

Mandate of the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
OL NGA 5/2017

14 November 2017

Excellency,

I have the honour to address you in my capacity as Chair of the Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolution 15/23.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **criminalisation of adultery under the Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960) which seems to contravene international human rights norms and standards as outlined below.**

Adultery is not criminalized in the national law of Nigeria (the Nigerian Criminal Code). However, nine northern states (Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, Yobe) have instituted Shari'a law and three states (Kaduna, Niger and Gombe) have partly instituted Shari'a law. The Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960) applies to these states. As a result of the institution of Sharia law, convictions are being handed down in the courts of those states for adultery. Sections 387 and 388 of the Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960), respectively, define the offence of adultery by a man and adultery by a woman and the penalty as two years in prison, or a payment of a fine or both.

In some northern states, the penalties are harsher, where each state implements its own penal code, such as in Zamfara state. For instance, article 126 of the Shari'a Penal Code for Zamfara State provides that "Whoever, being a man or a woman, fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of Zina". Article 127 provides that "Whoever commits the offence of zina shall be punished (a) with caning on one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year; or (b) if married, with stoning to death".

It is our firm belief that laws criminalizing adultery, such as the Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960), are based on and result in discrimination against women. Our Group has noted that the enforcement of such laws leads to discrimination and violence against women in law and in practice and has stressed that while criminal law definitions of adultery may be ostensibly gender neutral and prohibit adultery by both men and women, closer analysis reveals that the criminalization of adultery is both in concept and practice overwhelmingly directed against women and girls. Criminalisation of adultery hence contravenes article 2 of the

Convention on the Elimination of All Forms of Discrimination against Women (acceded to by Nigeria on 13 Jun 1985), in which States parties condemn discrimination against women in all its forms, and agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women. Our expert group considers that the offence of adultery, though it may constitute a matrimonial offence, should not be regarded as a punishable criminal offence and, *ex forte*, should not be punishable by death, stoning or imprisonment.

It is our view that criminalization of sexual relations between consenting adults should be regarded as an interference with the privacy of the individuals concerned in violation of article 17 of the ICCPR (acceded to by Nigeria on 29 July 1993) which provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation. Furthermore, domestic legislation should be brought into conformity with the norms of the ICCPR, including its article 6 (2) on the imposition of the death penalty (See our position paper in this regard available at <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx>).

We therefore call upon your Excellency's Government to comprehensively review the provisions of the Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960), and to remove all provisions that discriminate against, or have a discriminatory impact on women, including those regarding adultery.

In addition we would like to express our concerns that such discriminatory legislation may exacerbate gender-based violence, as women who are accused and/or convicted of adultery tend to be targets of violence and abuse, by members of family, community or law enforcement officers, due to a belief that they deserve to be punished for their moral crimes.

In its General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 on violence against women, the CEDAW Committee recommends that Member States repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; including in customary, religious and indigenous laws, including legislation that criminalises adultery or any other criminal provisions that affects women disproportionately [CEDAW/C/GC/35, paragraph 31(a)].

In addition and without in any way derogating from the state's obligation to entirely decriminalize adultery, regarding the punishments of stoning and caning provided by the Shari'a Penal Code for Zamfara State, we would also like to recall that in the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment's views stoning as a method of execution violates the prohibition of torture and is, beyond dispute, a violation of the prohibition cruel, inhuman and degrading treatment or punishment. The Special Rapporteur recommended States repeal all laws that support the discriminatory and patriarchal oppression of women, *inter alia* laws that criminalize adultery (A/HRC/31/57).

Similarly, with regard to caning, the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and that States cannot invoke provisions of domestic law to justify violations of their human rights obligations under international law, including the prohibition of corporal punishment. In paragraph 5 of General Comment No. 20 (1992), the Human Rights Committee stated that the prohibition of torture and ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime.

We would like to recall that following his mission to Nigeria from 27 June to 8 July 2005, the Special the Special Rapporteur on Extrajudicial, summary or arbitrary executions noted, *inter alia*, that “several aspects of the death penalty in Nigeria are of particular concern”, including “the operation of sharia law, especially in relation to adultery(...) [See: E/CN.4/2006/53/Add.4, paragraph 26(c)]. The Special Rapporteur stressed that “characterizing adultery as a capital offence leading to death by stoning is contrary to applicable Nigerian and international law” because adultery “cannot be considered to be one of the most serious crimes for which the death penalty may be prescribed. The Special Rapporteur insisted that “(...) the maintenance of such laws on the books is an invitation to arbitrariness and in the case of zina to a campaign of persecution of women” [See: E/CN.4/2006/53/Add.4, paragraph 35]. The Special Rapporteur added that “the operation of the zina laws is also discriminatory in terms of Nigerian and international law” including because “the woman alone remains very vulnerable because her pregnancy alone can be considered sufficient evidence to warrant conviction” and because “the rules of evidence operate so as to exculpate almost every male and inculpate almost every female in such situations” [See: E/CN.4/2006/53/Add.4, paragraph 36]. Consequently, the Special Rapporteur recommended, *inter alia*, that the Federal Government should reiterate that the imposition of the death penalty for offences such as adultery is unconstitutional and should commit to undertaking a constitutional challenge at the earliest opportunity [See: E/CN.4/2006/53/Add.4, paragraph 104 (a)].

As it is our responsibility under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide data on the impact of the above-mentioned legislation, including prosecutions, convictions and punishment carried out under it.
2. Please provide information on any measures that your Excellency's Government has taken or intends to take in order to implement the recommendations by UN human rights mechanisms, referred to above, and to bring its legislation into compliance with international human rights law.

The Working Group would appreciate a response within 60 days and remains available for any type of technical advice on legislative reform that your Excellency's Government may require.

We would like to inform you that this communication will be made available to the public on the website page of the mandate of the Working Group and will be included in the periodic communications reports of the Special Procedures to the Human Rights Council. Any response of Your Excellency's Government will also be made public in the same manner.

Please accept, Excellency, the assurances of our highest consideration.

Alda Facio

Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice