

Flamer-Caldera v Sri Lanka: Asia-Wide Implications of an Essential Evolution in CEDAW's Jurisprudence

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Abstract

The CEDAW Committee has issued a new Individual Communication concerning Rosanna Flamer-Caldera, a Sri Lankan lesbian woman, human rights defender and Executive Director of the only organisation in Sri Lanka advocating for the rights of the entire lesbian, gay, bisexual, transgender and intersex community. To date, the CEDAW Committee has received extensive criticisms concerning its neglect of women from diverse gender identities and sexual orientations. In this 2022 Communication, the Committee found that Sri Lanka's criminalisation of consensual same-sex relations among women violates Articles 2, 5, 15 and 16 of the Convention. Importantly, the Committee makes clear that non-heterosexual relations fall within the right to marriage and family relations enshrined in the Convention. With numerous States Parties in the region retaining criminalisation, this article analyses the implications of this decision for States Parties in Asia and grapples with the question, is this Communication "ground-breaking" and if so, how.

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) has issued an Individual Communication (the *Flamer-Caldera* Communication)¹ concerning Rosanna Flamer-Caldera (the Petitioner): a lesbian woman, human rights defender, and executive director of the only organization in Sri Lanka advocating for the rights of the lesbian, gay, bisexual, transgender, or intersex (LGBTI)² community. The *Flamer-Caldera* Communication is a challenge to Sri Lanka's Dutch-inherited criminalization of consensual same-sex relations under the Penal Code of 1883 (the Penal Code).³ Surprisingly, Sri Lanka's Penal Code was amended in 1995 for the worse. It did not eradicate but expanded criminalization to include sexual conduct between women by replacing the phrase "male person" with "person".⁴

¹ *Rosanna Flamer-Caldera v Sri Lanka* [2022] United Nations Committee on the Elimination of Discrimination against Women (UN CEDAW Committee), Communication No. 134/2018 [*Rosanna Flamer-Caldera v Sri Lanka*].

² LGBTIQ+ may be preferred, bringing within the rights being protected asexual people (A) and others (+) who fit within the queer identity but do not identify with one of the other categories. LGBTI has been chosen for this article as this is the scope of individuals mentioned in the Individual Communication. Nonetheless, the acronym fails to speak to the highly relevant diversity of terminology used in the region when discussing sexual and gender minorities. In Cambodia, for instance, "third-gender" is the Khmer term, see Maria ELANDER, "In Spite: Testifying to Sexual and Gender-Based Violence during the Khmer Rouge Period" in Dianne OTTO, ed., *Queering International Law: Possibilities, Alliances, Complicities, Risks* (London, United Kingdom: Routledge Research in International Law, Taylor & Francis Group, 2017), 110 at 125.

³ An Ordinance to Provide a General Penal Code for Ceylon (Ordinance No. 2 of 1883) http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf, Secs. 365 and 365A.

⁴ In *Toonen v Australia*, Human Rights Committee member, Mr. Bertil Wennergren, in his Individual Opinion issued under rule 94, paragraph 3 of the Human Rights Committee's rules of procedure, disagreed with the Human Rights Committee's decision that they did not need to look at violation of the right to be equal before the law under Article 16 of the International Covenant on Civil and Political Rights in Communication No. 488/1992. Rather, Mr Wennergren pointed out the unfairness of criminalization of consensual sex just between men in the Australian State of Tasmania, under which the law did not criminalise the same behaviour between women.

Targeted by State and Non-State actors for being a lesbian and for her activism,⁵ the CEDAW Committee highlights in its decision the inadequacy of Sri Lanka's efforts to eliminate the prejudices to which the Petitioner had been exposed as a woman, as a lesbian, and as an activist.⁶ In a fundamental statement of law, the CEDAW Committee has developed its existing position to state that "[t]he Committee considers 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".⁷

Importantly, too, the Government of Sri Lanka was found not only to have failed to prevent but actually partaken in the harassment, abuse, and threats against the Petitioner's work.⁸

In this note, I first situate the Committee's decision within its larger body of jurisprudence under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁹ Second, I offer some background about the Petitioner and the main claims made, before analysing how the Sri Lankan Government responded. I conclude by reflecting on the implications of the decision for the region based on this Sri Lankan case.

