

# ROLE OF THE POLICE IN ACCESS TO JUSTICE FOR SEXUAL AND GENDER-BASED VIOLENCE PERPETRATED AGAINST DIVERSE WOMEN IN ZIMBABWE

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## Abstract

*Bound by the 2013 Constitution of Zimbabwe (“Zimbabwean Constitution”), as informed by regional human rights law, Zimbabwean police should facilitate access to justice for everyone. This article interrogates the lived realities of diverse women in terms of how the police in Zimbabwe respond when they report cases of sexual and gender-based violence (“SGBV”). Using qualitative data this article also interrogates institutional practices questioning the alignment of laws and actions to the Zimbabwean Constitution. The findings show that the reluctance of the police to efficiently and appropriately engage with SGBV cases reported by diverse women is encouraged by the homophobic context in which these take place. The ability of the police to provide justice to diverse women who experience SGBV can be strengthened by repealing the laws that criminalise same-sex relations and sodomy and by implementing regional human rights law as interpreted through Resolution 275 of the African Commission on Human and People’s Rights.*

**Keywords:** *sexual and gender-based violence, LGBTI rights, homophobia, transgender rights, Zimbabwean police, Resolution 275 of the African Commission on Human and People’s Rights*

## 1 Introduction

In Zimbabwe, sodomy<sup>1</sup> is criminalised and same-sex marriage illegal. The latter is prohibited under Chapter 2 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 (the “Zimbabwean Constitution”), paradoxically setting out to protect fundamental human rights and freedoms of all

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<sup>1</sup> Section 73 of the Criminal Law (Codification and Reform) Act Cap 9:23.

Zimbabweans.<sup>2</sup> Sodomy and same-sex marriage are often related and conflated with other non-heteronormative identities, such as trans-identities, leaving many Zimbabweans, including police officers, to presume such identities to be illegal and the behaviour of transgender or gender diverse persons to be outlawed.<sup>3</sup> As a result of the conflation, and the anti-homosexuality sentiment prevailing within Zimbabwe's political<sup>4</sup> and religious<sup>5</sup> spheres, it is difficult for lesbian, gay, bisexual, transgender and intersex ("LGBTI")<sup>6</sup> persons to find protection under the law.<sup>7</sup> Moreover, Zimbabwean politicians often fuel the homophobia that prevails among the public.<sup>8</sup>

Zimbabwean police operate, as further argued in this article, within a homophobic context, as is briefly discussed in part 2 below, and hence LGBTI persons are often mistreated by the police. As one example, Ms Nathanson, a transgender woman, was arrested by six anti-riot police officers after a complaint was made that she was using a women's toilet. Ms Nathanson was detained for 48 hours during which she was forced to undergo repeated anatomical examinations to "determine" her sex.<sup>9</sup>

As argued in this article, the Zimbabwean Constitution, as informed by regional human rights law, provides a suitable framework to analyse the rights of LGBTI persons and the obligations of the police, as an organ of the state, to uphold such rights. Under the non-discrimination clause, both "sex" and "gender" are listed as prohibited grounds.<sup>10</sup> The Zimbabwean Constitution recognises basic human rights, such as the right of everyone to personal liberty, ensuring that no one is arbitrarily arrested.<sup>11</sup> The inherent human dignity of every person is recognised, guaranteeing that it be "respected and protected".<sup>12</sup> The Constitution recognises every Zimbabwean's right to privacy<sup>13</sup> and freedom of association.<sup>14</sup> In addition, the Constitution emphasises that all individuals are equal before the law, hence everyone should enjoy equal protection as well as other benefits of the law.<sup>15</sup>

<sup>2</sup> Section 78(3).

<sup>3</sup> E Mandipa "The Suppression of Sexual Minority Rights: a case study of Zimbabwe" in S Namwase & A Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 151-152.

<sup>4</sup> N Muparamoto "LGBT Individuals and the Struggle Against Robert Mugabe's Extirpation in Zimbabwe" (2020) 2 *Africa Review* 1-16.

<sup>5</sup> K Kaoma *Christianity, Globalization and Protective Homophobia: Democratic Contestation of Sexuality in sub-Saharan Africa* (2018) 22-24

<sup>6</sup> Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI).

<sup>7</sup> Mandipa "The Suppression" in *Protecting the Human Rights of Sexual Minorities* 151-152

<sup>8</sup> S Tamale "Confronting the politics of nonconforming sexualities in Africa" (2013) 56 *ASR* 39 31-45; Mandipa "The suppression" in *Protecting the Human Rights of Sexual Minorities* 151-156

<sup>9</sup> *Nathanson v Mteliso* (HB 176 of 2019, HC 1873 of 2014) [2019] ZWBHC 135 (14 November 2019) <<https://zimlil.org/zw/judgment/bulawayo-high-court/2019/135>>; T Ndoro "Mugabe Turning in His Grave as Zimbabwean Court Rules in Favour of LGBT Awards \$400 000 in Landmark Case" (18-11-2019) *iHarare News* <<https://iharare.com/zimbabwean-court-rules-in-favour-of-lgbt/>> (accessed 08-10-2021).

<sup>10</sup> Section 56(3) of the Zimbabwean Constitution.

<sup>11</sup> Section 49.

<sup>12</sup> Section 51.

<sup>13</sup> Section 56(3).

<sup>14</sup> Section 59.

<sup>15</sup> Section 56(1).

