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Promoting access to healthcare for trans and gender diverse persons in Zimbabwe in the context of HIV

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Abstract:

Zimbabwe has significantly curbed its HIV epidemic, but there are still gaps in coverage for certain groups, particularly transgender and gender diverse (TGD) persons. TGD persons face high rates of HIV infection, limited epidemiological data, and societal and legal factors that hinder their access to healthcare. Using the Human Rights Based Approach (HRBA) as the main theoretical approach, the research examines the legal and policy frameworks in Zimbabwe, that impact on HIV healthcare access for TGD persons. The research being qualitative in nature, analyses international human rights instruments, policies, health guidelines, national laws, and strategies, and draws lessons from South Africa, Kenya, Malta, and Argentina for recommendations in improving access to healthcare for TGD persons in Zimbabwe.

The findings show that despite TGD persons recognition as priority groups in HIV interventions in Zimbabwe, there are gaps in the law and constitution of the country which lead to systemic healthcare disparities. These mainly involve stigma and discrimination at health facilities, lack of comprehensive information for both TGD persons and the health practitioner and economic challenges faced by TGD persons. A key barrier to access to services has been the criminalisation and legal gender recognition for TGD person which further pushes them to the margins of society.


Key recommendations include legal reform that place emphasis on equality and non-discrimination. Legal reform should include decriminalisation of sexual and gender diverse persons, having gender laws that explicitly recognise TGD persons and provide constitutional protections for sexual and gender minorities. There is need to strengthen advocacy for TGD persons' rights on international and national platforms, through opening the space for civil society engagement. Directly linked to access to HIV services, there is need for a revision and update of national policies, guidelines, and HIV strategies to include the needs of TGD persons and the provision of gender affirming health services.

Declaration:

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30 October 2024

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Chapter One: Introduction

1.1 Background

Zimbabwe is still burdened by HIV epidemic, with an estimate of 1.3million people living with HIV¹, 23 000 new HIV infections, and a prevalence of 11.6% among adults. ² Zimbabwe has achieved epidemic control by achieving the 95-95-95 HIV targets.³ Ninety-five percent individuals living with HIV are aware of their status, ninety eight percent of those are being treated and ninety five percent have achieved viral suppression.⁴ While this achievement has been celebrated , a closer look at the data shows gaps among specific populations. The country has not achieved epidemic control among children⁵ and Key Population (KP) groups. Key populations are defined as individuals who face elevated HIV risk and vulnerability due to social and legal challenges, regardless of the local context or epidemic's nature.⁶ These individuals include men who have sex with men, sex workers, people who use or inject drugs, prisoners, and transgender and gender-diverse persons⁷, Transgender and gender diverse persons experiences with HIV are under-documented, despite having a well-established MSM and SW programme with comprehensive HIV data. ⁸

¹ UNAIDS 'Zimbabwe Country Fact Sheet'

<https://www.unaids.org/en/regionscountries/countries/zimbabwe> (accessed 27 March 2024).

² Centres for Disease Control and Prevention 'Global HIV and TB Zimbabwe Country profile'

<https://www.cdc.gov/globalhivtb/where-we-work/zimbabwe/zimbabwe.html> (accessed 27 March 2024).

³ UNAIDS '2025 AIDS Targets' https://www.unaids.org/sites/default/files/2025-AIDS-Targets_en.pdf

⁴'At a glance: HIV in Zimbabwe' Be in the know, 13 August 2023,

<https://www.beintheknow.org/understanding-hiv-epidemic/data/glance-hiv-zimbabwe> (accessed 27 March 2024).

⁵ UNICEF 'Ending HIV/AIDS with children, adolescents and young women' UNICEF , September 2022,

<https://www.unicef.org/zimbabwe/media/8636/file/Ending%20HIV%20AIDS%20with%20Children,%20Adolescents%20and%20Young%20Women.pdf> (accessed 27 March 2024).

⁶ World Health Organisation 'Report on key populations in African HIV/AIDS: national strategic plans' WHO Regional Office for Africa (2018).

⁷ T Chikava and others 'Zimbabwean law and its impact on HIV programmes for key populations.' (2023) 11 *Frontiers in public health* 1.

⁸ Global AIDS Monitoring 'Country Progress Report-Zimbabwe' (2019) https://www.unaids.org/sites/default/files/country/documents/ZWE_2019_countryreport.pdf (accessed 25 March 2024).

The phrase “gender diverse” is often used broadly to describe people whose gender expression or identity differs from their birth sex, it includes gender non-binary, transgender and transexual individuals.⁹ While the word “transgender” is often used to describe people whose gender identity or expressions differ from the sex they were assigned at birth.¹⁰ The term “trans” with an open ending is a term chosen by the community to acknowledge and affirm diverse gender identities.¹¹ Collectively, these definitions describe people whose gender identity, expression, or both, diverge from societal norms tied to their birth-assigned sex.¹² In this study, the term Transgender and Gender Diverse (TGD) persons is used to promote inclusivity and acknowledge the diverse gender identities, expressions, and experiences.¹³

Global statistics show that TGD persons bear a significantly higher HIV burden compared to other key population groups. The HIV prevalence is highest among TDG persons at 10.3%.¹⁴ Little data is available especially in Sub-Saharan Africa for TGD persons regarding HIV epidemiology. The absence of this data suggests inequalities that may be attributed to the legal, social, and economic environment in Zimbabwe which hinders TGD persons from accessing to sexual and reproductive healthcare.¹⁵

Sex, gender, and sexual orientation are frequently misunderstood and conflated with the assumption that they are interchangeable and identical.¹⁶ It important to highlight the differences at the outset of this study, as this clarifies the unique stigma and rights concerns. Sex characteristics refer to an individual's physical attributes associated with

⁹ ‘The struggle of trans and gender-diverse persons, Independent Expert on sexual orientation and gender identity’ <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> (accessed 06 October 2024).

¹⁰ GLAAD ‘Transgender FAQ’ <https://glaad.org/transgender/transfaq/> (accessed 6 October 2024).

¹¹ MN Appenroth & M do Mar Castro Varela (eds) *Trans health: international perspectives on care for trans communities* (2022) 14.

¹² E Coleman and others Standards of care for the health of transgender and gender diverse people, Version 8. (2022) 23 *International journal of transgender health* 11.

¹³ E Coleman and others (n12) 11.

¹⁴ UNAIDS *Fact sheet 2024: Global HIV statistics*

https://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf (accessed 27 March 2024).

¹⁵ UNDP Annual Report: Towards ending AIDS as a public health threat by 2030 (April 2023) 1.

¹⁶ JF Boylan *Trans bodies, trans selves: A resource for the transgender community* (2014) 5; L Jones ‘The third sex: Gender identity development of intersex persons’ (2009) 1 *Graduate Journal of Counselling Psychology* 1.

sex, encompassing genitalia, reproductive anatomy, chromosomes, hormones, and secondary sex traits that develop during puberty.¹⁷ Gender is a social construct that institutionalises a system of social and cultural practices and roles associated with femininity and masculinity.¹⁸ These are often ascribed according to the individual's sex at birth. Gender identity is one's internal experience of being either male, female, or another gender. Human gender identity is experienced along a continuum, from feeling fully aligned with their body to feeling strongly mismatched.¹⁹

Sexual orientation describes a person's enduring sexual, emotional, romantic attractions to women, men, or both.²⁰ This orientation may influence a person's identity, behaviour, and communal affiliation. It is important to note that it may occur on a continuum instead of clear categories of homosexual, bisexual, or heterosexual.²¹

Gender and sexual minorities in Zimbabwe face significant stigma and discrimination as same sex marriages are prohibited²² by the Constitution of Zimbabwe of 2013, section 78(3). Marriage is a formation of a socially recognised union²³, and is generally perceived as a marker for increased social inclusion and acceptance.²⁴ This prohibition perpetuates the stigmatisation and discrimination of sexual minorities in Zimbabwe.

While there is no law that directly criminalises TGD persons in Zimbabwe, they face stigma and discrimination due to indirect consequences of anti-homosexuality laws. Consensual sex between men is criminalised by the Criminal Law (Codification and

¹⁷ The Yogyakarta Principles -Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007).

¹⁸ WHO 'Gender and Health' https://www.who.int/health-topics/gender#tab=tab_1 (accessed 27 March 2024).

¹⁹ J Hage & BK Refaat 'Ought GIDNOS get nought? Treatment options for nontrans sexual gender dysphoria' (2000) 105 *Plastic and Reconstructive Surgery* 1222.

²⁰ American Psychology Association 'Understanding sexual orientation and homosexuality' (2008) [Understanding sexual orientation and homosexuality \(apa.org\)](https://www.apa.org/understanding-sexual-orientation-and-homosexuality) (accessed 8 October 2024).

²¹ C Moleiro & N Pinto 'Sexual orientation and gender identity: review of concepts, controversies, and their relation to psychopathology classification systems' (2015) 6 *Frontiers in Psychology* 2.

²² Constitution of Zimbabwe 2013 sec 78 (3).

²³ J Hasty and others 'Marriage and families across cultures' 23 February 2022, [11.5: Marriage and Families across Cultures - Social Sci LibreTexts](https://www.libretexts.org/Bookshelves/Social_Sciences/Book%3A_Marriage_and_Families_across_Cultures_-_Social_Sci_LibreTexts) (accessed 8 October 2024).

²⁴ LA Drabble and others 'It's complicated: The impact of marriage legalization among sexual minority women and gender diverse individuals in the United States' (2020) 7(4) *Psychology Sex Orientation Gender Diversity* 2.

Reform) Act 2006 section 73. For most Zimbabweans, gender, sex, and sexual orientation are often viewed in a binary, one is either male or female, heterosexual, or homosexual. In Shona and Ndebele, the term "ngochani" or "nkotshane" broadly refers to all individuals who are gay, transgender, or intersex.²⁵ The social fabric of Zimbabwe also affirms the punitive laws by also subjecting transgender persons to harassment, violence, abuse, and exclusion based on social and religious norms.²⁶ Social exclusion has a ripple effect such as limiting access to essential services, education, and the enjoyment of rights.²⁷

Aside from resorting to constitutional litigation, TDG persons face challenges in legally changing their gender markers on government issued identification cards and passports. The difference between the legal documents and gender identity of TGD persons create a barrier to accessing public services including health services. For TGD individuals, inadequate documentation can trigger traumatic experiences in healthcare settings, including misgendering and deadnaming, compromising their dignity, privacy, and well-being.²⁸

Transgender persons face systemic erasure by being mis-identified, mis-recognised within homosexual narratives. While global research continues to identify the barriers limiting health service access for transgender individuals²⁹, there is limited data or research done in-country that highlights how legal, and policy environments shape the health outcomes of transgender individuals.

The entitlement to the best possible psychological and physical wellbeing, without any differences or discrimination is guaranteed by Article 12 of the International Covenant on Economic Social Cultural Rights (ICESCR)³⁰ and article 16 of the African Charter on

²⁵ UNDP & NAC Zimbabwe 'Legal environment assessment for HIV, TB, sexual and reproductive health, and rights' (2019) 69.

²⁶ UNDP & NAC Zimbabwe (n25) 69.

²⁷ UNDP & NAC Zimbabwe (n25) 69.

²⁸ Southern Africa Litigation Centre, 'Laws and policies affecting transgender persons in Southern Africa' (2016) 1.

²⁹ J D Safer 'Research gaps in medical treatment of transgender/nonbinary people' (2021) 131(4) *Journal of clinical investigation* 1.

³⁰ International Covenant on Economic Social Cultural Rights (ICESCR) art12.

Human and Peoples Rights³¹. The Zimbabwean Constitution, in Section 76(1), guarantees the right to access basic healthcare, which includes reproductive healthcare.³² States are obligated to ensure through special provisions that everyone, particularly people from marginalised groups have equal opportunities to access comprehensive HIV services.³³

International human rights experts from 25 countries unanimously adopted the Yogyakarta Principles in 2007 as guidelines for ensuring equal and dignified access to healthcare for TGD people. These guidelines highlight the government's responsibility to uphold, safeguard and fulfil the rights of everyone, regardless of their gender identity.³⁴ These principles are an extensive set of regulations for recognizing and supporting the rights of sexual and gender diverse minorities.³⁵ In reference to this study, principles One, Seventeen, Eighteen and Thirty-three will be applied. The Yogyakarta Principles begin by acknowledging that securing healthcare as a human right relies on other interconnected rights.³⁶ Principle One specifically touches on the right to equality by emphasizing that government laws should not discriminate against TGD persons when it comes to accessing healthcare. Principle 17 echoes the right to the best possible state of health, especially regarding sexual and reproductive health.³⁷ While Principle 18 focuses on medical ethics and protecting the physical anatomy of TGD persons.³⁸ Principle 33 addresses the need for protection of individuals from discriminatory laws that criminalise and punish them for their identity.³⁹

³¹ African Charter on Human and People's Rights (ACHPR) art 16.

³² Constitution of Zimbabwe 2013 sec 76 (1).

³³ OHCHR and UNAIDS *Handbook on HIV and Human Rights for National Human Rights Institutions*. Geneva: Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS. (2007).

³⁴ D Zambezi 'The right of transgender persons to access healthcare in South Africa' unpublished PhD thesis, University of Pretoria, 2023 27.

³⁵ KP Magashula & C Ngwena 'Beyond symmetrical binaries: The emergence of the constitutional recognition of transgender persons in Zimbabwe with reference to *Nathanson v Mteliso & Others*' (2023) 23 *African Human Rights Law Journal* 386-409.

