

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES
[ISSN 2581-5369]

Volume 8 | Issue 4
2025

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The Evolution of CEDAW Jurisprudence Through the Communication Procedure: A Review of Rosanna Flamer-Caldera v. Sri Lanka (2022)

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ABSTRACT

This brief research paper reviews Rosanna Flamer-Caldera v. Sri Lanka, the communication that was submitted under the Communication Procedure of the CEDAW Optional Protocol (1999) concerning the matter of criminalisation of consensual same-sex activity between adult women by the criminal law of Sri Lanka, and gender-based violence against women. This communication has marked a significant turning point, being the first such individual communication before the CEDAW Committee against Sri Lanka and the first communication to find that discrimination against women on the ground of their sexual orientation violates the CEDAW principles and state obligation under the treaty. This research also highlights the impact of this communication, including an analysis of scholarly viewpoints on this communication and the responses of Sri Lanka. Another aim of this review is to understand the strength of the CEDAW communication procedure in the domestic implementation of CEDAW as an implementation mechanism. The research methodology employed in this review is a qualitative analysis, primarily based on a desk study of primary and secondary data, including international treaties, statutes, case law, academic literature, and online resources.

Keywords: CEDAW communication procedure, CEDAW optional protocol, gender equality, non-discrimination, criminalisation of same-sex sexual activity

I. INTRODUCTION: THE COMMUNICATION PROCEDURE UNDER THE CEDAW OPTIONAL PROTOCOL

To strengthen the enforceability of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),² the United Nations General Assembly in its Resolution 54/4 (A/RES/54/4), adopted the CEDAW Optional Protocol on 6th October 1999,

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² CEDAW was adopted in 1979 by the United Nations General Assembly Resolution 34/180.

and the Protocol entered into force on 22 December 2000.³ The Optional Protocol does not permit any reservations by the state parties.⁴ The Optional Protocol establishes two procedures to strengthen the enforcement of women's rights under the CEDAW: (i) the communications procedure and (ii) the inquiry procedure. By ratifying the Optional Protocol, a state party recognises the competence of the CEDAW Committee to receive and consider complaints from individuals or groups within its jurisdiction.⁵

If a country is a state party to both the CEDAW and its optional protocol, according to Article 2 of the Optional Protocol, 'the communications may be submitted by or on behalf of individuals or groups of individuals,⁶ under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the CEDAW by that State Party.'⁷ Article 3 of the Optional Protocol clearly states that 'Communications shall be in writing and shall not be anonymous', and 'no communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.'⁸ However, when making such a complaint to the CEDAW committee, 'it must have exhausted all domestic remedies available in the state in question, unless those remedies are unreasonably prolonged or unlikely to bring effective relief.'⁹

Another requirement for the admissibility of a communication is that 'the matter must not be under examination or have already been examined by another international body.'¹⁰ Having examined the communication, the Committee shall transmit its views, together with its recommendations, to the parties concerned.¹¹ Moreover, the Working Group on CEDAW communications under the optional protocol is responsible for following up on individual cases.¹² It is important to note that the CEDAW Optional Protocol also assures the safety of individuals who submit communications under the Protocol. According to Article 11 of the Protocol, 'the state parties must take appropriate measures to ensure that individuals in their

³ The UN Women website (June 10, 2025) <<https://www.un.org/womenwatch/daw/cedaw/protocol/>>. Also see the UN Human Rights Office of the High Commissioner Website, Human Rights Instruments (June 10, 2025) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-elimination-all-forms>>.

⁴ Article 17 of the CEDAW Optional Protocol, which was adopted in 1999 and entered into force in 2000.

⁵ Optional Protocol to the CEDAW, UN Women (June 10, 2025) <<https://www.un.org/womenwatch/daw/cedaw/protocol/>>. See Article 1 and Article 3 of the Optional Protocol.

⁶ Article 2 of the CEDAW Optional Protocol specifies that 'where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.'

⁷ Article 2 of the CEDAW Optional Protocol.

⁸ Article 3 of the CEDAW Optional Protocol.

⁹ *ibid.* Article 4(1) of the Protocol.

¹⁰ *ibid.* Article 4(2) of the Protocol.

¹¹ *ibid.* Articles 6 and 7 of the Protocol.

¹² United Nations, Follow-up to concluding observations, (June 12, 2025) <<https://www.ohchr.org/en/treaty-bodies/cedaw/follow-concluding-observations>>

jurisdictions are not subjected to ill-treatment or intimidation due to communications with the Committee.’¹³ Therefore, the adoption of the Optional Protocol to the CEDAW is significant as it has enhanced the treaty's enforceability at the national level by strengthening the accountability of state parties.

