Afro-feminism and the Coloniality of Gender in Constitutional and Legislative Drafting: South Africa as a Case Study

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Abstract

Before essential feminist contributions to legal drafting were made, legislative drafters adopted the use of the masculine rule, which established that all genders were implicitly included in the usage of the pseudo-generic third person masculine singulars such as 'he' and 'him.' In the 1960s, feminism acted as a nucleus for an approach to legal drafting that was inclusive of and thus avoided the erasure of women in constitutional and legislative language. Historically, the concept of gender neutrality has been approached from binary cisgendered and heteronormative perspectives. Legal drafters now have to take cognisance of this evolving reality as there is a growing need for legislation that is gender diverse and non-heteronormative. The Recognition of Customary Marriages Act 120 of 1998 has been subject to criticism for its use of gendered language that excludes queer couples. This article places the development of an understanding of inclusive legal drafting in South Africa within Afro-feminist theory. These theories present a more useful framework for thinking beyond a binary view of language in legal drafting. They also present an opportunity of placing inclusive legal drafting as African, in the face of continued marginalisation and subjugation of gender and sexual minorities on the continent. Using theories such as the coloniality of gender, the coloniality of being and the coloniality of knowledge for deconstructing Western and consequently binary notions of gender neutrality, I suggest an Afro-feminist understanding of drafting that will consequently be gender-neutral in a way that is inclusive of queer people.

Keywords: Legal drafting; customary law; Afro-feminism; gender and sexuality; legal language; gendered language; gender pronouns

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Introduction

This may be an unusual opening for an academic article, but indulge me for a moment. In the narrative of equality, language would perhaps not play the role of the protagonist, but it would certainly be a main or recurring character. Think of the story of racial equality and the role that language has played and continues to play in maintaining the dignity of the disenfranchised. Think of feminism and gender inequality and the role that language has played in changing the status quo for women. In both examples I have mentioned, language may not be central in the struggle to emancipate, but it has consistently played an essential role for understanding inequality and for engaging with inclusivity. The removal of racist and sexist language from the law and other writing, was and continues to be a chapter in the ongoing story of equality. Where sexual and gender equality (and inequality) are the protagonists, language plays the role of antagonist as well as confidant. As an antagonist, language establishes and maintains social hierarchies and the subsequent marginalisation of the most vulnerable and excluded people. As a confidant, language acts as a 'sidekick' or friend to equality. In the story of the struggle for equality for queer people, language makes another appearance—a centralised and unequivocally important role for equality. The adoption of inclusive language is an ongoing storyline.

In this article, I am interested in the story of queer equality and the role of the language of the law and with that, questioning the androcentric, cisgendered, heteronormative, and thus exclusionary nature of language as an ongoing conversation in the queer community. This includes the *re*-introduction and -incorporation of singular third person pronouns and/or neo-pronouns such as the singular use of 'they/their,' '*ze/zem/ziir*'[1] as a central focus of queer language activism. I am particularly interested in understanding the use of gendered language in legislation and thus curious about the historical use of androcentric language in law, the cisgendered and heteronormative responses to androcentric language and the potential for Afro-feminist responses as a more inclusive approach. Moreover, I am interested in the use of gendered language in South African law.

It is important that I clarify my use of 'queer' and 'transgender'. I use the word queer as an umbrella term for all gender and sexual minorities. My use of these terms is inclusive of all people who do not fit the mould of societies' expectations when we speak of gender and sexuality. It is inclusive of all sexual and gender diverse people including lesbian, gay, bisexual, transgender, intersex, and others who do not conform to cisgendered and heteronormative concepts of sex and gender. Although I recognise the pejorative history of the word queer, I use it as an empowering descriptor. Where I

1 *Ze/zem/ziir* are neo-pronouns used by gender diverse/queer people. See Kaitlyn Joanne Bjerketvedt, *Transgender College Students: A Training Developing Inclusivity and Advocacy on College Campus* (2020).

use specific terms such as transgender, I mean people who identify as transgender, both within and outside of the gender binary.

Prior to feminist contributions to legal drafting, legislative drafters adopted androcentric approaches to gender through the adoption of the 'masculine rule', which established that all genders were implicitly included in the usage of pseudo-generic third person masculine singulars such as 'he'/'him'/'his'. Feminism acted as a nucleus for legal drafting that is inclusive of and thus avoided the erasure of women in legal language.[2] Feminist approaches to gendered language led to gender-neutral approaches to legal drafting (GND). GND, which, uses gender neutral language whereas (GNL) is the use of language that treats men and women equally.[3] GNL and GND, however, have historically been approached from binary, cisgendered and heteronormative perspectives. In this respect, this usage is primarily aimed at the inclusion of cisgendered women, as they are focused on techniques that 'require that expressions used to describe women have a parallel meaning when used in reference to men.'[4] In the South African context, this is highlighted in the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The heteronormative and binary use of gendered language in the RCMA has been subject to criticism for the use of gendered language that excludes same-sex couples,[5] and I would argue, transgender couples.