³⁶ Yogyakarta Principles (n17) 6.

³⁷ Yogyakarta Principles (n17) 22.

³⁸ Yogyakarta Principles (n17) 23.

³⁹ The Yogyakarta Principles Plus 10 - additional principles and state obligation on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics to complement the Yogyakarta Principles (2017) 11.

Resolution 75/284 on the *Political Declaration on HIV and AIDS: Ending inequalities and getting on track to end AIDS by 2030* refers to the same societal enablers targets as the Global AIDS Strategy.⁴⁰ The societal enablers aim to reduce discrimination, stigma, and violence against marginalized groups by 2025. The targets are to ensure that fewer than 10% of countries have laws that punish people for their sexual orientation or gender identity, to reduce discrimination or stigma against people living with HIV and key populations to less than 10%, and to reduce gender inequality and violence experienced by women, girls, people living with HIV, and key populations to less than 10%.⁴¹ This affirms that criminal laws and the use of administrative sanctions stigmatise and marginalise TDG persons undermining public health efforts and increasing their susceptibility to HIV infection.

The research's main argument is that the legal framework and policy landscape in Zimbabwe hinders the realisation of TDG person's health rights. It impacts the availability, accessibility, acceptability, and quality⁴² of services offered to TGD persons, and increasingly places them at risk of transmission of HIV.

1.2 Problem Statement:

Zimbabwe has achieved significant milestones in controlling its national HIV epidemic, however gaps remain for specific populations, in particular trans and gender diverse (TGD) persons. TGD persons face high HIV prevalence, limited epidemiological data, and legal and social barriers that impede access to healthcare. This research aims to investigate the specific ways in which the legal framework and policy landscape in Zimbabwe hinders the realisation of TGD persons' health rights, particularly their access to HIV services.

⁴⁰ A/HRC/50/53 Human Rights and HIV/AIDS- Report of the United Nations High Commissioner for Human Rights (2022).

⁴¹ The Lancet 'HIV Seeing the people in the percentages' (2021) 8 *The Lancet HIV* 1.

⁴² WHO 'Human Rights' 1 December 2023 <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health#:~:text=Core%20components%20of%20the%20right,goods%20and%20services%20for%20all.> (accessed 28 April 2024).

1.3 Research Aims and Objectives:

The study aims to appraise existing legal and policy frameworks that influence the accessibility of healthcare services for trans and gender diverse (TGD) persons in the context of HIV in Zimbabwe. The sub-objectives of the study are:

- a) to identify the norms and standards under regional and international law that support access to HIV healthcare services for transgender and gender diverse (TGD) persons,
- b) to evaluate the legal frameworks and policies in Zimbabwe that influence access to HIV healthcare services for transgender and gender diverse (TGD) persons; and
- c) to propose legal and policy reforms to improve HIV healthcare access for transgender and gender diverse (TGD) persons in Zimbabwe.

1.4 Research Questions:

The main research question is, how do legal and policy frameworks impact on access to healthcare services for trans and gender diverse (TGD) persons in the context of HIV in Zimbabwe? The sub-questions are:

- a) What regional and international laws and standards promote access to HIV healthcare services for transgender and gender diverse (TGD) people?
- b) How do the existing legal and policy frameworks in Zimbabwe facilitate HIV healthcare access for trans and gender diverse (TGD) persons?
- c) What legal and policy reforms or recommendations regarding access to HIV care can be applied to the Zimbabwean context?

1.5 Research Methodology:

The research is qualitative in nature, using mainly desk and library research. It employs a policy analysis in which international human rights instruments, policies, health guidelines, national policies and laws, strategies, and guidelines that influence access to HIV services for TGD persons are critically examined. The study will consult a range of sources including journal articles, law reports, legislation, international treaties, policy documents, HIV country reports, reports from civil society organisations and relevant non-governmental organisations. The research will also consult the legislation, policies

and health strategies from other jurisdictions that have specific programmes targeted at TGD persons access to HIV services.

1.6 Significance of the research:

The study adds to the limited body of knowledge on TGD persons in Zimbabwe. It highlights the impact legal environments have on the access to healthcare especially HIV related services on TGD persons and address significant gaps to inform interventions to improve the quality of services, healthcare access and outcomes of TGD persons. The findings of the study can be used by activists and advocacy organisations to advocate for enabling legal frameworks and policy landscape that promotes the well-being of TGD persons in Zimbabwe.

1.7 Theoretical Approach:

The research essentially uses a human rights-based approach (HRBA) to critique systemic issues and state responsibilities. The HRBA is guided by five principles, that of, participation, accountability, empowerment, legality and non-discrimination and equality⁴³ The HRBA emphasises inherent rights and freedoms everyone deserves irrespective of HIV status, gender identity, or sexual orientation.

To provide a nuanced perception of the complex challenges faced by TGD persons, the research applies the intersectionality theory⁴⁴. The theory asserts that different forms of oppression are interconnected and reinforce each other to sustain a web of power that is rooted in, and maintained by, social structures and institutional systems. The theory will be helpful in highlighting how TGD persons experience a unique intersection of discrimination based on gender identity and sexual orientation and it impacts their access to healthcare. It assists in exploring the power dynamics within the system that might put TGD persons at a disadvantage in accessing healthcare in health institutions.

⁴³ European Network of National Human Rights Institutions 'Human Rights Based Approach' <https://ennhri.org/about-nhris/human-rights-based-approach/#:~:text=The%20HRBA%20is%20underpinned%20by,the%20enjoyment%20of%20their%20rights> (accessed 5 June 2024).

⁴⁴ K Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics and violence against women of color' (1991) 43 *Stanford Law Review* 1241.

The theory will also help in the analysis on how the policy and national HIV, or health frameworks address the specific needs and requirements of TGD persons in Zimbabwe.

1.8 Literature Review:

TGD identities are viewed as disruptive and challenge the dominant African norms of patriarchal power structures, heteronormative values, and traditional gender roles.⁴⁵ The contestation occurs when reconciling the correlation between sexuality, religion, culture and having a national identity. Some views within society challenge the legitimacy of TGD identities, denying TGD people social acceptance, legal protections, and even their very existence. These views often link TGD people and their bodies with mental health issues, 'abnormal behaviour, or even wrongdoing.'⁴⁶

Despite being a secular state, Zimbabwean political leadership have claimed the country a Christian nation.⁴⁷ Christianity has been a moral guide, shaping societal perspectives to lean towards heteronormativity.⁴⁸ Zimbabwe's stance on queer identities is clear in the anti-sodomy laws, and also through the infamous 'worse than dogs and pigs'⁴⁹ and the 'we are not gays'⁵⁰ speeches made by the President Robert Mugabe at a book fair and at the UN General Assembly. Mugabe's infamous speeches and opinions on homosexuality have shaped local discourse on queer identities and their social categorisations.⁵¹ However, during the Mugabe era, non-heteronormative identities were very politicised,

⁴⁵ B Boswell "On miniskirts and hegemonic masculinity: The ideology of deviant feminine sexuality in anti-homosexuality and decency laws" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 52.

⁴⁶ BA Rood and others 'Internalised transphobia: Exploring perceptions of social messages in transgender and gender-nonconforming adults' (2017) 18 *International Journal of Transgenderism* 8.

⁴⁷ D Itai 'Zimbabwean Vice President reiterates strong opposition to LGBTQ+ right' *Watermark LGBTQ News Source* (Online) 21 February 2024 <https://watermarkonline.com/2024/02/21/zimbabwean-vice-president-reiterates-strong-opposition-to-lgbtq-rights/> (accessed 24 March 2024).

⁴⁸ C Moyo & MP Ndhlovu 'Multivocality and Sexual Identity of a "Nation" in Zimbabwe: Exploring Twitter Discourse on Queer Sexualities.' (2024) 28 *Sexuality & Culture* 464–477.

⁴⁹ L Duke 'Mugabe makes homosexuals public enemies' *The Washington Post* (Online) 8 September 1995 <https://www.washingtonpost.com/archive/politics/1995/09/09/mugabe-makes-homosexuals-public-enemies/94008c9a-c402-48ad-b99d-7a4176217e43/> (accessed 27 March 2024).

⁵⁰ "We are not gays' Exclaims Mugabe during UN address" *Euronews* (Online) 29 September 2015 <https://www.youtube.com/watch?v=YvEAs2H2w6Y> (accessed 28 March 2024).

⁵¹ N Muparamoto 'LGBT individuals and the struggle against Robert Mugabe's extirpation in Zimbabwe' (2021)13 *Africa Review* 2.

often seen as outsiders, Western and un-Zimbabwean⁵², building a national identity on cisgender and heterosexual identities.

Forming identities therefore becomes a constant interaction with culture, religion, and other social contexts. Butler emphasises that identity is not something that one ‘has’ but rather something that one ‘does’, ‘performs’ or ‘recreates’ through interaction with other human beings.⁵³ Hall also argues that identities are dynamic and are constantly in flux due to societal positions individuals occupy such as race, gender, class and the power dynamics associated with them shape individuals’ sense of self.⁵⁴ Therefore, identity might be better understood as *identification*,⁵⁵ a constantly changing collection of different aspects of ourselves that come together in specific situations. Identity is open to new influences, and represents the intersection of continuity, difference, and rupture within the broader frameworks of history and discourse.⁵⁶

The recognition and protection of TGD persons’ rights may be a new concept in many African societies. At least 32 African countries have legal frameworks that criminalize same-sex sexual behaviour, resulting in punitive measures against individuals whose sexual orientation or gender identity does not conform to societal norms.⁵⁷ Countries like Nigeria have enacted laws that outlaw transgender identities by criminalizing the act of "posing" as the opposite sex.⁵⁸ South Africa in 2003 became the first country in Africa to recognise the existence of TGD identities in its national laws.⁵⁹ The Alteration of Sex Description and Sex Status Act 49 of 2004 allowed for the legal recognition of TGD identities.

⁵² Y Frossard de Saugy “‘We are not gays’”: regime preservation and the politicization of identity in Mugabe’s Zimbabwe’ (2022) 65 *African Studies Review* 600.

⁵³ M Bamberg and others ‘Discourse and identity construction. in: S Schwartz and others (eds) *Handbook of Identity Theory and Research* (2011) 177-199.

⁵⁴ S Hall ‘Who needs identity’ in P du Gay & P Redman (eds) *Identity: A reader* (2000) 15.

⁵⁵ C Ngwena *What is Africanness? Contesting nativism in race, cultures and sexualities* (2018) 30.

⁵⁶ Ngwena (n55) 30.

⁵⁷ Network of African National Human Rights Institutions ‘A guide for national human rights institutions for implementing Resolution 275 in Africa’ (2020).

⁵⁸ Human Rights Watch ‘Rights in transition: making legal recognition for transgender people a global priority’ <https://www.hrw.org/world-report/2016/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north-0> (accessed 15 November 2023).

⁵⁹ Alteration of Sex Description and Sex Status Act 49 of 2004.

The case of *September v Subramoney NO and Others (EC10/2016) [2019]* also a landmark case in South Africa, where the Equality Court of South Africa drew attention to the connection between the recognising TGD identities and upholding human dignity.⁶⁰ The case raised awareness on how discrimination can occur against transgender populations due to misrecognition. The *Audrey Mbugua v Kenya National Examinations Council 147 [2013]*, case ruling established the right for transgender people to have their identity recognized by the state. Although the case was about changing her gender marker on her educational certificates, the ruling has been used as precedent to inform transgender rights more broadly. This extends to medical documents and interactions with healthcare providers.

The process of legal gender recognition involves the government officially acknowledging a person's gender identity, as opposed to the gender assigned at birth. This acknowledgement is reflected in official documents and records.⁶¹ Without the proper documentation, accessing health care can be nightmare⁶², an invasion of privacy and violation of the right to human dignity⁶³, also triggering for TGD persons by being constantly misgendered or using their dead names.

The *Nathanson v Mteliso & Others* case shed light on how to define TGD identities, taking cues from the inclusive Yogyakarta Principles that defines gender identity as

Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender including dress, speech, and mannerisms.⁶⁴

The World Health Organisation (WHO) further defines TGD persons as

⁶⁰ Magashula & Ngwena (n35) 406.

⁶¹ TGEU 'Legal gender recognition' <https://tgeu.org/issues/legal-gender-recognition/> (accessed 7 June 2024).

⁶² UNDP & NAC Zimbabwe (n25) 70.

⁶³ Southern Africa Litigation Centre (n28) 1.

⁶⁴ Yogyakarta Principles (n17) 6.

