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## What's in a name? Dismantling patriarchy, advancing equality and reclaiming identity in *Jordaan v Minister of Home Affairs*

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**Summary:** *This article interrogates the South African Constitutional Court's landmark judgment invalidating provisions of the Births and Deaths Act that entrenched gendered surname practices. Historically rooted in Roman-Dutch law, English common law and colonial administration, these provisions reflected an ideological disposition that women could change surnames upon marriage, divorce or widowhood, while men could not. The result was the privileging of the husband's surname as the natural marker of family identity. The Court was called upon to determine whether such laws infringed equality and dignity through a constitutional challenge by two couples. In confirming the High Court's declaration of invalidity, the Constitutional Court held that the provisions unfairly discriminated on the basis of gender, perpetuated*

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*patriarchal hierarchies and undermined self-identity. Importantly, the Court acknowledged that while patriarchy privileged men's surnames, it simultaneously constrained men's autonomy by denying them equivalent choices. The judgment is situated within South Africa's broader substantive equality jurisprudence. It emphasises dignity as the constitutional thread linking naming, self-expression and familial belonging. By engaging comparative and international law, the Court also aligned South Africa with a global movement against patriarchal naming conventions. Ultimately, the case demonstrates that names are not trivial: They carry the weight of history, culture and power. This article, thus, through analysis and conclusion, presents Jordaan as a transformative step in dismantling patriarchy, affirming equality and reclaiming identity in democratic South Africa.*

**Key words:** *Jordaan v Minister of Home Affairs; surname; patriarchy; equality; identity*

## 1 Introduction

What's in a name? That which we call a rose by any other word would smell as sweet. So Romeo would, were he not Romeo called, retain the dear perfection which he owes without title.<sup>1</sup>

'What's in a name?' Shakespeare's Juliet (in the above quotation) posed the question to suggest that names are mere conventions, incapable of altering the essence of identity. Yet, as the South African Constitutional Court makes clear in the decision in *Jordaan v Minister of Home Affairs & Another*,<sup>2</sup> names are anything but trivial. They are sites of power, conduits of identity and symbols of belonging. Mensah maintains that in the African cultural context and beyond, personal names are not just labels of identification of their bearers; they constitute a body of knowledge that resonates with name givers' social enterprise and cultural experiences.<sup>3</sup>

A surname, in particular, is not simply a marker for bureaucratic convenience but, arguably, a deeply embedded signifier of personhood, kinship and social recognition. Handler and Jacoby argue that one of the functions of surnames is to identify family or clan membership, asserting the child's association with the family

1 See, generally, Juliet in W Shakespeare *The tragedy of Romeo and Juliet* (1594) act II, scene II.

2 2025 ZACC 19 (*Jordaan*).

3 EO Mensah 'Husband is a priority: Gender roles, patriarchy and the naming of female children in Nigeria' (2023) 40 *Gender Issues* 45.

and parentage.<sup>4</sup> Rosensaft, on the other hand, frames the symbolism of names in the following terms: Names serve as a symbol for individuality, lineage, family beliefs, religion and community, all of which are fundamental to identity.<sup>5</sup> To deny or constrain ability to choose or retain a surname is to regulate one of the most intimate expressions of selfhood. The constitutional invalidation of sections 26(1)(a) to (c) of the Births and Deaths Registration Act (Act),<sup>6</sup> therefore, is a profoundly transformative moment in South Africa's equality jurisprudence.

At its core, *Jordaan* confronts a long-standing patriarchal assumption embedded in law,<sup>7</sup> namely, that upon marriage a woman may assume her husband's surname, while the reverse possibility is either discouraged or entirely unrecognised. This asymmetry, rooted in colonial and Roman-Dutch legal traditions, arguably is emblematic of an invisible but menacing framework of patriarchal assumptions; the subtle, taken-for-granted legal norms that naturalise male dominance and subordinate women in both symbolic and material terms. With the advent of colonialism in South Africa,<sup>8</sup> the convention became for a husband and a wife to take one surname, which Heaphy and others maintain is the husband's surname.<sup>9</sup> The impugned provisions not only reflected this patriarchal order but also enshrined it in statutory form, granting women the option to choose their surnames after marriage while denying men the same choice, thereby positioning the husband's surname as the natural and superior marker of family identity.

Understanding the constitutional significance of *Jordaan* requires situating it within the broader trajectory of South African equality jurisprudence. Over the past three decades, the Constitutional Court

4 JS Handler & JA Jacoby 'Slave names and naming in Barbados, 1650-1830' (1996) 53 *William and Mary Quarterly* 685; see also J Finch 'Naming names: Kinship, individuality and personal names' (2008) 42 *Sociology* 713.

5 M Rosensaft 'The right of men to change their names upon marriages' (2002) 5 *University of Pennsylvania Journal of Constitutional Law* 190.