The purpose of legislation is to convey a particular message to the reader. Usually, the message sets out the relevant rights and obligations created or conveyed in the legislation. For legislative drafters, the aim is for that message to be clear and unambiguous and for the language of the law to be as effective as possible. Legal drafters must take cognisance of the evolving reality that there is a growing need for legislation that is diverse and non-heteronormative. Scholars have begun introducing and engaging in the idea of 'gender inclusive drafting' (GID), also known as 'gender silent drafting' (GSD), which is an all-inclusive drafting style that accounts for non-binary genders as a response to or an extension of GND. I place the development of an understanding of inclusive legal drafting in South Africa within Afro-feminist theory. These theories present an interesting framework for thinking beyond a binary and heteronormative view of language in legal drafting. Afro-feminism also presents the opportunity to engage with legal drafting in South Africa and the rest of the Global South, in the face of continued marginalisation and subjugation of gender and sexual minorities. Using theories on coloniality for deconstructing Western and consequently binary notions of gender neutrality, I suggest an Afro-feminist understanding of legal

2 Helen Xanthaki, 'Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham,' (2020)10(2) Feminist@Law 9.

3 ibid 5.

4 Karen Busby, 'The Maleness of Legal Language' (1989) 18 Manitoba Law Journal 191.

5 C Müller-Van der Westhuizen and SL Meyer, 'The (Non-)Recognition of Same-Sex Marriage in the Recognition of Customary Marriages Act 120 of 1998' (2019) 44(2) Journal for Juridical Science 44.

drafting that will consequently be neutral in a way that is inclusive of gender and sexual minorities.

Western Approaches to Gender: The Masculine Rule and the Two-way Rule

A further indulgence: think of the underlying history of gendered language and the assumptions created by gendered language. Starting with the old usage of 'mankind' as opposed to 'humankind' creating the assumption that humanity or the epitome of humanity is male. Think of the historic use of 'chairman' and 'congressman' which created the assumption that only men can hold leadership positions or the exclusive use of 'freshman' or 'policeman,' which created the assumption that an officer of the law or a university student is and can only be a man. This nomenclature and its assumptions established a gender hierarchy and acted as a mirror for a sexist society which defined humanity as male and amplified the superior position of men in the gender hierarchy. The language of law and its relationship with gender plays a part in maintaining that power. Writing an entire article on how gender appears in legislative drafting and the importance of the distinction between the exclusive use of 'he'/'him' versus the neutral 'his/her' versus the erasure of gender may therefore seem to be frivolous and distracting from the bigger picture.[6] The adoption of gender-neutral pronouns outside of the law is sometimes dismissed as such. As I briefly mention below, the language of gender and gender pronouns was an important part of feminist discourse in the 1970s and 80s, but was laughed off and dismissed as frivolous. Similarly, efforts for queer-inclusive language law, are also being dismissed.[7]

Western gender discourse is entwined with patriarchy and how it establishes structures and hierarchies of power through sex and gender, establishing white men as the superior human. Power operates through the law and the law maintains power. The exclusion of women and sexual and gender minorities and the responses to it from legal writing must therefore be understood from the perspective of power and how power marginalises. The destruction of any hierarchy is difficult and some efforts to dismantle, may result in the reification/reproduction of oppressive hierarchies. The existence of a hierarchy is thus maintained. Although the roles within the hierarchy are changing and evolving under the guise of equality or the destruction of the hierarchy, the hierarchy itself has not been dismantled. Gender in legal drafting is a good example of this. The masculine rule established men as more important. Political and non-political reasons have been provided for the use of the masculine rule. The non-political reasons provided were technical. It was argued that the exclusive use of a generic male gender, was simpler for

6 Hellen Petronella Vergoossen and others, 'Four Dimensions of Criticism Against Gender-fair Language' (2020) 83(5) Sex Roles 328–337.

7 Xanthaki (n 2) 5.

drafters as the inclusion of other pronouns would be verbose, and wordy.[8] On the other hand, the political reasons provided were illustrative of the sexist society of the time. Simply put, drafters did not need to consider women or anyone else, because women were excluded from political life.[9] Women could not vote or do certain work (policeman/chairmen), so there was no real need to expand the language. Therefore, one of the critical feminist criticisms of the masculine rule was that it was based on the notion that women were 'non-persons' and was thus sexist and promoted discrimination and bias against women.[10] Feminist discourse reformed the use of the masculine rule through the introduction of the two-way rule. The two-way rule however, maintained the gender hierarchy by including women but excluding gender and sexual minorities.

In Foucault's analysis and the analysis of feminists who have applied his work, the history or genealogy of knowledge production and the production of truth are described as essential.[11] Particularly in so far as it relates to sex, gender, and sexuality. What I mean by this, is that in every investigation or analysis that we make, it is important to engage with the genealogy of that branch of knowledge.[12] In other words, we need to engage with a brief look into when and why we adopted a particular style of writing. Sex, gender and sexuality have been set up as the supreme authority over everything.[13] This control established a social body that was based on 'truth,' thus establishing normal and abnormal/defective, with heterosexuality being the normal and homosexuality being the abnormal. The work of Michel Foucault on 'bio-power' was instrumental in setting up a framework for questioning sex and gender identity. Much of the late twentieth century feminist research is based on Foucault's work on bio-power, by exposing how bodies were subjugated and regulated by modern states. Foucault argued that sex is neither biological nor strictly natural. He believed that it was created by the powers that be for purposes of sexual regulation.[14] For Foucault, discourse on sexuality must not be separated from discourse on power because it has never actually existed or it has been situated separately from power. [15]For the purpose of this article, I seek to understand the origins of the masculine rule for defining gender in legal drafting.

The masculine rule was first established by John Kirby in 1746.[16] For Kirby and other English grammarians of the time, the use of male pronouns was interpreted as sex-indefinite and inclusive of 'both' sexes resulting in the establishment of a generic

8 Ray Stilwell, 'Sexism in the Statutes: Identifying and Solving the Problem of Ambiguous Gender Bias in Legal Writing' (1983) 32 Buffalo Law Review 565.

