

THE IMPACT OF THE LEGAL AND POLICY FRAMEWORK ON ACCESS TO JUSTICE FOR TRANSGENDER PERSONS IN UGANDA

In collaboration with:



RESEARCH BRIEF

2020





THE IMPACT OF THE LEGAL AND POLICY FRAMEWORK ON ACCESS TO JUSTICE FOR TRANSGENDER PERSONS IN UGANDA

In collaboration with:



Research Brief

2020

RESEARCH TEAM

Dr. Adrian Jjuuko	Principal Investigator and Lead Researcher
Dr. Denis Muhangi	Researcher
Linette du Toit	Researcher
Flavia Zalwango	Contributor
Sylvester Kazibwe	Research Assistant
Mariam Magezi	Research Assistant
Mike Banalyaki	Research Assistant

1. INTRODUCTION

Human Rights Awareness and Promotion Forum (HRAPF), in collaboration with Tranz Network Uganda (TNU), conducted a study on how the legal and policy environment affects access to justice for transgender persons in Uganda.

Transgender persons are persons whose appearance and characteristics are perceived as gender atypical. These include transsexual people, cross-dressers and people who identify as third gender. Transgender persons are usually targeted for arrest under various Penal Code provisions that criminalise same-sex relations as well as under petty offences.

The study was conducted during the period of June to December 2019 in Kampala in Central region, Kasese in Western region, Lira in Northern region, and Mbale in Eastern region. Study participants consisted of transgender persons, policymakers, law enforcement officials, staff of civil society organisations working with transgender persons, and representatives of organisations providing access to justice services. 30 Key Informant Interviews were held with stakeholders, together with 10 in-depth interviews with transgender persons, and 5 focus group discussions (FGDs) with transgender persons. Secondary data was collected through review of secondary documents. Data was analysed manually using a thematic procedure.

2. KEY FINDINGS

2.1 Ugandan laws and policies on access to justice are generally silent on transgender persons' access to justice:

International and regional standards on access to justice require that every person is treated equally without discrimination and generous interpretations have been made of international human rights documents that clearly include transgender persons among those protected. Legal aid too is an important part of this right to a fair hearing for the poor and marginalised. Transgender people are usually both poor and marginalised. Unfortunately, the domestic legal framework is much less protective. The Constitution clearly protects the rights of everyone, establishes different avenues for access to justice without discrimination and establishes positive provisions for all persons. Similarly, various laws creating different avenues to access justice do not discriminate and include every person, and this would cover transgender persons. The main challenge, however, is that these positive laws do not expressly recognise transgender persons, and as such they can be conveniently forgotten. Laws providing for legal aid service provision cover marginalisation but do not mention transgender people specifically. The laws create a situation of legal invisibility for such persons, and yet other laws prohibit conduct and actions that directly affect transgender persons. The Penal Code's criminalisation of personation, consensual same-sex relations, being rogue and vagabond and common nuisance gives the police perfect tools to use against transgender persons and the High Court's extension of the reach of section 145 of the Penal Code Act which criminalises carnal knowledge against the order of nature means that transgender groups may not organise meetings or have their organisations registered. This puts transgender people at the risk of not utilising the access to justice channels as they are not guaranteed protection.

2.2 Transgender persons have access to justice needs that arise specifically because of their gender identity.

Transgender persons suffer violations of their rights as well as discrimination at the family, community and institutional levels specifically based on their gender identity. At the family level, they are usually excluded, discriminated and thrown out of home, which leads them to leave education and to lack family support.

My dad disowned me completely. He does not greet me, I do not greet him, and he never allows me to go to his place ... He even refused to pay for my education after knowing what I am, so I stopped halfway. [IDI, Transman, Mbale].

At the community level, they are usually evicted from rented premises, face violence and sometimes murder, as well threats of rape. Local council authorities who are supposed to help them to access justice usually join in these violations. Many people regard them as homosexuals. They are often accused of recruiting and spoiling children, of being outcasts and devil worshippers. They are subjected to abuse and harassment and sometimes mob justice.