I. CEDAW'S SILENCE ON SEXUAL AND GENDER MINORITIES

The CEDAW Committee has been the subject of extensive criticism for the limited protection it has offered women from diverse gender identities and sexual orientations.¹⁰ Indeed, lesbian, bisexual, and transgender women have long been confronted by an absence of a clear international norm affirming non-discrimination on the basis of sexual orientation. Inclusion in international agreement making is rare, leaving such women vulnerable to discrimination on the basis of both gender and sexuality.¹¹ In turn, renowned American philosopher and scholar of law and ethics, Martha Nussbaum has declared CEDAW's neglect of sexual orientation as an "utter failure". While embrace of same-sex relationships would have alienated many nations at the time the treaty came into force, at the very least, the "coherence and integrity lost" by its exclusion must be acknowledged.¹²

As a consequence, for many scholars, particularly those focused on "queering" international law, such as pioneer, Dianne Otto, the "usual way of framing international legal problems and crafting solutions" is inadequate.¹³ CEDAW's silence on intersectionality has resulted in the Convention as a protection mechanism for a unified, monolithic category of women.¹⁴ Even

Obviously, it is unlikely that Mr Wennergren foresaw or intended to promote the type of law reform that took place in Sri Lanka in 1995.

⁵ *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 9.3.

⁶ *Ibid.*, at para. 9.4.

⁷ *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 9.7.

⁸ *Ibid.*, at para. 9.5.

⁹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Res. 34/180, UN Doc. A/34/46 (adopted 18 December 1979, entered into force 3 September 1981) [CEDAW].

¹⁰ Nadine GARTNER, "Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination against Lesbians" (2005) 14 *UCLA Women's Law Journal* 61 at 63-4.

¹¹ Chelsea Haley NELSON, "Sexualized Violence Against Lesbians" (2005) 17 *Peace Review* 163 at 165.

¹² Martha Craven NUSSBAUM, "Women's Progress and Women's Human Rights" (2016) 38 *Human Rights Quarterly* 589 at 609.

¹³ Dianne OTTO, "Introduction: Embracing Queer Curiosity" in Dianne OTTO, ed., *Queering International Law: Possibilities, Alliances, Complicities, Risks* (London, United Kingdom: Routledge Research in International Law, Taylor & Francis Group, 2017), 1 at 1.

¹⁴ Johanna BOND, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 *Emory Law Journal* 71 at 72.

defenders of CEDAW describe the “CEDAW woman” as assumed to be heterosexual, able-bodied, married (or likely to marry), and to have, or want, children.¹⁵

It is with some key developments over the last couple of years, however, that this critique could be tempered. References to sexual orientation and gender identity can be identified in several Concluding Observations from 1994 to 2001. This includes the Committee’s censuring of the criminalization of consensual sexual relations among women, the inadequacy of anti-discrimination laws, and the risks of criminalization, harassment, violence, and stigma facing sexual minorities seeking asylum.¹⁶ The Committee went on to be more explicit about harassment and discrimination facing lesbian women in Concluding Observations to Ecuador (2008), Kyrgyzstan (2008), and Guatemala (2009).¹⁷ More recently, in 2017, in General Recommendation No. 35,¹⁸ the Committee called upon State Parties to repeal provisions that allow, tolerate, or condone forms of gender-based violence against lesbian, bisexual, and transgender women.¹⁹

This development aligned with an Individual Communication submitted by two Russian petitioners, who authored a claim that same year to the CEDAW Committee. Their case centred around Russia’s failure to effectively investigate a violent offence committed by private individuals against them in 2013, owing to their “non-traditional sexual orientation”.²⁰ In that case, Russia’s failure to uphold women’s rights, in particular in the context of violence and discrimination against women based on their sexual orientation, to eliminate the barriers they faced in accessing justice, in particular the negative stereotypes associated with lesbian women, and to ensure law enforcement strictly applied the legislation prohibiting gender-based discrimination against women, were found to be a violation of Articles 1, 2(b)–(g), and 5(a) of the Convention.²¹

CEDAW’s weaknesses to date in protecting a greater diversity of women and family structures are indisputable. Yet, this limited, albeit developing, acknowledgement by the Committee of a group of rights-holders who come within the protection of the Convention, may be a signifier of the Committee’s desire to be bolder and more explicit in its effort to protect a greater diversity of women who face gender-based discrimination and harm. Indeed, the massive leap forward the CEDAW Committee has taken in the *Flamer-Caldera* Communication may be even more significant than some international law scholars realize.