9 ibid 564.

10 Venessa Mclean, 'Is Gender-neutral Drafting an Effective Tool Against Gender Inequality within the Legal System?' (2013) 39(3) Commonwealth Law Bulletin 444.

11 Michel Foucault, *Discipline and Punish and the History of Sexuality Vol 1* (Vintage 1990).

12 Oyèrónkẹ́ Oyěwùmí, *The Invention of Women* (University of Minnesota Press 1997).

13 Michel Foucault, *The History of Sexuality* (1st American edn, Pantheon Books 1978) 54

14 ibid.

15 ibid 32.

16 Ann Bodine, 'Androcentrism in Prescriptive Grammar: Singular "they," Sex-indefinite "he," and "he or "she"' (1975) 4(2) Language in Society 129–146.

masculine rule,[17] which established that all sexes were implicitly included in the usage of the pseudo-generic third person masculine singulars such as 'he', 'him' etcetera.[18]

The use of 'they' and 'their' as singular pronouns has been dubbed as grammatically incorrect subject to considerable backlash. Interestingly though, queer discourse has *re*-introduced the epicene use of 'they', not created or initiated it because this androgynous use of 'they' dates back to the eighteenth century[19] and was later rejected by grammarians.[20] In law, the masculine rule manifests itself as a rule of legal interpretation which dictates the use of male pronouns or the masculine singular which are thereafter interpreted as inclusive of women. It dictates that male pronouns may be interpreted as referring to women. The masculine rule was first introduced into British law in the 1820s[21] and became drafting policy when the British government passed a law introducing the masculine rule as a replacement for the use of the epicene 'they'.[22] The masculine rule was thereafter codified by several jurisdictions, including South Africa. The interpretation Act 33 of 1957 of South Africa is a replica of the 1889 Interpretation Act of Britain,[23] which reads as follows: '6. In every law, unless the contrary intention appears– (a) words importing the masculine gender include females.'[24]

GNL was introduced by second-wave feminist movements in the 1970s as a method for reforming the masculine rule and establishing equality between men and women.[25] Taking on the assumptions established by gendered language, the goal was to do away with the androcentric nature of language. Due to the focus of the feminist agenda at the time, some of the techniques adopted or introduced were binary and focused on the inclusion of women as opposed to the inclusion of gender diverse people. Western feminism highlighted several problems with the application of the masculine rule. This included the creation of male entitlement, the assumption that the average person in a particular jurisdiction is male, the superior place of men in the gender hierarchy, the discriminatory nature of the rule because it is biased and leads to interpretation problems caused by inaccuracies associated with the masculine rule.[26] In the United States for

17 John Kirby, 'A New English Grammar' 117 (1746) in Debora Schweikart, 'The Gender-Neutral Pronoun Redefined' (1998) 20 Women's Rights Law Reporter 2.

18 Charles Marshall Thatcher, 'What Is Eet: A Proposal to Add a Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting' (2014) 59 South Dakota Law Review 80.

19 Schweikart (n 17) 6.

20 Kristina M Lagasse, 'Language, Gender, and Louisiana Law: Removing Gender Bias from the Louisiana Civil Code' (2018) 64 Loyola Law Review 187.

21 Christopher Williams, 'The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland' (2008) 29(3) Statute Law Review.

22 Lagasse (n 20) 192.

23 Interpretation Act 1889 (United Kingdom).

24 Interpretation Act 33 of 1957 (South Africa).

25 Donald L Revell and Jessica Vapnek, 'Gender-Silent Legislative Drafting in a Non-Binary World' (2020) 48 Capital University Law Review 106.

26 Lagasse (n 20) 192.

example, there were inconsistencies found in how the courts interpreted laws in different ways because of the inaccuracies caused by the masculine rule and the use of generic male pronouns. Some courts interpreted it as both male and female and some said it was purely male.[27] GNL techniques are usually dimorphic and indirectly based on biological sex. This is clear from the definition of GNL, and the techniques adopted. One definition of GNL states that GNL is language that 'includes all sexes' but is then qualified with 'treats women and men equally.'[28] Modern language techniques prompted by GNL, replace the generic (example 'he') with the two-way rule (example 'he/she') with the aim to recognise women as 'persons' in legislative contexts. Legislative drafters are trained to avoid the application of the 'masculine singular' pronouns to the exclusion of women. Femicentric approaches (the exclusive use of female pronouns) to language were also suggested but have not been commonly adopted.

More recently, several tools have been adopted as a way of expanding GND and extending it to transgender people. The first is gender inclusive drafting (GID). Gender inclusive language (GIL), also known as gender silent drafting (GSD), seeks to eliminate gendered language from legal drafting entirely.[29] 'Gender silent legislative drafting', a phrase termed by Donald Rivell and Jessica Vapneck, is an all-inclusive drafting style that accounts for non-binary genders.[30] Where GNL is language that equalises men and women and adopts language which 'requires that expressions used to describe women have a parallel meaning when used in reference to men,' GID/GSD strategies are essentially 'avoidance' strategies in that they generally take the approach of avoiding gender entirely. GSD/GID techniques vary depending on which style fits best. Techniques include: the removal/omission of the pronoun; The use of active rather than passive voice;[31] pluralisation of nouns;[32] conversion of the noun to verb form; the use of gender-neutral terms such as 'people', 'person' or 'individual' rather than masculine and feminine pronouns (adopted in previous gender inclusive radicalisation); and the repetition of the noun and alternative pronouns. These strategies are more inclusive of queer people. Promoters of GID argue against gendered language and argue that gendered pronouns such as 'he/she' should only be used when exclusively referring to men or to women. In Sweden, the word *hen*, a gender-neutral personal pronoun, was added to the Swedish Academy Glossary (the official Swedish dictionary).[33] It has also