Trans and gender diverse people” is an umbrella term for those whose gender identity, roles or expression do not conform to the norms and expectations traditionally associated with the sex assigned to them at birth; it includes people who are transsexual, transgender, or otherwise gender nonconforming or gender incongruent. Transgender people may self-identify as transgender, female, male, trans woman or trans man, transsexual or one of many other gender nonconforming identities. They may express their genders in a variety of masculine, feminine and/or androgynous ways.⁶⁵

In this study the researcher illustrates how TGD person’s identities have been negotiated and shaped historically, pre- and post-colonial Zimbabwe and within HIV programming. While non-heteronormative identities have been portrayed as alien or western or white man’s diseases, there is significant evidence that these identities existed pre-colonialism. For instance, even though some African cultures placed high priority on heterosexual marriages, they were tolerant of non-heterosexual activities and identities that occurred within bounds of specific rituals, sacred places and designated social roles.⁶⁶

Although most of the history of diverse sexualities has been passed down through oral history, organisations in Zimbabwe such as GALZ, Sexual Rights Centre (SRC) and Trans Research Education Advocacy Trust (TREAT) Zimbabwe have had several projects and publications to document some of these stories. Magashula and Ngwena caution that there is need to include African experiences and expressions of gender identities into definitions of TGD persons, as the term ‘transgender’ may be colonising.⁶⁷

The SRC published a Ndebele Dictionary on Gender and Sexualities,⁶⁸ the compilation was done with the help of Ndebele historians. However, what was apparent from the terminology used, was that there was an overlap of sex, gender, and sexual practices, with sex and gender being described as “ubulili”. This has also carried onto modern local words that have been used to describe anyone who is lesbian, gay, bisexual, transgender,

⁶⁵ WHO ‘Frequently asked questions. WHO development of a guideline on the health of trans and gender diverse people’ 15 January 2024 https://cdn.who.int/media/docs/default-source/hq-hiv-hepatitis-and-stis-library/tgd_faq_16012024.pdf (accessed 28 March 2024).

⁶⁶ M Epprecht *Heterosexual Africa?: The history of an idea from the age of exploration to the age of AIDS (New African histories)* (2008) 9.

⁶⁷ Magashula & Ngwena (n35) 395.

⁶⁸ Sexual Rights Centre *Isichazamazwi Sobulili Obubanzi* (2019).

and intersex (LGBTI), the street language blankets TGD persons as “istabane/ inkotshane” in Ndebele and “ngochani” in Shona.

The research makes use of the above definitions of TGD persons to provide a nuanced understanding of how the laws, policies and health strategies address the vulnerabilities and needs of TGD persons in the context of HIV in Zimbabwe.

1.9 Provisional Outline of chapters:

The study is organised into 5 chapters. Chapter 1 is the introductory chapter. Chapter 2 explores the legal and policy frameworks that impact on the health rights of TGD persons in Zimbabwe, looking at international human rights law and regional statutes and WHO and World Professional Association for Transgender Health (WPATH) guidelines. Chapter 3 analyses the Zimbabwean Constitution, laws and the local HIV strategy and policy documents that facilitate access to health for TGD persons. Chapter 4 focuses on the recommendations for legal and policy reforms, drawing lessons from South Africa, Kenya, Malta, and Argentina countries that have been leading in Key Populations HIV programming and have inclusive gender laws. Chapter 5, the final chapter, provides the research summary, conclusions, and recommendations for future study.

CHAPTER TWO: A Human Rights Lens: International and Regional Legal Frameworks that impact access to HIV Services for TGD Persons

2.1 Introduction:

The right to health, including access to HIV services, is a fundamental human right enshrined in international law. Despite this, TGD persons continue to face significant challenges in accessing healthcare, particularly HIV related services. Most of these challenges stem from the legal and policy environment that imposes limitations to the access of HIV services by TGD persons.

This chapter examines the international and regional frameworks that shape the landscape of TGD access to health services in the context of HIV, with a focus on the human rights-based approach. This chapter highlights how key instruments, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights uphold the protection of TGD rights. Other frameworks including the Yogyakarta Principles⁶⁹, WPATH Standards of Care guidelines⁷⁰ and Resolution 275⁷¹ also reveal the importance of non-discrimination, participation, and accountability, in fostering inclusive, fair, and equal access to healthcare for TGD persons. This analysis aims to inform strategies that prioritize the health, dignity, and human rights of transgender individuals, ultimately contributing to a more inclusive and effective response to the HIV epidemic.

2.2: Human Rights Based Approach to Health

The right to achieve the highest possible level of physical and mental health⁷², has been integrated into several human rights international and regional treaties. It was first coined in 1946, in the WHO's Constitution preamble defining the right to healthcare as "a state of complete physical, mental and social well-being and not merely the absence of

⁶⁹ Yogyakarta Principles (n17).

⁷⁰ WPATH: SOC for the health of transsexual, transgender, and gender non-conforming people, vol 8 (2022).

⁷¹ Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity , ACHPR/Res.275(LV)2014.

⁷² 'WHO Constitution' <https://www.who.int/about/governance/constitution> (accessed 18 May 2024).

disease or infirmity.”⁷³ The 1948 Universal Declaration of Human Rights (UDHR) article 25 affirms everyone's right to a standard of living that ensures their health, well-being, and that of their family. This includes food, clothing, housing, healthcare, social services, and protection from economic hardship.⁷⁴

In 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) in article 12⁷⁵ recognised the right to health. It stated; ‘The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁷⁶ Article 16 of the African Charter on Human and Peoples’ Rights (African Charter), also affirms that “every individual shall have the right to enjoy the best attainable state of physical and mental health.”⁷⁷ Governments have a responsibility to take necessary actions to safeguard the rights of their citizens.

The right to health is a comprehensive right that goes beyond just receiving timely and appropriate healthcare. It includes essential that affect overall well-being, such as clean water, good sanitation, healthy work and living environments, and education about health, including sexual and reproductive health.⁷⁸ The Maputo Protocol recognizes women's right to health, which includes sexual and reproductive health, as guaranteed by Article 14. The right to health includes the ability to make decisions about your own health, give informed consent, protect your body, and participate in decisions about healthcare.⁷⁹ It encompasses the four essential aspects of accessing healthcare services: the availability of services, affordability of care, acceptability of healthcare providers, and quality of treatment.⁸⁰

⁷³ ‘WHO The Right to Health Fact Sheet No.31’

<https://www.refworld.org/reference/themreport/ohchr/2008/en/58915> (accessed 20 June 2024).

⁷⁴ The Universal Declaration of Human Rights, art 25.

⁷⁵ E da Luz Scherf and others ‘Healthcare access by transgender persons in South Africa: gender-based discrimination, human rights violations, and the role of the African Human Rights System’ (2022) 1 *Journal Health And Technology* 7.

⁷⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR) art 12.

⁷⁷ African Charter on Human and Peoples’ Rights art 16.

⁷⁸ Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.14 (2000).

⁷⁹ World Health Organisation ‘Human Rights’ https://www.who.int/health-topics/human-rights#tab=tab_1 (accessed 20 June 2024).

⁸⁰ CESCR General comment (n7).

The right to sexual and reproductive health is a crucial part of the right to health, as recognized in Article 12 of the ICESCR. It is also inseparable from other rights, General Comment No. 22 of 2016 states that the right to sexual and reproductive health is interconnected with other human rights, including civil and political rights. It is essential for physical and psychological well-being, and is linked to other rights like life, liberty, freedom from torture, privacy, and non-discrimination.⁸¹

General Comment No. 22 recognises how different parts of a person's identity (race, gender, sexual orientation, age, disability, and socioeconomic status) interact and create unique challenges which can lead to marginalization and exclusion from healthcare services. For example, a low-income transgender woman might face discrimination from health care providers due to her gender identity and socio-economic status, thereby limiting her access to services. It further highlights the need for governments to dismantle discriminatory laws that impede access to services and to ensure the availability, accessibility, acceptability, and quality of sexual and reproductive health services, while addressing the specific needs of marginalized groups.⁸²

Realizing sexual and reproductive health rights requires more than just providing services. It demands addressing underlying power dynamics, challenging assumptions, and transforming decision-making processes at all levels, from households to international institutions, to address the root causes of social inequalities.⁸³ The Special Rapporteur on the right to health⁸⁴ in their reports to the Human Rights Council and the UN General Assembly, has emphasized that laws, policies, and regulations that create obstacles to accessing sexual and reproductive health information and services should be reformed or repealed to ensure access to these essential rights.⁸⁵

⁸¹ General Comment No.22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights).

⁸² As above (n81).

⁸³ Sexual Rights Initiative 'Application of a Human Rights-based Approach to Sexual and Reproductive Health' (2012) 4.

⁸⁴ A/HRC/14/20: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (right to health and criminalization of same-sex conduct and sexual orientation, sex work and HIV transmission) (2010).

⁸⁵ Sexual Rights Initiative (n83) 5.

With the shift in HIV programming to focus on key and vulnerable populations across the world, it has become imperative to take a human rights-based approach (HRBA) to access to health services. A rights-based approach to health requires and involves a comprehensive and integrated methodology.⁸⁶ Despite the absence of a globally accepted definition and standardized application⁸⁷, Human Rights-Based Approach (HRBA) is a framework that integrates international human rights standards into sustainable development.⁸⁸ Adopting a HRBA in health means that health policies, processes, programmes and legislation⁸⁹ are based on a system of human rights and obligations that emphasise the importance of equality, non-discrimination, participation, and accountability.⁹⁰

2.3: HIV and human rights

More than forty years since the discovery of HIV and the subsequent interventions in the fight against it, one thing that has been clear is that human rights are essential for successful responses to HIV. Disregard for human rights drives HIV transmission and amplifies its devastating effects.⁹¹ The HIV epidemic has brought to the forefront the need to address the underlying inequalities and human rights violations, which are a major barrier to effective responses to the epidemic.⁹² The 2001 Declaration of Commitment on HIV/AIDS emphasizes that human rights are crucial for addressing the HIV epidemic. It highlights that respecting human rights in areas like prevention, care, support, and

⁸⁶ Sexual Rights Initiative (n83) 1.

⁸⁷ D Patterson 'Human rights-based approaches and the right to health: a systematic literature review' (2024) 16 *Journal of Human Rights Practice* 604.

⁸⁸ 'United Nations United Nations Sustainable Development Cooperation Guidance.' (2019) <https://unsdg.un.org/sites/default/files/2022-06/UN%20Cooperation%20Framework%20Internal%20Guidance%20--%201%20June%202022.pdf> (accessed 17 June 2024).

⁸⁹ M Rioux 'Healthcare reform: A human rights approach' in D Raphaek and others (eds) *Staying alive: Critical perspectives on health, illness, and health care* (2006) 4.

⁹⁰ UN Sustainable Development Group 'HRBA Portal: UN Practitioners' portal on Human Rights Based Approaches to Programming 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' https://unsdg.un.org/sites/default/files/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf (accessed 15 June 2024).

⁹¹ United Nations Human Rights Office of the High Commissioner 'HIV/AIDS and human rights: OHCHR and the right to health' <https://www.ohchr.org/en/health/hivaids-and-human-rights> (accessed 15 June 2024).

⁹² UNAIDS and OHCHR 'Handbook on HIV and Human Rights for National Human Rights Institutions' (2007).

treatment can reduce susceptibility to HIV and prevent stigma and discrimination against individuals living with or at risk of HIV.⁹³

Human rights institutions have become more focused on safeguarding the rights for individuals with HIV and high-risk individuals, especially in areas like healthcare, employment, education, and freedom of speech. This focus aims to safeguard their rights and address their vulnerabilities. The International Guidelines on HIV/AIDS and Human Rights, established in 2006, emphasize the importance of a rights-based approach to combating the epidemic. They offer guidance to governments and others on the most effective ways to advance, safeguard, and fulfil human rights in relation to HIV.⁹⁴ They emphasize that protecting public health and respecting human rights are both essential and should be pursued together. Governments have a duty to ensure equitable access to HIV services, without any discrimination. The guidelines stress the importance of reaching out to marginalized populations in the HIV response. They call for the implementation of laws that protect against discrimination to reduce human rights violations.⁹⁵

Various non-binding regional instruments related to HIV have been adopted by key organizations in Africa, including the African Union (AU), African Commission, Intergovernmental Authority on Development (IGAD), East African Community (EAC), and Southern African Development Community (SADC). The regional instruments aim to promote a coordinated response to the HIV epidemic across the region. Human rights bodies have intensified efforts to safeguard the rights of individuals living with HIV and those most at risk, including in key areas such as healthcare access, employment protections, education, and freedom of expression, to ensure that their rights are upheld, and their vulnerability is addressed.

⁹³ General Assembly resolution S-26/2: Declaration of commitment on HIV/AIDS (2001).

⁹⁴ Joint United Nations Programme on HIV/AIDS (UNAIDS) 'International Guidelines on HIV/AIDS and Human Rights' (2006).

⁹⁵ UNAIDS (n94).

The Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa (2006)⁹⁶, acknowledge the connection between human rights and health outcomes. The Abuja Call encourages member states to adapt national legislation, to repeal or enact laws and policies recognising the challenges of HIV and AIDS and TB, especially discrimination and stigma.⁹⁷ In the case of *Minister of Health and Others v Treatment Action Campaign and Others*⁹⁸ in South Africa, the courts directed the government to create a comprehensive program, using available resources, to ensure that pregnant women and their new-borns have access to healthcare services intended to prevent vertical transmission of HIV.

The Abuja Call highlights the importance of protecting the human rights particularly for populations more vulnerable to HIV. UNAIDS identifies men who have sex with men, sex workers, transgender people, people who inject drugs, prisoners, and other incarcerated people as key population groups particularly vulnerable to HIV.⁹⁹

2.4: Rights of TGD persons

The HIV epidemic has highlighted the critical need to protect and uphold the rights of LGBTIQ+ individuals under international human rights law. Globally, progress has been made towards HIV epidemic control, however important that progress is, it is unequal. Key populations are disproportionately affected and marginalised because of stigma, discrimination, and inequality. While research on TGD persons has increased, there are still some geographical disparities with most research coming from high income countries.¹⁰⁰

⁹⁶ African Union 'Abuja call for accelerated action towards universal access to HIV and AIDS, tuberculosis and malaria services in Africa' (2006).