The police must protect the rights of all individuals in adherence to the prevailing laws. The role of the police is to receive reports of any violations of the law, investigate, compile evidence, apprehend perpetrators and transmit cases together with the evidence gathered to courts of law for adjudication.<sup>16</sup> As such, the police is an institution that should be accountable to all citizens for it to be able to execute its mandate with fairness. However, as was evident in Ms Nathanson’s case, and through the further statements collected within the ambit of this research, the police in Zimbabwe have a history of being partisan and failing to protect all of its citizens.<sup>17</sup> As an example, in the past, the police has raided safe spaces that are used by LGBTI persons, arresting some of them, and following others to their homes, outing them to their families and friends.<sup>18</sup> This arguably placed these individuals at a heightened risk of being excommunicated or abused by their families. Blackmail of LGBTI persons is also common as the existing laws provide room for such behaviour to occur.<sup>19</sup> Phillips points out that these laws have been used by the police and public prosecutors to intimidate and extort funds from those accused of homosexuality.<sup>20</sup>

The objective of this article is to interrogate the experiences of diverse women – as broadly defined in this article (as discussed in part 2 below) – when they seek assistance from the Zimbabwean police to access justice for sexual and gender-based violence (“SGBV”). In this regard, this article importantly combines a legal perspective with individual case studies to be able to infuse the legal analysis with the lived realities of the most vulnerable individuals that the law is set to protect. This analysis takes place against the backdrop of the international legal obligations that rest on Zimbabwe. To this end, the article analyses data collected through interviews with lesbian, transgender and intersex persons against sexual orientation, gender identity and expression (“SOGIE”) reading of the domestic and international legal framework.

The article is structured as follows: Part 2 briefly sets out the context within which the Zimbabwean police operates. Part 3 outlines the terminology and definitions relevant in the Zimbabwean context. It also defines what constitutes SGBV. Part 4 presents the relevant provisions of regional human rights law

<sup>16</sup> Open Society Justice Initiative “Who Polices the Police? The Role of Independent Agencies in Criminal Investigations of State Agencies” (2021) *Open Society Foundation 1* <<https://www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations>> (accessed 12-01-2022).

<sup>17</sup> See also Zimbabwe Human Rights NGO Forum “Who guards the guards? – Violations by law enforcement agencies in Zimbabwe, 2000 to 2006” (20-12-2006) *HRforumzim* <<https://reliefweb.int/report/zimbabwe/who-guards-guards-violations-law-enforcement-agencies-zimbabwe-2000-2006>> (accessed 02-03-2022); Sokwanele. “‘I can arrest you’: The Zimbabwe Republic Police and Youth rights” (16-07-2012) *Sokwanele* <<https://reliefweb.int/report/zimbabwe/%E2%80%9C-i-can-arrest-you%E2%80%9D-zimbabwe-republic-police-and-your-rights>> (accessed 02-03-2022); K Chitiyo “The Case for Security Sector Reform in Zimbabwe” (2009) *Royal United Services Institute (RUSI) – Occasional Paper* <[https://static.rusi.org/assets/Zimbabwe\\_SSR\\_Report.pdf](https://static.rusi.org/assets/Zimbabwe_SSR_Report.pdf)> (accessed 12-01-2022).

<sup>18</sup> Muparamoto (2020) *Africa Review* 1-16.

<sup>19</sup> O Phillips “Blackmail in Zimbabwe: Troubling Narratives of Sexuality and Human Rights” (2009) 13 *IJHR* 345 345-351.

<sup>20</sup> 352.

and the interpretations of these by the African Commission of Human and Peoples' Rights ("African Commission") in Resolution 275.<sup>21</sup> Part 5 offers a brief methodological note explaining how the data of this study was collected, collated, and analysed. Part 6 presents the lived realities of diverse women in three categories namely, legal environment and suitability of policing; the response of the police to SGBV cases reported by diverse women; and the opportunities for the police to provide justice for diverse women as survivors of SGBV. The final part, Part 7, presents the conclusions and recommendations.

## 2 A brief background to the political and religious context in Zimbabwe

Many Zimbabweans view LGBTI persons as adopting behaviours that are "unAfrican".<sup>22</sup> This homophobic and misogynistic idea was made popular by the statements by late former President Robert Mugabe at the 1995 book fair<sup>23</sup> where GALZ – an association of LGBTI persons (formerly Gays and Lesbians of Zimbabwe) was barred from exhibiting its materials by government order. At this event, he used his opening speech to denounce LGBTI persons as immoral perverts.<sup>24</sup> Most recently, opposition leader, Nelson Chamisa, offered his support to the late former President Robert Mugabe's anti-homosexuality stance in an interview on Zimbabwe's national broadcaster.<sup>25</sup> President Emmerson Dambudzo Mnangagwa has also pointed out that homosexuality is illegal in Zimbabwe, and that he will not canvas for the rights of LGBTI persons.<sup>26</sup> These sentiments expressed by the political elite in Zimbabwe arguably encourage homophobic practices by the broader public, including the police, having a spillover effect on diverse women.<sup>27</sup>

Since the 1990s, religious leaders in Zimbabwe have also influenced public perception on homosexuality. In 1995, Zimbabwe Assemblies of God, Africa ("ZAOGA") issued a press release, and thousands of its members marched in Harare, in support of the then President Robert Mugabe's anti-homosexuality sentiments.<sup>28</sup> The Anglican Church's province of central Africa excommunicated former Archbishop Nolbert Kunonga in 2007 because he tried to withdraw the church's Diocese of Harare after he made allegations that the province of central Africa supported homosexuality.<sup>29</sup> In 2014, the

<sup>21</sup> 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 ("Resolution 275").

