

ROSANNA FLAMER-CALDERA v. SRI LANKA (CEDAW COMMUNICATION NO. 134/2018)

Case Digest of Rosanna Flamer-Caldera v Sri Lanka (Committee on the Elimination of Discrimination against Women Decision on Communication No. 134/2018)

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Human
Dignity
Trust

Rosanna Flamer-Caldera v Sri Lanka (CEDAW Communication No. 134/2018)

Individual complaint to the Committee on the Elimination of Discrimination against Women

Complaint submitted 23 August 2018
Decision adopted 21 February 2022

Complainant and victim: Rosanna Flamer-Caldera

Respondent: The State of Sri Lanka

Background:

This Complaint was submitted on 23 August 2018 by Rosanna Flamer-Caldera, a Sri Lankan lesbian woman, represented by the Human Dignity Trust. She sought to challenge the criminalisation of lesbians and bisexual women in Sri Lanka.

Ms Flamer-Caldera alleged that the Sri Lankan Penal Code, which was amended in 1995 to criminalise same-sex sexual conduct between women, violates Sri Lanka's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Sri Lanka has ratified both the Convention and the Optional Protocol, the latter of which provides for individual complaints to be considered by the CEDAW Committee.

The criminalisation of same-sex sexual conduct in Sri Lanka has its origins in 19th century British colonial law. Introduced in 1883, section 365A originally criminalised "any act of gross indecency" between males. In 1995, as part of more general reforms to the Penal Code, the relevant wording of s365A was changed from "male person" to "person", bringing lesbian and bisexual women within its remit. Anyone convicted of a gross indecency offence can be imprisoned for up to two years.

Ms Flamer-Caldera had no domestic remedies available to her, as Article 16(1) and Article 80(3) of the Sri Lankan Constitution explicitly prevent any legal challenge to the validity of laws that are already in force. Constitutional challenges can only be brought to bills that have not yet been passed into law. There was therefore no effective remedy available in the domestic courts and she was entitled, in accordance with the Optional Protocol, to apply directly to the CEDAW Committee for the vindication of her rights under the Convention.

The legal arguments in this case specifically highlighted the intersectional impact of the criminalising provisions on lesbian and bisexual women, who face discrimination both because they are women and because they are lesbian or bisexual.

Challenged provision:

Sri Lanka Penal Code 1883 section 365A, as amended:

Any person who, in public or private, commits, or is a part to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either the description for the term which may extend to two years or with fine or with both...

Remedies sought:

Ms Flamer Caldera sought the following remedies:

- Declaration that the criminalisation of same sex consensual relationships between adult women is contrary to the Convention
- Repeal of s365A and its 1995 amendment
- Decriminalisation of consensual same-sex sexual conduct in private between adults
- Provision of effective protection from gender-based violence against women based on the intersection of their sex and sexual orientation, in particular through the enactment of comprehensive anti-discrimination legislation covering, inter alia, the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity
- Adequate protection and assistance for lesbians and bisexual women who are or who have been the victims of criminalisation
- Adoption of a new anti-discrimination law and policies with reference to sexual orientation and gender identity as one of the prohibited grounds of discrimination and ensure the law also applies to the workplace and public spaces
- Prevention of laws on public indecency such as the Vagrancy Ordinance, being used to discriminate against lesbians and bisexual women on the basis of their sexual orientation and gender identity
- Collection of statistical data in cases of hate crimes and crimes of gender-based violence against women committed against lesbian and bisexual women
- Address discrimination against lesbian, bisexual, transgender and intersex women in the workplace, through awareness campaigns, disciplinary processes and the punishment of offenders
- Development and adoption of legislation to explicitly criminalise written or verbal expression, or acts of hatred against lesbian and bisexual women
- Adequate support systems and effective remedies for crimes committed against lesbian and bisexual women
- Adoption of a law to offer reparation to victims of violence and discrimination based on sexual orientation and gender identity
- Clear instructions to the police and other law enforcement agents, such as through protocols or codes of conduct, to respect human rights and to offer protection to women, including lesbians and bisexual women
- Legislative and other measures to eliminate violence against women such

as criminalising ‘marital rape’ and violence against lesbians and bisexual women and to punish perpetrators including State and non-State actors who perpetrate these crimes

- Particular measures to prevent forced or pressured marriage of lesbians and bisexual women and to provide social services and information to women and girls needing to escape from family or community pressures to enter into unwanted marriage
- Ensure access to sexuality information for all women and girls, including information on abortion and reproductive health

In doing so, Ms Flamer-Caldera argued that the criminalisation of private, consensual sexual activity between women violated the following CEDAW provisions:

- Article 2
 - Article 2(a): discrimination against women on the basis of gender and sexual orientation in law, and its effect, and failure to protect women from discrimination
 - Article 2(d): failure to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation
 - Article 2(f) and (e): failure to take all appropriate measures to modify or abolish existing laws which are discriminatory, and to eliminate discrimination against women by any person, organisation or enterprise
 - Article 2(g): failure to repeal all national penal provisions which constitute discrimination against women
- Article 5: failure to take measures to modify social and cultural patterns and eliminate practices based on stereotyped roles for women.
- Article 16 read with Article 5: violation of the rights to sexual autonomy and self-determination of sexuality

Violations

The Committee explicitly identified the following violations:

- The Committee considered that the State party had breached Ms Flamer-Caldera’s rights under Article 2(a) and (d)-(g) of the Convention. In doing so, the Committee recalled “*that certain groups of women, including lesbian women, are particularly vulnerable to discrimination through civil and penal laws, regulations, and customary law and practices*” [para 9.2]. It also noted that s365A “*has the effect of sanctioning the threats and abuse to which [Ms Flamer-Caldera] and her organization have been subjected by State and non-State actors and of obstructing access to procedures for the author to complain hereof*” [para 9.2].
- The Committee found that the State party had breached Ms Flamer-Caldera’s rights under Article 2(c)-(f) of the Convention, read in conjunction with the

Committee's general recommendations Nos. 19 and 35. It noted that she claimed that the criminalisation of same-sex sexual activity between women "*exacerbates gender-based violence against women*" and went on to find that the State party had "*neither effectively refuted [the] allegations nor indicated any legal or other measures taken to respect and protect the author's right to a life free from gender-based violence*" [para 9.3].

- The Committee also identified that the State party had breached its obligations under Article 5(a), read in conjunction with Article 1, noting that the "*decriminalisation of consensual same-sex relations is essential to prevent and protect against violence, discrimination and harmful gender stereotypes*" [para 9.4].
- The Committee also found that the State party's authorities "*have failed to protect the author against, and have partaken in, harassment, abuse, and threats against the author's work promoting the rights of lesbian, gay, bisexual, transgender and intersex community in Sri Lanka*", amounting to a violation of Ms Flamer-Caldera's rights under Article 7(c) of the Convention [para 9.5].
- The Committee recognised the problems that Ms Flamer-Caldera has experienced in relation to approaching the police and filing complaints against threats and harassment, as a result of the fact that s365A renders her vulnerable to arrest and prosecution. Consequently, the Committee found that her rights under Article 15(1) of the Convention had also been violated.
- Finally, the Committee found that Article 16 of the Convention had been violated because the criminalisation of same-sex sexual conduct between women had made it difficult for Ms Flamer-Caldera to find a partner and freely maintain relationships. The committee recognised that the rights to autonomy and choice underpin Article 16, and further recognised that "*whatever the form of a family, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people*".

Conclusions and recommendations:

The Committee made the following recommendations to the State of Sri Lanka:

Concerning the author of the communication:

- Take immediate and effective action against the threats, harassment and abuse to which the author has been subjected, including through the adoption of preventative and protective measures and, where appropriate, initiate criminal procedures to hold those responsible to account
- Take all appropriate measures to ensure that the author and her organization can carry out their activism safely and freely
- Provide the author with appropriate reparation, including adequate compensation, commensurate with the gravity and the ongoing consequences

of the violations of her rights

Generally:

- With respect to section 365A of the Penal Code of 1883, decriminalise consensual same-sex sexual conduct between women having passed the age of consent
- Provide effective protection against gender-based violence against women, including by adopting comprehensive legislation against discrimination against lesbian, bisexual, transgender and intersex women
- Provide adequate protection, support systems and remedies, including reparation, to lesbian, bisexual, transgender and intersex women who are victims of discrimination
- Ensure that victims of gender-based violence against women, including lesbian, bisexual, transgender and intersex women, have access to effective civil and criminal remedies and protection, including counselling, health services and financial support, in line with the guidance provided in the Committee's general recommendation No. 33
- Collect statistics on cases of hate crimes and gender-based violence against lesbian, bisexual, transgender and intersex women
- Effectively address discrimination against lesbian, bisexual, transgender and intersex women in the workplace
- Take specific and effective measures to ensure a safe and favourable environment for women human rights defenders and female activists
- Provide training to law enforcement agencies on the Convention, the Optional Protocol thereto and the Committee's general recommendations, in particular general recommendations Nos. 19, 21, 28, 33 and 35, to raise awareness of the human rights of lesbian, bisexual, transgender and intersex women and so that crimes with homophobic undertones committed against lesbian, bisexual, transgender or intersex women will be understood as gender-based violence or hate crimes requiring active State intervention.

Points to note:

- This decision was the first finding by a UN treaty body that the criminalisation of same-sex intimacy is a violation of the Convention. It was only the second time that any UN treaty body had considered the issue of criminalisation; the first being the seminal case of *Toonen v Australia* (Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)) in 1994.
- In finding the communication admissible, the Committee rejected both the

argument that the claim was inadmissible *ratione temporis* and that the author had failed to exhaust domestic remedies. It emphasised that there is no requirement to pursue non-judicial remedies before bringing a communication to the Committee [para 8.4]. The Committee also made clear that, while s365A was brought into force before the entry into force of the Optional Protocol regarding Sri Lanka, its effects nonetheless continued after that date and could therefore be considered by the Committee [para 8.5].

- The Committee's findings in relation to Article 16 are significant, as they explicitly recognise the importance of family rights within non-heterosexual relationships. In this context, the Committee states that "*the rights enshrined in the Convention belong to all women, including lesbian, bisexual, transgender and intersex women, and that article 16 of the Convention applies also to non-heterosexual relations*".
- Many of the Committee's findings and recommendations explicitly include transgender women, making clear that the rights recognised in the Convention apply on the basis of gender as well as sex.
- The State party has been given six months to provide the Committee with a written response to the views and recommendations expressed within the decision.