



AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH & INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION MEMORANDUM

1 November 2011

Nigeria: 'Same Gender Marriage (Prohibition) Bill, 2011' violates Constitution

Amnesty International, Human Rights Watch (HRW) and the International Gay and Lesbian Human Rights Commission (IGLHRC) strongly urge the Nigerian Senate not to pass the 'Same Gender Marriage (Prohibition) Bill 2011'. On the surface, the Bill appears to limit itself to introducing criminal penalties for marriage ceremonies between persons of the same sex, with a penalty of three years' imprisonment. However, the Bill's provisions extend far wider. The bill seeks to criminalise anyone who 'witnesses', 'aids' or 'abets' such a relationship. This means that the bill now criminalises identities, and not merely behaviours. It could also penalise any human rights defenders who would seek to stand up for the rights of lesbian, gay, bisexual or transgender people in Nigeria, as well as their friends, families and colleagues. The penalty for those who 'witness', 'abet' and 'aid' a same-sex relationship is five years imprisonment and/or a fine of N2000 for individuals and N50,000 for groups.

The bill singles out one group of people to be deprived of rights that all people should be able to exercise as guaranteed by the 1999 Constitution and international human rights treaties to which Nigeria is a state party. Furthermore, it is clear that the provisions of the bill violate the rights to non-discrimination, equality before the law, privacy and freedom of expression and association, and the right to health under national, regional and international law. This is in contravention of Nigeria's obligations under Chapter IV, entitled 'Fundamental Rights', of its own Constitution as well as the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR).

Under Nigeria's criminal code and penal code, consensual same sex conduct between adults is already punishable with terms of imprisonment: chapter 42, section 214 of Nigeria's criminal code provides a sentence of fourteen years' imprisonment for 'carnal knowledge against the order of nature.' Furthermore, Shari'a penal codes, as introduced in northern Nigeria since 1999, continue to criminalize "sodomy" and "adultery" with death by stoning. The use of such laws to imprison individuals for consensual same-sex relations in private is a violation of human rights, and Amnesty International considers any person so imprisoned to be a prisoner of conscience.

The Nigerian government has international human rights obligations and commitments to promote and protect the human rights of its population without distinction of any kind, including sexual orientation or gender identity. As a member of the UN Human Rights Council, Nigeria is required to uphold the highest standards in the promotion and protection of human rights of all people regardless of their sexual orientation or gender identity. Amnesty International, HRW and IGLHRC are concerned about the fact the Nigerian

government stated in February 2009, during the debate on UN Universal Periodic Review (UPR), that it was not aware of any 'Lesbian, Gay and Transgender group' in Nigeria. The government underlined however that "as citizens, all Nigerians have their fundamental rights guaranteed by the Constitution." Several countries, including Canada, Finland, The Netherlands and The United Kingdom recommended the Nigerian government not to pass the 'Same Gender Marriage (Prohibition) Bill' into law.

Amnesty International, HRW and IGLHRC are also concerned that in June 2011 the Nigerian government voted against the first United Nations resolution which supports equal rights for gay, lesbian, bisexual and transgender people (UN Res. A/HRC/17/L.9/Rev.1).

In the past, Amnesty International, HRW and IGLHRC have expressed concerns about human rights violations in Nigeria against individuals on the basis of their actual or imputed consensual sexual behaviour with people of the same sex. In August 2007, police in Bauchi state arrested 18 men suspected of consensual same-sex conduct, charging them with belonging to an unlawful society, committing indecent acts, and engaging in criminal conspiracy. In 2008 several men and women were also arrested and detained on charges of engaging in consensual same-sex relations. In September 2008, a pastor of a church in Lagos attended by lesbian, gay, bisexual and transgender people, had to flee the country after several newspapers criticized the church. The police harassed several of the church members.

RIGHT TO FREEDOM FROM DISCRIMINATION

The bill violates the right to freedom from discrimination as recognized in section 42, 1, of the 1999 Nigerian Constitution:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject

The right to freedom from discrimination is also recognized in the African Charter on Human and Peoples' Rights, ratified by Nigeria in 1983 and which has become part of Nigeria's national laws.¹ Article 2 of the African Charter states: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Article 3 promises 'every individual' equality before the law and article 26 prescribes that "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

The African Commission on Human and Peoples' Rights in its twenty first activity report said that "Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights...The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation."²

The ICCPR, to which Nigeria acceded without reservations in 1993, affirms the equality of all people before the law and the right to freedom from discrimination in articles 2 and 26. The UN Human Rights Committee, which monitors states' compliance with the ICCPR, has said that the protections afforded in articles 2 and 26 extend to freedom from discrimination on the basis of sexual orientation, saying: "The Committee confines

¹ As confirmed in the 'African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act chapter 10, laws of the Federation of Nigeria, 1990.

² African Commission on Human and Peoples' Rights, twenty first activity report, EX.CL/322 (X).

*itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."*³

The UN Human Rights Committee has since urged states not only to repeal laws criminalizing homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitutions or other fundamental laws. Discrimination on the basis of sexual orientation is also prohibited under other international human rights treaties to which Nigeria is a state party. The Committee on Economic, Social and Cultural Rights has repeatedly addressed the impact of sexual orientation discrimination on the enjoyment of economic, social and cultural rights. This has usually been done in consideration of Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), indicating that this Committee, like the Human Rights Committee, considers that "sexual orientation" can be read into the Covenant's non-discrimination provisions. The Committee on Economic, Social and Cultural Rights asserted, "Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."⁴

The 'National Action Plan for the Promotion & Protection of Human Rights in Nigeria', published by the Federal Government of Nigeria in 2006, states that the Nigerian constitution provides for the right to freedom from discrimination: *A citizen of Nigeria is protected against any unfair discrimination, directly or indirectly, by the state or any person on the basis of one or more grounds, including: Gender, Sex, ...* It further states that: *'Inequality and discrimination exists on the basis of: Physically challenged person, HIV/AIDS, Sexual orientation, Age, Youth.'*

RIGHT TO PRIVATE AND FAMILY LIFE

The bill defines "Same Gender Marriage" as "the coming together of persons of the same sex with the purpose of leaving together as husband and wife or for other purposes of same sexual relationship." Under the bill, any person who "entered into a same gender marriage contract" would be subject to up to three years imprisonment. Amnesty International considers this is in contravention of section 37 of the Nigerian Constitution, which guarantees the right to private and family life. The clause extends the definition of "Same Gender Marriage" to "other purposes of same sexual relationships" and could lead to arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation.

Article 17 of the ICCPR states: *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."*

Invasion of privacy can amount to discrimination. In the landmark *Toonen* case, the UN Human Rights Committee considered that the provisions of the Tasmanian Criminal Code criminalizing same-sex sexual relations constituted an arbitrary interference with the complainant's right to privacy and amounted to discrimination. The UN Human Rights Committee, the treaty body tasked with monitoring states' compliance with the ICCPR, noted elsewhere that *"the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination."*⁵

RIGHT TO FREEDOM OF RELIGION OR BELIEF

Article 4 (2) (a) of the draft bill provides for the sentencing of any person who "witnesses, abet and aids the solemnization of a same gender marriage" with five years' imprisonment and/or a possible fine of N2,000. Any priest, cleric or other religious actor found to have aided or abetted such a union would be subject under this new law to a prison term. Such measures violate the right to freedom of conscience and freedom of religion as recognized in section 38 of the Nigerian constitution.

³ UN Human Rights Committee, Communication No. 488/1992: Australia. CCPR/C/50/D/488/1992, 4 April 1994, para.8.5

⁴ General Comment 9, paragraph 15.

⁵ Concluding Observations of the UN Human Rights Committee: United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40, para.287.

State intervention in the decisions of religious bodies is in breach of their freedom of religion or belief, as protected by Article 18 of the ICCPR. A state should not obligate, nor prevent, a religious institution to conduct a marriage ceremony between individuals of the same sex.

RIGHT TO FREEDOM OF ASSOCIATION

Under article 4(2) of the draft bill 'Any persons or group of persons' who "witnesses, abet[s] and aids "such a marriage could be sentenced to a five year prison term and or a fine of N2,000 (for individuals) or N50,000 (for groups).

It is pertinent to note here that the definition of 'same-gender marriage' in the Bill extends to those who are living together in a same-sex relationship, but who are not married.

The high penalties for anyone convicted of witnessing, aiding or abetting a marriage, could likely result in the targeting of lesbian, gay, bisexual, same-sex practicing and transgender organizations and events, as well as heterosexual human rights defenders who stand up for the rights of all individuals, regardless of sexual orientation or gender identity. Such a law would also potentially incriminate friends and families of any lesbian, gay, bisexual or transgender people. Amnesty International, HRW and IGLHRC believe that this violates the right to freedom of peaceful association as guaranteed in section 40 of the Nigerian Constitution.

According to the Federal Government in their National Report to the 2009 UN UPR "*Sexual minorities are not visible in Nigeria, and there is no officially registered association of gay and lesbians. ... The laws of Nigeria recognize marriage as a relationship between a man and a woman. However, like every democracy, those who want a change in the existing laws have to come out and lobby for the change they desire.*" However, if this Bill is passed, it will be very hard for activists to form organizations and campaign for any change at all in the law as the bill could seriously restrict the freedom of association as recognized in section 40 of the Nigerian Constitution. If this Bill is passed, lesbian, gay, bisexual and transgender individuals could find it difficult to meet in private without being suspected of being in a same-sex relationship.

The rights to freedom of assembly and association are also protected under the ACHPR and the ICCPR. The United Nations Declaration on Human Rights Defenders provides, in its article 5, that "everyone has the right, individually and in association with others, at the national and international levels: a) to meet or assemble peacefully; b) to form, join and participate in non-governmental organizations, associations or groups." Article 7 of the Declaration affirms that "Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance."

