

## **REPORT ON THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION AND GENDER JUSTICE**

GIN-SSOGIE is providing input for the upcoming report of the Special Rapporteur on the promotion and protection of freedom of Opinion and Expression to be presented at the 76<sup>th</sup> session of the General Assembly. GIN-SSOGIE has taken note that the Special Rapporteur, in presenting a thematic report on gender justice and the right to freedom of opinion and expression comes as one of the identified priority for the empowerment of women and girls. We have prepared a report on this basis.

The report is a consolidated compilation of 3 different regional contributions; the first one from a transgender activist and director of Gender Dynamix, an NGO in South Africa- Liberty Matthyse, the second one a theologian and researcher at Tricontinental Institute for Social Research and activist in São Paulo, Brazil- Angelica Tostes ,and the third also from theologian and researcher from São Paulo, Brazil- Rev. Dr Ana Ester.

***Background information:*** GIN-SSOGIE is a global organization headquartered in South Africa, focusing on LGBTI rights at the intersections of faith, religion, politics and culture. As a member-led organization, with 420+ members around the world, it is working to provide safe spaces to convene, document best practices, develop resources, and together create local, regional, and international strategies for the inclusion and mainstreaming of LGBTI identities.

To the report key questions, GINSSOGIE's input wishes to address the following elements:

1. (a) *What barriers, challenges and threats do women in the public sphere face in exercising their freedom of opinion and expression online and offline?*

*(Southern Africa)* Despite constitutional protection on the grounds of sex and gender, and affirmative action legislation to support gender parity in all spheres of society, socially South Africa remains a highly gender oppressive country. It is a country that places more value on maleness and masculinity than women, femininity or any alternative gendered identity and expression. Before Covid-19 South Africa had labeled gender-based violence and violence against women and girls its biggest pandemic and national disaster and thus called for aggressive programming to challenge and eradicate toxic forms of masculinity. Men who embody toxic masculinity intimidate diverse women and Trans and gender diverse persons through the threat or actioning of violence. The brutalization of bodies and unaccountability when not submitting to male dominance sends powerful messages out to diverse women and Trans and gender diverse persons to submit or die. These acts of violence and intimidation has a silencing effect and prevent people from speaking up and out and challenge patriarchy. Women are also further pacified to not speak up and act against patriarchy by other women who out of fear and indoctrination form a first line defense in favor of patriarchy.

The perpetuation of men as heads of households through religious doctrine and cultural practices places diverse women and Trans and gender diverse persons in subordinate positions. This gender bias continue to play itself out at school and work etc. and negatively impacts diverse women and trans and gender diverse persons' abilities to fully participate and ascend into leadership roles. The role of diverse women as 'homemakers' further impact on the extent to which women are able to develop themselves, their careers and their roles in society

*(São Paulo 1)* In April 2021, The Legislative Assembly of the State of São Paulo, voted in a law project (PL 504), wrote by a congresswoman called Marta Costa (PSD), that would prohibit the advertisement of LGBTQIA + people or homo-affective families in the state of São Paulo. Marta Costa and her followers

associates LGBTQIAP+ people with “inadequate influence on the formation of young people and children”. Gladly, a congresswoman Erica Malunguinho (PSOL-SP), the first transwoman in the Legislative Assembly of the State of São Paulo, led the opposition and said to all that putting LGBTQIA + people in a place of perversion and lasciviousness “is to take another step towards the violence that is already constant in relation to us”. Fortunately, the bill was removed from the voting agenda, although there is no deadline for it to be voted on again, there is always a possibility of dealing with this issue again.

(b) *What are the distinct challenges faced by those who experience multiple and intersecting forms of discrimination?*

*(Southern Africa)* Trans women continue to face a triple threat to exercising their freedom of opinion and expression on the basis of race, gender and legal recognition. This means that similar to cisgender women that trans women of color face misogyny and gender-based violence and femicide in a society that continue to centre whiteness, maleness and masculinity. What compounds the struggle for trans women is the criminalization of gender identity and gender expression; and the lack of legal gender recognition (LGR) or accessible pathways thereto where LGR is available.

Many countries criminalize same sex consensual sexual conduct. These countries also do not necessarily provide LGR. This means that in environments where homosexuality is criminalized and LGR is not provided that heterosexual Trans women are likely the subjects of criminalization on account of being recognized on the basis of their sex assigned at birth and due to the visible ways in which they transgress societal gender norms. Certain countries also criminalize gender identity and expression under ‘gender impersonation’ and ‘immorality’ laws. This results in Trans women (and Trans and gender diverse persons more broadly) needing to hide who they are and continuously live in fear of being the subjects of discrimination, harassment and violence.