6 Act 51 of 1992.

7 Verma observes that '[p]atriarchy is a pervasive social system characterized by dominance of men over women and other marginalized genders. It manifests in various domains, including family structures, workplace hierarchies, cultural norms and legal frameworks.' See S Verma 'Understanding patriarchy: Legal and societal implications' (2024) 25 *REDVET – Revista Electrónica de Veterinaria* 1359; Roberts, quoting Akatsa-Bukati, states that '[p]atriarchy refers to the organization of social and institutional structures so that men are vested with authority, power and control over women and children in most, if not all, aspects of life'. See A Roberts 'South Africa: A patchwork quilt of patriarchy' (2010) 3 *Skills at Work, Theory and Practice Journal* 63.

8 MA Machaba 'Naming identity and the African renaissance in a South African context' LLM dissertation, University of Kwa-Zulu Natal, 2004 ch 3.

9 BC Heaphy and others 'Couple worlds' in same sex marriages: New generations, new relationships (2013) 147.

has progressively developed a substantive conception of equality aimed at dismantling structures of systemic disadvantage. The Court's decision in *Harksen v Lane NO* established the analytical framework for assessing unfair discrimination,<sup>10</sup> emphasising that differentiation must be evaluated not only formally but also in terms of its social impact and its relationship to patterns of historical disadvantage. This framework is directly relevant to the present discussion because the patriarchal structure of surname regulation operates precisely through such seemingly neutral differentiation, masking deeper forms of gender hierarchy.

Similarly, in *President of the Republic of South Africa v Hugo*,<sup>11</sup> the Court acknowledged that discrimination may arise from laws or practices that reinforce traditional gender roles and stereotypes. The recognition that legal rules can perpetuate gendered assumptions about family and social roles is central to understanding the problem addressed in *Jordaan*. The statutory framework governing surnames implicitly assumed that women's identities are relational and adaptable to marital status, while men's identities remain fixed and autonomous. The reasoning in *Hugo*, therefore, provides an important doctrinal foundation for interrogating the gendered assumptions embedded in surname law.

The Court's jurisprudence in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>12</sup> further expanded the reach of constitutional equality by affirming that the Constitution protects the ability of individuals to define and express their identities free from exclusionary legal norms. In that case, the Court recognised that laws regulating intimate aspects of identity and personal relationships can entrench stigma and marginalisation. Although the context differed, the underlying principle – that constitutional equality requires the dismantling of laws that symbolically and materially subordinate certain identities – is directly relevant to the regulation of surnames. Naming practices, such as sexuality and family recognition, lie at the intersection of personal autonomy, social identity and legal recognition.

Alongside equality, the right to dignity forms a second constitutional foundation for the analysis undertaken in this article. The Constitutional Court famously described dignity in *S v*

10 [1997] ZACC 12; 1997 BCLR 1489 (CC); 1998 (1) SA 300 (CC).

11 *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

12 [1998] ZACC 15; 1991 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition 1*); [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) (*National Coalition 2*).

*Makwanyane*<sup>13</sup> as the ‘touchstone of the new constitutional order’. Naming practices implicate dignity because they relate to the ways in which individuals define themselves and are recognised within familial and social structures. To compel or restrict a person’s choice of surname based on gendered assumptions undermines this capacity for self-definition, thus striking at the core of human dignity.

A third dimension shaping the significance of *Jordaan* is the broader project of transformative constitutionalism. South Africa’s Constitution is often described as a normative bridge from a past characterised by systemic inequality to a future founded on substantive justice. Within this framework, constitutional adjudication plays a critical role in interrogating legal rules that appear mundane but reproduce historical hierarchies. The regulation of surnames is one such domain. While seemingly administrative, surname law reflects deeper historical assumptions about gender, family and authority. The historical origins of these assumptions further underscore the importance of constitutional intervention.

In many African societies, women did not traditionally assume their husbands’ surnames upon marriage; instead, children often bore their mother’s clan name.<sup>14</sup> This suggests that the patriarchal surname convention was not indigenous but imposed through colonial structures, missionary influence and Roman-Dutch common law. Instead, lineage and identity were often structured through more complex kinship systems, including matrilineal traditions in certain communities. Roman law’s marriage *cum manu* placed wives under the *manus* (hand) of their husbands. This subsumed women’s legal identities into that of the male household head. English common law’s doctrine of coverture reinforced the same philosophy,<sup>15</sup> ‘rendering wives almost entirely legally invisible’. As the Court itself stated, the question of surnames may appear symbolic but symbolism has material consequences: It reinforces hierarchies,<sup>16</sup> legitimates unequal power relations and perpetuates historical disadvantage.<sup>17</sup> The patriarchal surname convention, therefore, was not an indigenous practice but rather a product of colonial legal structures, missionary

13 [1995] ZACC 3; 1995 (2) SA 391 (CC); 1995 (6) BCLR 665 (CC).

14 See, generally, C Saidi ‘Women in precolonial Africa’ *Oxford research encyclopedia of African history* (2020), 27 October 2020 <https://academic.oup.com/edited-volume/61663/chapter-abstract/553467912?redirectedFrom=fulltext#553467912> (accessed 18 March 2026); Theron J in *Jordaan* (n 2) para 23.

15 Under the medieval legal doctrine of coverture, a wife, her children and her property became the husband’s possession. See, generally, S Duncan and others ‘Understanding tradition: Marital name change in Britain and Norway’ (2020) 25 *Sociological Research Online* 439.