Importantly, the 2022 Individual Communication by the CEDAW Committee represents only the second time a United Nations (UN) Human Rights Treaty Body has explicitly focused,

¹⁵ Fareda BANDA, “The Limits of Law: A Response to Martha C. Nussbaum” in Bardo FASSBENDER and Knut TRAISBACH, eds., *The Limits of Human Rights* (Oxford University Press, 2019), 267 at 269.

¹⁶ Angela KUGA THAS, “CEDAW in Defending the Human Rights of Lesbians, Bisexual Women and Transgenders in Malaysia as a Framework for the Respect, Protection, Promotion and Fulfilment of Human Rights Related to Gender Identity, Gender Expression and Sexual Orientation” *ResearchGate* (2007), online: ResearchGate https://www.researchgate.net/profile/Angela-Kuga-Thas/publication/271078001_CEDAW_in_Defending_the_Human_Rights_of_Lesbians_Bisexual_Women_and_Transgenders_in_Malaysia_as_a_framework_for_the_Respect_Protection_Promotion_and_Fulfilment_of_Human_Rights_related_to_Gender_Identit/links/54bda5b40cf218d4a16a2c6b/CEDAW-in-Defending-the-Human-Rights-of-Lesbians-Bisexual-Women-and-Transgenders-in-Malaysia-as-a-framework-for-the-Respect-Protection-Promotion-and-Fulfilment-of-Human-Rights-related-to-Gender-Iden.pdf at 1-2.

¹⁷ *Ibid.*, at 5.

¹⁸ For more, see Ramona VIJEYARASA, “CEDAW’s General Recommendation No. 35: A Quarter of a Century of Evolutionary Approaches to Violence Against Women” (2019) 19 *Journal of Human Rights* 2.

¹⁹ *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, CEDAW Committee, UN. Doc. No. CEDAW/C/GC/35 (2017) at para. 31(a).

²⁰ *ON and DP v Russian Federation* [2020] UN CEDAW Committee, Communication No. 119/2017 [*ON and DP v Russian Federation*]; see also Gabrielle SIMM, “Queering CEDAW? Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIESC) in International Human Rights Law” (2020) 29 *Griffith Law Review* 374.

²¹ *ON and DP v Russian Federation*, *supra* note 19 at para. 7.10.

in an Individual Communication, on criminalization of consensual same-sex relations. In the 1994 decision of the Human Rights Committee, criminalization in the Australian State of Tasmania was found to be a continuous and direct violation of the right to privacy of Nicolas Toonen, an activist for gay rights in Australia.²² A quarter of a century has since passed, warranting a rigorous analysis of the CEDAW Committee's decision in this Sri Lankan case.

In many respects, this decision can be a clear signal that international law can be an effective means to protect the interests of LGBTI individuals. It is worth celebrating the progress made in the human rights space for greater respect and recognition.²³ I now turn to the specifics of the *Flamer-Caldera* Communication and decision before considering its implications.

II. THE PETITIONER, THE COMMUNICATION, AND CEDAW'S RESPONSE

The *Flamer-Caldera* Communication was brought by a life-long activist for LGBTI²⁴ rights in Sri Lanka, Rosanna Flamer-Caldera, a Sri Lankan national born in 1956 who is an openly-identifying lesbian woman. After a period of living in the United States of America, "where she could be open about her sexuality",²⁵ Flamer-Caldera returned permanently to Sri Lanka in 1990. Her return to Sri Lanka was faced with difficulties in finding a job, running her business, dressing in what is considered "masculine" attire, and wearing her hair short. In 1999, she co-founded a support group for lesbian and bisexual women, the Women's Support Group. Among the many threats she faced, the CEDAW Committee noted the public's response to a conference proposed in 1999 by Flamer-Caldera and her organization: the media called on the police to release convicted rapists so that lesbians "might get a taste of the real thing".²⁶ A complaint by Flamer-Caldera to the Press Council proved fruitless, with the Press Council in turn publishing a denunciation of "lesbianism".