27 Schweikart (n 19) 6.
28 Xanthaki (n 2) 5.
29 ibid (n 2) 6.
30 Revell and Vapnek (n 25) 106.
31 Thatcher (n 18) 81.
32 ibid.
33 Hellen Vergoossen and others, 'Are New Gender-neutral Pronouns Difficult to Process in Reading? The Case of *Hen* in Sweden' (2020) 11 Frontiers in psychology 1.

been included in Swedish laws on driver's licences. GID has been adopted in Zambia, New Zealand, and the Isle of Man.[34]

Gendered Writing in South African Law

The removal of gendered language in South African law has gained traction.[35] The Cybercrimes Act, which was passed in 2020, was the first gender inclusive Act enacted in South Africa. I began thinking about the role of gendered language in the law when I was invited to contribute to three bills that were introduced to parliament in 2020. The Domestic Violence Amendment Bill (the Domestic Violence Bill), the Criminal and Related Matters Amendment Bill (Criminal Law Bill) and the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (the Sexual Offences Bill) were introduced as a response to increased gender-based violence and femicide in South Africa. In light of the increased violence against gender and sexual minorities in South Africa, as well as the shift towards GID, joint submissions were made by ALT Advisory, and along with Research ICT Africa (RIA) recommended the use of gender inclusive pronouns throughout the Bill, particularly with reference to victims and survivors of gender-based violence.[36] The submissions made were ultimately incorporated into the Act, making it the second gender-inclusive Act in South Africa.[37]

The exclusive use of masculine pronouns remains the standard in Constitutions and legislation around the world. An example of this is the Bangladesh Constitution. According to Masum Billah, the Bangladesh Constitution is riddled with applications of the masculine rule and includes over one hundred mentions of male pronouns whereas female pronouns do not appear at all.[38] Masum criticises the constitution for its use of male pronouns in the appointment of leaders as well as the masculinisation of institutions. This approach to interpretation legislation mirrors the approach taken in the United Kingdom and other Commonwealth countries.[39]

South Africa adopted GND policy in 1995,[40] a year after the political transition to a democratic South Africa. Constitutions are often promulgated in response to a country's history. The South African Constitution was drafted as a response to the divisions caused by apartheid and its inequalities, with the intention to develop a diverse and

34 Revell (n 25) 144.

35 Tina Power, 'New Law Protects Women Against Online Abuse' (*Groundup* 22 February 2022) <https://www.groundup.org.za/article/new-laws-extend-protections-against-gender-based-violence-online-spaces/> accessed 7 June 2022.

36 Domestic Violence Amendment Bill [B20 – 2020].

37 'South Africa: Domestic Violence Amendment Bill Revised to Reflect Gender-Neutrality' (*All Africa*, 7 June 2022) <https://allafrica.com/stories/202109080690.html> accessed 14 March 2022

38 Billah SM Masum, 'Can Constitutions be for Women Too' (2017) ELCOP (Empowerment through Law of the Common People) Yearbook of Human Rights 2.

39 See the British Interpretation Act 1978 which is the same as the previous Interpretation Act, 1889.

40 Xanthaki (n 2) 6.

inclusive South Africa.[41] The South African Constitution displays an important and progressive approach to gendered language and avoids masculine rule by either removing gender or adopting the two-way rule. The adoption of the two-way rule was intentional in its feminist approach. As discussed by Christina Murray, the issue of gendered language has always been at the forefront of debates and discussion by the drafters of the South African Constitution.[42] GNL caused robust debate but ultimately, the use of the singular 'they'/'their' was adopted in the final Constitution, particularly in the context of the framing of the Bill of Rights. Drafters were particularly concerned with the potential exclusion of women in political leadership because of the assumption that political actors are or should be male.[43] Drafters even debated whether references to 'women' and 'men' should begin with 'women' or 'men'.[44] Provisions with stereotypically anti-women nuances were therefore drafted with the express inclusion of women. To really drive the point home, the Constitution places 'women' before 'men.'[45] For example: 'The President … must appoint a woman or man as the National Commissioner of the police service … .' This was intentional for this particular provision because police commissioners are stereotypically men.

Although South Africa's Constitution is admirable in its approach, there are exclusions and limitations that come with the two-way rule, such as the exclusion of queer people. In the discussion below, I identify legislation and case law that exposes the limitations of the two-way rule and the potentially harmful effects of gendered language in South African law. I have specifically chosen these laws because they were adopted in a democratic South Africa and the legal climate at the time was one that was focused on inclusivity and the avoidance of discrimination—nonetheless, inadvertent discrimination occurred because these laws have remained susceptible to 'imposed gender frameworks.'[46]

GND and GSD have been dismissed as window-dressing with no real meaning in practice. Greenberg argues that with the increasing turn towards gender-neutral drafting, lawyers and judges may later interpret new legislation that mistakenly adopts the use of 'he' or 'his' or 'she' as intentional and thus exclusionary of anyone else.[47] As I have mentioned above, potential bias and discrimination are primary concerns for gendered language in legislative drafting. Scholars argue that in practice, the masculine rule is interpreted as inclusive of women which means that, it does not have any real exclusionary or discriminatory effects.[48] However, this is not always the case. There