16 *Jordaan* (n 2) para 50.

17 *Jordaan* (n 2) para 53.

influence and Roman-Dutch common law. Roman law's institution of marriage *cum manu* placed wives under the legal authority of their husbands, effectively subsuming their legal identities into that of the male household head. English common law reinforced a similar philosophy through the doctrine of coverture, which rendered married women legally invisible by merging their identities with those of their husbands. These traditions shaped the development of South African statutory and common law, embedding patriarchal assumptions about family identity within the legal system.

The Births and Deaths Registration Act represents a direct descendant of these historical traditions. By allowing women to choose their surnames while withholding this option from men, the Act both reflected and reinforced the assumption that the husband's surname should serve as the default family name. This gendered construction was not neutral; it reproduced the symbolic hierarchy of male authority within the family.

The constitutional challenge brought by the applicants in *Jordaan*, therefore, raised issues that extended far beyond administrative regulation. Two married couples sought the freedom to structure their family identities outside the patriarchal template prescribed by law. Their claims implicated broader questions about gender equality, personal autonomy and the power of law to shape social norms. The symbolism of surnames carries material consequences: It reinforces hierarchies, legitimises unequal power relations and perpetuates patterns of historical disadvantage.

The significance of the decision also resonates within the broader landscape of international human rights law. Instruments such as the International Covenant on Civil and Political Rights (ICCPR) recognise the equal rights of spouses within marriage, including the freedom to retain or choose a family name.<sup>18</sup> The United Nations (UN) Human Rights Committee in *Müller v Namibia*<sup>19</sup> held that laws restricting men from adopting their wives' surnames constituted discrimination under article 26 of the Covenant. Likewise, the European Court of Human Rights in *Burghartz v Switzerland*<sup>20</sup> found that limitations on surname choices violated the prohibition on sex discrimination

18 International Covenant on Civil and Political Rights (1966) (ICCPR) (ratified by South Africa on 10 December 1998). See, generally, arts 3, 17, 23(4) & 26 of ICCPR and UNHR Committee ICCPR General Comment 16 'Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988), HRI/GEN/1/Rev 9 (Vol I).

19 Communication 919/2000, UNHR Committee (2002), UN Doc A/57/40, vol II 243, UN Doc CCPR/ C/74/D/919/2000 (2002).

20 (1992) ECHR 16213.

under the European Convention on Human Rights. Namibia's Civil Registration and Identification Act 2024,<sup>21</sup> which allows spouses of any gender to assume each other's surnames, exemplifies the regional trend towards dismantling patriarchal naming conventions. These developments reflect a growing international recognition that naming practices are closely tied to equality and identity.

Augustine-Adams argues that names may also communicate certain values, including those of equality.<sup>22</sup> Against this comparative and constitutional backdrop, the decision in *Jordaan* represents a significant step in the ongoing dismantling of patriarchal legal structures in South Africa. By invalidating the provisions that privileged male identity and subordinated women's surnames, the Court affirmed that equality and dignity extend into the most intimate domains of family life.

This case discussion proceeds by first outlining the facts, issues and decisions of the High Court and the Constitutional Court. It then undertakes a critical analysis of the judgment, examining how the Court applied the principles of substantive equality, dignity and transformative constitutionalism to dismantle patriarchal assumptions embedded in surname regulation. The article further explores the historical roots of surname law, the comparative and international dimensions of naming rights and the broader implications of the judgment for gender equality. Finally, it considers whether the Court's reasoning and remedial approach go far enough in reimagining the relationship between law, identity and equality.

Ultimately, the article argues that *Jordaan* constitutes a landmark in the constitutional dismantling of patriarchal norms. By recognising that the regulation of surnames reflects deeper structures of gender hierarchy, the Court reaffirmed the transformative promise of the Constitution: to reconstruct South African law and society in the image of substantive equality, non-sexism and human dignity. Names may appear trivial, but as this case demonstrates, they carry the weight of history, power and constitutional meaning. In a constitutional democracy committed to equality and dignity, there indeed is everything in a name.

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21 Act 13 of 2024.

22 K Augustine-Adams 'The beginning of wisdom is to call things by their right names' (1997) 75 *California Review of Law and Women's Studies* 10, citing KA Foss & BE Edson 'What's in a name? Accounts of married women's name choices' (1989) 53 *Western Journal of Speech Communication* 364.

## 2 The case

*Jordaan* was an application before the Constitutional Court seeking confirmation of a declaration of constitutional invalidity.<sup>23</sup> At issue were the provisions of the Act, namely, sections 26(1)(a) to (c), together with Regulation 19(2)(a) of the accompanying Regulations, which prescribed the circumstances under which South Africans could assume another surname. The legislative framework was steeped in gendered assumptions: It explicitly allowed women to assume or resume surnames upon marriage, divorce or widowhood but it offered no such possibility for men. The High Court, sitting in the Free State Division, had already found these provisions unconstitutional for violating the right to equality and dignity and accordingly referred its order to the Constitutional Court in terms of section 167(5) of the Constitution, which requires confirmation by the Constitutional Court before such orders take effect.<sup>24</sup>

The case thus represents the constitutional system at work: a lower court identifying unconstitutional provisions, a referral mechanism ensuring consistency and legitimacy and the Constitutional Court exercising its supervisory jurisdiction under section 167(5) of the Constitution. It is also a powerful example of how laws inherited from earlier eras – often overlooked as mundane administrative provisions – can perpetuate patriarchal structures long after the democratic transition.