Where I was fetching water, a man told me face to face, that “now you, you call yourself a man but information reached here that you are a woman, you waste our time here while calling you Ivan, Ivan [not real name],.... I’m assuring you and saying this when the people are here, I’m going to rape you, I leave you in the forest when I have tied you there...”... [Transman, FGD Participant, Mbale].

At the institutional level, they are harassed and bullied at school, denied employment, or lose their jobs. They are also discriminated against when accessing health care and HIV services.

Most of them when they find out that you are trans they will expel you. They will be like this child is not conforming to the strict school rules and regulations. They will even organise the PTA [Parents Teachers Association] meeting ... most of us are forced to drop out of school [FGD-2, Transgender persons, Kampala].

3. The duty bearers contribute to the inaccessibility of legal aid to transgender persons

The law puts in place a number of avenues for accessing justice for all persons and this should ideally cover transgender persons. In reality however, since the laws do not make specific mention of transgender persons and other laws positively allow discrimination and marginalisation, in such an environment, transgender people

face real challenges when trying to access justice. The following challenges are faced at the different avenues:

- i) *Local Council officials*: Local Council officials are complicit in unlawful evictions of transgender persons from rented premises as well as banishment from villages, and thus cannot be considered a viable source of accessing justice for such people.
- ii) *The Uganda Police Force*: The Police which usually is the first point of call for persons facing violations or violence is largely out of the question because the Police usually focuses on one's gender identity rather than the crime one has come to report. This usually results in arbitrary arrests, which quickly degenerate to accusations of homosexuality and sometimes non-consensual anal examinations.

You first evaluate, before going to the Police, they may arrest her instead, the one they call the homosexual, they may jail her instead of the one she came to report. ... You may want to go and report a case and then it ends up when they have turned back on you, that, "you, you are a homosexual; you deserve to be behind bars". [IDI-2, Transwoman, Kampala].

- iii) *State attorneys*: A number of criminal cases involving transgender persons are referred by the state to the State Attorneys under the office of the Director of Public Prosecutions. Usually, these are sanctioned and therefore the cases go to court. In many cases, charges like having 'carnal knowledge against the order of nature' are sanctioned against transgender persons, even though there is no evidence that such acts were committed as the police simply rely on the appearance of the person.
- iv) *The Courts of law*: There are only three civil cases concerning human rights violations brought by a single transgender person (along with other applicants) before Uganda's courts and even then, these were not specifically on transgender matters. This indicates how little transgender persons make use of the formal courts. Their main interaction with the courts is in criminal cases, where if a case goes to court, then they have no option but to come to court, charged with one vague offence or another. Magistrates barely understand what being transgender is about and have on many occasions

spoken rudely to the suspects, sometimes including 'preaching' to them. Most of the cases end in dismissal for want of prosecution as the state usually has no evidence.

- v) *Prisons*: For some of the cases that go up to court, sometimes the accused transgender people may be remanded to prison, creating a further set of challenges in prisons mostly due to the absence of specific cells for transgender persons, and so they have to be placed in cells for either females or males, which sometimes leads to sexual violence by other inmates or exclusion.
- vi) *The Uganda Human Rights Commission*: Despite its clear mandate on investigating human rights violations, the Commission has barely been engaged in handling cases concerning transgender persons. Only two cases concerning transgender persons have so far been filed at the Commission, but they have not been concluded in over three years.
- vii) *The Equal Opportunities Commission*: Despite its mandate, on providing redress for marginalisation, this Commission has also rarely been accessed by transgender persons, and only a few know of its existence. No report on transgender issues has ever been made, and the Commission does not do specific outreaches targeting transgender persons.