<sup>22</sup> N Hoad *African Intimacies: Race, Homosexuality and Globalisation* (2007) 105.

<sup>23</sup> The Zimbabwe international book fair is an annual event which was started in 1983 and is held in Harare. The 1995 book fair was themed "human rights and justice".

<sup>24</sup> Muparamoto (2020) *Africa Review* 2.

<sup>25</sup> 2.

<sup>26</sup> R Quest & M Sheena "President Mnangagwa: Zimbabwe is Open for Business. Davos: Switzerland" (22-01-2018) *CNN* <<https://edition.cnn.com/2018/01/24/africa/zimbabwe-president-emmerson-mnangagwa-davos-intl/index.html>> (accessed 02-09-2021).

<sup>27</sup> One example is the case of a gay teacher who was publicly threatened and forced to resign in 2018. Muparamoto (2020) *Africa Review* 2.

<sup>28</sup> D Maxwell "'Catch the Cockerel Before Dawn': Pentecostalism and Politics in Post-Colonial Zimbabwe" (2000) 70 *Africa* 249-263.

<sup>29</sup> N Muparamoto *Understanding Defiant Identities: An Ethnography of Gays and Lesbians in Harare, Zimbabwe* DPhil Thesis, Rhodes University (2018) 12.

popular Pentecostal prophet, Emmanuel Makandiwa, labelled homosexuals as mentally ill.<sup>30</sup> Such statements and actions, targeted at LGBTI persons, arguably legalise, in the eyes of their followers, the promotion of homophobia. Together, the sentiments communicated by religious and political leaders create fertile ground for the police to operate with impunity in victimising LGBTI persons and denying them access to justice.

### **3 Terminology and definitions relevant in the Zimbabwean context**

#### **3 1 Lesbians, bisexual women, transgender women, and intersex people (diverse women)**

LGBTI persons are persons whose SOGIE fall outside heteronormativity.<sup>31</sup> Such sexual orientations include lesbian and gay persons, individuals who are sexually and emotionally attracted to people of the same sex; and bisexuals who are individuals that are sexually and emotionally attracted to people of all sexes.<sup>32</sup> Such gender identities and expressions include transgender individuals whose gender identity does not align with the sex they were assigned at birth; and intersex individuals, born with ambiguous genitalia or internal reproductive organs or chromosomes that make it difficult to place them in neither of the binary male nor female categories.<sup>33</sup>

This article focuses on non-heteronormative and/ or gender diverse persons who live their lives as women either by choice or because of societal norms – referred to in this research as diverse women. This includes, but is not restricted to, lesbians, bisexual women, women who were assigned the male sex at birth although they self-identify as female – transgender women, intersex persons assigned the female sex at birth, with or without self-identification, intersex persons assigned the male sex at birth but identifying as women and gender diverse individuals who may at times identify as women.

Following the above, the definition of diverse women applied in this article is expanded to include all women – based on real or imputed sexual orientation and/or gender identity.<sup>34</sup> As discussed further in part 4 below, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa<sup>35</sup> defines women as “persons of female gender”.<sup>36</sup> Applying the trans-inclusive reading of the Maputo Protocol as put forward by Snyman and Rudman includes all individuals that self-identify or are identified with the

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<sup>30</sup> 12.

<sup>31</sup> World Health Organization *A Technical Brief: HIV and Young Transgender People* (2015) 3.

<sup>32</sup> E Green & EN Peterson *Gender and Sexuality Terminology* (2015) 7.

<sup>33</sup> 7.

<sup>34</sup> In accordance with the definition set out in Resolution 275 of the African Commission on Human and Peoples’ Rights.

<sup>35</sup> (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66 6 (“Maputo Protocol”).

<sup>36</sup> Article 1(k).

female gender, including transgender women and intersex persons assigned the male or female sex – identifying as women.<sup>37</sup>

### 3.2 Sexual and gender-based violence

SGBV takes the form of economic, physical, emotional, sexual violence as well as harmful traditional practices.<sup>38</sup> This definition of SGBV is originally based on the Declaration on the Elimination of all forms of Violence Against Women (“DEVAW”), particularly Articles 1 and 2.<sup>39</sup> The prohibition of SGBV under international law departs from an understanding that violence against women is a form of discrimination. The Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) established this more than 25 years ago.<sup>40</sup> In this regard General Recommendation No 19 establishes that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.<sup>41</sup> This definition significantly includes sexual violence and violence in the form of harmful practices based on culture, tradition, and religion.

For the purpose of this Article 1(1) of the Maputo Protocol defines violence as “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war”. As argued by Rudman, the “Maputo Protocol does not distinguish between SGBV committed in private or in public; it prohibits all acts of violence, sexual or non-sexual, everywhere, at all times”.<sup>42</sup> Therefore, as is further suggested by Rudman the rights in the Maputo Protocol referring specifically to violence against women “comprehensively locate violence within the contexts of dignity, integrity, security, cultural/traditional practices, refugee status, widowhood, age and disability”. However, as is further highlighted in the interviews referenced in part 4 below, diverse women are particularly vulnerable to SGBV because there is little specific protection availed to them.<sup>43</sup>

<sup>37</sup> T Snyman & A Rudman “Protecting Transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and proposed GBV model law” (2022) 30 *Stell LR* forthcoming).

<sup>38</sup> United Nations High Commission for Refugees (UNHCR) *Handbook for the Protection of Internally Displaced Persons* (2010) 194-195.

<sup>39</sup> Article 27(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>40</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW) General recommendation No 19: Violence against women, 1992 UN Doc A/47/38 para 1. As reconfirmed in UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No 35 on Gender-Based Violence against Women, updating General Recommendation No 19, 2017 UN Doc CEDAW/C/GC/35.