### 2.1 Facts and issues raised

The dispute arose from the lived experiences of two couples. The first and second applicants, Jana Jordaan and Henry van der Merwe,<sup>25</sup> were married in Bloemfontein in 2021.<sup>26</sup> Before their marriage, they had agreed that Van der Merwe would assume Jordaan's surname in order to preserve her family name and honour the memory of her deceased parents.<sup>27</sup> When they attempted this change, the Department of Home Affairs refused, citing section 26(1) of the Act, which permitted only women to assume or resume surnames after

<sup>23</sup> *Jordaan* (n 2) paras 1-2.

<sup>24</sup> Sec 167(5) of the Constitution reads as follows: 'The Constitutional Court makes the final decision on whether an Act of Parliament, a provisional Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or court of similar status, before that order has any force.'

<sup>25</sup> *Jordaan* (n 2) para 9.

<sup>26</sup> *Jordaan* (n 2) para 10.

<sup>27</sup> As above.

marriage.<sup>28</sup> Their request for their child to be registered with the surname 'Jordaan' was also refused on the same basis.

The third and fourth applicants, Jess Donnelly-Bornman and Andreas Bornman, wished to adopt as double-barrelled surname – 'Donnelly-Bornman' – as their family name.<sup>29</sup> They also were informed by the Department that such an arrangement was unavailable to men, who were legally precluded from altering or combining surnames upon marriage.<sup>30</sup> In both instances, the Department's refusal relied entirely upon the gendered language of the statute and regulations, which positioned the husband's surname as the default marker of family identity.

The respondents, the Minister of Home Affairs and the Minister of Justice and Constitutional Development, chose not to oppose the application.<sup>31</sup> Instead, they acknowledged that the impugned provisions were relics of colonial and patriarchal traditions that no longer accorded with constitutional values.<sup>32</sup> The High Court admitted the Free State Society of Advocates as *amicus curiae* to assist the Court.<sup>33</sup> In both the High Court and the Constitutional Court, the substantive question was the constitutionality or unconstitutionality of impugned provisions and what the appropriate remedy would be.

The case raised three interconnected questions.<sup>34</sup> The first was whether sections 26(1)(a) to (c) of the Act were unconstitutional because they differentiated between men and women, thereby violating the equality clause in section 9 and the right to dignity in section 10 of the Constitution. The second was whether Regulation 18(2)(a), which limited surname changes to women, suffered from the same constitutional effect. The third was remedial: if these provisions were invalid, how the defect should be addressed (what the appropriate remedy would be). These issues framed the deliberations of both the High Court and the Constitutional Court.

## 2.2 Decision of the High Court

In the Free State Division, the High Court held that sections 26(1) (a) to (c) and Regulation 18(2)(a) were unconstitutional as they

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28 As above.

29 *Jordaan* (n 2) para 11.

30 As above.

31 *Jordaan* (n 2) paras 13 & 19.

32 *Jordaan* (n 2) paras 19 & 52.

33 *Jordaan* (n 2) para 13.

34 See, generally, *Jordaan* (n 2) para 20.

discriminated unfairly on the basis of gender.<sup>35</sup> The Court reasoned that the legal asymmetry based on gender constituted unfair discrimination on a listed ground (gender) and undermined the constitutional guarantee of equality and dignity.

The High Court's order declared the provisions invalid but suspended the declaration for 24 months to allow Parliament an opportunity to amend the law. Importantly, the Court did not leave the applicants without relief in the interim. It crafted a temporary solution by reading gender-neutral language into the provisions, thereby permitting both men and women to assume or resume surnames after marriage. It further ordered the Department of Home Affairs to amend the surnames of the applicants in accordance with their wishes. In this way, the High Court struck a balance between constitutional compliance, immediate justice for the applicants and institutional deference to Parliament's role in legislating.

### 2.3 Decision of the Constitutional Court

On referral, the Constitutional Court unanimously confirmed the High Court's order.<sup>36</sup> Theron J, writing for the Court, held that sections 26(1)(a) to (c) of the Act differentiated irrationally on the basis of gender, served no legitimate governmental purpose and amounted to unfair discrimination in violation of sections 9(1) and 9(3) of the Constitution.<sup>37</sup> The Court emphasised that these provisions entrenched patriarchal gender norms by assuming that only women's surnames were malleable and relational, while men's surnames were fixed.<sup>38</sup> This reinforced the superiority of the husband's surname as the default family name, thereby violating both equality and dignity.

The Court drew extensively on historical analysis, tracing the origins of surname conventions to Roman-Dutch law,<sup>39</sup> English common law,<sup>40</sup> and colonial impositions that subordinated women through doctrines such as coverture and marital power.<sup>41</sup> It noted that African customary practices often differed significantly, with women retaining their birth names and children bearing their mother's clan names.<sup>42</sup> The imposition of colonial naming conventions thus represented not an indigenous practice but an imported patriarchal

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35 *Jordaan* (n 2) para 16.