In 2004, the Petitioner founded the new organization, Equal Ground, advocating for the rights of Sri Lanka's LGBTI community *vis-à-vis* non-discrimination. Threats followed. In 2012, the Women and Children's Bureau of the police made presentations blaming homosexuality for the spreading of paedophilia; Equal Ground remains under the surveillance of the Criminal Investigation Department, which has deemed any homosexual material pornography, and the makers subject to arrest;²⁷ while Flamer-Caldera is subject to online threats and face-to-face ones by members of the public.²⁸ Members of the LGBTI community remain unprotected by the police. Meanwhile, in 2016, the Supreme Court of Sri Lanka (the Supreme Court) confirmed the validity of Sections 365 and 365A of the Penal Code which criminalize consensual same-sex sexual relations and upheld convictions against two men.²⁹

The *Flamer-Caldera* Communication argued that criminalization of female consensual same-sex activity and the concomitant potential for arrest and prosecution violates CEDAW in several respects, but here, I first deal with the procedural matters at hand.

²² *Toonen v Australia* [1994] United Nations Human Rights Committee, Communication No. 488/1992, at para. 8.1.

²³ Banda, *supra* note 14 at 269.

²⁴ LGBTIQ+ may be preferred, bringing within the rights being protected asexual people (A) and others (+) who fit within the queer identity but do not identify with one of the other categories. LGBTI has been chosen for this article as this is the scope of individuals mentioned in the Individual Communication. Nonetheless, the acronym fails to speak to the highly relevant diversity of terminology in the region. In Cambodia, for instance, "third-gender" is the Khmer term, see Elander, *supra* note 3 at 125.

²⁵ *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 2.2.

²⁶ *Ibid.*, at para. 2.4.

²⁷ *Ibid.*, at para. 2.5.

²⁸ *Ibid.*, at para. 2.6.

²⁹ *Ibid.*, at para. 2.8.

A. Failure to Exhaust Domestic Remedies and Admissibility

The Government of Sri Lanka sought to argue that Flamer-Caldera failed to exhaust domestic remedies, naming various other judicial or pseudo-judicial bodies that have directly addressed the issue of criminalization, including the Supreme Court of Sri Lanka. The Government referred to previous suggestions by the Supreme Court that neither the police nor the State should be policing consensual sex, although they had to concede that the domestic law in force continues to explicitly criminalizes such consensual sex.³⁰ Other domestic avenues for remedies include writs before the Court of Appeal, the Human Rights Commission, the Public Petitions Committee of Parliament, the Parliamentary Commissioner for Administration, and the National Police Commission.

Flamer-Caldera disputed any suggestion as to inadmissibility, given the ongoing nature of Section 365A of the Penal Code. Moreover, Flamer-Caldera made evident that the Constitution precludes review of enacted legislation as made evident in the 2016 Supreme Court decision noted above.³¹ There was no response from the Government on the impossibility of conducting such a review, nor any examples offered of successful constitutional challenges to the validity of the criminal law.³² Moreover, the CEDAW Committee itself has expressed concern that there is no opportunity for judicial review of legislation predating the Constitution.³³ The Government's response offered examples of what the Petitioner considers empty options, such as police stations dedicated to women's needs, which Flamer-Caldera, for reasons made evident in the Petition, has chosen not to use.³⁴

The Government of Sri Lanka also attempted to argue that the *Flamer-Caldera* Communication was insufficiently substantiated to be admissible.³⁵ Some events, for instance, were alleged to have occurred prior to entry into force of the Optional Protocol³⁶ for Sri Lanka.³⁷ The Government further suggested that it was in fact undergoing a process of revising the law, recognising that non-discrimination "includes non-discrimination on the ground of sexual orientation" and that constitutional reform had already been suggested by the Parliamentary Subcommittee on Fundamental Rights.

The CEDAW Committee was unpersuaded by the Government's arguments concerning the alleged failure to exhaust domestic remedies. With little information forthcoming, the Committee was unable to properly ascertain whether or not Article 121(1) of the Sri Lankan Constitution was in fact a remedy for the Petitioner.³⁸ Nor was it persuaded that the Human Rights Commission or Police Commission could be adequate avenues to redress the Petitioner's complaint.³⁹ The Committee therefore felt able to proceed with the complaint, pursuant to the Optional Protocol. This was particularly the case given that the *effects* of the amendments to the Penal Code that expanded criminalization to include lesbian women continued after Sri Lanka became a signatory to the Optional Protocol.⁴⁰

B. The Right to Non-Discrimination under Article 2 of CEDAW

³⁰ *Ibid.*, at para. 4.1.