<sup>41</sup> Paras 11-12.

<sup>42</sup> A Rudman “A Feminist Reading of the Emerging Jurisprudence of the African and ECOWAS Courts Evaluating their Responsiveness to Victims of Sexual and Gender-Based Violence” (2020) 31 *Stell LR* 424, 429.

<sup>43</sup> S Tamale “Exploring the contours of African sexualities” (2014) 14 *AHRLJ* 150 158.

Although this research focuses on diverse women, it is important, as a point of departure, to acknowledge that SGBV against cisgender<sup>44</sup> Zimbabwean women is widespread.<sup>45</sup> Zimbabwe National Statistics Agency (“ZimStats”) has confirmed that this crime is underreported. Nevertheless, statistics show that 42.5% of Zimbabwean cisgender women, 15 years and older, reported having experienced physical or sexual violence.<sup>46</sup> In addition, a report by the United Nation’s Office for the Coordination of Humanitarian Affairs (“UNOCHA”) from 2021 noted a 175% increase in the reports of SGBV that were made to MUSASA<sup>47</sup> during the height of COVID-19 – between April and December 2020 – as compared to the same period in the previous year.<sup>48</sup> There is also evidence that cisgender women in Zimbabwe fall victim to violence and abuse at the hands of the police.<sup>49</sup> Zengenene and Susanti provide evidence that women are often subjected to physical, sexual and emotional forms of violence by the police.<sup>50</sup> The police in Zimbabwe have also been reported to have physically assaulted women who were deemed to violate COVID-19 restrictions.<sup>51</sup> Thus, added to the homophobic and transphobic position of the Zimbabwean police, as discussed in this research, is also the deeply patriarchal nature of Zimbabwean society.

## 4 The regional legal framework

### 4 1 The African Charter on Human and People’s Rights

The African Charter on Human and People’s Rights<sup>52</sup> was established for the protection of all Africans from discrimination, and to ensure the enjoyment of their human rights including the rights to dignity, life, and physical integrity. The African Charter is binding on Zimbabwe as the Zimbabwe parliament ratified it on 5 September 2008.<sup>53</sup> Articles 2 and 4 of the African Charter,

<sup>44</sup> Cisgender refers to a person whose gender identity conforms to their assigned sex at birth.

<sup>45</sup> R Martin & V Ahlenback “Sexual and Gender-Based Violence in Zimbabwe: Women Human Rights Defenders’ Experiences and Legal Challenges: Evidence synthesis” (10-11-2020) *International Commission of Jurists* <<https://www.icj.org/wp-content/uploads/2021/03/Zimbabwe-SGBV-WHRD-Publications-Reports-Thematic-reports-2021-ENG.pdf>> (accessed 10-02-2022).

<sup>46</sup> Zimbabwe National Statistics Agency Zimbabwe Multiple Indicator Cluster Survey 2019 (2019) Harare, Zimbabwe.

<sup>47</sup> MUSASA is a non-governmental organisation that was set up in 1988 to deal with issues of violence against women and girls. It provides relief to survivors of SGBV. MUSASA operates from four regional offices in Harare, Bulawayo, Gweru and Masvingo.

<sup>48</sup> OCHA “Zimbabwe Situation Report” (19-02-2021) *UNOCHA* <<https://reports.unocha.org/en/country/zimbabwe/>> (accessed 10-02-2022).

<sup>49</sup> R Martin & V Ahlenback “Stopping Abuse and Female Exploitation (SAFE) Zimbabwe Technical Assistance Facility” (10-11-2020) *SDDirect* <<https://www.sddirect.org.uk/news/2020/12/covid-19-and-gender-based-violence-in-zimbabwe-how-is-the-pandemic-increasing-the-risk-of-violence-against-women-and-girls/>> (accessed 10-02-2022).

<sup>50</sup> M Zengenene & E Susanti “Violence against Women and Girls in Harare, Zimbabwe” (2019) 20 *Journal of International Women’s Studies* 83-93.

<sup>51</sup> Martin & Ahlenback “Sexual and Gender-Based Violence in Zimbabwe: Women Human Rights Defenders’ Experiences and Legal Challenges: Evidence synthesis” (10-11-2020) *International Commission of Jurists*.

<sup>52</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (“African Charter”).

<sup>53</sup> Veritas “Protocol to the African Charter on Women’s Rights – Women’s Watch 1/2019” (11-04-2019) *Kubatana* <<https://kubatana.net/2019/04/11/protocol-to-the-african-charter-on-womens-rights-womens-watch-1-2019/>> (accessed 04-06-2021).

reaffirm the inalienable nature of all the rights and freedoms for all, including LGBTI persons. Particularly, Article 4 specifies that rights to life and personal integrity are non-derogable and must always be upheld with regard to all persons. However, since the 1990s, Zimbabwean parliamentarians have made every effort to silence any voice raised in favour of decriminalising sodomy and same-sex marriage.<sup>54</sup> A key example is the actions of Professor Jonathan Moyo. As a long-standing parliamentarian, he actively lobbied for the exclusion of sexual orientation as a ground for discrimination in the Zimbabwean Constitution.<sup>55</sup>

Article 3(1) and (2) of the African Charter importantly emphasises that “every individual shall be equal before the law” and that “every individual shall be entitled to equal protection of the law”. This places a responsibility on the police, as well as the courts, to guarantee that every individual has access to justice for any violation that is committed against them, including diverse women.

#### 4 2 The Maputo Protocol

As briefly mentioned, in parts 3 1 and 3 2 above, the Maputo Protocol provides a definition of women that embraces diverse sexual orientations and gender identities under Article 1(k); and provides a detailed definition of SGBV under Article 1(j). The Maputo Protocol was endorsed by African heads of state and government to tackle discrimination against women as emphasised under Article 2.<sup>56</sup> Against this backdrop, Articles 1(j), (k) and 8(d) are of specific interest to this study. Building on the right to equality before the law in Article 3 of the African Charter, Article 8 of the Maputo Protocol specifically stipulates that “women and men are equal before the law and shall have the right to equal protection and benefit of the law”. Article 8(d) specifies that states parties must take all appropriate measures to “ensure that that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights”. This is essential for diverse women as they, as mentioned in the introduction, are often subjected to police brutality and unlawful detention. If Zimbabwe’s legal obligations under international law are considered in conjunction with the Constitution which, as introduced in part 1, includes a person’s gender and sex as prohibited grounds for unfair discrimination, this establishes that the Zimbabwean police must protect *all* women, including diverse women, from discrimination and SGBV.

<sup>54</sup> M Epprecht “The Constitution Making Process and Sexual Minority Rights in Zimbabwe” (2012) *Solidarity Peace Trust* <<http://www.solidaritypeacetrust.org/1226/the-constitution-process-and-sexual-minority-rights-in-zimbabwe/>> (accessed on 21-09-2021).

<sup>55</sup> Epprecht “The Constitution Making Process and Sexual Minority Rights in Zimbabwe” (2012) *Solidarity Peace Trust*.

<sup>56</sup> Veritas “Protocol to the African Charter on Women’s Rights – Women’s Watch 1/2019” (11-04-2019) *Kubatana*.



### 4.3 The African Commission Resolution 275

The mandate of the African Commission is to promote and protect the human rights of all Africans as well as interpret the African Charter. Within this mandate, the African Commission has repeatedly referred to SOGIE as prohibited grounds for discrimination.<sup>57</sup> The most important contribution of the African Commission in this regard is its interpretations of the African Charter and other regional human rights law instrument in Resolution 275. Of particular concern to this article, the African Commission pointed out that it was deeply disturbed by:

“[T]he failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity”.<sup>58</sup>

This statement laments the failures of law enforcement agents, including the police, in their duty to protect diverse women from SGBV. Resolution 275 condemns the persecution of diverse women, including arbitrary arrests and urges law enforcement agents to protect them as well as the organisations that represent them. This interpretation of the state obligations under the African Charter and the Maputo Protocol is an important contribution to the development of regional human rights law and should therefore inform the application of these treaties within member states such as Zimbabwe. Resolution 275 informs how the Zimbabwean police ought to execute their duties. This article, as introduced in part 1, utilises Resolution 275, read together with the African Charter and the Maputo Protocol, as the standard against which the constitutional protection must be measured, instructing the police on how it must handle all matters of SGBV that are reported to them by diverse women.

## 5 Methodology

The data represented in this article was collected from seventeen diverse women through in-depth interviews and focus group discussions.<sup>59</sup> The in-depth interviews were conducted with four lesbian women (two femme, one versatile and one butch), one bisexual woman, five transgender women, two intersex persons who self-identified as gender diverse and one heterosexual woman (key informant). The respondents whose quotations were extracted

<sup>57</sup> See African Commission Guidelines on the Implementation of Economic, Social and Cultural Rights [2010]; “Pathologization – Being Lesbian, Gay, Bisexual and/or Trans is not an Illness” For International Day against Homophobia, Transphobia and Biphobia [2016]; General Comment No 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) [2017]; Guidelines on combating sexual violence and its consequences in Africa [2017] and Joint thematic dialogue on sexual orientation, Inter-American Commission the African Commission and United Nations human rights mechanisms [2018].

<sup>58</sup> Resolution 275.

<sup>59</sup> The data for this study was collected as part of the PhD studies of the first author. M Shoko *Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People’s Access to Sexual Health in Zimbabwe* PhD dissertation, University of KwaZulu-Natal (2022). Ethical clearance for the study was provided by UKZN Humanities & Social Sciences Research Ethics Committee on 26 June 2019 (Protocol reference number: HSS/0838/018D).

from the focus group discussions for the purpose of this analysis, were one femme lesbian and three transgender women. As a result, the findings from this research, though they may resonate with findings from other studies, are not generalisable because of the small sample. As mentioned in part 3 1 above, the respondents either self-identify as women or are viewed as women by members of society. The data from all seventeen respondents was collected at GALZ-run safe spaces in Harare, Bulawayo, Mutare, Gweru and Masvingo. The interviews and focus group discussions were conducted in two local languages, Shona, and Ndebele, and then translated to English during the transcription process.

During the interviews and focus group discussions, the role of the police in protecting the rights of LGBTI individuals was a recurring theme. Hence all quotations on the role of the police that were shared by these diverse women were utilised in this article. The pronouns used, such as she, he, or them, are the pronouns the respondents chose to use.

## 6 The lived realities of diverse women in Zimbabwe

### 6 1 Legal environment and the suitability of policing

As discussed in parts 1 and 2 above, the role of the police is influenced by the legal environment in which they operate. The legal environment includes the culture within the judiciary and the legislature that generally views homosexuality as immoral, thus perpetuating and sometimes superimposing the adherence to sodomy laws that were established during the colonial period.<sup>60</sup> Respondents generally felt that Zimbabwe's laws influence the way that people, including the police, view diverse women as shown in the following quotation:

“Because same-sex sexual relationships are illegal, no matter how much training is offered to them [the police], they will still take advantage [of diverse women].” Paida, versatile lesbian, Masvingo.