36 *Jordaan* (n 2) para 85.

37 As above.

38 *Jordaan* (n 2) paras 43-44, 49-50 & 52.

39 *Jordaan* (n 2) paras 25-27 & 52.

40 *Jordaan* (n 2) para 28.

41 *Jordaan* (n 2) paras 28-29.

42 *Jordaan* (n 2) para 23.

norm.<sup>43</sup> In Britain, the practice of women changing their names upon marriage reflects a deeply patriarchal tradition.<sup>44</sup>

In its constitutional analysis, the Court applied the *Harksen* test,<sup>45</sup> confirming that the provisions differentiated on the basis of gender,<sup>46</sup> a listed ground, and that such differentiation was presumptively unfair under section 9(5) of the Constitution. No legitimate governmental purpose could justify this discrimination and the impact on dignity was profound. The Court stressed that names were central to personal identity and familial belonging, and denying individuals the ability to structure this aspect of their lives infringes both equality and dignity.<sup>47</sup>

The Court also situated its reasoning in comparative and international law. It referenced ICCPR, the UN Human Rights Committee's decision in *Müller v Namibia*,<sup>48</sup> the European Court of Human Rights' decision in *Burghartz v Switzerland*,<sup>49</sup> and reforms in Namibia and Zimbabwe, all of which supported the principle that spouses of any gender should have equal rights to assume and retain surnames.

On the question of remedy, the Court confirmed the High Court's suspension of invalidity for 24 months, granting Parliament the opportunity to amend the legislation.<sup>50</sup> In the interim, it read gender

43 *Jordaan* (n 2) para 24.

44 *Duncan and others* (n 15).

45 *Harksen* (n 10) 52. The test states: 'In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors have to be considered. This would include: (a) the position of the complainants in society, and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not; (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal such as, for example, furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair; (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.'

46 *Jordaan* (n 2) para 34.

47 *Jordaan* (n 2) para 51.

48 *Müller* (n 19).

49 *Burghartz* (n 20).

50 *Jordaan* (n 2) paras 16 & 85.

neutral language into the provisions, thereby allowing either spouse to assume or resume surnames.

### 3 Analysis

#### 3.1 Patriarchy and the law on names

Our analysis draws intellectual strength from the work of Fairclough, who argues that powerful ideologies are legitimised and reproduced through linguistic and cultural conventions that societies often take for granted.<sup>51</sup> Building on this insight, we contend that naming practices embedded in law are not merely neutral administrative rules, but are reflective of deeper patriarchal assumptions that have historically shaped legal institutions. Without persistent critical scrutiny, careful analysis and judicial commitment to transformative constitutionalism, these conventions risk remaining unquestioned. In this way, injustice-bearing norms may continue to reproduce themselves across generations, operating subtly yet persistently, much like a silent but enduring social pathology.

The provisions impugned in *Jordaan* represent one of the most enduring legal vestiges of patriarchy in South African law. By stipulating that only women may assume or resume surnames upon marriage, divorce or widowhood, the law reified a gendered logic in which men's surnames carried greater permanence, authority and legitimacy.<sup>52</sup> A husband's surname was constructed as the unmarked norm – stable, autonomous and authoritative – while a wife's surname was rendered secondary, mutable and relational. Another symbolic consequence is that women's identities are subsumed into their husbands' families after marriage.<sup>53</sup> In effect, women were legally positioned as persons whose identities were contingent upon their marital status, while men were afforded a static identity insulated from similar regulation.

This framework constitutes what might be described as an invisible architecture of patriarchy. Unlike overt discrimination,

<sup>51</sup> See, generally, N Fairclough *Language and power* (1989).

<sup>52</sup> This is generally premised on what Johnson and Scheuble refer to as 'highly gendered, with men having the assumed "right and obligation" to pass their birth surname on to their children'. See, eg, DR Johnson & LK Scheuble 'What should we call our kids? Choosing children's surnames when parents' last names differ' (2002) 39 *Social Science Journal* 420.

<sup>53</sup> E Bonthuys 'Deny thy father and refuse thy name: Namibian equality jurisprudence and married women's surnames' (2000) 117 *South African Law Journal* 469.

which is easily identifiable and susceptible to direct legal challenge, such structures are embedded in everyday practices and social expectations. They operate subtly to normalise male dominance by presenting historically contingent arrangements as natural or inevitable. The surname conventions entrenched in the Births and Deaths Registration Act exemplified this phenomenon. While the legislation appeared to provide women with a measure of flexibility regarding their surnames, this apparent benevolence masked a deeper hierarchy in which the husband's surname was implicitly constructed as the natural foundation of family identity.

Legal theorists have long recognised the symbolic relationship between marriage, authority and naming.<sup>54</sup> Writing in *The nomos of the earth*, Carl Schmitt observed that within traditional European legal orders, the institution of marriage historically functioned as a public act through which the unity of the family was symbolically expressed through the husband's name. As he explains:<sup>55</sup>

The man, who in this special way takes a wife, gives her his name; the woman takes the man's name, and their children are born with the man's name ... If the unity of *Nahme* and name were to be forgotten completely, we would lose any understanding of how we got our own names.