⁹⁷ University of Pretoria Centre for Human Rights *Compendium Of Key Documents Relating to Human Rights And HIV In Eastern And Southern Africa* (2008) 65.

⁹⁸ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

⁹⁹ UNAIDS 'Key Populations' <https://www.unaids.org/en/topic/key-populations> (accessed 24 June 2024).

¹⁰⁰ S Baral and others 'Human rights, the law, and HIV among transgender people' Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law' (2011).

International human rights law applies to everyone, without exception, including LGBTIQ+ persons.¹⁰¹ Article 2 of the UDHR emphasises the universality of rights regardless of any distinctions such as “as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”¹⁰²

The phrase “other status” implies that discrimination categories are not fixed and can extend beyond the list.¹⁰³ Therefore, equality, universality, and non-discrimination indispensable principles in the application of human rights to all individuals, including LGBTIQ+ persons. In 1994, the UN Human Rights Committee opined in *Toonen v Australia*¹⁰⁴, recommending that UN member states broaden the understanding of the right to non-discrimination, as recognised in international human rights law, to include sexual minorities, thereby promoting equal protection and recognition for LGBTIQ+ individuals worldwide.¹⁰⁵

The 1990s marked a significant turning point in the fight for TGD person’s rights, as a growing global movement emerged to challenge the long-held belief in the existence of only two genders (male and female) and work towards recognizing and legitimizing TGD identities.¹⁰⁶ The movement aimed at dismantling stigma and pathologisation of gender diversity. The gradual removal of stigmatising and pathological framings of homosexuality within the Diagnostic and Statistical Manual of Mental Disorders (DSM) mirrored how societies were becoming more aware and accepting of homosexuality.¹⁰⁷ The DSM-5 now recognizes gender dysphoria¹⁰⁸ as a condition, shifting the focus from labelling transgender individuals as disordered to acknowledging the distress they may experience related to their gender identity. In 1992 WHO declassified homosexuality as a disease in

¹⁰¹ Network of African National Human Rights Institutions (n57).

¹⁰² UDHR Art 2.

¹⁰³ Network of African National Human Rights Institutions (n57).

¹⁰⁴ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁰⁵ Baral and others (n100).

¹⁰⁶ AM O’Connor and others ‘Transcending the gender binary under international law: advancing health-related human rights for trans* populations’ (2022) 50 *Journal of Law, Medicine & Ethics: A Journal of the American Society of Law, Medicine & Ethics* 412.

¹⁰⁷ SE McHenry ‘Gay is good: history of homosexuality in the DSM and modern psychiatry’ (2022)18 *American Journal of psychiatry residents’ journal* 4.

¹⁰⁸ American Psychiatric Association *Diagnostic and statistical manual of mental disorders, fifth edition, text revision* (2022).

the International Classification of Diseases 10 (ICD-10). The following ICD 11 redefined gender identity disorder as gender incongruence, emphasising that it is not a psychological illness.¹⁰⁹ The intended impact of the declassification was to reduce stigma and facilitate access to better health care services for TGD persons.

2.4.1: Standards of Care for TGD persons

The WPATH organisation was founded in 1979 and lauded for being one of the first organisations to combine international TGD advocacy and the right to health¹¹⁰. The organisation has established a series of ‘Standards of Care’ (SOC) clinical guidance for health professionals to help TGD persons to fully enjoy their right to health.¹¹¹ WPATH envisions a world where trans individuals have access to quality healthcare, social services, and equal rights, free from discrimination.¹¹² They recognize that well-being depends on both excellent clinical care and a supportive social and political environment that fosters acceptance, equality, and full citizenship.

SOC offer an adaptable framework to address the unique, multifaceted health needs of TGD persons worldwide. The most recent SOC-8 published in 2022, takes on a more patient-centred approach and a shift from clinical to informed consent models for medical interventions¹¹³. They also acknowledge ‘gender diversity’ and ‘non-binary’ identities as part of the trans-spectrum, emphasising on respect for patients’ self-identified genders.¹¹⁴ The chapter on sexual health recognizes the significant influence of sexual health on the physical and mental well-being of TGD people. Recommendation 17.6 recommends that healthcare professionals who care for TGD people provide comprehensive counselling on STI prevention, tailored for adolescents and adults.¹¹⁵

¹⁰⁹ WHO *Clinical descriptions and diagnostic requirements for ICD-11 mental, behavioural and neurodevelopmental disorders* (2024).

¹¹⁰ WPATH ‘History and Purpose’ <https://www.wpath.org/soc8/history> (accessed 8 October 2024).

¹¹¹ WPATH ‘History and Purpose’ <https://www.wpath.org/soc8/history> (accessed 8 October 2024).

¹¹² WPATH ‘About’ <https://www.wpath.org/about/mission-and-vision> (accessed 8 October 2024).

¹¹³ A Cross ‘The WPATH Standards of Care: Their history and importance in advocating for Transgender health’ Honors thesis, University of Maine, 2023 27.

¹¹⁴ Cross (n113) 27.

¹¹⁵ Coleman and others (n12).

Health care professionals are required to have open and informed conversations with their TGD clients on HIV/STI prevention. Referring to the full range of prevention options, including safer sex commodities, post-exposure prophylaxis (PEP), pre-exposure prophylaxis (PrEP), and HIV treatment, to prevent the spread of HIV, as highlighted in the WHO 2021 guidelines.¹¹⁶ Recommendation 17.7 also emphasises on offering HIV and STI testing services in accordance with existing guidance either national guidance or WHO global guidance.

The WPATH SOC version 8 guidelines have the potential to change the trajectory of improving health outcomes for TGD populations, worldwide. They contribute to the ongoing efforts to build consensus on the vital role of gender-affirming care, the use of inclusive language to reduce stigma and discrimination, to improve the accessibility and quality of healthcare services attained by TGD persons.¹¹⁷

2.4.2: Yogyakarta principles

The Yogyakarta Principles (YP), adopted in 2006 by a group of experts in HIV, sexual minorities, and human rights, constitute the most comprehensive global non-binding instrument.¹¹⁸ They outline how international human rights law to LGBTIQ+ are applied, providing a landmark framework for promoting and protecting their rights.¹¹⁹

In 2017 a supplement to the principles, the Yogyakarta Principles plus 10 (YP+10) were adopted.¹²⁰ The YP+10 emerged from advancements in international human rights law and a growing comprehension of the specific abuses faced by people based on their sexual orientation, gender identity, gender expression, and sex characteristics.¹²¹ This intersection emphasised the need to safeguard and recognise these individuals' rights, particularly in cases where multiple forms of discrimination intersect. These give guidance on TGD persons' health as a human rights issue.

¹¹⁶ Coleman and others (n12).

¹¹⁷ Cross (n113) 27.

¹¹⁸ Yogyakarta Principles (n17).

¹¹⁹ Yogyakarta Principles (n17).

¹²⁰ Yogyakarta Principles+10 (n39).

¹²¹ Yogyakarta Principles +10 (n39).

The creators of the Yogyakarta Principles deliberately crafted them as soft law, allowing for flexible application and adaptation.¹²² As soft law, the principles can be utilized in various ways, such as international courts using them for interpretive purposes or states voluntarily adopting them as policy, legislative or judicial recognition as law.¹²³ The introduction of the principles emphasizes the universality and indivisibility of human rights. It states that all people are born equal and have the same rights, regardless of their sexual orientation or gender identity.¹²⁴

Principle 1 when applied in the context of health recognises that access to healthcare is a fundamental right that is intricately linked with other rights to equality. Specifically, it highlights that state laws and policies must ensure non-discrimination against transgender individuals, promoting inclusive healthcare access and addressing systemic barriers to their well-being.¹²⁵

Principle 17 reaffirms the fundamental right to health, enshrined in Article 12 of the ICESCR, emphasizing sexual and reproductive health as an essential component.¹²⁶ States are urged to ensure transgender individuals' right to healthcare by providing equal access, non-discriminatory policies, adequate facilities, and educated healthcare professionals.¹²⁷ This includes legislation, autonomy, and informed decision-making, promoting a comprehensive and inclusive healthcare environment that addresses transgender individuals' specific needs, fostering a supportive and protective framework for their well-being.

Principle 18 focuses on upholding medical ethics and preserving the bodily integrity of transgender individuals.¹²⁸ The Yogyakarta Principles serve as a guiding framework for

¹²² D Brown 'Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles' (2009) 31 *Michigan Journal of International Law* 869-870.

¹²³ Brown (n122).

¹²⁴ Yogyakarta Principles (n17).

¹²⁵ Yogyakarta Principles (n17) Principle 1.

¹²⁶ Yogyakarta Principles (n17) Principle 17.

¹²⁷ Yogyakarta Principles (n17) Principle 17.

¹²⁸ Yogyakarta Principles (n17) Principle 18.

legislators and healthcare providers, ensuring that transgender individuals receive equal and dignified access to healthcare, free from discrimination and harm.¹²⁹

Principle 33 aims to protect individuals from discriminatory laws, policies, and practices that criminalize or punish them for who they are and ensures their right to be free from fear of persecution, arrest, or punishment. The principle helps ensure that TGD individuals can access HIV services without fear, promoting their health, dignity, and human rights. Governments are urged to repeal laws that punish people based on their sexual orientation, gender identity or expression, or sex characteristics. Including laws that criminalise “sex work, abortion, accidental transmission of HIV, adultery, nuisance, loitering, and begging.”¹³⁰

2.4.3 Resolution 275

The African Commission on Human and Peoples’ Rights adopted Resolution 275 in 2014, a turning point for LGBTI+ rights on the continent.¹³¹ The resolution titled; *Protection Against Violence and other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity*, condemns all violence, discrimination, and human rights abuses targeting people based on their sexual orientation or gender identity.¹³²

The resolution requires countries to enact and effectively implement laws that protect human rights defenders and civil society organizations working on sexual minority from stigma, retaliation, and criminalisation.¹³³ These laws should establish victim-focused investigations, prosecutions, and judicial processes to ensure justice and accountability.¹³⁴ The goal is to create a safe and enabling environments for everyone, regardless of their sexual orientation or gender identity.

¹²⁹ Zambezi (n34) 27.

¹³⁰ Yogyakarta Principles +10 (n39) Principle 33.

¹³¹ Zambezi (n34) 171.

¹³² ACHPR/Res.275(LV)2014.

¹³³ ACHPR/Res.275(LV)2014.

¹³⁴ ACHPR/Res.275(LV)2014.

Resolution 275, although non-binding, underscores the importance of protecting LGBTQ+ individuals from violence and bias, guiding states in fulfilling their human rights commitment.¹³⁵ While progress is still needed, it marks a significant milestone for transgender rights in Africa, providing regional protection against stigma and discrimination. However, its impact relies on state parties' political will and commitment to promote and implement its provisions.¹³⁶

2.5: Conclusion

This chapter has demonstrated the critical role of international and regional frameworks in shaping the landscape of TGD access to health services, particularly in the context of HIV. International human rights law and regional instruments establish a strong foundation for ensuring TGD access to healthcare. The UDHR, the ICESCR and the African Charter provide a strong foundation for advocating for TGD health rights.

The chapter also highlighted frameworks that uphold the health rights of TGD persons. Frameworks like the Yogyakarta Principles, WPATH Standards of Care and the African Charter Resolution 275 have established important standards and obligations. By emphasizing principles like non-discrimination, participation, and accountability, these frameworks offer a vital foundation for addressing the systemic barriers and biases that hinder TGD persons' accessibility to quality HIV services.

¹³⁵ ACHPR/Res.275(LV)2014.

¹³⁶ African Men for Sexual Health and Rights 'Application of Resolution 275 by the African Commission on Human and Peoples' Rights: A six-year assessment' (2020)18.

Chapter Three: The legal and policy landscape of TGD healthcare in Zimbabwe

3.1 Introduction:

Chapter two discussed international and regional frameworks that lay the foundation for ensuring TGD persons healthcare. The UDHR, the ICESCR and the African Charter for Human and Peoples' Rights provide a strong base for acknowledging the right to health for everyone, including TGD persons. Frameworks like the Yogyakarta Principles, Resolution 275 of the African Commission on Human and Peoples' Rights and WPATH Standards of Care have also established important standards and obligations essential in addressing the systemic barriers that hinder access to services for TGD persons. This thesis asserts that adopting a human rights-based approach is essential in ensuring access to HIV health services for TGD persons.

Chapter three gives an overview of Zimbabwean laws and policies that ensure the realisation of rights for all citizens including TGD persons. As a member of the African Union (AU) and the United Nations (UN), Zimbabwe has international human rights obligations and is committed to upholding and respecting these rights. Zimbabwe signed and ratified, without reservations, the ICESCR and the African Charter for Human and Peoples' Rights, and expressly provides for socio-economic rights in the 2013 Constitution. The Constitution stipulates when inferring to the Declaration of Rights in Chapter 4 of the Constitution that courts must "take into account international law and all treaties and conventions to which Zimbabwe is a part."¹³⁷ Using the Constitution of Zimbabwe of 2013 as the starting point, the chapter reviews the measures taken by the state to ensure all citizens including TGD persons access HIV health services.

¹³⁷ Constitution (2013) section 46 (1) (c).