41 Christina Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23 University of Arkansas at Little Rock Law Review 829.
42 ibid 827.
43 ibid 829.
44 ibid.
45 ibid.
46 Maria Lugones, 'Toward a Decolonial Feminism' (2010) 25(4) Hypatia 743.
47 Daniel Greenberg, 'The Techniques of Gender-Neutral Drafting' in Constantin Stefanou and Helen Xanthaki, *Drafting Legislation: A Modern Approach*' (Routledge 2016) 76.
48 Paul Solembier, *Legal and Legislative Drafting* (Lexis Nexis 2018) and Xanthaki (n 2).

have been cases of litigants using the masculine rule for either claiming/withholding a benefit or wanting to escape liability.[49] The South African case of *Rahube v Rahube and Others* 2019 (2) SA 54 (CC) (*Rahube* case) is a good example of how the use of masculine generics in legal drafting have the potential to exacerbate existing vulnerabilities and to dehumanise and violate human rights.

In the *Rahube case* the court assessed the constitutionality of the Upgrading of Land Tenure Rights Act 112 of 1991 in so far as it failed to provide other occupants or affected parties the opportunity to make submissions in applications to convert land tenure rights into rights of ownership of property. The laws in question granted property rights to the 'heads of household.' Although the law did not provide a definition for 'heads of household,' the law adopted the use of masculine pronouns when using the terminology.

> Any person who is the head of a family and is desirous of taking up **his** residence in the township and of leasing and occupying for residential purposes, together with the members of **his** family, a dwelling erected by or belonging to the Trust, shall apply for a certificate in respect of such dwelling and of the site on which such dwelling stands. (own emphasis).[50]

The law also defined 'family' in relation to the 'head of the household.' Family, in relation to a person was defined as a wife, an unmarried child, widowed daughters and their children, or parents/grandparents. The definition was gendered in that it excluded husbands and other male family members, thus alluding to the fact that the intent was for the 'head of the household' to be male family members with other members falling under their control. According to section 6 of the Interpretation Act, disagreements on interpretation of the masculine rule must be dealt with on a case-by-case basis and must remain in line with the Constitution. The Constitutional Court considered whether it could be possible for masculine pronouns to be interpreted as referring to both men and women but found that this was unlikely:

> When the Proclamation is read in the context of the multiple discriminatory statutes that aimed to limit the autonomy of women at the time, it seems unlikely that the Legislature intended that the masculine pronouns should be read to be gender neutral. Moreover, an examination of the treatment of statutes by the courts illustrates that Judges, in times gone by, even interpreted the seemingly neutral word 'persons' to exclude women from its purview. Beyond this context, it is unlikely that male relatives and township officials, operating within a system of patriarchy, which prioritised male interests in spheres such as property, would interpret the Proclamation in favour of African women.[51]

These provisions were ultimately declared unconstitutional because they discriminated against women.

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49 Stilwell (n 8) 566.

50 *Rahube v Rahube and Others* 2019 (2) SA 54 (CC) 67.

51 ibid 68.

Another example of gendered writing that is exclusionary is found in the RCMA. The RCMA was enacted in 1998 and was instrumental in ensuring that customary marriages were protected and regulated by facilitating legal pluralism in South Africa. Before the enactment of the RCMA, customary marriages were not legally recognised. The RCMA in its current form, recognises monogamous marriages between black couples and polygamous marriages between one man and multiple women. There are a few exclusions in the RCMA as it does not recognise polyandry and marriages between South Africans and non-citizens.[52] Although the RCMA does not explicitly exclude same-sex marriages, the language adopted in the Act is drafted from a heterosexual perspective. Over and above that, according to the Green Paper on marriages in South Africa, the RCMA is currently in favour of marriages for couples 'of the opposite sex.'[53] Similarly, to the Constitution, the RCMA avoids the masculine rule by using the two-way rule and therefore still uses gendered language by subscribing to the assumed biological binary and heteronormative understandings of marriage.

The gendered language in the RCMA are provisions of consequence. What I mean by this is that the relevant provisions have an impact on the equal rights, family rights and cultural rights of gender and sexual minorities. The requirements of a valid customary marriage are that the couple must be of age, must consent and that the marriage must be negotiated and entered into in accordance with customary law.[54] Although the requirements set out in the Act avoid gendered language, there are a number of gendered definitions and relevant provisions that adopt the use of gendered language, such as the definition for *lobolo;* the requirements for a valid marriage entered into by minors; the registration of customary marriages; the proprietary consequences of customary marriages; and the equal status and capacity of spouses.

Lobolo is defined as:

> … the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a **prospective husband or the head of his family** undertakes to give to the head of the prospective **wife's** family in consideration of a customary marriage' (own emphasis).

The definition of *lobolo* is a binary and heteronormative term in that it is understood to be between a man and a woman and that the 'bride' price can only be paid by a man to a woman's family, thus making no provision for queer customary couples, even though there are same-sex couples who uphold the practice of *lobolo*.

Because customary marriages are understood under a heteronormative framework, provisions dealing with the proprietary consequences of the marriage allude to a

52 Department of Home Affairs, South Africa <http://www.dha.gov.za/index.php/notices/1449-know-your-green-paper-on-marriages-in-south-africa> accessed 10 March 2022

53 ibid.