Schmitt's observation is descriptive of a legal-historical tradition rather than a normative defence of it. Yet, it illuminates the deep conceptual link that historically existed between patriarchal authority and naming practices. The husband's surname functioned not merely as a personal identifier but as a juridical marker of lineage, authority and familial unity. The constitutional challenge in *Jordaan*, therefore, confronts precisely this inherited legal imagination by rejecting the assumption that family identity must be organised around the automatic primacy of the male name.

Importantly, the discrimination identified in *Jordaan* did not arise uniformly across all marital frameworks in South African law. A revealing statutory contrast can be found in the Civil Union Act 17 of 2006. From its inception, the Act permitted spouses entering into a civil union to determine their preferred surnames upon solemnisation of the union. Either spouse could assume the surname

54 PR MacDougall 'The right of women to name their children' (1985) 3 *Law and Inequality: A Journal of Theory and Practice* 102-103; OM Stone 'The status of women in Great Britain' (1972) 20 *American Journal of Comparative Law* 592, 606; SR Bysiewicz & GJ Stillson MacDonnell 'Married women's surnames' (1973) 5 *Connecticut Law Review* 598, 600-601.

55 C Schmitt *The nomos of the earth in the international law of the ius publicum europeum* trans GL Ulmen (2006) 347-348.

of the other, retain their existing surname, or adopt a combined or double-barrelled surname. Significantly, this framework applied equally to both same-sex and opposite-sex couples who elected to marry under the Act. The administrative practice of the Department of Home Affairs accordingly reflected a gender-neutral understanding of surname choice within civil unions.

The absence of litigation analogous to *Jordaan* in relation to civil unions, therefore, exposes the historically contingent nature of the problem. The constitutional difficulty did not arise from the concept of marital surname choice itself, but from the gendered language embedded in the Births and Deaths Registration Act, which was drafted in a legal environment where 'marriage' was understood primarily with reference to the Marriage Act 25 of 1961 and its heteronormative and patriarchal assumptions. The legislation thus reproduced an older legal imagination in which the husband's surname was presumed to constitute the natural and legitimate identity of the family unit.

The Constitutional Court's intervention in *Jordaan* represents a significant moment of what may be described as juridical depatriarchalisation. By invalidating provisions that implicitly privileged the husband's surname, the Court exposed the extent to which law itself actively constructs and maintains patriarchal social structures. This recognition is particularly important because family law has historically been treated as a private sphere insulated from constitutional scrutiny. The judgment rejects that assumption, affirming that the constitutional commitment to equality and dignity must extend even into the intimate and symbolic domains of family life.

The symbolic dimension of this transformation should not be underestimated. Symbols matter in law, and naming is among the most powerful markers of identity and belonging. By dismantling patriarchal surname rules, the Court did more than amend a technical administrative framework; it disrupted centuries of social meaning that positioned women's identities as secondary within marriage. Naming thus is reclaimed as an act of autonomy, equality and dignity – one that the Constitution now protects against the inertia of patriarchal tradition.

### 3.2 Equality jurisprudence and the turn to substantive justice

The Aristotelian understanding of equality is to treat like as like and unlike differently.<sup>56</sup> Doctrinally, the Court's reasoning followed the well-established framework from *Harksen v Lane*. It first asked whether the provisions differentiated between categories of people. The answer was clear, as the law afforded women automatic rights to surname changes while denying men similar entitlements. Next, it asked whether this amounted to discrimination; again, the answer was self-evident, since the differentiation was on the listed ground of gender. Finally, the Court examined whether the discrimination was unfair, concluding that it was, because it entrenched patriarchal assumptions and undermined both equality and dignity. Formal equality would have been satisfied if both men and women were treated identically, irrespective of the social context. Substantive equality, by contrast, requires an inquiry into the actual impact of laws in their historical and social setting. It insists on recognising and redressing systemic disadvantage, rather than merely eliminating formal distinctions.

In *Jordaan* the Court engaged precisely in this contextual analysis. It recognised that the law's privileging of the husband's surname entrenched long-standing hierarchies between men and women. Women's identities were relegated to the background, while those of men were naturalised as central to familial belonging. This asymmetry inflicted a profound indignity upon women, perpetuating the historical pattern of subordinating female identity to male authority. By invalidating the provisions, the Court vindicated substantive equality, affirming that true equality requires dismantling not only material disadvantages but also symbolic hierarchies that shape social meaning.

The decision thus continues the trajectory established in cases such as *National Coalition I and II*, where the Court extended rights to same-sex couples, and *Sithole v Sithole*, where it invalidated marital property regimes that entrenched male dominance. In each case, the Court has demonstrated a willingness to interrogate laws not merely for their surface distinctions, but for their deeper social meanings. *Jordaan* is a vital addition to this jurisprudence, underscoring that substantive equality extends even into symbolic domains, such as the choice of a surname, because symbols are constitutive of social reality.

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<sup>56</sup> P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537.