3.2 Health, HIV, and Human Rights in Zimbabwe:

3.2.1 *The Constitution*

Zimbabwe's Constitution is rooted in a set of core principles, including equality, gender equality, human rights protection, and the advancement of human dignity.¹³⁸ The Constitution of Zimbabwe includes an enforceable bill of rights that recognises socio-economic rights. However, Section 78 (3) of the Constitution bans same sex marriage.¹³⁹ When the law only recognises heterosexual marriages it sends a message of disapproval to non-heteronormative sexualities making them outsiders and not full members of society.¹⁴⁰ This clause perpetuates the discrimination and stigmatisation of LGBTIQ+ people.

Section 76 of the Constitution upholds healthcare, including reproductive health as a fundamental right.¹⁴¹ The right to HIV services is implied in the package of services considered for reproductive health. Furthermore, it enforces that individuals living with long term illnesses have the right to primary healthcare services for their condition.¹⁴² With advancements in treatment, HIV has evolved from being life-ending to a manageable chronic disease, enabling people to age naturally, live longer while requiring lifelong care and treatment.¹⁴³

Section 76(4) of the Constitution obligates governments to take practical legislative and other measures, using available resources, to gradually fulfil people's rights.¹⁴⁴ While this provision gives a nod to General Comment 14 of the CESCR, the phrase "within the limits of the resources available" dilutes and weakens the right and the government's

¹³⁸ Zimbabwe Constitution sec 3.

¹³⁹ Zimbabwe Constitution sec 78 (3).

¹⁴⁰ B Grant 'Comments and cases on same-sex marriage. Homosexual marriage and the Constitution' (1996)12 *South African Journal on Human Rights* 568-586.

¹⁴¹ Zimbabwe Constitution sec 76 (1).

¹⁴² Zimbabwe Constitution sec 76 (2).

¹⁴³ Global HIV Programme 'Chronic comorbidities & coinfections among PLHIV' <https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/hiv/treatment/chronic-comorbidities-and-coinfections#:~:text=The%20HIV%20infection%20has%20become,diseases%20and%20mental%20health%20disorders> (accessed 20 July 2024).

¹⁴⁴ Zimbabwe Constitution Sect 76 (4).

responsibility to fulfil it.¹⁴⁵ The government has taken advantage of the vagueness of the ‘limits’ by compromising the quality of services to its citizens. Multiple news reports have documented the poorly resourced health sector, with an exodus of health care professionals leaving the country and shortages in medication and condoms. Budget allocation trends for 2022-24 for the health sector show that Zimbabwe is nowhere close to reaching the target of 15% allocation as prescribed in the Abuja Declaration of 2001.¹⁴⁶

In addition, section 29(1) obligates “the state to take all practical measures to ensure provision of basic, accessible and adequate health services throughout Zimbabwe”.¹⁴⁷ The national Key Populations programme is currently implemented in 30 out of the 64 districts of the country,¹⁴⁸ meaning that all the clinics and facilities in other districts do not provide health services that are friendly and adequate to TGD persons. Media reports have also noted that there is low access to HIV services in rural and farming communities.¹⁴⁹

3.2.2 Legislation

a) *The Public Health Act*

The Public Health Act of 2018 aims to harmonise public health legislation and the Constitution to advance public health, improve quality of life, and ensure healthcare for all.¹⁵⁰ The Act's preamble emphasizes respect for human rights, justice, equity, and gender equality, as well as the protection of vulnerable groups of minors.¹⁵¹ However, the Act falls short of incorporating a rights-based approach aligned with the Constitution.¹⁵² The Act does not identify TGD persons as a vulnerable population, this leads to the

¹⁴⁵ N Pillay and others ‘Gender Inequality, Health Rights and HIV/AIDS among Women Prisoners in Zimbabwe’ (2021) 23 *Health and Human Rights Journal* 228.

¹⁴⁶ Zimbabwe Coalition on Debt and Development ‘Health and Education Situational Report’ (2024) 3.

¹⁴⁷ Zimbabwe Constitution Sect 29 (1).

¹⁴⁸ National AIDS Council ‘Key Populations’ < <https://nac.org.zw/key-populations/> > accessed 20 July 2024

¹⁴⁹ M Mugugunyeki ‘Lack of healthcare facilities disrupts HIV control efforts in Midlands’ *The Standard* (online) 19 February 2023 <https://www.newsday.co.zw/thestandard/news/article/200007647/lack-of-healthcare-facilities-disrupts-hiv-control-efforts-in-midlands#:~:text=Lack%20of%20healthcare%20facilities%20disrupts%20HIV%20control%20efforts%20in%20Midlands,-News&text=Low%20access%20to%20HIV%20prevention,Aids%20in%20the%20Midlands%20province> (accessed 20 July 2024).

¹⁵⁰ Public Health Act (2018).

¹⁵¹ Public Health Act (2018) sect 31 (1) (a)-(c).

¹⁵² Pillay and others (n145).

invisibility and exclusion of TGD persons in healthcare policies and service delivery. Without this recognition, TGD persons are excluded from targeted HIV interventions such as Pre-exposure Prophylaxis (PrEP), Anti-retroviral therapy (ART) and voluntary and confidential testing services.

The Act lacks explicit protections against discrimination based on sexual orientation and gender identity in healthcare. Without legal safeguards TGD persons remain vulnerable to stigma and discrimination in healthcare, and healthcare providers may not feel compelled to offer equitable and respectful care to TGD persons. The Act provides a legal framework for STI prevention and treatment¹⁵³, mandating reporting, treatment, and confidentiality, it does not recognise nor address the specific needs of TGD persons. It is important for the Act to include and recognise targeted HIV/STI prevention and treatment interventions, including gender affirming care for TGD persons as essential public health services. These gaps restrict access to HIV services, increasing HIV risk, delaying diagnoses, and worsening health outcomes for TGD persons.

The absence of anti-discrimination provisions that specifically include TGD persons leaves them exposed to mistreatment, harassment, and discrimination by healthcare providers, with limited legal options for recourse.¹⁵⁴ In Zimbabwe, where it is common for government leadership to publicly condemn gender diverse persons, health care providers become hesitant to offer services.¹⁵⁵

b) National AIDS Council of Zimbabwe Act

Zimbabwe reported its first case of AIDS in 1985, and by end of 1999 an estimate of two hundred thousand people had died of AIDS and one million five hundred thousand people were infected with HIV/AIDS.¹⁵⁶ This necessitated the establishment of the National AIDS Council (NAC) in 1999 through the National AIDS Council of Zimbabwe Act. The Act establishes the NAC, defining its structure, roles, and authority in the HIV/AIDS

¹⁵³ Public Health Act (2018) part V

¹⁵⁴ UNDP & NAC Zimbabwe (n25).

¹⁵⁵ UNDP & NAC Zimbabwe (n25).

¹⁵⁶ N Zungu-Dirwayi and others (eds) *An audit of HIV/AIDS Policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe*. (2004) 32.

response, through the implementation of various programs and measures aimed at effectively responding to the epidemic.¹⁵⁷ Besides mobilising and managing resources the NAC is mandated to “enhance the capacity of various sectors of the community to respond to the HIV/AIDS epidemic and coordinate their responses.”¹⁵⁸ The NAC has been instrumental in coming up with policies and strategies that have incorporated Key Populations including TGD persons in the HIV response.

c) Criminal Law (Codification and Reform) Act

Zimbabwe has no law that explicitly criminalises TGD identities, however, TGD persons often face indirect or discriminatory criminalisation. This is often done through laws that ban consensual same-sex intimacy, sex work, and drug use. The Criminal Law (Codification and Reform) Act 2006 (Criminal Code) criminalises consensual sex between men. This law specifically prohibits “any male person who, with the consent of another male person, knowingly performs anal sexual intercourse or any other indecent act involving physical contact.”¹⁵⁹

In countries like Zimbabwe, where TGD persons have no legal recognition sexual activity between a trans-woman and a cisgender man is regarded as same-sex conduct, and as such criminalised.¹⁶⁰ Criminalisation creates a persistent atmosphere of fear and stigma that not only affects cis-gender LGBTQ+ persons but also TGD persons, thereby increasing their vulnerability.¹⁶¹

Not only are TGD persons targeted through the anti-homosexuality laws, but they are also affected by laws that criminalise sex work. Barriers to education and employment contribute to higher rates of sex work among TGD persons compared to the general population.¹⁶² Section 81 (2) of the Criminal Code makes the act of selling sex illegal¹⁶³,

¹⁵⁷ National AIDS Council of Zimbabwe Act Chapter 15:14.

¹⁵⁸ National AIDS Council of Zimbabwe Act Section 4 (1)(c).

¹⁵⁹ Criminal Law (Codification and Reform) Act 2006, sec 73 (1).

¹⁶⁰ Human Dignity Trust ‘Injustice Exposed: The Criminalisation of Transgender People and its impacts’ (2019) 47.

¹⁶¹ Human Dignity Trust (n158).

¹⁶² Z Chiam and others ‘Trans Legal Mapping Report 2019: Recognition before the law’ (2020) 15.

¹⁶³ Criminal Law (Codification and Reform) Act 2006, sec 81 (2).

Section 77 refers to the crime of public indecency, where a person indecently exposes themselves or conducts themselves indecently, offending another person.¹⁶⁴ The law does not define clearly what public indecency is, allowing a broad and arbitrary interpretation of the provision. Police have been known to act with impunity, arbitrarily searching, arresting, and detaining TGD persons.¹⁶⁵ These actions are often motivated by the perception that TGD persons' clothing or public behaviour violates conventional gender norms. This creates a climate of fear, discouraging TGD persons from accessing public spaces such as healthcare facilities.¹⁶⁶ The misuse of Section 77 deepens the systemic barriers to HIV related services, highlighting the need for legal reforms to prevent discrimination and guarantee equitable healthcare access for TGD persons.

Section 156 and 157 criminalise the possession, use and distribution of dangerous drugs for all individuals.¹⁶⁷ Research indicates that TGD persons are more likely to experience problems with drug and substance use, stemming from the negative impacts of discrimination, minority stress, and social isolation.¹⁶⁸ Zimbabwe's drug laws have been criticized for lacking harm reduction measures in healthcare, forcing drug users to avoid seeking essential medical services due to fear of arrest.¹⁶⁹ The enforcement of this provision unjustly targets TGD persons who are already burdened by systemic inequalities, stigma, and lack of healthcare protections, leading to further harm and profiling as deviant.

The *Nathanson v Mteliso & Others* landmark ruling, which relied on an Indian precedent, affirmed TGD person's rights to equality and dignity.¹⁷⁰ In a clear and decisive statement, the ruling declared that transgender citizens are afforded equal rights, privileges, and protections.¹⁷¹ Despite the ruling not directly establishing gender identity as a distinct

¹⁶⁴ Criminal Law (Codification and Reform) Act 2006, sec 77 (1)(a).

¹⁶⁵ Chiam and others (n160) 16.

¹⁶⁶ UNDP & NAC Zimbabwe (n25).

¹⁶⁷ Criminal Law (Codification and Reform) Act 2006, sec 156 & 157.

¹⁶⁸ UNDP & NAC Zimbabwe (n25).

¹⁶⁹ UNDP & NAC Zimbabwe (n25).

¹⁷⁰ Magashula and Ngwena (n35) 392.

¹⁷¹ Magashula and Ngwena (n35) 409.

constitutionally protected right in Zimbabwe, it signals a progressive step towards TGD persons recognition.

d) The Births and Death Registration Act

The Births and Deaths Registration Act in Section 18 only has provisions for an individual to alter their first and last name.¹⁷² The current legislation does not permit TGD persons to update the gender identifier on government-issued documents, effectively denying them the ability to have their true gender identity recognized and validated by the state.¹⁷³ Inadequate documentation denies transgender people dignified healthcare, exposing them to misgendering, deadnaming, and privacy violations.

3.2.3 Policies

Zimbabwe has implemented multiple policies guiding the HIV epidemic response since 1985. For this study, the most recent policies and strategies will be reviewed, acknowledging the change in the landscape in the HIV response. While the HIV response is still largely driven by heterosexual sex/ transmission, the definition of priority, vulnerable, and key population groups has changed since the National Policy on HIV/AIDS Policy of 1999. The National Policy on HIV/AIDS had human rights considerations for children and young people, commercial sex workers, and prisoners that facilitated access to services without discrimination.¹⁷⁴

In 2002, HIV/AIDS was declared a national emergency, which meant that efforts needed to be intensified to stop new HIV infections and to treat and prevent AIDS related deaths.¹⁷⁵ The first Zimbabwe National HIV/AIDS Strategic Plan (ZNASP) 2006-2010 was developed to provide guidance for all HIV/AIDS programmes implemented by all key stakeholders.¹⁷⁶ The ZNASP was intended to be renewed every five years, it was until the extended ZNASP 3 (2015-2020) that transgender populations were formally recognised

¹⁷² Birth and Deaths Registration Act, Chapter 5:02, sec 18.

¹⁷³ Southern Africa Litigation Centre (n28) 50.

¹⁷⁴ MoHCC & NAC 'National Policy on HIV/AIDS' (1999).

¹⁷⁵ MoHCC & NAC 'Zimbabwe National HIV/AIDS Strategic Plan (ZNASP) 2006-2010' (2006) 1.

¹⁷⁶ MoHCC & NAC (n171) 2.

as a sub-population group with increased vulnerability to HIV.¹⁷⁷ Despite the mention of TGD persons in the strategy, it did not define who TGD persons, did it elaborate on the epidemiological data or challenges faced by TGD persons that make them vulnerable to HIV. None of the priority strategies were targeted at easing the HIV burden for the group.