³¹ *Ibid.*, at para. 2.8.

³² *Ibid.*, at para. 5.1.

³³ *Ibid.*

³⁴ *Ibid.*, at para. 6.2.

³⁵ *Ibid.*, at para. 4.3.

³⁶ CEDAW Committee, UNITED NATIONS GENERAL ASSEMBLY, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GENERAL ASSEMBLY A/54/4 (1999).

³⁷ *Ibid.*, at para. 4.4.

³⁸ *Ibid.*, at para. 8.3.

³⁹ *Ibid.*, at para. 8.4.

⁴⁰ *Ibid.*, at para. 8.5.

Article 2(d) requires States Parties to refrain from engaging in acts or practices of discrimination and to ensure the conformity of public authorities with this obligation. The *Flamer-Caldera* Communication noted the intersecting forms of discrimination faced by women and sexual minorities that have a compounded impact on lesbian and bisexual women.⁴¹ Criminalization creates discrimination and stigmatization, creating significant barriers to access justice in instances of harassment and violence. Threats and harassment due to non-conformity with expected roles has created a fear for Flamer-Caldera and her family.

As a human rights defender, Flamer-Caldera also alleged her particular vulnerability to discrimination, “demonstrated by the vilification, monitoring, surveillance and harassment” that she has faced.⁴² Given her activism and sexual orientation, the *Flamer-Caldera* Communication names her fear of falling victim to a continuing practice of “white van disappearances”,⁴³ a reference to a long and documented history of forced disappearances in Sri Lanka.⁴⁴ The CEDAW Committee acknowledged the ways in which the Petitioner has been subject to surveillance and fear. Indeed, the Committee highlighted that the very role of States is to encourage the work of human rights and women’s rights organizations, the opposite of what has occurred in Sri Lanka, making the barriers facing women such as Flamer-Caldera to actively participate as member of civil society even graver.⁴⁵

Articles 2(c)-(g) of CEDAW set out a range of obligations to provide legal protection against discrimination, including its elimination and the repeal of discriminatory laws. The *Flamer-Caldera* Communication argued that criminalization of same-sex sexual relations exacerbates gender-based violence against women, including by the family and the community. It further went on to elaborate the impact of such discrimination, particularly in a cultural context in which women are forced into heterosexual marriages and where investigations into claims of discrimination are inadequate nor are they prosecuted.

C. *The Obligation to Remove Socio-Cultural Prejudices and Stereotypes under Article 5*

The *Flamer-Caldera* Communication further argued that criminalization acted to legitimize a particularly harmful socio-cultural stereotype. Criminalization thereby violates Article 5 of the Convention, which requires States Parties to eliminate prejudices and customary and all other practices based on the superiority or inferiority of either of the sexes, or on stereotypes of the roles of men and women.⁴⁶ Such stereotypes of Sri Lankan women entrench patriarchal attitudes and reduce women to a particular reproductive function,⁴⁷ that is, the Petitioner was in part targeted for her non-conformity to the expected role of wife and mother.

D. *The Obligation to Eliminate Discrimination in Marriage and Family Life under Article 16*

Finally, the *Flamer-Caldera* Communication argued that Article 16 of the Convention had been violated on multiple grounds. Probably most fundamental is the violation of the right to privacy, with criminalization bringing consensual private activity into the public domain.

⁴¹ *Ibid.*, at para. 3.1.

⁴² *Ibid.*, at para. 3.3.

⁴³ *Ibid.*

⁴⁴ *Follow-up on the Visits of the Working Group on Enforced or Involuntary Disappearances to Peru and Sri Lanka Report of the Working Group on Enforced or Involuntary Disappearances*, United Nations Human Rights Council, UN Doc. A/HRC/42/40/Add.1 (2019).

⁴⁵ *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 9.5.

⁴⁶ CEDAW, *supra* note 1, art. 5.

⁴⁷ *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 3.4.