In many countries like South Africa where legal recognition is afforded transgender persons the law is typically conceptualized using an outdated bio-medical understanding. Thus, access to legal recognition is generally curtailed by such medical requirements as most trans women do not have access to gender affirming hormonal or surgical care as this level of care is initiated at tertiary healthcare/academic hospital level situated in the main urban centres resulting in most trans women never being able to affirm self legally as women. This has a ripple effect as non-legal recognition results in non-recognition of identities socially and therefore compounding and perpetuating trans stigma, discrimination and violence. When the law fails to provide gender recognition it reinforces gender oppressive cultural and religious beliefs about Trans and gender diverse persons and through omission gives society permission and justification to openly engage in hate speech and hate crimes in all spheres of life. Thus, curtailing all abilities of Trans women (and broadly Trans and gender diverse persons) to exercise freedom of expression and freedom of opinion to counter such violence and optimally participate in all spheres of society.

*(São Paulo 1)* In the context of Brazil, the country does not have reliable data’s of violence against LGBTQIA+ and without official data that actually represent the reality of violence against LGBTQIA+, it is difficult to create effective public security policies to protect the population.

*(São Paulo 2)* A recent example that shows violence not only against divergent opinions, but against the presence of divergent bodies in the public sphere, happened to the city councilor of Niterói (State of Rio

de Janeiro), where Benny Briolly, a trans and black woman, had to leave Brazil, in May 2021, after receiving death threats. In a video explaining the situation, she stated:

*'It's impossible not to have an answer from the Brazilian State, it can't stay that way and it can't be that way. Brazil, from the imprisoned scream, from the popular demonstrations, from the popular revolt of the people, demands a response, demands my physical integrity and demands that I, the most voted woman being a trans woman and slum child, can exercise my mandate with the integrity of life and physics. We will still fight'.*

This context of violence and silencing of LBTQIA+ women is the same that murdered the black and lesbian city councilor Marielle Franco, in 2018. Opinions that go against the extreme-right government's death policy are violently wrenched from the public arena.

(c) *How have the pandemic, economic crises and recent political unrests affected women's ability to communicate, protest and access information online and offline?*

*(Southern Africa)* There is a clear connection between lockdown measures and the increase in violence against women and children as well as Transphobia in the home resulting in homelessness and exposure to violence for Trans and gender diverse persons. Lockdown regulations and increased financial insecurity everywhere and dependency on men resulted in women being unable to flee oppressive and violent households. With many human rights and service provisioning organizations finding new ways of working, and particularly remotely and decentralized, it meant a slowing down in response time, especially with an increase in complaints. Lockdown also meant that people could not convene in public spaces to organize and air frustrations through in-person protest action. A lack of freedom of movement thus impacted freedom of expression and opinion.

South Africa consists of multiple parallel universes with vast race and gendered wealth and income inequalities. These socio-economic disparities can also be mapped out across spatial geographies and linked to access to infrastructure or lack thereof. For example, this means that during lockdown many women and LGBTQI+ people did not have smart phones or could not afford data to access online spaces to connect with community, for support or access information. This would have required data and airtime. This was the result of financial dependency that these individuals had on either men and/or cis straight loved ones had as a result of societal gender norms driving understandings of women as homemakers and formally unemployed; men as income generators and in control; and LGBTQI+ persons as marginalized and disposable. In many places, particularly in rural and peri-urban spaces lack of digital connectivity infrastructure lack cellphone and internet towers made it difficult for people to get onto the digital and cellular grid even if they had access to data and airtime.

The pandemic also impacted the ability of diverse women and Trans and gender diverse persons to engage in advocacy. This was the case where many transgender persons were frustrated by the Department of Home Affairs' decision to suspend forename and gender marker changes resulting in continued exposure to being called out and questioned at material relief stations and testing sites where service providers could question trans and gender diverse persons for fraud on account of their legal gender particulars not matching their actual particulars. Another example was the suspension of gender affirming health and surgical care which compounded mental trauma for the community. With little recourse for accountability in systems that could site the pandemic as justification it left many trans and gender diverse persons exposed self-harm and external sources of violation.