In line with the Extended ZNASP 3, the NAC developed another strategic document specifically targeted at key population groups. The Zimbabwe's National Key Populations HIV and AIDS Implementation Plan 2019-2020, developed through a consultative process, intended to guide evidence-based programmatic HIV interventions to address the gaps in the National HIV response per specific target group.¹⁷⁸ The plan has ten focus areas that cover health service delivery, legal and policy reforms, understanding of SOGIE terms, and funding management and prioritisation. The plan acknowledges the paucity of data on TGD persons in Zimbabwe and how that could impact their health outcomes.¹⁷⁹ However, after 2020, there has not been a follow-up or an evaluation of the plan. The plan recommended mainstreaming of KP into the HIV response, comprehensive size estimates in the Zimbabwe Demographic Health Survey, and a sustainable human rights programme to address barriers to access to services.¹⁸⁰

The current ZNASP 4 (2021-2025) drafted within the context of leaving no one behind concentrates efforts on high-need districts and populations, guided by HIV burden and coverage gap analysis.¹⁸¹ The strategy highlights a key populations programme that seeks to strengthen client centred services and ensure the delivery of a service package designed to address the unique needs of key populations.¹⁸² The strategy also emphasises on the need to strengthen social enablers such as legal and policy frameworks to prevent HIV related stigma and discrimination. About key populations, it states that laws that prohibit same-sex sexual behaviour, sex work, drug, and substance

¹⁷⁷ MoHCC & NAC 'Extended Zimbabwe National HIV/AIDS Strategic Plan 3, 2015-2020' (2018) 23.

¹⁷⁸ NAC 'Zimbabwe's National Key Populations HIV and AIDS Implementation Plan 2019-2020' (2019) 8.

¹⁷⁹ NAC (n174) 48.

¹⁸⁰ NAC (n174) 67.

¹⁸¹ MoHCC & NAC 'Zimbabwe National HIV/AIDS Strategic Plan (ZNASP) 4 2021-2025' (2021) 19.

¹⁸² MoHCC & NAC (n177) 31.

use make it harder for key populations to get healthcare and increase stigma and discrimination against them.¹⁸³

The ZNASP have been used as a guideline that sets standards in in which HIV services to the populace will be conducted. The ZNASP acknowledging KP including TGD persons determines the coverage and access of services, coordination of key stakeholders in funding and programming for TGD.

3.2.4: Minimum Service Package for TGD Persons

The Operational Service Delivery Manual for the Prevention, Care and Treatment of HIV in Zimbabwe (OSDM) was created by the Ministry of Health and Child-Care (MoHCC) in 2022 to provide clinical guidance on how to prevent, diagnose, treat, and manage HIV.¹⁸⁴ The position of the MoHCC is that everyone should have access to HIV related services at all levels of the Zimbabwe healthcare system, i.e., Community, clinics, district/mission hospitals, provincial hospitals and central hospitals.¹⁸⁵ However, there are no specific population service packages, the general minimum package includes HIV testing, prevention and treatment services. A status neutral approach¹⁸⁶ is used to create an entry point for individuals to access optimal HIV services, irrespective of their HIV status.¹⁸⁷

The OSDM does provide special considerations TGD persons, highlighting additional medical needs like STI screening, anal health, mental health screening, intimate partner violence screening and hormonal therapies should be integrated into their clinical

¹⁸³ MoHCC & NAC (n177) 64.

¹⁸⁴ MoHCC 'Operational Service delivery Manual for the Prevention, Care and Treatment of HIV in Zimbabwe (OSDM)' (2022).

¹⁸⁵ MoHCC (n180) 7.

¹⁸⁶ Status Neutral Approach is an HIV testing approach that optimizes linkage to HIV services regardless of the HIV test result. Those who test HIV negative are linked to prevention options to maintain their HIV negative status. Those who test HIV positive are then linked to HIV treatment and care services, to manage their viral load.

¹⁸⁷ Centre for Disease Control 'HIV and TB Overview: Zimbabwe' 13 June 2024, <https://www.cdc.gov/global-hiv-tb/php/where-we-work/zimbabwe.html#:~:text=CDC's%20office%20in%20Zimbabwe%20works,health%20capacity%20and%20technical%20expertise> (accessed 24 July 2024)

reviews.¹⁸⁸ The country hasn't launched a gender affirming programme that offers hormonal therapy for TGD persons, but acknowledges that hormonal therapies are obtained from the black market.¹⁸⁹ The OSDM also provides key steps for a differentiated service delivery approach for TGD persons, in-order to address the availability, accessibility and frequency of services. In terms of accessibility, the model offers a decentralised approach to reach TGD persons where they are in their communities, Drop-in Centres, and hotspots, including operating clinics outside normal working hours.¹⁹⁰

3.3 Conclusion:

This chapter outlined the legal and policy landscape that guides health and HIV programming for TGD persons in Zimbabwe. The discussion highlighted the universality of human rights, the domestication of some of the international human rights provisions within the Zimbabwean Constitution. The discussion highlighted key strategic policies that guide HIV programming, especially targeted at TGD persons, such as the ZNASPs, and the OSDM that provides an HIV minimum service package. The discussion also considered other laws and policies that affect HIV access for TGD persons, such as the laws that penalise sex work, same-sex sexual conduct and the lack of gender recognition. However, it highlighted the affirmation that human rights are indivisible as enshrined in the Constitution and those rights apply to TGD persons.

¹⁸⁸ MoHCC (n180) 124.

¹⁸⁹ NAC (n174) 48.

¹⁹⁰ MoHCC (n180) 123.

CHAPTER FOUR: Recommendations for enhanced HIV services for TGD persons: Lessons from other jurisdictions.

4.1 Introduction:

The previous chapters discussed in-depth the Zimbabwean legal frameworks that impact access to HIV healthcare for TGD persons. Chapter three highlighted that the legal and policy environment remains primarily restrictive and inadequate to address TGD persons' health needs. This chapter answers the question, what recommendations regarding access to HIV services for TGD persons can be applied in the Zimbabwean context? To adequately answer this question, the chapter draws lessons from the experiences in Kenya, South Africa, Malta, and Argentina.

Despite the continued criminalisation of homosexuality Kenya has seen legal victories that have improved access to HIV services for marginalised populations including TGD persons. South Africa, on the other hand, has a more progressive approach that has provided legal protections for LGBTI+ rights, and has enhanced access to HIV services for TGD persons. Malta and Argentina are countries that are pioneers in the recognition of TGD persons' rights, with progressive legal frameworks that challenge societal norms about gender. Focusing on how these countries navigated similar challenges to develop frameworks that promote access to services for TGD persons.

The chapter explores case law, legal frameworks, policies and practical examples from Kenya, South Africa, Malta, and Argentina. It makes recommendations to foster a more inclusive legal environment, that enables Zimbabwe to better address the health disparities faced by TGD persons.

4.2: South Africa and TGD healthcare

South Africa stands out in Southern Africa for its progressive laws for LGBTI+ rights.¹⁹¹ In 1996, South Africa banned discrimination based on sexual orientation in its constitution.¹⁹² Subsequently, in 2003, transgender and gender-diverse individuals were

¹⁹¹ E Kenny & E Bloom 'Explainer: The Crucial Fight for Legal Gender Recognition' 03 April 2023, <https://www.idea.int/blog/explainer-crucial-fight-legal-gender-recognition> (accessed 13 August 2024).

¹⁹² Outright International *Country Overview: South Africa* Outright International <https://outrightinternational.org/our-work/sub-saharan-africa/south-africa> (accessed 13 August 2024).

able to obtain legal gender recognition. This was made possible through a combination of legal and social factors that include the constitutional framework, social and political advocacy, and landmark case law.

The country has a robust legal and policy framework that in practice should enhance access to HIV services for TGD persons. The legal and policy landscape is underpinned by a transformative constitution¹⁹³, anti-discrimination laws, and specific health policies targeted at addressing health needs of TGD persons. Section 9 of the Constitution, also known as the equality clause¹⁹⁴, safeguards everyone from unfair discrimination. The prohibited grounds include, “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.”¹⁹⁵

The *National Coalition for Gay and Lesbian Equality* case¹⁹⁶ interpreted sexual orientation to also include persons who are transsexual. The judgement stated that the concept of "sexual orientation" in the Constitution should be understood broadly to include bisexual and transgender people, as well as those who may only be attracted to the same sex on a single occasion¹⁹⁷. Some scholars find the interpretation as misleading and inaccurate leading to legal uncertainty on TGD persons experiences.¹⁹⁸ Conflating ‘sexual orientation’ and ‘gender identity’ in legal frameworks may lead to the invisibility or marginalisation of TGD persons’ experiences. However, this provision has opened avenues for legal recourse for TGD persons in South Africa. The wide interpretation of sexual orientation holds the potential to lead to a shift towards a more inclusive, queer-affirming, and less binary understanding of identity.¹⁹⁹

¹⁹³ J Van Wyk & M Oranje ‘The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?’ (2014) 13 *Planning Theory* 343.

¹⁹⁴ Zambezi (n34) 162.

¹⁹⁵ South Africa Constitution 1996, sec 9 (3).

¹⁹⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (1) SA 6 (CC) para 21.

¹⁹⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (1) SA 6 (CC) para 21.

¹⁹⁸ Zambezi (n34) 163.

¹⁹⁹ J Barnard-Naudé & P De Vos ‘War by other means: The law and politics of sexual minority freedom in post-apartheid South Africa’ in A Jjuuko and others (eds) *Queer Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 48.

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) of 2000, is a critical legislation piece that operationalises the non-discrimination clauses in the Constitution and establishes the Equality Courts²⁰⁰. Section 6, states that no one, including government or individuals, may unfairly discriminate against anyone²⁰¹, this includes health care providers. Therefore, healthcare providers and institutions are legally obligated to treat TGD persons with respect and dignity ensuring that they have access to HIV services. The Act also empowers individuals to seek legal redress, by making the Equality Courts easily accessible to individuals with or without legal representation²⁰², and making them available at every High Court and Magistrates Court in South Africa.²⁰³

The *September v Subramoney NO and Others* case involved a transgender inmate who sought the right to wear feminine hairstyles, makeup, and female underwear. The court acknowledged that the government has the obligation to accommodate the applicant's needs and that there are various reasonable steps it can take to do so.²⁰⁴ The case drew attention to the relationship between acknowledging transgender identity and upholding human dignity.²⁰⁵ This case established the states responsibility to provide reasonable accommodations for TGD persons, and any failure to do so constitutes a violation of their human rights.²⁰⁶ In 2011, the Equality Court in South Africa, ruled that a transgender woman's neighbour had violated her rights through verbal abuse.²⁰⁷ The court awarded damages and ordered psychological counselling for the victim, finding that the abuse constituted harassment, hate speech, and discrimination.

South Africa provides for legal gender recognition for TGD persons in addition to the equality and non-discrimination clauses. Legal gender recognition is simply defined as

²⁰⁰ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 2000 sections 16-23.

²⁰¹ PEPUDA, sect 6.

²⁰² PEPUDA, sect 20.

²⁰³ PEPUDA, sect 16.

²⁰⁴ *September v Subramoney NO and Others* 2019 (10) ZAEQC (EC10/2016) [2019] ZAEQC 4.

²⁰⁵ KP Magashula & C Ngwena (n35).

²⁰⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] para.164.

²⁰⁷ *Ambrose Gregorio Lallu v Wilna van Staden* 2011 (3) SA 3 (EC).

the process of changing official documents to match a person's identity.²⁰⁸ The Alteration of Sex Description and Sex Status Act enables individuals who have undergone gender reassignment, have naturally developed altered sexual characteristics, or are intersex to change their birth record sex description.²⁰⁹

The High Court in the *KOS and Others v Minister of Home Affairs and Others* case ruled that a person's legally changed sex description is considered to be of their new gender for all official purposes.²¹⁰ This applies only to their future interactions and status, without altering their past records or circumstances.²¹¹ The Act has been criticised for perpetuating a binary view of gender and for being inherently medicalised. The Act requires a medical diagnosis or intervention for the application to be approved, thus excluding a significant population of TGD persons from accessing legal gender recognition.²¹² Despite this, the potential of the impact this Act has on the access to services for TGD persons cannot be ignored. The lack of acceptable identity documents that align with their lived gender identity creates a myriad of challenges that open TGD persons to scrutiny, discrimination, and exclusion in health service access.

South Africa also has specific health policies and strategies that address the health needs for TGD persons. Like the concept of WPATH guidelines, South Africa developed the Southern African HIV Clinicians' Society gender-affirming healthcare guideline for South Africa (SAHCS).²¹³ The SAHCS provide guidance to health care practitioners on how to offer gender affirming healthcare services. The document defines gender-affirming healthcare as comprehensive care that addresses the psychological, physical,

²⁰⁸ TGEU (n61).

²⁰⁹ Alteration of Sex Description Act, 2003 sect 2(1).

²¹⁰ Alteration of Sex Description Act, 2003 sect 3(2).

²¹¹ J Sloth-Nielsen 'KOS v Minister of Home Affairs and its relevance to the law of marriage in South Africa', (2019) 35 *South African Journal on Human Rights* 298-310.

²¹² Human Sciences Research Council 'Policy guidance: Improving access to gender-affirming healthcare for transgender women' 28 September 2022 <https://hsrc.ac.za/news/impact-engagement/policy-guidance-improving-access-to-gender-affirming-healthcare-for-transgender-women/> (accessed 18 August 2024).