54 Recognition of Customary Marriages Act 120 of 1998, s 3.

customary marriage as a marriage that is between a husband (man) and his wife or wives. Section 6 and section 7, which deal with the equal status and capacity of spouses, are good examples of this. Section 6 stipulates that,

> A **wife** in a customary marriage has, on the basis of equality with **her husband** and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers she might have at customary law. (own emphasis)

Like the political leadership provisions in the Constitution, it is easy to infer the context under which these provisions were drafted. These provisions and their explicit inclusion in the RCMA in the manner set out above were due to the rife inequality experienced by women in customary relationships. It is possible that the drafters of the Constitution did not contemplate the possibility of queer customary marriage. The exclusion of queer couples from the RCMA framework has not been constitutionally tested. However, the Equality Act of South Africa specifically highlights that some individuals belonging to a particular cultural group cannot be excluded from enjoying the same rights that other members of their cultural group enjoy. In other words, if heterosexual couples have their cultural rights recognised through the right to marry under the RCMA, we can argue that same-sex couples and other gender-diverse couples should have access to the same rights. Even under South Africa's limitations of rights framework, it would therefore be difficult to argue that same-sex couples should not have access to marry under the RCMA. One of the main duties of the drafter is to translate government policy into law.[55] Government policy also highlights that the exclusion of queer couples from the framework is unconstitutional and reforms do seem to be underway.[56]

The RCMA also highlights the importance of a nuanced approach to GID. In some cases, legislation is carefully drafted so that it speaks to an existing inequality within structures such as marriage, where women were historically discriminated against by virtue of their position as women in a society that treats them as second-class citizens. GSD may be seen as inadvertently ignorant of the marginalisation of women.[57] In other words, similar to the masculine rule, it may be argued that GSD as a blanket rule, would promote the inclusion of queer people and erase the importance of legislation that speaks to existing gender discrimination. The RCMA was clearly drafted to address inequality between spouses in customary marriages. This is clear in the language and purpose of sections 6 and 7 referred to above. Because of this, it is clearly drafted as a response to the patriarchal nature of marriage. Therefore, replacing all the references to the two-way rule would alter this purpose. This is not to say that the RCMA should not be

55 Richard C Nzerem, 'The Role of the Legislative Drafter in Promoting Social Transformation' in Xanthaki and Stefanou (n 47) 131.

56 Department of Home Affairs, South Africa <http://www.dha.gov.za/index.php/notices/1449-know-your-green-paper-on-marriages-in-south-africa> accessed on 10 March 2022.

57 See Murray (n 41).

amended. It arguably needs to be amended, but the approach should not be simplified by solely focusing on pronouns. Existing protections should be inter-sectional. Thus, drafters must be cognisant of these protections whilst ensuring that queer people have the rights to marry customarily.

The above sections serve to highlight a few issues: the first, is that the Interpretation Act does not solve the problems created by the generic use of 'he/him' as it still has the potential to create discriminatory practices by excluding women and queer people and creates interpretive issues as is highlighted in *Rahube*. The second is that even in instances where GND and GSD are adopted, the drafting of legislation from a hetero-normative perspective also establishes bias and discrimination, as is highlighted by the *Rahube* case and the RCMA. And lastly, that taking a blanket GSD approach, is not always the answer as it may inadvertently cause harm in instances where the aim of the Act is to protect vulnerable groups. In this regard Xanthaki reminds us that there is room for more than one technique, and we do not need to take an all-or-nothing approach to gender in legal drafting.[58]

The RCMA and the legal framework litigated in the *Rahube* case are the perfect example of the absence of a decolonial feminist approach to legal drafting. As a piece of legislation that is symbolic of South African cultural life, decolonial approaches to drafting this legislation could have taken cognisance of an expansive notion of decolonial gender. Although the RCMA framework is important for improving the status quo for marginalised women in customary marriages, it remains exclusionary. The use of binary pronouns is indicative of the persistence of hetero-normativity and binary gender norms pertaining to the marriage laws of South Africa, despite legalised gay marriage; as well as the persistence of Westernised and colonial gender norms despite research to the contrary[59] and established customary law.

Afro-feminism: A Decolonial Response for Future Discourse and Reform

My aim with this article is not to argue against the adoption of GSD, but rather, to present Afro-feminism as a lens through which to view gender-inclusive writing. First, Afro-feminism highlights the imposition of Western gender norms and how they persist in post-colonial contexts. Secondly, decolonial Afro-feminism exposes the diversity of gender, sexuality and gender hierarchies in pre-colonial contexts. Lastly, Afro-feminism is inter-sectional and is better suited to avoiding potential reifications of oppression, as discussed above. This is not to deny that Afro-feminism is beyond criticism. As highlighted by Sylvia Tamale, the terms 'womanism,' 'motherism' and 'stiwanism' have been subject to criticism as being hetero-normative, exclusionary, and

58 Xanthaki (n 2) 8.

59 See for example Sylvia Tamale, Oyeronke Oyěwùmí and others. Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2021) 43; Oyěwùmí (n 12).

contradictory.[60] The Afro-feminism described in this article is a type of feminism that disrupts and responds to current contexts. Like any decolonial project, its focus is to restore dignity to all people by deconstructing and reconstructing.