II. ROSANNA FLAMER-CALDERA V. SRI LANKA: FACTS, ISSUES AND ARGUMENTS

Sri Lanka became a state party to CEDAW through the ratification of the Convention on 5th October 1981.¹⁴ Moreover, Sri Lanka ratified the Optional Protocol to CEDAW on the 15th of October 2002 by accepting the complaints and inquiry procedures within three years of the adoption of the protocol.¹⁵ Accordingly, by ratifying CEDAW and its Optional Protocol, Sri Lanka reflects its voluntary intention to abide by the treaties and, thus, ratification can be interpreted as a legal and moral pledge for fulfilling the state's commitments to take appropriate and effective measures compatible with the obligations imposed by the treaties to eliminate all forms of discriminations against women and girls despite the economic-social-cultural obstructions.

Rosanna Flamer-Caldera (the author of the communication) is a national of Sri Lanka and is a prominent activist for the rights of LGBTQI (Lesbian, Gay, Bisexual, Transgender, Queer and Intersex) in Sri Lanka. In the communication, the author complained that ‘the author has been subjected to discrimination, harassment, stigmatisation, threats, high-profile attacks on her character and threats of violence by State officials and members of the public, including on social media. She has been targeted due to her openness about her sexual orientation.’¹⁶ In Sri Lanka, section 365A of the Penal Code,¹⁷ as amended by the Act, No. 22 of 1995, criminalises consenting same-sex activity between adult women with the effect of the amendment, replacing the previous wording of ‘male person’ with ‘person.’ The author argued that the criminalisation of female same-sex sexual activity and the concomitant potential for arrest and

¹³ *ibid.* Article 11 of the Optional Protocol.

¹⁴ OHCHR, United Nations Human Rights Treaty Bodies, UN Treaty Body Database, Ratification Status for Sri Lanka (Dec. 22, 2024) <https://tbinet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=en>

¹⁵ *ibid.*

¹⁶ *supra*, *Rosanna Flamer-Caldera v Sri Lanka* at section 2.6 at p.3.

¹⁷ Section 365A of the Penal Code of Sri Lanka, No.2 of 1883 - ‘Acts of gross indecency between persons’ was amended by Section 18 of the *Penal Code (Amendment) Act, No. 22 of 1995*, and the section reads as follows. ‘Any person who, in public or private, commits, or is a party to the commission of, or procures, or attempts 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 description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.’

prosecution amount to discrimination on the grounds of gender and sexual orientation in violation of the right to non-discrimination under article 2 (a) and (d)–(g) of the CEDAW.¹⁸ However, the author did not intend to challenge the constitutionality of sections 365 or 365(A) of the Penal Code,¹⁹ since section 80(3) of the Constitution of Sri Lanka expressly prohibits post-enactment judicial review of legislation.²⁰

Furthermore, the author argues that ‘the criminalisation of same-sex sexual conduct between women, violates the rights to autonomy and choice underpinning Article 16 of the CEDAW.’²¹ The author has also argued that under article 2 (c)–(g) of the CEDAW and General Recommendation No. 35 (2017) on Gender-based violence against women, updating General Recommendation No. 19, the criminalisation of same-sex sexual activity between women exacerbates gender-based violence against women, including at the hands of their community and family.²² According to the review of the Human Dignity Trust, “the author sought a wide range of remedies, beginning with the repeal of section 365A of the Penal Code and a declaration by the CEDAW Committee that the criminalisation of same-sex consensual relationships between adult women is contrary to the Convention.”²³

III. CEDAW COMMITTEE RECOMMENDATIONS CONCERNING THE COMMUNICATION

In response to this communication, Sri Lanka challenges the admissibility of the complaint on the ground that ‘the author has failed to exhaust domestic remedies, as she has not engaged any domestic procedure.’²⁴ Moreover, Sri Lanka, on the state party’s observation on the merit, argued that ‘even though the author had the possibility of challenging the Penal Code (Amendment) Act No. 22 of 1995, the author had not questioned the bill.’²⁵ However, upon considering the author’s responses to the above observations by the state party, the committee decided that the author’s failure to use the pre-enactment review in the constitution of Sri Lanka to question the Penal Code Amendment Bill of 1995 was not an obstruction to the admissibility of this communication, as the pre-enactment review in Sri Lanka provides only a

¹⁸ *supra*. *Rosanna Flamer-Caldera v Sri Lanka* at section 3.1 at p.3.

¹⁹ *ibid*. Section 2.8 at p.3.