Specifically, the petitioner argued that the law, by criminalising consensual acts in both the public and private, allows a police officer to enter a household merely on the suspicion that two consenting women are in an intimate relationship.⁴⁸ The Petitioner also raised discrimination in the context of a healthcare setting, whereby in 2005, a healthcare professional had refused to provide her partner treatment in her presence.⁴⁹

E. The CEDAW Committee's Main Findings

On substantive matters, the CEDAW Committee found that the Government of Sri Lanka had subjected the Petitioner to direct and indirect discrimination emanating from the Penal Code.⁵⁰ It further found, with little evidence to dispute the claims, that the Government had breached the Petitioner's rights under Article 2(c)-(f), read in conjunction with General Recommendations Nos. 19 and 35, both on gender-based violence.⁵¹ Having failed to decriminalize consensual same-sex relations, which is "essential to prevent and protect against violence, discrimination and harmful gender stereotypes,"⁵² Article 5(a) had been breached. Moreover, the Committee found a breach under Article 7(c) of CEDAW, requiring the elimination of discrimination in political and public life and to ensure women's participation on equal terms with men.⁵³ Failure to create avenues for the Petitioner to approach the police and file complaints, exacerbating her vulnerability to arrest and prosecution, amounted to a breach of Article 15(1): "States Parties shall accord to women equality with men before the law".⁵⁴ Finally, and some might suggest most importantly, the Committee found a violation of the principles of equality and justice that apply whatever the form of family, acknowledging a breach of the Petitioner's rights under Article 16 on marriage and family relations.⁵⁵

III. SRI LANKA'S ENGAGEMENT WITH CEDAW AND RESPONSE TO THE PETITION

Sri Lanka has traditionally embraced CEDAW. The Government was one of the world's first to unreservedly ratify the Convention on 5 October 1981 and its Optional Protocol in 2002. Nevertheless, an evident question must be raised as to the Government of Sri Lanka's efforts to fulfil CEDAW's spirit of actually achieving legal and social equality. The legitimacy of CEDAW for Sri Lankan women has been explained well by Deepika Udagama, Sri Lankan professor and human rights activist: the shortcomings may lie not with the resonance and receptivity of Sri Lankan women and women activists to CEDAW's content which seems high.⁵⁶ Rather, the concern lies with the ability, to date, of the government to meet *some* of CEDAW's obligations, without guaranteeing the substantive equality that CEDAW itself requires from the Sri Lankan government.⁵⁷

⁴⁸ Section 365A explicitly criminalises "gross indecency" in either public or private. See also *Rosanna Flamer-Caldera v Sri Lanka*, *supra* note 2 at para. 3.5.

⁴⁹ *Ibid.*, at para. 7.4.

⁵⁰ *Ibid.*, at para. 9.2.

⁵¹ *Ibid.*, at para. 9.3.

⁵² *Ibid.*, at para. 9.4.

⁵³ *Ibid.*, at para. 9.5.

⁵⁴ *Ibid.*, at para. 9.6.

⁵⁵ *Ibid.*, at para. 9.7.

⁵⁶ For more, see Ramona VIJEYARASA, *The Woman President: Leadership, Law and Legacy for Women Based on Experiences from South and Southeast Asia* (Oxford University Press, 2022).

⁵⁷ Deepika UDAGAMA, "Implementation of the UN Convention on Women (CEDAW) in Sri Lanka: A Country Study" (2012) 24 Sri Lankan Journal of International Law 53 at 53.

Criminalization of consensual same-sex relations—even within a background where the government claims it intends to reform the law—is one such example that has been brought under the spotlight through this *Flamer-Caldera* Communication. Here, I outline Sri Lanka’s engagement with CEDAW since ratification before considering the government’s response to the *Flamer-Caldera* Communication and the implications for the nation.

A. Sri Lanka’s History with CEDAW: A Legitimate Tool Among Women Activists

CEDAW has been credited for bringing a “unifying focus” to Sri Lanka on issues such as violence against women and development,⁵⁸ arming local groups and movements in their advocacy efforts to bring about change. One outcome was the Woman’s Charter,⁵⁹ aimed at eradicating sex-based discrimination and achieving gender equality in all areas of life.⁶⁰ Adopted by the Sri Lankan Government in March 1993 and explicitly grounded in CEDAW, it is arguably the most significant measure taken by the Government since ratification. In its Preamble, it provides a reminder that: “Sri Lanka has endorsed these international standards and has accepted by ratification, international obligations under the Convention on the Elimination of All Forms of Discrimination against Women”. However, discrimination against women continues to exist.⁶¹ It goes on to call for such rights, principles, and policies to “guide the actions of all persons, institutions, organizations and enterprises”, in a sense calling for rights-based gender-responsive laws and policies.⁶²