RIGHT TO HEALTH

Article 16 of the African Charter recognizes the right to health. It obliges state parties to take measures to protect the health of their people. Nigeria has the world's third-largest population of people living with AIDS. The proposed bill would further hinder HIV and AIDS education and prevention efforts in the country by driving some groups affected by the epidemic further underground for fear of violence. The 2010 UNAIDS (Joint United Nations Programme on HIV/AIDS) country report on Nigeria recognized that criminalization of vulnerable populations, including men who have sex with men, makes HIV and AIDS prevention and treatment efforts less accessible to these populations. The 2010 UNAIDS Report on the Global AIDS Epidemic similarly noted that that obstacles to effective HIV prevention in Nigeria were existing "laws, regulations, policies obstructing access to treatment, care and support for vulnerable sub-populations." The proposed bill will only exacerbate this problem. The 2011 UN "Political Declaration on HIV/AIDS" adopted at the UN General Assembly High Level Meeting on AIDS in June noted "many national HIV prevention strategies inadequately focus on populations that epidemiological evidence shows are at higher risk" including men who have sex with men.

Amnesty International, HRW and IGLHRC note with concern that the 'Same Gender Marriage (Prohibition) Bill', if it becomes law will potentially criminalize civil society groups engaged in vital work around HIV prevention.

IMPACT OF THE BILL ON HUMAN RIGHTS

The passing of this Bill would be in violation of Nigeria's obligations under the Constitution, as well as the ICCPR and African Charter. It could have the following impact on human rights in Nigeria:

- The imprisonment of individuals solely for their actual or imputed sexual orientation or gender identity, or on the basis of assumptions or allegations about their relationship status or consensual sexual conduct.
- The punishment of anyone aiding, abetting or witnessing a same gender marriage or relationship, which endangers the human rights of all Nigerians.
- The incitement of hatred and violence against anyone suspected of being lesbian, gay, bisexual, same-sex practicing or transgender and the encouragement of homophobic and transphobic individuals or groups to target individuals, their organizations and events.
- Restriction of essential freedoms as well as the activities of human rights defenders and members of civil society. Without the protection of fundamental freedoms, activists will be unable to form organizations or to campaign for the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people. Public, as well as private, meetings could become dangerous.
- Further criminalizing of an already criminalized sector of society will stymie Nigeria's efforts to prevent HIV transmission. It will drive people already suffering stigma for their identity or consensual sexual behaviour still further underground. This bill will not only making it more difficult for outreach and education efforts to reach them, but could potentially criminalize civil society groups engaged in that vital work.

BACKGROUND

In 2008, the Senate proposed to introduce a bill according to which any person who "entered into a same gender marriage contract" would be subject to up to three years imprisonment. Another clause provided that any person who "witnesses, abets and aids the solemnization of a same gender marriage" would be subject to five years' imprisonment and/or a possible fine of N2,000. In addition the draft bill refused to recognise any same sex marriage contract formally entered into or validated in foreign jurisdictions and incited violence against anyone suspected of being lesbian, gay, bisexual or transgender. This bill was in contravention of the Nigerian Constitution and inconsistent with Nigeria's obligations under international and regional human rights treaties which the country has ratified. Nigerian and international NGOs publicly expressed their concern. The bill was not passed.

In 2006, the Federal Minister of Justice presented a similar bill which punished with a five year prison term anyone involved in a same-sex marriage, or who aided or abetted such a marriage. The draft bill also prohibited the registration of "Gay Clubs, Societies and organizations". Nigerian and international NGOs, as well as the UN Special Representative of the Secretary-General on human rights defenders, the Special Rapporteur on racism, the Special Rapporteur on violence against women, and the Special Rapporteur on the right to health expressed deep concern about that draft bill. In a press release, the UN representatives stated in February 2007: "*Provisions of the draft Bill discriminate against a section of society, are an absolutely unjustified intrusion of an individual's right to privacy and contravene Article 1 of the Universal Declaration of Human Rights that '(a)ll human beings are born equal in dignity and rights'.*" The bill was not passed before a change of government in 2007.

The UN treaty bodies and the special procedures of the UN have called on states to repeal laws criminalizing same-sex sexual relations. They also have urged those states that retain the death penalty not to impose it for sexual relations between same-sex consenting adults. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated in his report on Nigeria that "*the imposition of the death sentence for a private sexual practice is clearly incompatible with Nigeria's international obligations. Moral sanction is a matter for the consciences of individuals and the beliefs of religious groups. Criminal sanctions are an entirely different matter and when the threat of execution is involved the State cannot stand idly by and permit the two types of sanctions to be conflated in a way that violates international law.*"⁶

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⁶ Report of the Special Rapporteur on freedom of religion, mission to Nigeria, E/CN.4/2006/Add.2

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