive force on society and a destabilizing influence in law: this conflation embodies, exudes, and extends androsexist and heterosexist biases, which engender and accentuate social and sexual rankings and acrimonies in both law and society.' F Valdes 'Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society' (1995) 83(1) *California Law Review* 1, 8.

[144] Discussion at part III above for an exploration of the sex/gender binaries that exist in South African law.

may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible.'[145] The conflated gender binary is one of these practices. The practice starts within the immediate family,[146] and sex-determinism and gender norms are imposed and performed in these private spaces without critical engagement because they appear 'socially and culturally normal'. The binary model entrenched in our families and wider communities is echoed and amplified by a number of social and political institutions, reinforcing the hierarchy that prizes heteronormativity. To combat this, the role of transformative constitutionalism should entail an engagement with this normative treatment of sex and gender to fully grasp and navigate the impact on those individuals who are gender non-conforming.

A failure to engage with the more complex nature of the intersectionality of the grounds of sex and gender[147] will continue to entrench the overly simplistic binary,[148] perpetuating the negative impact on the status and lived experiences of persons who are gender non-conforming. Public policy considerations and principles of equality cannot be informed by a legal system that benefits only a majority intersectional class – the cisgendered individual. This is the true impact of the conflation: the marginalisation of gender non-conforming South Africans and those who do not fall within any of the limited sexual categories that our law recognises. This marginalisation can only be overcome by an express acknowledgement of the differences between sex and gender and the recognition that a binary understanding of these terms is simplistic to the point of being reductive. In support of this, Chang and Wildman assert that '[a] historical and cultural argument can be made for why systems of law should recognize gender identity and gender expression. While gender is partly socially constructed, the lack of formal legal recognition of one's self-proclaimed gender identity has had serious consequences.'[149] For example, barring access to properly gendered documents impacts on the person's ability to open bank accounts or inherit property, which can have negative financial consequences. The absence of legal protections for gender non-conforming people can also result in discrimination in places of employment. This creates cycles of poverty that force 'some transgender people [to] engage in sex work, drug sales or other aspects of the street economy in order to survive. This [behaviour] puts them at a higher risk of arrest and imprisonment.'[150] The consequences of a failure to recognise people's gender identity can thus be life-threatening, as there is a heightened

[145] *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) at para 162.

[146] A good example of how societal, economic and cultural values and *mores* change over time is how the definition of 'family' in the law of succession is understood. In 1997, De Waal wrote that 'the concept "family" used so far is the so-called "nuclear" family, consisting of married parents with dependent children.' He went on to state that 'once a different or wider definition of "family" is accepted, the rules of especially intestate succession may look quite different.' De Waal 'The Social and Economic Foundations of the Law of Succession' (1997) *Stellenbosch Law Review* 165. In the 25 years since, it has become apparent that many different permutations of family exist, and that the 'nuclear family' as envisioned above is no longer the lived norm, especially in South Africa, where '[l]ess than one fifth of households in South Africa take the form of a nuclear family (i.e. "childed couple")' K Hall & Z Mokomane 'The Shape of Children's Families and Households: A Demographic Overview' (2018) *South African Child Gauge* 32, 34.

[147] Discussion of intersectionality and how gender intersects with sex at part II above.

[148] '[T]he conflation matters to legal culture because it causes the law to fail the society it serves by causing legal culture to violate the fundamental (self-professed) principles and aspirations that law is formally charged with upholding.' Valdes (note 143 above) at 27.

[149] Chang & Wildman (note 15 above) at 72.

[150] Ibid.

risk of harassment, poverty and incarceration.[151] In light of this, it has been asserted that the focus should be on achieving substantive equality,[152] addressing systemic injustices and making an effort to create a more inclusive legal understanding of sex and gender.

According to Valdes, 'legal culture recycles the conflation and, as in society as large, conflationary pressures leave an unsatisfactory legacy in the law because they inflict harm on multiple levels.'[153] The conflation 'in legal culture serves to license and exacerbate traditionalist and invidious sex/gender bigotries that create cultural acrimony and polarize society' and '[t]hough the law did not invent the conflation of sex, gender and sexual orientation, legal culture certainly gives it effect and thereby helps to legitimize it.'[154] Valdes argues that there are escalating levels of harm caused by this conflation. The first level is focused on the individual, considering the harm caused to people in various cultural and doctrinal settings by compounding sex and gender. The next level of harm is seen amongst the lawmakers and the courts, and Valdes proposes that conflation at this level undermines the law substantively, pragmatically and systemically as it allows courts to substitute informed and reasoned legal analysis with stereotypical conflationary suppositions. The last level of harm is a broader societal harm, as the conflation of sex and gender at the individual level and at the legal level are compounded to increase societal division and dysfunction.[155] Viewing the conflation in this layered way is helpful, as it allows for an understanding of the various facets of life, both individual and societal, that are affected by adherence to the binary and a lack of appreciation of the nuanced relationship between sex and gender.

Our current legal culture is based on a deductive model that deduces gender from an individual's apparent biological sex.[156] This results in an external imposition of one's sexual gender profile informed by cultural abstractions as opposed to a recognition of the individual's self-identified gender. This imposition ties gender to sex, making them inextricable from each other. Such an approach stands in contrast to an inductive model, which induces one's gender from the personality traits manifested by the person over time regardless of their genitalia. The deductive model conceives of gender as an intransitive trait, which problematises gender atypicality and fosters fear and retaliation against those who disjoin sex and gender, separating their gender identity from biological constraints.[157] Valdes acknowledges the limitations of the deductive model, arguing that '[t]he law cannot fulfill its mandate to fight sex and gender discrimination if it continues to embrace and recycle the conflation culturally while denying it legally.'[158]

[151] Yacoob argues that in South Africa and on the rest of the continent '[v]iolence against transgender and intersex persons is underpinned by societal stigma, sex-binarism, transphobia and intersexphobia. It is driven by confusion and conflation of preconceived notions of an individual's gender identity, gender expression and/or physical sex (bodily) characteristics.' Z Yacoob 'Sex and Gender Transformation in Africa' (2016) 112 *South African Journal of Science* 1, available at https://doi.org/10.17159/sajs.2016/a0188.

[152] 'Gender-expansive individuals face harassment in multiple facets of daily life if officials determine that discrepancies exist between their gender appearance and official documents. Therefore, significant value should also be placed on substantive equality, "equality in effects and results, not just equality in form", as Mari Matsuda has urged in her important critique of equality doctrine.' Chang & Wildman (note 15 above) at 72.

[153] Valdes (note 143 above) at 275.

[154] Ibid at 275, 206.

[155] Ibid at 276.

[156] Ibid at 280.

[157] Ibid at 281.

[158] Ibid at 279.

VI RECOMMENDATIONS

We thus argue for a shift from the deductive model of gender and sex, because although the grounds of sex and gender are often intersectional, it must be understood that they are distinct from each other. Even if it is not always possible to delineate them clearly, gender and sex must be approached in a nuanced way, taking into account the inherent fluidity of these concepts and avoiding the temptation to cast them as immutable. A failure to engage with these concepts separately has the impact of excluding gender non-conforming South Africans from the legal framework.[159]

The function of transformative constitutionalism is to ensure the dignity, equality and freedom of all individuals.[160] In explaining their understanding of the role of equality under a legal system based on transformative constitutionalism, Albertyn and Fredman argue that 'substantive equality should be understood in terms of a four dimensional framework, which aims at addressing stigma, stereotyping, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change.'[161] Albertyn provides further guidance on how to achieve substantive equality:

> This entails a close look at the origin and the history of a rule or a practice, its importance and purpose, and the extent to which it is supported or contested within the group. It also requires a consideration of the effects that outlawing or permitting the practice would have on different members of the group. Attention to context always insists that we take account of the actual reality of people's lives, their place within the community and the power, resources and interests implicated by the dispute.[162]

Engaging with our preconceptions of the relationship between sex and gender requires us to recognise the difference between them and appreciate how these concepts are presented in the Constitution and the Equality Act, acknowledging the limitations in such presentation and leaving room for a more expansive understanding of sex and gender. Doing so can lead us towards a better engagement with gender identity and sexual identity, and provide meaningful guidance around the language framing of future legislation and case law. It is imperative that '[t]he constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.'[163] To achieve this, the courts must aim to understand the distinction between the listed grounds of sex and gender, but also adopt an expansive interpretation of

[159] 'Legal culture, in short, must recognize why and how the conflation matters to the law, and must appreciate that cutting through the conflation will require an ongoing critical enterprise that matches the conflation's nuanced yet enormous impact on the law.' Valdes (note 143 above) at 205.

[160] It should be noted that achieving the aims of transformative constitutionalism is challenging, because '[i]n South Africa, as well as in the rest of Africa and much of the world, there is a disjuncture or disconnect between what constitutions or other legal instruments provide and what the courts say on the one hand, and the status of the hearts and minds of people on the other. It has been suggested that our Constitution is out of step with the hearts and minds of our people.' Yacoob (note 151 above).

[161] C Albertyn & S Fredman 'Equality Beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' (2015) 15 *Acta Juridica* 430, 431.

[162] C Albertyn '"The Stubborn Persistence of Patriarchy"? Gender Equality and Cultural Diversity in South Africa' (2009) 2 *Constitutional Court Review* 165, 185.

[163] *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) at para 162.

both grounds which does not simply enforce the binary model without questioning its impact on gender inequality.

The prevalence of binary terminology and the effect that it has of entrenching outdated gender norms[164] mean that we should reconsider our approach to gendered language as a whole, and specifically our approach to gendered language in the law. As discussed above, one of the approaches often adopted by language and law scholars when trying to be more inclusive of gender and sex differences is the feminisation of terms.[165] This approach is aimed at being more inclusionary by acknowledging women in particular roles.[166] However, this practice has been criticised. As highlighted by Revell and Vapnek,[167] the problem with the feminisation of terminology is that gender is then still constructed as a binary, and the end result is to marginalise all those who fall outside of that binary. Another approach that has found much popularity is that of gender neutralisation, where gender-specific terms are replaced by gender-neutral terms,[168] removing any indication of gender. An example of this is replacing the term 'man' or 'woman' with a more neutral term, like using the term 'police officer' instead of policeman or policewoman. This seems to be the more practical of the two options, removing any reference to gender and thus avoiding the assignment of gendered traits to individuals who identify outside of the traditional gender binary. Although this seems to be a good option to use in the future development of the law, it has also been criticised. Mclean is of the opinion that 'it is a fallacy to think that gender-neutral drafting is an effective cure for the disease of patriarchy',[169] stating that gender neutrality and gender awareness should not be conflated. Mclean argues that gender neutrality often amounts to a superficial change, whereas true gender awareness is an ongoing process, incorporating language which actively challenges accepted gender stereotypes.[170]

In South African law, the approach of the Constitutional Court in *Rahube v Rahube & Others* seems to acknowledge this need for gender awareness. In the judgment, the Court engages the nuance in the difference between the grounds when presenting their definitions of sex and gender.[171] The judgment appropriately deals with the grounds as separate and serves as a good example of how our courts should be defining and engaging with the separate yet intersectional nature of the grounds of sex and gender in future cases.[172] Goliath AJ employs the following definitions:

> For the purposes of this judgment references to the word 'sex' refer to the biological characteristics that define humans as female, male or intersex. This is usually assigned at birth and differentiation between people is made on the basis of external genitalia, chromosomes, hormones and the

[164] '[F]or many in the LGBTQIA+ community, "he/she" binary terminology is just as incorrect and offensive as the "universal he" is to most women.' Revell & Vapnek (note 80 above) at 126.

[165] This is referred to in part III above, where mention is made of the terms 'testator'/'testatrix' and 'executor'/'executrix'.

[166] '[F]eminization is based on the explicit inclusion of women. Thus, masculine generics are replaced by feminine-masculine word pairs.' S Sczesny, M Formanowicz & F Moser 'Can Gender-Fair Language Reduce Gender Stereotyping and Discrimination?' (2016) 7 *Frontiers in Psychology* 1, 3.

[167] Revell & Vapnek (note 80 above) at 126.

[168] Sczesny, Formanowicz & Moser (note 166 above) at 3.

[169] V Mclean 'Is Gender-Neutral Drafting an Effective Tool Against Gender Inequality Within the Legal System?' (2013) 39(3) *Commonwealth Law Bulletin* 443, 444.

[170] Ibid.

[171] [2018] ZACC 42, 2019 (1) BCLR 125 (CC), 2019 (2) SA 54 (CC).

[172] Ibid at para 19.

> reproductive system. References to 'gender' are references to an identity that can change over time, and that differs from one culture or society to another. Gender is both a social construct and a personal identity. In social terms gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies regardless of their sex.[173]

In addition to courts using the definitions in *Rahube v Rahube & Others* and following the approach taken in that instance, certain practical language adjustments could be implemented within the private law context to be more inclusive of gender expansive individuals. In the context of the law of succession, Sneddon argues that '[t]he most personal of legal documents, the Will's language must reflect modern standards and practices to speak for the testators of today in a manner that is deliberately gender-inclusive and deliberately gender specific as required by the particular circumstance' and that '[f]or Wills drafted today to be implemented in the future, acknowledgment, identification, and understanding of the residual language of patrimony is necessary. Language use constructs reality.'[174] This language shift should be done with the aim to reform our legal discourse, to remove its entrenched masculine character and to reflect a diverse reality,[175] especially in the future development of private law.

In the area of contract law, Van Eck provides practical considerations for achieving gender neutrality in standard contracts.[176] These considerations include drafters considering amending gendered language to gender inclusive language, or taking steps to determine the person's gender preference before drafting or amending the contract. Drafters could also take care to include interpretation clauses that use language that is not limited to the binary, or make an effort to use generic or neutral language as an alternative.[177] Van Eck also recommends that it would be good practice to avoid citing the individual's gender when identifying the contracting parties, because it has no direct impact on the validity of the contract. Another suggestion is for parties to use second person personal pronouns in their drafting to achieve gender neutrality in contracts.[178] Van Eck argues that 'a better way of drafting a contract is to recognise the dignity of all members of society and approach the drafting of a contract with gender-neutral language.'[179] Similar to Sneddon's suggestions for removing the gendered binary in the drafting of wills, the aim of gender neutral contract drafting is to create a legal space that ensures the safety and dignity of individuals in contractual engagements regardless of their individual gender identification.[180]

An important tool for the development of a more inclusive understanding of sex and gender can also be found in the common law, where public policy is a measure used to develop the law to be more reflective of societal norms. Specifically, in the law of succession, it has already been recognised that all bequests that are deemed contrary to public policy are unenforceable.[181] As

[173] Ibid at fn 22.
[174] Sneddon (note 82 above) at 1538.
[175] BL Bernier 'Assimilation or Liberation: Post-Modern American Women – Speech and Property Law' (2004) 9 *Roger Williams University Law Review* 546, 562.
[176] Van Eck (note 80 above) at 120–121.
[177] Ibid.
[178] Ibid.
[179] Ibid at 122.
[180] Ibid.
[181] C Rautenbach & J Jamneck (eds) *The Law of Succession in South Africa* (3rd Ed, 2017) at 127–132.

confirmed by the High Court, '[p]ublic policy – like its synonyms, boni mores, public interest and the general sense of justice of the community – is not a static concept, but changes over time as social conditions evolve and basic freedoms develop.'[182] Other societal changes that have taken place over time are the recognition of same-sex unions,[183] the recognition of polygynous marriages,[184] and the changing attitudes taken towards embracing a wider concept of gender, sex and sexuality.[185] Although the first two changes have been acknowledged in legislation and thus give expression to modern public policy, there is still room for the development of public policy in the area of gender,[186] as to date it has been conflated with considerations of sex. This evolution of social conditions and basic freedoms opens up the possibility for a reconceptualisation of how we approach discrimination on grounds of gender or sex, given the growing understanding of what these grounds truly comprise. A concern is that it is not easy to change people's cultural and social attitudes,[187] especially in a society like South Africa, where there is often hostility to the very idea of anything operating outside our established heteronormative approach to sex and gender. Former Justice Yacoob, in a comment regarding sex and gender transformation, finds that 'it would seem that we have not gone very far' in terms of addressing sexism and gender discrimination and that '[l]awyers and the law cannot achieve this change alone. All of us need to contribute to a social revolution to achieve this result.'[188] Any attempt to address the conflation and its discriminatory impact in both our legal system and society 'cannot be effective until both oppressor and oppressed understand and discard the stereotypes that underpin it'.[189]

The judgment in *King v De Jager* thus represents an important step in the development of South African jurisprudence as it relates to gender discrimination, bringing the right to gender equality firmly into the sphere of private law. This judgment emphasises that all sectors of South African law are subject to constitutional values and norms, and highlights the deeply entrenched patriarchal values that still inform much of our private interactions, especially in the areas of property law and the law of succession. It is encouraging that the Constitutional Court in *King* chose to develop the law in a way aimed at achieving substantive equality, and it is hoped that courts will continue to develop the law in this manner. However, there is still much to be done in terms of our understanding of sex and gender, and the Court in *King*

[182] *Minister of Education & Another v Syfrets Trust Ltd NO & Another* (2544/04) [2006] ZAWCHC 65; 2006 (4) SA 205 (C); [2006] 3 All SA 373 (C); 2006 (10) BCLR 1214 at para 24.

[183] Civil Union Act 17 of 2006.

[184] Recognition of Customary Marriages Act 120 of 1998.

[185] MS Pepper 'Attitudes to Gender and Sexual Diversity: Changing Global Trends' 2019 *The Conversation* available at https://theconversation.com/attitudes-to-gender-and-sexual-diversity-changing-global-trends-117684.

[186] 'Traditional norms relating to sexual orientation, family life and expression of identity are being challenged.' Sloth-Nielsen (note 41 above) at 91.

[187] 'Legal protection, however, does not address the harmful effects of prejudice and stigmatisation prevalent in South African society, and the realisation of equal rights in everyday life has been more challenging … In practice, the reality ranges from everyday experiences of discrimination to human rights violations, hate crimes against sexually and gender non-conforming minorities, and high levels of gender-based violence generally.' Victor et al (note 32 above) at 293.

[188] Yacoob (note 151 above). Seger and White, in this regard, argue that 'gender relations are power relations and in order for balance of power to be changed, gender stereotypes must be examined and questioned by both women and men. The "reconstruction" of gender roles should not be postponed, but must be recognised as being just as important as the elimination of race and class discrimination.' Seger & White (note 142 above) at 111.

[189] Seger & White (note 142 above) at 97.

has not done much to consider the conflation of these terms and the consequences thereof. Despite this, the judgment of *King v De Jager* provides a useful snapshot of the current judicial understandings of sex and gender, highlighting the limitations of such understandings and leaving room for deeper future engagement.