Local Sri Lankan organizations have also demonstrated their ability to respond to CEDAW’s limitations as a tool for accountability. For example, in 2004, a team of experts from the locally renowned non-governmental organization, Centre for Women’s Research (CENWOR), took up the challenge of developing indicators to monitor and benchmark the progress of the Sri Lankan government against CEDAW’s provisions, specifically through proactive measures such as legislation, but also through policy planning, resource allocation, and programmes.⁶³ The indicators that were derived directly from CEDAW sought to examine legislation, along with institutional arrangements, programmes, and policies “that are conducive to implementing the rights referred to in each article in CEDAW”.⁶⁴ In short, there is an evident embrace by Sri Lankan women’s groups of the Convention itself in their advocacy efforts targeting the Government. This ownership over the Convention is important to acknowledge when we reflect upon the significance and potential of this Communication.

IV. IMPLICATIONS FOR STATES PARTIES IN THE REGION

CEDAW is evidently a living document. Its goal of protecting women from discrimination remains foremost. The Committee has achieved in this decision what it has not, or has chosen

⁵⁸ Neloufer DE MEL, “Between the War and the Sea: Critical Events, Contiguities and Feminist Work in Sri Lanka” (2007) 9 *Interventions* 238 at 238.

⁵⁹ *Women’s Charter (Sri Lanka)*, 3 March 1993 [*Women’s Charter*], online: International Labour Organization https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=50168&p_classification=05#:~:text=Charter%20promulgated%20by%20the%20Office,discrimination%20and%20gender%2Dbased%20violence. .

⁶⁰ Anula ATTANAYAKE, “Elitism in Women’s Political Participation in Sri Lanka Within a South Asian Context” in Kazuki IWANAGA and the Nordic Institute of Asian Studies, eds., *Women’s Political Participation and Representation in Asia: Obstacles and Challenges* (Copenhagen, Denmark: NIAS Press), 253 at 268-9.

⁶¹ *Women’s Charter*, *supra* note 55 at Preamble.

⁶² *Ibid.*

⁶³ CENWOR, “CEDAW Indicators for South Asia: An Initiative” *CENWOR and UNIFEM South Asia Regional Office* (2004), online: CEDAW South Asia <http://cedawsouthasia.org/wp-content/uploads/2017/07/CEDAW-Indicators-for-South-Asia-An-Initiative.pdf> .

⁶⁴ *Ibid.*, at 11.

not to do, in earlier iterations: bring within its scope of protections, lesbian, bisexual, and transgender women.

Discerning what might be the regional implications of the CEDAW Committee's call for, among other things, the decriminalization of same-sex sexual relations in Sri Lanka, is a little more complex. In the words of one scholar, when it comes to LGBTI rights in Asia, there is "no regional pattern".⁶⁵ While Thailand's or the Philippines' international reputations may be softer when it comes to the rights of sexual minorities, the reality is one of acceptance if and when "certain stereotypes and occupational positions are maintained".⁶⁶ In other words, progress, or the possibility of progress, coexists with insecurity and vulnerability.⁶⁷

First, for even these more "progressive" nations, this decision has important implications. While States such as Thailand may have moved towards decriminalization, this is still a long way from active protection of the rights of LGBTI persons. Many States in the region have shown little or no interest in enacting anti-discrimination measures, or ensuring that sexual assault laws address LGBTI concerns, and in general, civil rights are not protected. Mongolia is an exception, where efforts are being made to re-draft laws on domestic violence and the workplace, with the rights of individuals from a diversity of sexual orientations and gender identities in mind.⁶⁸ More progressive countries in the region may be urged to follow suit.

Second, the consequences for countries that continue to criminalize consensual same-sex relations are more obvious, including, but not limited to Afghanistan, Brunei, Malaysia, and Singapore.⁶⁹ Developments in India have been closely watched in this regard. In 2009, after much campaigning, the Delhi High Court read down Section 377 of the Indian Penal Code in the 'Naz Foundation' case and decriminalized homosexual relations between consenting adults, a decision that was quickly reversed after legal developments in 2012 and 2013, to great "shock, terror, rage and solidarity".⁷⁰ Today, Section 377 still exists in law for other purposes, but cannot be used in India to criminalize consensual same-sex relations.