²⁰ Article 80(3) of the Constitution of Sri Lanka (1978) states that “Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be endorsed thereon, no court or tribunal shall inquire into it, pronounce upon or in any manner call into question, the validity of such Act on any ground whatsoever.”

²¹ *supra*, *Rosanna Flamer-Caldera v Sri Lanka* at section 3.5 at p.5.

²² *ibid*. at section 3.3 at p.4.

²³ Human Dignity Trust, Sri Lanka: *Case before UN Committee on the Elimination of Discrimination against Women (CEDAW)* (Jan. 18, 2025) <<https://www.humandignitytrust.org/what-we-do/cases/sri-lanka-case-before-un-committee-on-the-elimination-of-discrimination-against-women-cedaw/>>

²⁴ *supra*. *Rosanna Flamer-Caldera v Sri Lanka* at section 4.1 at p.5.

²⁵ *ibid.*, section 6.1 at p.6.

limited timeframe.²⁶ The CEDAW Committee decided that the state party's submission that this communication is inadmissible is insufficiently substantiated.

Having inquired on the communication, finally the CEDAW committee was of the view that 'the facts before it reveal a violation of the author's rights under Articles 2(a) and 2 (c)–(g) and 5 (a), 7 (c), 15 and 16 of CEDAW, read in conjunction with article 1, of the Convention, in the light of General Recommendations Nos. 19, 33 and 35.'²⁷ Therefore, the CEDAW Committee has made specific recommendations to guarantee the rights and safety of the author of the communication. The committee directed Sri Lanka to 'take immediate and effective action against the threats, harassment and abuse to which the author has been subjected; and to take all appropriate measures to ensure that the author and her organisation can carry out their activism safely and freely.'²⁸ Moreover, the Committee recommended to 'provide the author with appropriate reparation, including adequate compensation, commensurate with the gravity and the ongoing consequences of the violations of her rights.'²⁹

Furthermore, the CEDAW Committee recommended legislative reforms concerning section 365A of the Penal Code of 1883, for Sri Lanka to 'take steps to decriminalise consensual same-sex sexual conduct between adult women.'³⁰ Moreover, the Committee has recommended to "guarantee effective protection against violence, support systems and access to effective legal remedies to lesbian, bisexual, transgender and intersex women in Sri Lanka, particularly for women who have become victims of this discrimination."³¹ This communication is also remarkable for emphasising the "impact of gender stereotyping and societal prejudice against women in Sri Lankan society as an obstruction to achieving gender equality for women, especially those who have a non-heterosexual orientation."³² With that focus, the Committee has also recommended providing training to law enforcement agencies in Sri Lanka on the Convention, its Optional Protocol and the CEDAW General recommendations to raise awareness.'³³ Having understood the importance of the Committee's recommendations, this review next examines their immediate impact on the Sri Lankan government, the legal community, and civil society.

²⁶ *supra*, *Rosanna Flamer-Caldera v Sri Lanka* at section 8.3 at p.8.

²⁷ *ibid.* Section 10 at p.11.

²⁸ *ibid.* Section 11 (a) (i) and (ii) at p.11.

²⁹ *ibid.* Section 11 (a) (iii) at p.11.

³⁰ *Ibid.* Section 11 (b) (i) at p.11.

³¹ *Ibid.* Section 11 (b) (ii), (iii) and (iv) at p. 12

³² *Ibid.* 9.4 at p.10.

³³ *ibid.* Section 11(b) (viii) at p.12.

IV. AN ANALYSIS OF THE IMPACT OF THE CEDAW COMMUNICATION: RESPONSES AND COMMENTS

The individual communication submitted by Rosanna Flamer-Caldera against Sri Lanka is considered a significant turning point in the history of CEDAW for several reasons. First, this is the first individual communication before the CEDAW Committee concerning Sri Lanka's state obligations, and this effort will certainly encourage others who are victimised or disadvantaged due to the violations of CEDAW obligations by Sri Lanka to present their case before the CEDAW Committee, having exhausted the domestic remedies. Second, this is the Committee's first crucial decision under the communication procedure to cover the state's conduct of criminalisation of consensual same-sex conduct between adult females within the scope of gender-based discrimination against women in the Convention. Third, the CEDAW committee acknowledged the human rights violations against the LGBTQI community³⁴ in Sri Lanka and urged active state intervention for their protection against violence and to guarantee equal rights for them in the Committee's recommendations.³⁵

Regarding the responses and comments from scholars and activists, Vijayawada has offered a different perspective on the significance of this communication, considering its impact on the Asian region.³⁶ In her case commentary, Vijayawada has built up an argument that "all nations in the region that criminalise consensual same-sex relations are at risk of an allegation that their law violates the Convention."³⁷ Thus, the legal illumination of this communication would reach other parts of the world and fill the gaps in the gender inequality dialogue. In reviewing the immediate social-legal responses concerning this communication, it is observed that the CEDAW committee's communication has been praised as a 'turning point' in the eyes of contemporary legal scholarship, mainly by researchers, human rights activists, and human rights organisations.³⁸

It is also important to inquire about the responses of the Sri Lankan government after this

³⁴ *ibid.* Sections 7, 9, and 11.