The statement by Paida shows that the existence of the Criminal Law Act that criminalises sodomy<sup>61</sup>, as well as the criminalisation of same-sex marriage within the Constitution<sup>62</sup> makes it possible for police officers to harass diverse women.

However, while Paida felt that the legal environment allows the police to treat diverse women unfairly, one individual was confident that even with the existing legal environment, it is possible to get some protection from abuse.

“Even if you tell a police officer that that one is gay, I would not be arrested. But the thing that gets one arrested is when you are found having sexual intercourse with another man, then you get arrested for sodomy. And also, if someone insults you and also calls you gay, *Ngochani* or *chichi-man*, then you have the right to go to the police and report that person, and he/she could get arrested.” Farai, transgender woman, Harare FGD.

<sup>60</sup> M Epprecht *Hungochani: The History of a Dissident Sexuality in Southern Africa* 2 ed (2013).

<sup>61</sup> Section 73 of the Criminal Law (Codification and Reform) Act, Cap 9:23.

<sup>62</sup> Section 78(3) of the Zimbabwean Constitution.

The confidence that was shown by Farai was quickly challenged by the other participants who were in the same focus group discussion with her. They felt that only a few police officers would be comfortable to stand up for LGBTI rights because of the prevailing homophobia within Zimbabwean society, including among some police officers. In addition, the other respondents highlighted that most people in Zimbabwe do not see any difference between identifying as a homosexual and the actual act of sodomy. Hence, the diverse women that were interviewed expressed that they generally fear the police and would not want to present themselves at police stations even when they were wronged.

The raiding of safe spaces used by diverse women by the police in Zimbabwe was a major concern to the respondents. Some respondents felt that there was always a risk that the police could raid their safe spaces because they did not have any protection from the law. One respondent from Mutare expressed concern about the way that some members of the police force treat diverse women as individuals without any rights. Themby stated,

“Even if we are attacked (by the police) here at this Drop-In-Centre right now, they will just say ‘right, everyone is under arrest’. Because we have no rights currently, there is no place where our rights are protected. We just hope that they [parliamentarians] sit down and then pass a viable law that protects us.” Themby, transgender woman, Mutare FGD.

Themby’s concerns highlight a view that was shared by many LGBTI individuals who were interviewed, that their rights are elusive and that they are exposed to harassment from the police. These statements also bring out the impunity with which the police in Zimbabwe are deemed to operate, allowing homophobic elements among the police to thrive. Themby aptly pointed out that the legislature has a responsibility to pass laws to protect the rights of diverse women. However, her statement is unfortunately pinned more on hope than on reality because, as indicated in part 2 above, political and religious homophobia prevails. As a result, the lack of responses by the legislature, to the position of diverse women serves to embolden those members of the police and the judiciary who are homophobic, to harass and abuse diverse women.

MaDube who experienced a raid when she was at one of GALZ’s drop-in-centres<sup>63</sup> in Harare, explained the experience at the hands of the police as follows:

“We got arrested here at GALZ in 2012 and the issue came out in the press. The issue came out in the press saying 42 homosexuals arrested. So when the police were making a follow-up that is when they went home [and outed me to my family].” MaDube, transgender woman, Harare.

The raid that is narrated by MaDube was also documented by Muparamoto, who provided details of how the raid occurred.<sup>64</sup> The impunity displayed by the police during the raid that was referred to by MaDube and Muparamoto shows the disregard of diverse women’s right to be protected from arbitrary arrest. In addition, the raid on GALZ provided evidence that the police did

<sup>63</sup> A drop-in-centre is a place that was established by GALZ to provide for walk-in LGBTI clients who need treatment, counselling, legal aid and other services.

<sup>64</sup> N Muparamoto *Understanding Defiant Identities: An Ethnography of Gays and Lesbians in Harare, Zimbabwe* DPhil dissertation, Rhodes (2018) 242-247.

not see the importance of allowing GALZ, a legally registered LGBTI NGO in Zimbabwe, to work without facing stigma and reprisals. The further steps taken by the police to follow some individuals to their homes and to inform their family members about their sexual orientation and/or gender identity also infringed on their right to privacy and effectively put them in harm's way. When their identities became known to their families, some families subsequently threw them out of their homes or began to abuse them in different ways.<sup>65</sup>

The statements provided by the respondents show that the Zimbabwean legal environment castigates same-sex sexual relations and conflates sexual orientation with gender identity and expression, hence effectively criminalising many aspects of the lives of diverse women. This furthermore makes it difficult for people who sympathise with diverse women to support and promote their rights.

## 6.2 Response of the police to SGBV cases reported by diverse women

Some respondents indicated that they had not reported cases of SGBV to the police. A key factor that contributed to this was the legal environment, as discussed in part 2 above, and the unwillingness of the police to respond to matters related to diverse women. In addition, cases of SGBV were not reported because the diverse women interviewed were not sure that they would have a chance of getting a fair hearing if their cases reached the courts. This was based on the perceived culture of prejudice and homophobia within the judiciary. Welly, an individual who was born intersex narrates his experience of SGBV:

“Three guys who knew that I am Intersex attacked and badly injured me last year [2018] demanding money, saying that ‘if you do not give us money, we will take you to the police’ ..... When we arrived at the station [the police] asked me, ‘so what do you say about these things that you are a homosexual?’ I explained to them that I am Intersex and I described my genital organs ..... [Some of the officers wanted to] undress me so that they see if I am really an intersex person, but one of them then said, ‘Oh no that is not legal’”. Welly, intersex, Masvingo.