South Africa has made attempts at decolonising its laws and introducing legal pluralism. Despite this, coloniality has maintained its grip on the legal system. For purposes of my discussion here, I am specifically interested in the sustained control over our understanding of gender and sexuality. The sections above serve as a discussion on Western approaches to gender hierarchies that have made their way into legal writing and discourse and how they have impacted South African law, even in the context of customary law. In this section I focus on Afro-feminist perspectives on the coloniality of power, gender, being and knowledge. I use these theories to explain the persistence of dimorphic notions of gender and sexuality, even in a country like South Africa, where considerable efforts have been made towards pluralism and diversity and how Afro-feminism is a more suitable theory for developing GID.

According to Quijano, under colonialism it was established who qualified as human and who did not.[61] Social organisations around the world were influenced by colonialism.[62] Colonial powers decreed who would be superior or inferior in the social schema[63] and who qualified as a legal person. It established 'biological' selection criteria for those who qualified as 'human' and others who should be relegated to a sub-category of humanity.[64] Colonialism achieved this by creating medicalised or 'biological' social identities and subjectivities and organising them into a 'neatly' packaged social hierarchy.[65] Existing gender relations and sexualities were also altered.[66] The medicalisation of sex and gender and the division of human bodies into two categories were based on the political power at the time, rather than by the laws of nature.[67] Binary assumptions also gendered subjectivities and used so-called scientific truths to naturalise and solidify the social hierarchy. In establishing these binaries, the main aim was to maintain control by erasing diversity. As discussed by Ngwena, nature (defined biologically) is often used to contest the absence of plurality.[68] People whose bodies did not display the 'typical' characteristics of sexual differentiation were 'erased' by being forced into 'neat' categories of male and female through hormonal and surgical

60 Tamale (n 59) 43.
61 Aníbal Quijano quoted in Sabelo J Ndlovu-Gatsheni, *Coloniality of Power in Postcolonial Africa* (CODESRIA 2013) 38.
62 Tamale (n 59) xi
63 Ndlovu-Gatsheni (n 61) 5.
64 Tamale (n 59) 4.
65 Oyěwùmí (n 12) ix – x.
66 Tamale (n 59) 5.
67 Elizabeth Reis, 'Impossible Hermaphrodites: Intersex in America, 1620-1960' (2005) 92(2) Journal of American History; Julie A Greenberg, *Intersexuality, and the Law: Why Sex Matters* (NYU Press 2012).
68 Charles Ngwena, *What is Africanness? Contesting Nativism in Race, Culture and Sexualities* (PULP 2018) 195 and 198.

interventions by medical practitioners and scientists of the time. The work of Richardson,[69] Dreger,[70] Greenberg,[71] Reis[72] and others has exposed how the medical (and legal) treatment of difference was not based on immutable scientific truths, but on the politics of the time.

Research by Afro-feminists has shown how gender and sexuality influenced society before colonialism in the Global South. They have shown how societies were matriarchal, diverse and did not always relate male to men or female to women or masculinity to men and femininity to women and the existence of forms of same-sex relations.[73] The work of Oyěwùmí and others highlights how colonialism erased the fluidity of sex and gender in African societies and established a society organised by Western gender structures, which were introduced and maintained through the erasure of existing knowledge systems—establishing a single global understanding of gender.

Decolonial scholarship provides a useful distinction between colonialism and coloniality. Where colonialism reflects the act of the violent conquering of states and the occupation of indigenous land, coloniality is the remaining effects of colonialism. For example, colonialism is the active colonial rule over colonial subjects, and coloniality is the remaining effect of colonialism. If colonialism is the founder of imperialism, then coloniality is the heir/successor that has maintained the legacy created by the founder. With this, the coloniality of power is established. Quijano's theory of the coloniality of power highlights imperial control over four specific systems: economies; authorities (traditional leaders); gender and sexuality; and knowledge systems.[74] Maria Lugones criticises Quijano's theories by problematising his acceptance of biological dimorphism. Sylvia Tamale also highlights a gender gap in decolonial scholarship.[75] Lugones expands the coloniality of gender in Quijano's theory by incorporating a critical analysis of gender that was omitted by Quijano.[76] Although colonialism 'ended' with what has been called 'flag independence,' colonial subjectivities and structures remain prevalent in many ways. Afro-feminism responds to coloniality through the 'dismantling of several layers of complex and entrenched colonial structures, ideologies, narratives, identities, and practices that pervade every aspect of our lives' and the reconstruction of our humanity, integrity, and self-determination.[77] The staying power of exclusionary gendered language today is symbolic of the power of coloniality and how difficult it is to move away from the

69 Sarah Richardson, *Sex Itself: The Search for Male and Female in the Human Genome* (University of Chicago Press 2013).
70 Alice Dreger, *Hermaphrodites, and the Medical Invention of Sex* (Boston 1998) Boston.
71 Greenberg (n 67) 201.
72 Reis (n 67).
73 María Lugones, 'Heterosexualism and the Colonial/Modern Gender System' (2007) 22(1) Hypatia 196.
74 Anibal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21(2-3) Cultural Studies 168–178.
75 Tamale (n 59) 3.
76 Lugones (n 73) 193.
77 Tamale (n 59) 20–21.

perceived norms that were imposed. Afro-feminism offers the concept of the coloniality of gender for understanding the imposition of Western gender structures. The coloniality of gender, for purposes of this article, is defined by two elements. The first was the introduction of Western gender systems and hierarchies. The second was the acceptance of Western knowledge as 'truth' and the labelling of everything else as fiction, thus erasing or deeming it mythical rather than scientific 'fact'.