3. What in your view are the key elements of a gendered perspective on the human right to freedom of opinion and expression? What would a feminist perspective add to the understanding of this right?

(Southern Africa) To achieve gender equity, discourse needs to shift beyond defining it as equality between cisgender women and cisgender men. The achievement of gender equity rests upon the recognition of the challenges facing Trans and gender diverse persons, particularly Trans women and gender diverse persons, alongside cisgender women. As more and more Trans and gender diverse persons affirm themselves publicly, in spite of the politico-legal contexts, so too is there the potential for anti-trans and anti-women backlash and violence as a result of conservative anti-gender ideology movements that root themselves in already gender oppressive religious and cultural belief systems. For an authentic and sustainable iteration of gender justice to emerge the conceptualization needs to be intersectional and rooted in the rights to bodily autonomy, recognition on the basis of gender self-determination, privacy and dignity. It is only when this approach will be applied that Trans and gender diverse persons, especially Trans women, would be able to live freely and able to exercise freedom of opinion and expression.

5. (a) What legislative, administrative, policy, regulatory or other measures exist in your State to promote and protect women's freedom of opinion and expression online and offline? To what extent do these measures take into account intersectionality?

(Southern Africa) Constitution of South Africa expressly protects the rights to freedom of religion, belief and opinion; freedom of association; freedom of expression; and Assembly, demonstration, picket and petition, amongst other rights such as gender and sexual equality and dignity.

Domestic Violence Act 166 of 1998.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act operationalize the non-discrimination and equality clause contained in the Constitution. It provides for civil law remedies in dealing with issues of harassment and hate speech.

Choice of Termination of Pregnancy Act as amended Act 38 of 2004.

Alteration of Sex Description and Sex Status Act 49 of 2003 – legal mechanism to change a gender marker.

Civil Union Act 17 of 2006 – same-sex marriage legislation.

Labour Relation Act 66 of 1995 and Employment Equity Act 55 of 1998 – advances affirmative action to achieve gender parity in the workplace.

Equality Court cases –

- September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019) – advances freedom of gender expression for Trans women in prison settings.
- Nari Mphela v Department of Basic Education – advances the rights of transgender learners to wear school uniforms in accordance with their gender identity.

National Strategic Plan on Gender-based Violence and Femicide – promotes womens' agency and autonomy by guiding a national response to ending gender-based violence in all its forms.

Prevention and Combatting of Hate Speech and Hate Crimes Bill (not promulgated as yet) – criminalizes certain forms of speech that is intended to promote violence against women and girls, LGBTQI+ people and persons with disabilities. In the case of hate crimes, prejudice on the basis of certain identity characteristics such as gender identity, sexual orientation, disability etc. can be seen as aggravating circumstances during sentencing on a base offence.

6. What legal administrative, policy or other measures exist in your State to protect women from sexual and gender based violence and harassment online? How effective are they? What impact have they had on women's empowerment and public participation, including freedom of expression?

(Southern Africa) The Protection from Harassment Act 17 of 2011 which came into effect on 27 April 2013 provides victims of cyber harassment with an inexpensive civil remedy that covers both a domestic as well as non-domestic relationships. In the Act harassment is defined to include cyber stalking and harmful electronic communications. The Act places an obligation on Internet Service Providers (ISPs) to assist law enforcement by providing any information that can help to ascertain the identity of the perpetrator. This is to be done within five days of having been served with a request from law enforcement.

7. What do you believe States should do to a) uphold women's human right to freedom of opinion and expression b) protect women from violence, harassment and intimidation online and offline and c) promote women's public participation?

(Southern Africa) South Africa has a rich legal and policy tapestry that support women's rights and emancipation on paper. However, in practice this remains a challenge. The country therefore needs to popularize education on women's rights and authentic versions of gender equity through diverse programming in all fields and disciplines. Men and boys should be taught more enabling forms of masculinities that are respectful to the needs and wants of women. Women should be powered to fully participate within leadership, business ventures and employment at large to forge a viable livelihood and should not have to bear a double burden of both career women and homemaker. This requires the unlearning of rigidly defined gender binary norms and redefining the division of labour in more equitable terms between partners. To eradicate its gender-based violence and femicide culture which ultimately silence women into submission, it should put in place harsher measures of accountability to send strong messages to toxically masculine men and their supporters of what will not be tolerated. The country also needs to eradicate its high unemployment rate and corruption and focus on eliminating the big wealth and income disparities in the country which remain big drivers of racial class and gender inequality.