4. Transgender persons have limited access to legal aid

Uganda has no national legal aid scheme and so the Uganda Law Society and the Law Council try to fill the gap through the pro bono scheme. These however reach out to only a handful of persons, and as such transgender persons are not prioritised. There are very few lawyers who are willing and available to support transgender people when they face access to justice challenges. Among legal aid service providers, only Human Rights Awareness and Promotion Forum (HRAPF) operates a specialised legal aid clinic for LGBT groups. It has legal aid centres in Mbale, Lira and Kasese. However, its reach is limited and many of those who are upcountry cannot readily access the services.

5. Transgender persons have adopted non-legal coping mechanisms to deal with violations

Transgender persons have resorted to ways of coping with the violations, discrimination and marginalisation. Many try to fit within society by appearing to be like everyone else, others move away from areas where they are known and yet others face the challenges openly and head-on. This certainly affects them psychologically, and makes it more problematic to live a life of dignity.

6. Lack of effective access to justice impacts on the fight against HIV/AIDS

Uganda's legal and policy framework has a huge negative implication on access to justice for transgender persons. This in turn has a huge implication on the fight against HIV, as people who are discriminated and legally invisible and yet persecuted cannot seek services or use them correctly. Transgender persons cannot easily access HIV services and health services in general due to stigma and discrimination at service points. This stigma and discrimination is both from other clients seeking services and from health workers. Transgender persons cannot easily seek/utilise HIV services from mainstream health facilities unless they hide their preferred identity.

You can get those services if you go in a different identity but not using your preferred sexual orientation [gender identity]. Getting services is not easy because ... if you say that let me show who I am they can say you first sit there, people first surround you and they ask you questions there it will be very hard. [FGD, Transgender persons, Kasese District].

Transgender persons may get demotivated to seek services altogether, while others resort to self-medication, and other poor healthcare seeking behaviours. Overall, it is noted that lack of access to justice inextricably affects HIV prevention among transgender persons, and as they are a Key Population, also affects the general population.

7. CONCLUSION

This study establishes that the legal and policy framework greatly affects how transgender persons access justice in Uganda. International standards on access to justice require that every person is treated equally without discrimination. Legal aid too is an accepted component of access to justice for the poor and marginalised to access justice. The Constitution clearly protects the rights of everyone, establishes different avenues for access to justice without discrimination and establishes positive provisions for all persons including transgender persons. The main challenge however is that these positive laws do not expressly recognise transgender persons, and as such they can be conveniently forgotten. Laws providing for legal aid service provision cover marginalisation but do not mention transgender people specifically. The laws create a situation of legal invisibility for such persons, and yet other laws prohibit conduct and actions that directly affect transgender persons. This puts transgender people at the risk of not utilising the access to justice channels as they are not guaranteed protection.

Whereas the legal and policy framework on access to justice is generally weak, and almost entirely excludes transgender persons, stigma and marginalisation makes them persons in great need of effective means of accessing justice. Transgender persons suffer violations of their rights as well as discrimination at the family, community and institutional levels. Transgender people face real challenges when trying to access justice, and these have made many of them to resort to coping mechanisms rather than trying to seek redress. They rarely report their challenges to the authorities. Access to legal aid services is another challenge. There is no national legal aid scheme and so the Uganda Law Society and the Law Council try to fill in the gap through the pro bono scheme. These however reach out to only a handful of persons, and as such transgender persons are not prioritised. Among civil society organisations offering legal aid, only HRAPF offers specialised services and reaches out to transgender persons.

The state of accessing justice for transgender persons has a huge implication on the fight against HIV, as people who are discriminated and legally invisible and yet persecuted cannot seek services or use them correctly. Transgender persons cannot easily access HIV services due to stigma and discrimination at service points.

The legal framework needs to be addressed and laws curtailing transgender persons' rights as well those limiting access to justice amended or repealed, and positive laws should be put in place. The Constitutional requirements for equality as well as the international obligations have to be respected as transgender persons are human beings like others.