²¹³ A Tomson and others 'Southern African HIV Clinicians' Society gender-affirming healthcare guideline for South Africa' (2021) 22 *Southern African journal of HIV medicine* 3-27.

and social well-being of TGD persons, while acknowledging their self-identified gender.²¹⁴ Chapter three of the guidelines elaborates on TGD specific comprehensive care, including sexual and reproductive health.²¹⁵ Specifically for HIV related services, key considerations for HIV screening, prevention and treatment are discussed in detail for TGD persons. These provisions serve as a minimum service package for TGD persons focused service delivery, ensuring that health care providers deliver quality services.

In addition to the SAHCS guidelines, the National Strategic Plan (NSP) for HIV, TB and STIs 2023-2028 identifies TGD persons as a key population and identifies access to gender affirming healthcare as a priority area.²¹⁶ The NSP in goals one and two, outlines interventions targeted at TGD persons, and highlights a minimum HIV health service package for all key populations. The structure and development of the NSP highlights community engagement and participation, and supports initiatives led by TGD led organisations to increase awareness, advocacy, and engagement in HIV services by TGD persons.

While there may be gaps in the operationalisation of the policies and legal protections for TGD persons in South Africa, the impact of the legislation, policies, and strategies on access to HIV services cannot be ignored. The legal and policy framework reflect a holistic approach to ensuring that TGD persons' rights are respected and that they have equitable access to services. The reduction in stigma and discrimination within the healthcare settings facilitates enhanced access to HIV testing, prevention, and treatment services, leading to better health outcomes.

4.3: Kenya and TGD persons' healthcare

Kenya has a legal and policy landscape with both progressive and regressive elements. Kenya's 2010 Constitution establishes a strong foundation for human rights protection

²¹⁴SL Reisner and others 'Integrated and gender-affirming transgender clinical care and research.' (2016) 72 *Journal of acquired immune deficiency syndromes* 237.

²¹⁵ Tomson and others (n209) 6.

²¹⁶ South Africa National Strategic Plan (NSP) for HIV, TB and STIs 2023-2028 38.

and promotion.²¹⁷ Article 27 ensures equal treatment, forbidding direct or indirect discrimination by the State on grounds of, “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth”²¹⁸

Although not explicitly stated, the protection of human dignity and identity in the provision suggests that sexual orientation and gender identity are covered, being fundamental to personal identity..²¹⁹ Building on the constitutional framework, the Kenya Health Policy 2014-2030 ensures inclusive and discrimination-free healthcare for every individual.²²⁰ The 2010 Constitution has enabled the emergence of a vibrant civil society network that has been instrumental in working with the government to curb the spread of HIV.²²¹

The penal code imposes criminal sanctions on acts of ‘gross indecency’ and ‘carnal knowledge against the order of nature’.²²² Only men are criminalised under that law, however TGD persons also face discrimination as they are targeted by the same laws. While there have been significant cases litigated in the Kenyan courts, negative attitudes about LGBTIQ+ persons persist due to the deep-rooted perceptions of culture, religion, and colonialism.²²³

The Births and Deaths Registration Act, the Registration of Persons Act, and the Citizenship and Immigration Act, which regulate the issuance of vital legal identity documents, inadequately caters for the needs of TGD persons or individuals seeking to

²¹⁷ NW Orago and others ‘Queer lawfare in Kenya: Shifting opportunities for rights realisation’ in A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 105.

²¹⁸ Kenya Constitution 2010 Article 27(4).

²¹⁹ Orago and others (n213) 119.

²²⁰ Kenya Health Policy 2014-2030.

²²¹ UNAIDS ‘Vibrant civil society remains at heart of the HIV response in Kenya’ 29 May 2018

<https://www.unaids.org/en/resources/presscentre/featurestories/2018/may/resources/presscentre/featurestories/2018/may/civil-society-in-kenya> (accessed 19 August 2024).

²²² Kenya Penal Code sec 162.

²²³ MW Kuria & SG Maranya ‘The legal impunity for gender-based violence against intersex, transgender, and gender-diverse persons in Kenya: A legal recognition issue for the African human rights system’ (2022) 33 *Stellenbosch Law Review* 105.

update their gender designation.²²⁴ In the *Audrey Mbugua v Kenya National Examinations Council 147 [2013]*, the High Court affirmed the right of TGD persons to have their identity recognised and respected by the state. Although the court declined to sanction a gender marker change, it took a ground-breaking approach by permitting the omission of the gender identifier in instances not mandated by law, such as educational certificates.²²⁵

Kenya has a vibrant civil society organising space, which has been critical in advocating for progressive legal environment for LGBTI+ organising. In a landmark ruling in February 2023, the Kenyan Supreme Court granted the National Gay and Lesbian Human Rights Commission (NGLHRC) the right to register as an NGO, concluding a decade-long legal battle that began in 2013.²²⁶ The court ruled that denying registration due to sexual orientation would be unconstitutional, reaffirming freedom of association as a fundamental right essential for democratic societies. This ruling upheld previous decisions by the High Court in 2015²²⁷ and Court of Appeal in 2019²²⁸, which deemed the NGO Coordination Board's refusal to register the organization due to its name and focus on LGBTQ+ issues as unconstitutional and an infringement to the freedom of association.

The Kenyan government has shown commitment to ending HIV as a public health threat, despite its penal code. Civil society and the government have worked together to address the HIV epidemic and develop a responsive national key populations programme.²²⁹ In 2009 the Modes of Transmission (MOT) study identified female sex workers (FSW), men who have sex with men (MSM), and People who inject drugs (PWID) as priority populations in HIV programming.²³⁰ In 2020, the national strategic framework recognised

²²⁴ Kenyan Human Rights Commission and others 'The Human Rights Situation, Case Law, and Research on Protections on Grounds of Sexual Orientation, Gender Identity, and Expression in the Republic of Kenya' (2017).

²²⁵ MW Kuria & SG Maraya (n219) 112.

²²⁶ *Eric Gitari v NGO Board & 4 others [2015], Petition 440 (2013)*.

²²⁷ *Eric Gitari v NGO Board & 4 others [2015], Petition 440 (2013)*.

²²⁸ *NGO Coordination Board v. Eric Gitari & others (2019)*.

²²⁹ H Musyoki and others 'A decade and beyond: learnings from HIV programming with underserved and marginalised key populations in Kenya' (2021) 24 *Journal of the International AIDS Society* 54.

²³⁰ Musyoki and others (n225) 53.

TGD persons and people in prison and closed settings as priority populations.²³¹ While the Kenya AIDS Strategic Framework 2020/21-2024/25 acknowledges the vulnerabilities of TGD persons, it does not have specific interventions and programmes to address their needs. The minimum service package for TGD persons is lumped together with that of other KP groups²³² ignoring the need to integrate gender affirming care services within the HIV response.

Beyond advocacy initiatives civil society organisations provide direct support services to TGD persons, including healthcare referrals, legal assistance, and psychosocial support.²³³ These services are vital in bridging the gap between TGD persons and the healthcare system, ensuring that they can access HIV testing, treatment, and prevention services in a non-judgemental environment. The presence of a strong civic space gives hope to the inclusion of the TGD needs into the national HIV programme.

4.4: Malta and TGD persons' healthcare

Malta has received international recognition for having a progressive legal framework that is non-discriminatory and explicitly protects the rights of TGD persons.²³⁴ The country laws promote inclusivity and non-discrimination, and greater access to healthcare services. The historic move for Malta was the passing of the Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act²³⁵ in 2015, which guarantees the right to bodily integrity, physical autonomy, and gender identity. According to the Act's provisions, Maltese citizens over 18 can update their official documents and records to reflect their true gender, without needing medical or psychological interventions.²³⁶

²³¹ Musyoki and others (n225) 53.

²³² Kenya AIDS Strategic Framework 2020/21-2024/25 27.

²³³ Jinsiangu 'Our HIV Programme' <https://jinsiangu.org/our-hiv-programme> (accessed 16 August 2024).

²³⁴ ILGA 'Rainbow map 2024' <https://rainbowmap.ilga-europe.org/countries/malta/> (accessed 9 October 2024).

²³⁵ Malta Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC) 2015.

²³⁶ Malta Gay Rights Movement 'Gender Identity, Gender Expression and Sex Characteristics Act' 29 March 2017 <https://maltagayrights.org/gender-identity-gender-expression-and-sex-characteristics-act-2/> (accessed 8 October 2024).

The act catalysed significant advancements in the rights of sexual minorities, including the LGBTIQ Action Plans 2015-2017 designed to address all aspects of equality and rights for LGBTIQ.²³⁷ Malta is currently on its third equality strategy and action plan, which focuses on various areas such as equality and non-discrimination, education, health, sports, privacy, family life, hate crime, LGBTQ+ civil society, asylum, international LGBTQ+ equality, and other LGBTQ+ initiatives.²³⁸

Despite the commendable steps in upholding the rights of sexual minorities, TGD persons still face challenges in accessing healthcare. There is limited literature documenting the barriers to access to health for TGD persons.²³⁹ However, some challenges in healthcare access include stigma and discrimination due to socio-cultural norms that perpetuate a negative viewpoint of TGD persons.²⁴⁰ Additionally, TGD persons' face healthcare obstacles due to untrained providers, financial constraints, stigma, and inadequate support for vulnerable groups, highlighting the need for inclusive and compassionate care.²⁴¹

In 2018, the Gender Well-being clinic was opened, the clinic offers gender affirming healthcare services.²⁴² The Transgender Health policy was crafted through inclusive consultations with diverse stakeholders.²⁴³ The Transgender Health policy tackles the clinical, psychological, and social aspects of gender affirmation in healthcare. The vision of the policy is to create a trans-inclusive healthcare with person-centred, gender-affirmative care.²⁴⁴ These healthcare guidelines offer a personalized approach, tailored

²³⁷ C F Tavares 'From underdog to trailblazer: A study of the evolution of trans rights in Malta' Masters Thesis, Instituto Universitario De Lisboa, 2023 16.

²³⁸ Government of Malta 'LGBTIQ+ equality strategy and action plan 2023-2027' Human Rights Directorate.

²³⁹ Zambezi (n34) 213.

²⁴⁰ Zambezi (n34) 225.

²⁴¹ Zambezi (n34) 226.

²⁴² 'The gender well-being clinic' <https://transgenderhealth.gov.mt/en/the-clinic/the-gender-wellbeing-clinic/> (accessed 8 October 2024).

²⁴³ Office of the Deputy Prime Minister, Ministry for Health 'Transgender Health' https://health.gov.mt/wp-content/uploads/2023/04/Transgender_Healthcare_EN-MT.pdf (accessed 8 October 2024).

²⁴⁴ Office of the Deputy Prime Minister, Ministry for Health (n239) 11.

to individual needs and preferences, ensuring inclusive access to sex-specific screening tests.²⁴⁵

4.5: Argentina and access to HIV services for TGD persons

Like Malta, Argentina is also a pioneer in the recognition and promotion of the rights of TGD persons.²⁴⁶ Argentina is a good example of an enabling policy and legal environment conducive for greater access to health care for TGD persons. The Constitution of Argentina guarantees the rights to health protection, personal safety, and economic security.²⁴⁷ In 2012, Argentina passed the Gender Law No 26.743²⁴⁸ which adopts a self-determination approach. This approach ensures individuals' freedom to explore and affirm their gender identity, separate from assigned birth sex.²⁴⁹ The law allows individuals to alter their gender identifier and name through a straightforward administrative process.²⁵⁰ Article 11 of the Gender Identity Law²⁵¹ allows individuals to get the medical care they need, including hormone therapy and surgeries, without requiring any judicial or administrative authorization. The 2021 amendment includes a third gender category as an alternative for gender options,²⁵² acknowledging gender diverse identities.

Ideally, the impact of the law should have lessened the stigma and discrimination against TGD persons in Argentina. However, there is a paucity in studies on the impact of the law.²⁵³ The HIV prevalence among TGD persons' is relatively high at 34% compared to the

²⁴⁵ A Bezzina and others 'Participatory approaches to reaching the Sustainable Development Goals in Malta' (2019) <https://iris.who.int/bitstream/handle/10665/346214/WHO-EURO-2019-3497-43256-60624-eng.pdf?sequence=3> (accessed 8 October 2024).

²⁴⁶ E Choclin 'Laws for the Support of Transgenders in Argentina and Brazil' Bachelor of Arts thesis, Roger Williams University, 2022 2.

²⁴⁷ Argentina Constitution sec 42.

²⁴⁸ G Garrido 'Argentina's Gender Identity Law' in H Chiang and others (eds) *Global encyclopaedia of LGBTQ history: Volume 1* (2019) 120.

²⁴⁹ L Matthyse and others 'Keep the promise of dignity and freedom for all: a position paper on legal gender recognition in South Africa' (2020) 58.

²⁵⁰ CG Cabrera 'Argentina recognizes non-binary Identities: decree allows for third gender option in identification documents' 22 July 2021 <https://www.hrw.org/news/2021/07/22/argentina-recognizes-non-binary-identities> (accessed 9 October 2024).

²⁵¹ Argentina Gender Identity Law, art 11.

²⁵² Cabrera (n246).

²⁵³ LM Rojas 'Argentina's Gender Identity Law allows gender modification on official documents; recognizes third category, "X," for non-binary identities (2012-ongoing)' 2 June 2023 <https://www.sdg16.plus/policies/argentinas-gender-identity-law-allows-gender-modification-on-official-documents-recognizes-third-category-x-for-non-binary-identities/#policy-reference-14> (accessed 9 October 2024).