### 3.3 Dignity as the constitutional thread

If equality provided the analytical structure of the Court's reasoning, dignity supplied its normative heart. Since *S v Makwanyane*, dignity has been described as the 'touchstone of the new constitutional order'. It embodies the recognition of each person's equal moral worth, autonomy and right to self-determination. In *Jordaan*, dignity was implicated in two central ways: the denial of agency in choosing a surname, and the symbolic subordination of one spouse's identity to that of the other.

Names are at the heart of our individual identity and surnames, in particular, signal social, civil and legal status.<sup>57</sup> The Court recognised that names are central to personal and social identity. They are the means through which individuals constitute themselves in relation to others, claim recognition within communities, and transmit legacies across generations. To deny an individual the right to choose a surname upon marriage is to deny them a profound dimension of self-expression. It is to tell them that their identity is not fully theirs to define but is subject to the dictates of patriarchal convention. This, the Court held, is an affront to dignity.

The injury was compounded by the symbolic message embedded in the law: that the husband's surname is primary, while that of the wife is secondary. Such a message communicates to women that their identities are less valued, less permanent, and less worthy of recognition. Dignity, as understood in South African constitutional jurisprudence, is not only about personal autonomy but also about social recognition. To be treated as inferior in this way is to be denied equal membership in the moral community.

This analysis resonates with earlier decisions such as *Dawood v Minister of Home Affairs*, where the Court held that laws restricting spousal immigration permits violated dignity because they undermined the ability of couples to build a family life together. Similarly, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court struck down the exclusion of same-sex partners from immigration benefits on the ground that such exclusion demeaned their dignity. *Jordaan* aligns with this line of jurisprudence, affirming that dignity is compromised whenever laws deny individuals the ability to define and be recognised in their most intimate relationships.

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57 J Pilcher 'Names, bodies and identities' (2016) 50 *Sociology* 764-779.

### 3.4 Patriarchy's double bind: Harm to women and men

An important dimension of the Court's reasoning lies in its recognition that the impugned naming regime did not only affect women.<sup>58</sup> Although the legal framework clearly privileged men by positioning their surnames as the default markers of family identity, it also constrained men in ways that are often overlooked. Under the statutory scheme, men could not assume their wives' surnames or adopt a double-barrelled surname that reflected a shared family identity. The law, therefore, imposed a rigid structure: The man's surname had to remain fixed, while the woman's identity was expected to shift. In this sense, patriarchy operated as a double bind. It elevated male identity symbolically but, at the same time, denied men the freedom to depart from the very norm that privileged them.

Seen in human terms, the law effectively dictated how families could define themselves. A couple wishing to construct a shared identity through a double-barrelled surname, or a man wishing to adopt his wife's surname as an expression of partnership or solidarity, simply had no legal space to do so. The legal system assumed a particular model of the family and enforced it through naming laws. Men were therefore confined to the role of the fixed bearer of the family name, regardless of their personal values or the nature of the partnership they wished to create within marriage.

The Court's acknowledgment of this constraint is significant because it reflects a more nuanced understanding of how patriarchal systems function. Patriarchy does not operate only by privileging men; it also regulates behaviour by prescribing rigid roles for both men and women. Men are expected to embody authority, continuity and lineage, while women are expected to assimilate into that lineage upon marriage. Naming practices become one of the ways in which this hierarchy is normalised and reproduced. By legally fixing the man's surname as the centre of family identity, the law reinforced the idea that family heritage flows through the male line, while at the same time denying individuals the freedom to organise their family identity differently.

Yet, the Court was careful not to suggest that the harm experienced by men and women was the same. The deeper injury lies with women. For women, the expectation that they should adopt their husband's surname is part of a much longer history in which women's identities were treated as secondary within the

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<sup>58</sup> *Jordaan* (n 2) para 45.

institution of marriage. Naming practices historically reflected and reinforced the idea that a woman's identity was absorbed into that of her husband. What appears on the surface as a simple administrative rule, therefore, carries a deeper symbolic meaning: It affirms the man as the centre of family identity and places the woman in a derivative position within that identity.

Men's harm, by contrast, arises from a restriction of choice rather than from a history of systemic subordination. While the law limited men's ability to adopt alternative naming arrangements, it nevertheless affirmed their surnames as the default and dominant marker of family identity. The structure of the law, therefore, continued to privilege male identity even while constraining men's autonomy in particular circumstances. Recognising this distinction is important for constitutional equality analysis. It prevents the analysis from slipping into a superficial symmetry that treats all restrictions as equivalent. Instead, it situates the harm within its broader social and historical context. Patriarchy constrains both women and men, but it does so unevenly. Women experience it as a system that has historically diminished their identity and status, while men experience it as a system that prescribes rigid expectations about masculinity and authority.

By acknowledging both dimensions of harm, the Court moves toward a more realistic understanding of gender inequality. Patriarchy persists not only because it privileges men, but also because it normalises particular roles and identities for everyone within the family. The constitutional commitment to equality, therefore, requires more than simply removing explicit discrimination against women. It also requires dismantling legal rules that compel individuals to conform to inherited patriarchal models of identity, marriage and family life.