The compulsory nature of Western gender systems is highlighted in the RCMA and particularly in the context in which the RCMA was drafted. The work of Afro-feminism also relies on an understanding of the *coloniality of being*, which is how coloniality colours our worldview and perceptions of normal and abnormal or our perception of 'common-sense'[78] and how compulsory heterosexuality was embedded into our social fabric. The coloniality of being shows how coloniality controls our mentalities and psychologies.[79] Maldonado-Torres highlights that our coloniality of being is exposed whenever we meet someone who does not fit the social fabric of what we deem 'normal.'[80] For example, known histories reflected in several works such as Amadiume's work on Igbo societies highlights that 'biological sex' and gender did not always correspond.[81] Research on the *mudoko daka* (effeminate males that marry men) in Uganda reflects that same-sex couples do marry.[82] There is also research on women-to-women marriages among the *Vhavenda* in South Africa and research on the *imbakala* of Angola ('men in women's apparel').[83] This research is not limited to discussions on relationships, it also shows how social organisation and structures differed to what was imposed. Oyěwùmí's work shows us that gender was not used for organisation in Yoruba societies.[84] The coloniality of being is reflected in the difficulty we have with even considering diverse contexts or experiences and conflicting ideas on what 'African culture' is.

Finally, colonialism and coloniality are not limited to the question of who is superior and who is not, but also extends to what (knowledge) is superior and what is not. Gender and sexuality (in their Western format) are both colonial introductions[85] that are further preserved by *coloniality of knowledge*. Mbembe asserts that the three authoritative knowledge systems still in existence in Africa are Islam, Christianity, and colonisation. These systems define and control narratives and societal perspectives on identity.[86] Laws of religion define what is acceptable and what is not, who belongs and who does

78 Tamale (n 59) 93.
79 Ndlovu-Gatsheni (n 65).
80 Nelson Maldonado-Torres, 'On the Coloniality of Being: Contributions to the Development of the Concept' in Walter Mignolo and Arturo Escobar (eds), *Globalization and the Decolonial Option* (Routledge 2010) 94–124.
81 Tamale (n 59) 101.
82 ibid 94.
83 ibid.
84 Oyěwùmí (n 12) 21.
85 Lugones (n 73) 186.
86 JA Achille Mbembe, 'On the Power of the False' (2002) 14(3) Duke University Press 632.

not.[87] The perceived supremacy of Western knowledge over indigenous knowledge sustains ignorance, making it possible for unwavering perceptions that gender and sexual minorities are 'un-African.' The persistence of Westernised approaches to gender are also rooted in the fact that the primary drafting language in South Africa is English. The English language employs the pronouns 'he'/'she') as opposed to a genderless language system or a grammatical gender language (feminine, masculine or neutral).[88] Drafting in other languages would not necessarily pose similar problems. For example, the Tshivenda translation of 'his or her' does not include gendered pronouns.[89]

Afro-feminism allows us to conceptualise legal drafting in South Africa and to approach legal drafting from an Afro-feminist perspective. This would avoid the approach of searching for gendered pronouns in legislation like the RCMA and replacing them with gender-inclusive language without assessing the context in which they were drafted and ensuring that they are assessed wholistically. Gendered language in colonial and customary law needs to be assessed through an inter-sectional lens. For example, when reforming the gendered language in the RCMA, the protection of cisgender wives in polygamous marriages needs to be taken into account.

Conclusion

Legal drafting often falls victim to the political climate of the time. To be gender-neutral no longer means to be exclusively male and female, it is now, as argued in this article, understood beyond the binary and heteronormative lens that is assumed to be the norm. Although this seems to be a topic on the periphery when it comes to conversations and debates on gender equality, it is an important discussion because of the real impact that legislation and the language of legislation has on individuals. In this article I ,therefore, suggest the use Afro-feminism to engage with legal drafting in a way that is inclusive of all.

The purpose of this article is not to make technical recommendations for reforming legislation like the RCMA. Although I engage with GID techniques, my focus is instead to highlight the gaps in the legislation and to begin a discussion on how gendered language in law should be approached. In order for reform to be effective in South Africa and other Global South contexts, reform should be approached from an Afro-feminist perspective.

There are a few takeaway points with which I should like to conclude the article. The first is that amendments to gendered language in the law must be understood holistically and contextually to ensure the inclusion of the excluded and to ensure that everyone who needs to be protected by specific laws are not inadvertently erased by well-

87 Tamale (n 59) 131.
88 Lagasse (n 20).
89 The Constitution of the Republic of South Africa, 1996 (Tshivenda translation).

intentioned reform. One of the main goals of the RCMA is to protect women in heterosexual and cisgendered polygamous marriages by extending their rights and protections regarding their marriages because they were previously disadvantaged by the system and cultural practice. Applying a blanket approach of deleting of the two-way rule and inclusion of non-gendered language, may marginalise further a class of people in need of protection. A holistic approach is also important because amending pronouns does not solve the heteronormative and patriarchal foundations of the Act and would therefore result in poorly drafted legislation, rather than genuine inclusivity. Looking at gender in its entirety as opposed to solely focusing on pronouns is a more efficient approach. It therefore moves beyond debates around the singular use of 'they/them' because reform is also about looking at existing gender oppression (how it intersects and affects), hierarchies, addressing them and doing the work towards dismantling them to avoid reifications.

Language can either be friend or foe in the story of equality and right now, it is straddling the line in the story of queer equality. My hope is that this article will contribute towards existing efforts in cementing language as a friend rather than foe.

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