Thus, the handling of this case by the police clearly undermined Welly's access to justice and additionally exposed him to secondary abuse. The police officer who stopped the other officers from undressing Welly might have understood the implication of the laws on Welly's situation. However, although preventing further abuse the officer did not enable Welly to obtain justice for the violence that he had faced at the hands of the initial perpetrators as well as from the other police officers. This is again related to the legal environment, discussed in part 2 above, that vindicates SGBV against diverse women. Welly's experiences suggest that there is little accountability among the police when it comes to SGBV that affects diverse women.

Furthermore, the reputation of the police is such that diverse women are often not prepared to report their cases. One of the respondents explained the

<sup>65</sup> 227.

abuse that she encountered and why she did not have a desire to report it to the police:

“I used to work at a fast-food outlet, and my supervisor was demanding that I should have sex with him. He knew that I am lesbian, and one day he tried to force me into sex while I was changing into the work uniform. I was traumatised but I managed to push him away and I ran out of the workplace. I never went back there again, and I could not even report the matter to the police because Aaagghh, I think that would have caused me more problems because of my Butch identity and all.” Sphiwe, butch lesbian, Mutare.

Sphiwe was doubtful that the police would assist her to get justice because of their reputation. She had heard that the police would rather accept a bribe from a perpetrator of SGBV than facilitate the process of accessing justice in the courts for matters reported by a diverse woman. This is especially so because she felt that her Butch identity made it easier for people to recognise that she is a lesbian woman, an identity that made her subject to discrimination. As a result, she felt that the moment the police saw her, they would have treated her with prejudice. Sphiwe’s experience is further supported by evidence that police in Zimbabwe have previously abused diverse women.<sup>66</sup> Thus, in her opinion, not reporting the attempted rape by her supervisor was a logical solution to avoid secondary abuse at the hands of the police.

### 6.3 Opportunities for the police to provide justice to diverse women survivors of sexual and gender-based violence

As discussed in parts 5.1 and 5.2 above, diverse women suffer significant levels of SGBV at the hands of community members, intimate partners, and the police. If appropriately applied, the Constitution, incorporating the provisions of the African Charter and the Maputo Protocol, provides diverse women with an avenue for accessing justice for the SGBV that they continue to face. However, as is clear from the information provided by the respondents, the police in Zimbabwe are not appropriately trained and sensitised to offer protection to diverse women. As evidenced in this study, the SGBV encountered by diverse women in Zimbabwe often goes unreported because of fear that the police will not act, and/or they may end up victimising the survivor.

One respondent showed that the end of former president Mugabe’s rule brought in some opportunities for the protection of the rights of LGBTI individuals in Zimbabwe:

“So you find that others are warming up to us. We attended a certain workshop recently at Chevron hotel. They came, the members of ZRP (Zimbabwe Republic Police), Lawyers for Human Rights, and those from the courts also. Before this president (President Mnangagwa), government did not allow this, and once you see the police you would jump through the window.” Carol, femme lesbian, Masvingo.

The involvement of the police, lawyers, and court officials in an engagement meeting with LGBTI persons shows that there is an opportunity for them to start working towards providing justice for diverse women. There are various

<sup>66</sup> Muparamoto *Understanding Defiant Identities* 242-247; Phillips (2009) *IJHR* 345-351.

ways in which the police can provide justice for SGBV perpetrated against diverse women. Respondents expressed that the police should execute their job without discrimination and prejudice to be able to provide justice. The police's failure to do so violates Article 3(2) of the African Charter, which gives every person the right to equal protection of the law; this is further reiterated in Resolution 275. It also violates Article 8(d) of the Maputo Protocol as the Zimbabwean police is far from equipped to effectively interpret and enforce gender equality rights of diverse women protected under the Maputo Protocol.

Regardless of the existing laws that criminalise same-sex marriage and sodomy, and the impact of the conflation of identities discussed in this article, the police in Zimbabwe have an opportunity to provide impartial policing for all to end homophobic violence and discrimination. This would go a long way to ending corrective rape, assault, arbitrary arrest, and blackmail, all of which were mentioned by respondents in this study and all of which are violations of the Constitution and regional human rights law.

The Zimbabwean Constitution obliges the police to protect diverse women from SGBV. As stated earlier, the Constitution includes gender, as a prohibited ground for unfair discrimination.<sup>67</sup> This means that transgender and intersex individuals must be protected from unfair discrimination based on their preferred gender identity. Unfortunately, this is not the dominant interpretation of the non-discrimination clause in the Constitution and the police have a tendency, as confirmed in the interviews, to conflate non-heteronormative sexual orientations and gender identities under the banner of homosexuality. Therefore, in the situations narrated by the respondents, the police also perpetrate the violence in addition to denying the victims access to justice.

In 2014, the Supreme Court of India ruled that the right to self-identify one's gender, including as a "third gender" was a constitutional right linked to the right to dignity.<sup>68</sup> However, contrary to the position adopted the Supreme Court of India, the police as encountered by MaDube and Welly did not respect their identities and protect their rights. In Welly's case, the police were unable to help him have access to justice because they could not see anything wrong with the acts of violence that were perpetrated against him. In MaDube's case, the police continued to re-victimise her beyond her unwarranted arrest.