8. RECOMMENDATIONS

The study makes recommendations to the following entities:

To Parliament of Uganda

- Amend the Penal Code to remove section 145 of the Penal Code Act, which criminalises consensual same-sex conduct between adults, and also remove sections 160, 167, 168, and 381 of the Penal Code Act which criminalise 'being a common nuisance,' 'being idle and disorderly,' 'being a rogue and vagabond' and personation respectively, which offences are used to arbitrarily arrest transgender persons on the basis of their appearance.
- Amend the laws to remove sections of the HIV Prevention and Control Act (2014) that criminalise HIV transmission.
- Amend the Registration of Persons Acts to provide a procedure for changing sex for adult persons.

To Ministry of Health (MOH)

- Specifically include transgender persons in policies concerning HIV prevention and control.
- Ensure the availability of all services in the minimum package of services for Key Populations and the additional services tailored to the specific needs of transgender persons for example PrEP, SMC and Universal Testing & Treatment (UTT).
- Train more health workers to provide Key Population friendly services, paying special attention to the different needs of transgender persons.
- Extend and sustain the MARPI model in different parts of the country.

The Ministry of Gender, Labour and Social Development

- Include transgender persons in policies that concern gender issues

To Ministry of Internal Affairs – NIRA/Uganda Police Force/Uganda Prisons

- Introduce Rules/Guidelines easing the process of change of gender markers for transgender persons
- Police stations and prisons should have separate cells for people do not conform to the binary genders of male/female.
- Organise sensitisations for National Identification and Registration Authority (NIRA) officials, police officers and prisons officials on transgender issues.

The Uganda Law Reform Commission

- Make recommendations for amendment of the Penal Code to remove provisions criminalising same-sex relations and those creating petty offences such as common nuisance, idle and disorderly, rogue and vagabond and personation.

To organisations working on transgender issues

- Create awareness about transgender persons, and their needs.
- Sensitise transgender persons about their rights and about the available access to justice mechanisms.
- Undertake dialogues with various stakeholders (policy makers, law enforcement authorities, civil society, parliament, community leaders, and the media) to create understanding of the situation of transgender people and the issues affecting them. Such dialogues should include local leaders such as Local Council leaders, councillors, cultural leaders, religious leaders and clan leaders.
- Train more community paralegals from among transgender persons in order to assist in linking transgender persons in conflict with the law to professional legal services, strengthen provision of legal advice and referral.
- Train peers who are located within health facilities to be able to better link transgender people to the health workers and facilitate the reception and interaction with health workers.
- Strengthen provision of legal aid services and representation to transgender persons accused of various offences.

To Health Service Providers (CSOs, Health Facilities)

- Integrate in HIV programmes, components for support to victims of intimate partner violence, rights violations, and mental health support.
- Use innovative KP-friendly strategies such as outreach and peer-based models to reach transgender persons with HIV-tailored services.
- Ensure HIV programmes have linkages to legal literacy and legal aid service



The Partnership to Inspire, Transform and Connect the HIV response (PITCH) enables people most affected by HIV to gain full and equal access to HIV and sexual and reproductive health services.

The partnership works to uphold the sexual and reproductive health and rights of lesbian, gay, bisexual, and transgender people, sex workers, people who use drugs and adolescent girls and young women. It does this by strengthening the capacity of community-based organisations to engage in effective advocacy, generate robust evidence and develop meaningful policy solutions.

PITCH focuses on the HIV response in Indonesia, Kenya, Mozambique, Myanmar, Nigeria, Uganda, Ukraine, Vietnam and Zimbabwe. Partners in these countries also share evidence from communities to influence regional and global policies that affect vulnerable populations.

PITCH is a strategic partnership between Aidsfonds, the International HIV/AIDS Alliance and the Dutch Ministry of Foreign Affairs.

Human Rights Awareness and Promotion Forum (HRAPF)

Plot 390 Professor Apollo Nsibambi Road.

P.O Box 25603 Kampala

Tel:+256-414-530-683 | Email:info@hrapf.org

Website: www.hrapf.org