³⁵ *Ibid.* Section 11 (recommendations), at pp.11-12

³⁶ Ramona Vijayarasa, *Flamer-Caldera v Sri Lanka: Asia-Wide Implications of an Essential Evolution in CEDAW's Jurisprudence* [2023] 13-2, *ASIAN JOURNAL OF INTERNATIONAL LAW*, Cambridge University Press, 209-219 at (June 27, 2025) <<https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/flamercaldera-v-sri-lanka-asiawide-implications-of-an-essential-evolution-in-cedaws-jurisprudence/06BA0CFAEB5DD2B32C267BFEBFD85A10>>

³⁷ *Ibid.*, Vijayarasa, pp. 9-10

³⁸ For example, Loveday Hodson and Kseniya Kirichenko, *Rosanna Flamer-Caldera v Sri Lanka (CEDAW): The First International Case on Lesbian Criminalisation*, OXFORD HUMAN RIGHTS CLUB, (Sep. 7, 2024) <<https://ohrh.law.ox.ac.uk/rosanna-flamer-caldera-v-sri-lanka-cedaw-2022-the-first-international-case-on-lesbian-criminalisation/>> Also, see *supra*, Ramona Vijayarasa, *Flamer-Caldera v Sri Lanka: Asia-Wide Implications of an Essential Evolution in CEDAW's Jurisprudence* [2023] 13-2, *ASIAN JOURNAL OF INTERNATIONAL LAW*.

CEDAW communication. Subsequently, a member of the Parliament of Sri Lanka submitted a private member's bill in 2023³⁹ to repeal sections 365 and 365A⁴⁰ of the Penal Code of Sri Lanka, which criminalises homosexual conduct. However, the constitutionality of the bill was questioned under the jurisdiction of Article 121(1)⁴¹ of the Constitution of Sri Lanka. Having considered the petition, the Supreme Court of Sri Lanka ruled that 'we are of the opinion that the Bill as a whole or any provision thereof is not inconsistent with the Constitution.'⁴² The Court further went on to declare that 'we are of the view that the removal of criminalisation of intimate acts between consenting adults would be in conformity with Article 12(1) [of the Constitution] and would uphold the dignity of human beings.'⁴³ Yet, the court held that 'they have no mandate to interfere with such a decision, which is the prerogative of Parliament.'⁴⁴ Therefore, passing a law to repeal or amend sections 365 and 365A of the Penal Code to decriminalise consensual same-sex conduct between adults is in the hands of the Parliament.

V. CONCLUSION

This case analysis of the CEDAW communication concerning Sri Lanka proves how the CEDAW jurisprudence can be expanded through the CEDAW communication procedure under the Optional Protocol. Moreover, it can be questioned about the binding authority of the CEDAW committee's recommendations under the communication procedure, as state parties have yet to provide excuses or reasons for not complying with the CEDAW committee's recommendations. However, the vital contribution of the CEDAW Optional Protocol and the CEDAW Committee in upholding the CEDAW values and principles and transforming CEDAW into an enforceable international treaty on women's rights, with communication and inquiry procedures, is significant. Holding state parties accountable for their violations and failures to follow treaty obligations is one method of compelling state parties to respect, protect, promote, and fulfil their treaty obligations, ensuring the practical realisation of gender equality for women and girls.

³⁹ *Athula H. De Silva v. Attorney General*, The Supreme Court Determination on the Penal Code Amendment Bill of 2023, SC SD No. 13/2023, (June 23, 2024)

<http://www.supremecourt.lk/images/documents/sc_sd_13_2023.pdf>

⁴⁰ *supra*, sections 365 and 365 A of the Penal Code of Sri Lanka (As amended in 1995).

⁴¹ Article 121(1) of the Constitution of Sri Lanka (1978) states that 'The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within fourteen days of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker.'

⁴² *ibid.*, *Athula H. De Silva v. Attorney General*, 2023, at p.43

⁴³ *ibid.*, *Athula H. De Silva v. Attorney General*, 2023, at p.36

⁴⁴ *ibid.*, at p.36

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