0.4% of the general population²⁵⁴ A study done by *Equity Health Journal* in 2014, found that social factors play a big role in whether TGD persons get the health care they need.²⁵⁵ Some avoid going to the healthcare facilities due to internalised stigma, stigma from healthcare providers and communities, or having experienced police harassment. However, those with good health insurance are more likely seek healthcare.²⁵⁶

4.6: Recommendations for Zimbabwe

4.6.1 Legal Reform and Decriminalisation:

Zimbabwe should prioritize repealing laws that have criminal penalties on same-sex relations and the enactment of legal protections against discrimination based on gender identity. Zimbabwe already has a progressive Constitution, that includes the Bill of Rights and includes clauses on equality and non-discrimination.²⁵⁷ To guard against unfair discrimination of TGD persons especially in the health sector, section 56(3) should include sexual orientation and gender identity as grounds for non-discrimination. The lack of explicit protections within the law leaves TGD persons vulnerable to mistreatment, harassment, and discrimination by health providers with little opportunity for legal recourse.

Criminalisation of homosexuality and anti-sodomy laws are a barrier to health service provision and access. Zimbabwe should repeal section 73 of the Criminal code, that prohibits same sex sexual conduct. The criminalisation of homosexuality has been widely recognized by experts as a major obstacle to successful HIV prevention and treatment strategies, exacerbating the pandemic rather than mitigating it.²⁵⁸ While on an individual level it creates barriers to accessing essential treatment for those diagnosed with HIV and prevention services for those at high risk of HIV, thereby increasing their risk of illness and

²⁵⁴ F Lavadenz and others 'Thirty years of the HIV/AIDS epidemic in Argentina: An assessment of the national health response' World Bank Publications (2015) at 44.

²⁵⁵ Choclin (n242) 20.

²⁵⁶ Zambezi (n34) 224.

²⁵⁷ Constitution of Zimbabwe (2013) sec 56

²⁵⁸ Human Dignity Trust 'Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS' (2015) 5

death. Criminalisation creates a climate of fear, fear from the health provider side and from transgender populations in accessing the health services.

Currently, the Zimbabwean law does not allow for altering gender identifiers in official government issued documents for TGD persons. This has been a significant challenge in the access and navigating healthcare, especially HIV and sexual reproductive health related services.²⁵⁹ Including a provision that allows TGD persons to alter their gender identifiers and names on government issued documents in Births and Deaths Registration Act would ease the burden in accessing health services in public health facilities. However, when making these adjustments, they should align with the international law principles such as the Yogyakarta Principles to prevent the pathologisation of TGD persons and ensure accessibility to the service.

Legal reforms that protect the rights of TGD persons are essential for creating an environment where they can access healthcare services, including HIV services, without fear of stigma, discrimination, or legal repercussions.

4.6.2: Strengthen Civil Society Engagement and Partnership

Zimbabwe has had a tumultuous relationship with civil society organisations (CSO), more so those active in LGBTI+ rights.²⁶⁰ However, the government of Zimbabwe through the Ministry of Health and Child-Care and the National AIDS Council have successfully engaged the CSOs in the HIV response. CSOs have advocated and facilitated for easy access to HIV services especially among Key Population groups. The success of the KP programme in Zimbabwe is attributed to partnerships with KP led and serving CSOs, that have helped implement a core package of HIV services to communities.²⁶¹ However, these gains are under threat as the government continues to clamp down on the civic

²⁵⁹ UNDP & NAC Zimbabwe (n25)

²⁶⁰ 'Chiwenga denounces gay elements' *The Herald*, (Online) 16 February 2024
<https://www.herald.co.zw/vp-chiwenga-denounces-gay-elements/> (accessed 19 August 2024).

²⁶¹ National AIDS Council Zimbabwe 'Key Populations' <https://nac.org.zw/key-populations/> (accessed 19 August 2024).

space with the proposed Private Voluntary Organisations Amendment Bill of 2021²⁶² which when passed into law will repress and interfere in the daily operations of CSOs.

The ability of CSOs to take a leading role in key areas such as promoting demand for services, supporting treatment adherence, preventing HIV transmission, and negotiating social contracts is vital for a successful HIV response, and essential in advocating for gender affirming health care services, and legal and policy reforms. Their participation is essential in the Universal Health Coverage agenda and the long-term sustainability of health services delivery.²⁶³ Providing legal protection and funding for these organisations will enhance their ability to advocate for TGD persons and deliver essential services.

4.6.3 National Policies and Strategies reforms

Zimbabwe should ensure that its national HIV strategies explicitly include TGD persons as a key population and has specific and tailored interventions to address their needs. Zimbabwe should integrate gender-affirming care into its HIV services, ensuring that TGD persons can access necessary treatments in a stigma-free environment. This integration would enhance the overall health of TGD persons and improve their engagement with HIV services. Zimbabwe needs to develop and implement a comprehensive service package that addresses the SRH, HIV, hormonal therapy, and mental health needs of TGD persons. National policies should invest in awareness raising and healthcare infrastructure to ensure healthcare providers are knowledgeable on treating the unique needs of TGD persons.

4.7 Conclusion:

This chapter discussed the legal and policy environment in both South Africa and Kenya in facilitating access to HIV services for TGD persons. South Africa, Kenya and Zimbabwe all share a similar colonial past, transformative current constitutions, and similar penal

²⁶² Zimbabwe Lawyers for Human Rights ‘The operating space of civil society organisations in Zimbabwe: a critical analysis of the proposed regulation of civil society’ ZLHR (2021) 1.

²⁶³ UNAIDS ‘Revitalisation and capacity building for civil society in Zimbabwe’ UNAIDS 15 June 2019 <https://rstesa.unaids.org/highlights/2019/item/202-revitalisation-and-capacity-building-for-civil-society-in-zimbabwe> (accessed 19 August 2024).

code. However, the major difference is that South Africa has made strides in recognising the rights of TGD persons by adopting laws and policies that guarantee their legal protection from stigma and discrimination. Despite, having all those policies in place, HIV service delivery for TGD persons has not reached its optimal stage, this is evidenced by the limited data on TGD persons epidemiology.

Kenya on the other hand, has maintained the punitive laws that criminalise homosexuality, but has opened the civic space for effective engagement and governance. As a result, the Key Populations programme has recorded success in targeted service delivery. However, the national strategies just included TGD persons in 2020, and the programme has not fully matured to give data and guidance on service provision for TGD persons.

Malta and Argentina have provided a framework in which gender laws have progressively influenced the integration of TGD persons in society. The implementation of these laws serves as a blueprint to Zimbabwe to ensure that gender recognition is inclusive and non-bureaucratic as possible.

Zimbabwe stands to learn from the other jurisdictions legal reforms that guarantees the protection of TGD persons and ease the barriers to access to HIV services. Legal reforms facilitate inclusive health policies and strategies that will ensure targeted and responsive interventions for TGD persons. Legal reforms also pave the way for an active civil society space that will continue to monitor service delivery, facilitate safe spaces for service delivery and advocate for more inclusion of TGD persons in the HIV response.

Chapter Five: Conclusion and Key Findings

5.1: Introduction

This chapter highlights the key findings of the research, which focused on the legal and policy frameworks that impact access of trans and gender diverse (TGD) persons to HIV healthcare services in Zimbabwe. The research highlighted a complex dynamic of TGD person's experiences navigating the health sector that pose as barriers to access to services. These include discriminatory laws and policies that lead to stigmatisation both in the society and in the health facilities, and the lack of legal protection and inclusive policies and strategies that address TGD persons' needs. By examining Zimbabwe's legal environment and HIV strategies and using the international human rights standards and HIV guidelines as a yard stick, the research underscores the need for legal and policy reforms to promote access to services. This chapter, therefore, summarises the key findings and the implications of these findings for legal and policy reform are discussed. The broader significance of the research and suggestions for further inquiry and study to inform efforts to promote the health and well-being of TGD persons in Zimbabwe is discussed.

5.2: Summary of findings

The research highlighted various critical insights into the barriers to HIV healthcare for TGD persons and how they relate with the legal and policy landscape in Zimbabwe. The literature review in chapter one gave a global view of the challenges faced by TGD persons in the HIV response, and these are underscored by the intersectionality of legal and socio-cultural factors that collectively contribute to the marginalisation and social exclusion of TGD persons. Central to the discussion was the misrecognition of TGD identities in legal context, social and cultural history, as well as in medical text. Zimbabwean societal norms prioritise heteronormative identities and cisnormativity, therefore creating an environment where gender diversity and expression is misunderstood and stigmatised. Gender identity and sexual orientation in Zimbabwean discourse is often conflated leading to the misalignment of interventions and inadequate targeting and prioritisation of health care needs of TGD persons.

One of the significant findings of the research was the influence of Zimbabwe’s legal framework on the lives of TGD persons. Zimbabwean laws prohibit same sex marriage,²⁶⁴ criminalise same sex consensual sex²⁶⁵, and have no provisions for legal gender recognition.²⁶⁶ While these provisions do not explicitly target TGD persons they are indirectly affected by them through reinforcing a legal framework that penalises nonconforming gender identities and sexual orientations. As a result of the criminalisation and legal framework that does not protect the rights of TGD persons, most TGD persons navigate their health needs outside of the public health facilities. The lack of legal gender recognition for TGD persons, worsens the level of difficulty in accessing services, as accessing HIV services requires identification documents which mismatch their gender identity.

The Zimbabwean Constitution contains provisions that can be leveraged as a “Hail Mary” for advancing and recognising the rights of TGD persons. The Constitution contains a Bill of Rights that upholds equality and non-discrimination for all citizens.²⁶⁷ The provisions align with international human rights standards, in particular Article 2 of the UDHR, and could be interpreted to align with the Yogyakarta Principles. However, Zimbabwean law still has a disconnect between its domestic legal and policy framework and the international human rights obligations.

While Zimbabwe has made significant progress in achieving epidemic control through its national level strategies and policies, there is a gap in addressing the health needs of TGD persons. The ZNASP IV recognises TGD persons as key population group, however, the research highlights that there is an absence of specialised healthcare services tailored to the needs of TGD persons particularly in relation to HIV. Central to that, is the unavailability of a comprehensive service package for TGD persons that addresses their SRH, HIV, Hormonal Therapy, and Mental Health needs. Gender affirming care standards are crucial for the overall well-being of TGD persons and their ability to navigate the

²⁶⁴ Constitution of Zimbabwe section 78.

²⁶⁵ Criminal Code Section 73.

²⁶⁶ Births and Deaths Registration Act.

²⁶⁷ Constitution of Zimbabwe sec 56.

healthcare system. WPATH SOC-8 guidelines while focusing on gender affirming health care emphasise the importance of comprehensive care that includes HIV prevention, treatment, and support, recognising the unique vulnerabilities of TGD persons to HIV. The emphasis is on affirming environments, tailored interventions, and collaborations with communities to develop an approach that will significantly improve outcomes for TGD populations.

Drawing lessons from South Africa, Kenya, Malta, and Argentina the research shows legal and policy environments do have an impact on access to healthcare and the potential outcomes. South Africa, Malta and Argentina have more legal protections for TGD persons, that include legal gender recognition provisions, equality, and non-discrimination clauses and ultimately the decriminalisation of same sex consensual sex, has facilitated access to services for TGD persons. The gender laws in Malta and Argentina foster acceptance and normalisation of TGD identities, ensuring greater inclusion and participation. These countries have also developed tailored interventions for TGD persons within healthcare that also include HIV services and gender affirming care standards. Despite these developments, stigma with the health sector persists, there are data gaps on HIV incidence among TGD persons. This highlights a gap in policy implementation.

Kenya's legal environment is complex but is characterised by a strong civil society network that plays an important role in advocating for the rights of TGD persons. While the programme targeting TGD persons for HIV services in Kenya has not reached maturity, CSOs have worked together with the government to bridge the gap between TGD persons and the healthcare system. The CSOs have been engaged by government structures in the development of inclusive HIV strategies, including the establishment of drop-in-centres and safe spaces. However, the criminalisation of consensual same sex conduct hangs over the progress in the HIV response and threatens to hamper efforts for the full engagement of TGD persons to access HIV services.

The research highlighted key learnings, the first being the need for legal reform to promote access to HIV services for TGD persons. Legal reforms include decriminalising consensual same sex conduct, introducing legal provisions for legal gender recognition, with specific protections against discrimination on the grounds of gender identity and sexual orientation. Having legal protections for TGD persons in Zimbabwe will allow for better organising for CSOs that work with TGD persons, facilitating an exchange of knowledge and strategies to promote access to services. CSOs should continue to advocate for the rights of TGD persons including working towards increasing awareness and understanding of gender diversity in Zimbabwe. There is a need to have more inclusive national HIV strategies that highlight the specific needs of TGD persons, integrating gender affirming health care, to improve the quality and accessibility of HIV services. Developing inclusive strategies and training healthcare providers on TGD persons' issues, is crucial for improving healthcare access.

5.3: Future Research

Further research is needed to explore and document the lived experiences of TGD persons in Zimbabwe, particularly in relation to accessing health care in a broader scope. Further research is critical to deepening our understanding of the challenges faced TGD persons and developing effective strategies for their engagement in the health system. While the research focused on the policy and desk review, there is a need to capture TGD persons' voices and experiences to better articulate the barriers to access to HIV services and various intersecting factors such as poverty, race and age may affect their access to services.

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