Third, this Communication comes at a time when the world is particularly cognisant of the reality that gains in the protections for human rights are not always sustained. This fluidity with which progress is reversed must be acknowledged. Relatively "tolerant" Muslim-majority Indonesia was hit by a wave of homophobia from 2016 onwards, including consideration of a hitherto not passed law to criminalize consensual same-sex relations that would also involve a ban on materials that "promote LGBTI issues".⁷¹ According to the Human Dignity Trust, criminalization already exists in two Indonesian provinces.⁷² While activists in Singapore have rallied in response to a similarly concerning trend, the nation too has reaffirmed its prohibition on same-sex relations between men, not even considering a repeal when the Singaporean Penal Code was reviewed in 2018.⁷³

⁶⁵ See Anthony J. LANGLOIS, "No Regional Pattern: LGBTIQ Rights and Politics in Asia" in Fernand DE VARENNES and Christie M. GARDINER, eds., *Routledge Handbook of Human Rights in Asia* (Routledge, Taylor & Francis, 2018).

⁶⁶ *Ibid.*, at 329.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ "Map of Countries That Criminalise LGBT People" *Human Dignity Trust*, online: Human Dignity Trust <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>.

⁷⁰ Langlois, *supra* note 61 at 325.

⁷¹ Saskia E. WIERINGA, "Criminalisation of Homosexuality in Indonesia: The Role of the Constitution and Civil Society Special Issue: Legal Regimes of Sexual Orientation and Gender Identity in Asia" (2019) 20 *Australian Journal of Asian Law* 227 at 227.

⁷² "Indonesia" *Human Dignity Trust*, online: Human Dignity Trust <https://www.humandignitytrust.org/country-profile/indonesia/>.

⁷³ George Baylon RADICS, "#Ready4Repeal? Viewing s 377A of the Singaporean Penal Code through the Lens of Legal Actors and Artists Special Issue: Legal Regimes of Sexual Orientation and Gender Identity in Asia" (2019) 20 *Australian Journal of Asian Law* 213 at 213.

All nations in the region that criminalize consensual same-sex relations are at risk of an allegation that their law violates the Convention. Discriminatory behaviour—public or private, including acts which lead to gender-based violence and discrimination at home, at work, or in public life against lesbian, bisexual, or transgender women—could be found to violate the right to privacy, the obligation to remove socio-cultural prejudices and gender stereotypes, to not discriminate against women’s equal participation in political and public life, and to uphold the principles of equality and justice, whatever the form of family. A more expansive embrace of the decision could see other treaty bodies being requested to revisit their jurisprudence with regards to criminalization and discrimination, ideally bringing to light the intersectional identities involved and how a greater diversity of individuals who identify as LGBTI are affected by a host of violations of their rights.

V. CONCLUSION

Is “ground-breaking” the right term to describe CEDAW’s decision in *Flamer-Caldera v Sri Lanka*? Perhaps not. If one sees the UN human rights system as a global North, top-driven architecture, this decision may be seen as more of the “white man’s burden” to address the colonial export of many of these criminal laws and merely another attempt “to match Northern resources and expertise with Southern needs”.⁷⁴ The Individual Communication, and this analysis of it also falls foul of Dianne Otto’s concern with “the politics of heteronormative injury”;⁷⁵ that is, a focus on the injured and not the rights-bearing active agent. We may be left with a Communication that may not be seen as “progress” but rather a decision centred around rights violations in heteronormative terms. Moreover, the decision naturally reinforces the regulatory power of the state in order to address violence and discrimination of sexual minorities, which has been disputed and challenging terrain for many years.⁷⁶

Yet with numerous States Parties in the region retaining criminalization and with hints that some of the more progressive nations may regress and shift towards criminalization, this Communication means that States Parties to CEDAW risk a finding that they are in grave violation of international human rights. How each State Party chooses to respond to such a risk will naturally differ. The Committee’s finding that criminalization is in violation of the Convention stands strong. The CEDAW Committee should be proud that it has significantly widened the door to much greater protections for LGBTI individuals in the human rights system.

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⁷⁴ Rahul RAO, “A Tale of Two Atonements” in Dianne OTTO, ed., *Queering International Law: Possibilities, Alliances, Complicities, Risks* (London, United Kingdom: Routledge Research in International Law, Taylor & Francis Group, 2017), 15 at 18.

⁷⁵ Otto, *supra* note 12 at 1.

⁷⁶ Simm, *supra* note 19 at 377.