Additionally, in line with the Constitution, individuals who are born intersex must be protected against unfair discrimination based on their sex. A person's sex is also a prohibited ground for discrimination within the Constitution.<sup>69</sup> A person who is born intersex may be gender diverse or may not self-identify with the sex assigned at their birth.<sup>70</sup> In Welly's case, the police should have

<sup>67</sup> Section 56(3) of the Zimbabwean Constitution.

<sup>68</sup> *National legal ser. auth. v Union of India* (Writ petition (civil) No(s) 400 of 2012, W.P(C) No. 604 of 2013) [2014] (15 April 2014) <<https://web.archive.org/web/20140527105348/http://supremecourtindia.nic.in/outtoday/wc40012.pdf>>; SI Khan, NM Khan, M Rahman & G Gourab "Hijra/ Hejira" in NA Naples (ed) *The Wiley Blackwell Encyclopaedia of Gender and Sexuality Studies* (2016) 1-3, 2.

<sup>69</sup> Section 56(3) of the Zimbabwean Constitution.

<sup>70</sup> A Muller *Sexual Health for Transgender and Gender Non-Conforming People: Guidelines for Health Care Workers in Primary Care* (2013).

applied the law, either way, to protect Welly from the abuse and arrested the perpetrators. The police clearly prevented Welly from accessing justice by not arresting the perpetrators of violence and perpetuating secondary emotional abuse. Through its agents, the state thus failed to comply with the Constitution, the African Charter and the Maputo Protocol prescribing the protection of women's rights to dignity, life, integrity, and security of the person, as discussed in parts 1 and 3.

Welly's and MaDube's experiences embody several violations of the African Charter and the Constitution. First, the African Charter condemns the torture, inhuman and degrading treatment that was perpetrated by community members who then went on to take Welly to a police station demanding his arrest.<sup>71</sup> Similarly, the violence that was perpetrated by the police when they raided GALZ's safe space as well as the subsequent follow-up visits to the homes of those who were arrested at GALZ offices as narrated by MaDube, was degrading. Second, the police who raided the GALZ safe shelter, as well as Welly's persecutors, also deprived diverse women of their liberty and freedom.<sup>72</sup> In its interpretation of the African Charter, Resolution 275 condemns the persecution of LGBTI individuals, in the manner that some of the police officers were perpetrating further abuse by demanding the undressing of Welly, even though he was a victim of SGBV. Lastly, the way that Welly's persecutors and the police acted in the two examples, violated diverse women's right to personal liberty,<sup>73</sup> right to human dignity,<sup>74</sup> right to personal security<sup>75</sup> and freedom from torture and inhuman treatment,<sup>76</sup> all of which are enshrined in the Constitution.

## 7 Conclusions and recommendations

Diverse women, for the many reasons as recorded in this article, are reluctant to seek recourse for SGBV. The Constitution, the African Charter, and the Maputo Protocol – the two latter interpreted through Resolution 275 – provide state obligations to guarantee that the police ensure access to justice for all without regard of their sexual orientation, gender identity or expression. However, as this article has established, in the homophobic political and religious context in Zimbabwe, the lack of awareness of the legal provisions that protect all women from SGBV as well as corruption among the police, prevents the police from accurately responding to SGBV cases reported by diverse women. As such the police is failing to fulfil its legal duties under the Constitution and regional human rights law. This is spurred by a lack of measures to check the abuse of its authority by the police.

This article argued that the legislature has an obligation to ensure that all laws of Zimbabwe conform to international human rights standards and that

<sup>71</sup> Article 5 of the African Charter.

<sup>72</sup> Article 6.

<sup>73</sup> Section 49 of the Zimbabwean Constitution.

<sup>74</sup> Section 51.

<sup>75</sup> Section 52.

<sup>76</sup> Section 53.

the police abide by those standards. For the police to uphold the Constitution as well as the African Charter and the Maputo Protocol as interpreted in Resolution 275, the legislature has a responsibility to repeal its anti-sodomy laws that have a detrimental effect on the rights of diverse women. Furthermore, although there is no right to marriage under international human rights law, when such an opportunity is only provided to some members of society the fundamental right to non-discrimination is violated. This is even more so when specific individuals are prohibited from exercising an opportunity that other individuals have based solely on the ground of sexual orientation. Thus section 78(3) of the Constitution should be amended.

Nevertheless, until such time that same-sex marriage and sodomy are de-criminalised in Zimbabwe, the police must take great care not to conflate non-heteronormative sexual orientations and gender identity, as identifying as an LGBTI is not a criminal offence – and expressing a non-heteronormative gender identity is not synonymous with engaging in homosexual sexual acts – this is not to say that the latter should in any way be criminalised. Essential to ending this conflation is knowledge about diverse identities, non-heteronormative gender identities and the position of the law.

Thus, considering the data and analysis provided in this article the following recommendations are made: First, the government of Zimbabwe should decriminalise sodomy and amend section 78(3) because they promote and support homophobia within Zimbabwean society. These restrictions in themselves violate international and regional human rights law; and in addition, cause the conflation of non-heteronormative gender identities and sexualities with the dire effects as detailed in this research. Second, the government of Zimbabwe should work to align its policing strategies with Resolution 275 to ensure the realisation of the rights that are protected in the African Charter and the Maputo Protocol for all Zimbabweans. Third, the government of Zimbabwe should provide training for the police on the rights of diverse women, so that they can protect them from SGBV and other discrimination and abuse and if such violations occur facilitate the victims' access to justice. Finally, entrenched cultures of homophobia and impunity within the police force must be dealt with through clear institutional messages that call out such practices. This message must be clearly communicated by the legislature through legislation and the repeal of legislation, the judiciary, the leadership of the police and the country itself.