### 3.5 History, colonialism, and the invention of tradition

One of the most powerful aspects of the judgment is its historical critique of surname conventions. By tracing the roots of these practices to Roman-Dutch law, English common law<sup>59</sup> and colonial administration, the Court exposed their contingent and patriarchal

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59 Erickson argues that '[t]he family name is meant to represent who can legitimately say they are part of the family unit: In England this has meant the woman taking on her husband's name and the children also having that name.' See AL Erickson 'The marital economy in comparative perspective' in M Agren & AL Erickson (eds) *The marital economy in Scandinavia and Britain 1400-1900* (2005) 11.

origins. Under Roman law, *manus* marriages transferred women from the authority of their fathers to that of their husbands, effectively erasing their independent legal identities. English common law's doctrine of coverture similarly subsumed a wife's legal existence into that of her husband. These doctrines were not only legal technicalities, but were ideological instruments for maintaining male dominance in the family.

Colonial administrators transplanted these practices into South Africa, codifying them in statutory and administrative frameworks that positioned the husband's surname as the family identity. What the Court revealed is that these conventions were not indigenous to African societies but were imposed through colonial law. Indeed, in many African communities, women retained their names after marriage, and children often bore their mother's clan names. The patriarchal surname conventions, therefore, were an 'invented tradition' – colonial impositions that displaced local practices in the service of patriarchal and colonial governance.

By unmasking this history, the Court strengthened its constitutional analysis. It demonstrated that the challenged provisions were not timeless or culturally authentic but were legacies of subordination incompatible with the values of a democratic South Africa. This historical analysis carries decolonial significance: It affirms that constitutional transformation requires not only the rejection of apartheid era laws, but also the repudiation of colonial norms that have long structured family life.

#### 4 Conclusion

At first glance, the dispute in *Jordaan v Minister of Home Affairs* may seem to concern something as ordinary as the administrative rules regulating surnames. Yet, as the Constitutional Court recognised, beneath the surface lay fundamental questions about equality, dignity, identity, and the endurance of patriarchy within South African law. By striking down statutory provisions that privileged the husband's surname as the natural and superior family name, the Court dismantled a legal convention that had for centuries normalised the subordination of women and constrained the autonomy of both spouses.

The significance of this judgment cannot be overstated. It extends the Court's substantive equality jurisprudence into a domain often overlooked in constitutional adjudication: the symbolic and intimate practices of family life. In doing so, it reaffirms that the Constitution's

transformative project is not limited to the public or economic spheres but must permeate every corner of social existence. The right to choose or retain a surname is not a trivial preference; it is a matter of personal dignity and familial autonomy, central to how individuals define themselves and are recognised by others.

In historical terms, the Court's repudiation of patriarchal surname conventions represents an explicit break with the colonial and Roman-Dutch traditions of coverture and marital power. These traditions cast women's identities as relational, contingent and subordinate, while enshrining men's identities as fixed and authoritative. By exposing and rejecting this history, the Court aligns South African law with indigenous practices that often afforded greater autonomy to women, and with international human rights norms that demand gender equality in all aspects of marital and family life.

In jurisprudential terms, *Jordaan* builds on and deepens the Court's commitment to substantive equality, echoing earlier decisions such as *Harksen*, *National Coalition I and II* and *Sithole*. It demonstrates the centrality of dignity as both a right and a constitutional value, affirming that recognition, autonomy and belonging are indispensable to human flourishing. The judgment also illustrates the Court's comparative and international orientation, situating South Africa within a global consensus that patriarchal naming laws are inconsistent with equality.

In remedial terms, the Court's approach balanced fidelity to separation of powers with the imperative of immediate justice. By suspending invalidity but simultaneously reading in gender-neutral language, the Court ensured systemic relief while respecting Parliament's role. This demonstrates the Court's characteristic pragmatism, although it also raises questions about whether more immediate and radical relief might have been appropriate.

The case also leaves important questions for the future. Should the state's regulatory role in naming be reimagined altogether, moving towards a more expansive recognition of individual autonomy?<sup>60</sup> How will Parliament respond in amending the legislation, and will it seize the opportunity to craft a framework that is not only gender-neutral but also sensitive to the plural legal traditions of South Africa? What implications might *Jordaan* have for other areas where patriarchal assumptions persist, such as marital property regimes,

<sup>60</sup> Surnames give an individual a personal identity and self-awareness. See, generally, *Roe v Conn* 417 F Supp 769, 782 (MD Ala 1976).

customary law and reproductive rights? These are questions that extend beyond the immediate dispute, but which flow naturally from the principles the Court has articulated.

Ultimately, the answer to Juliet's famous question – 'What's in a name?' – is that in a constitutional democracy, a name carries everything. It carries the weight of history, the imprint of power, the recognition of dignity, and the promise of equality. In *Jordaan*, the Constitutional Court decisively affirmed that names cannot be left to patriarchal traditions or administrative inertia; they must be governed by the Constitution's vision of non-sexism, dignity and substantive equality. The judgment, therefore, is not only about the right of individuals to choose their surnames, but about the broader project of dismantling patriarchy and reclaiming identity in democratic South Africa.