

Strengthening Jurisprudence of Equality

Violence Against Women



The Commonwealth

Printed and published by the Commonwealth Secretariat, 2014

For more information please contact:

Gender Section
Secretary-General's Office
e-mail: gender@commonwealth.int

Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

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This Information Brief situates violence against women within a juridical context and raises key questions regarding jurisprudence of equality, particularly within the Commonwealth.

As the main institution on which women's rights ultimately depend, the judiciary plays a critical role in the development and implementation of formal legal responses to discriminatory and criminal activities, including violence against women. Judges and magistrates are responsible for deciding how and when the provisions of international human rights law and/or CEDAW, the international convention on women, may be applied at the national level. They are also responsible for deciding the degree to which legal systems may conform to international human rights standards. An effective theoretical framework regarding principles of equality is therefore very important for all judicial officers.

Defining violence against women

Violence against women knows no boundaries – whether in rural areas or urban centres, women are subjected to gender-based violence; indeed survivors are from all religious, ethnic, economic and educational backgrounds, and of all ages, physical abilities and lifestyles. However, when the violence occurs within the confines of the home, it is often considered a family matter rather than a human rights issue.

In the case of **G v. G**,¹ the Auckland High Court, in awarding damages to a female survivor of domestic violence, declared that women were 'entitled to the equal protection and enjoyment of all human rights and fundamental freedoms... as guaranteed under several international Conventions.'

1 (1997) NZFLR 49 (HC) High Court of Auckland.

CEDAW, the most comprehensive international instrument on the rights of women, establishes standards relating to equality and discrimination against women. It calls upon States parties to the Convention to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women.

The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) is mandated to monitor the progress of States parties in implementing the Convention. In General Recommendation No. 19, adopted at its 11th Session in 1992, the Committee confirms that violence against women constitutes a violation of human rights.

Further, while defining the word, 'discrimination', the Committee makes an important connection between gender-based violence and discrimination by stating: 'Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.'²

The role of the court in promoting women's rights

There is a growing tendency by national courts to look to international and treaty law for guidance in relation to the issue of violence against women. It is a well-established judicial function for national courts to consider international obligations for the purpose of removing ambiguity from domestic law – whether constitutional, statute or common law – in circumstances where it is uncertain or incomplete.

As far as possible, judges should interpret domestic law consistently with the international obligations of their respective State. This is based on the presumption that the legislature does not intend to act inconsistently with international law.³

Both customary law rules and international and treaty law may be applied by domestic courts where there is no conflict with the existing

2 See: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

3 Economic Commission for Africa (1998), *Gender and the Law, East Africa Speaks*, World Bank Publications.

domestic law, even in cases where these have not been incorporated into domestic legislation.

When treaty law is inconsistent with national legislation in common law countries the national court is obliged to apply the national law. But even then, the court should draw such inconsistency to the attention of the appropriate authorities. This is because the supremacy of national constitutions does not mitigate a breach of an international legal obligation undertaken by any State (Commonwealth Bangalore principle 8⁴).

More specifically, where the State fails in its obligation to enact legislation or to take such other measures to protect women from violence, the State should be held liable to the victims in damages. In the case of **Suzette Irene Nelson v. Minister of Safety and Security & Another**,⁵ the plaintiff was abused by her husband who threatened her with his firearm. She was granted a protection order but the government failed to take steps to withdraw his firearm. Ms Nelson was subsequently shot and injured by her husband. The court held that the State was liable to the plaintiff for the injury she suffered, since it failed in its constitutional duty to afford its citizens protection from all forms of violence. Had the State acted diligently and withdrawn the firearm, the plaintiff may not have suffered the said violence.

The South African case of **Carmichele v. Minister of Safety and Security & Another**,⁶ also deals with failure by the State to protect women from violence. It focuses on the duty of the court to develop the common law in order to afford women protection and to avoid compromising women's rights.

In this case, the applicant sued the respondents after she was sexually assaulted by a man (the accused) who had been released from custody without any security while awaiting trial for attempting to rape another woman. The police failed to bring this fact to the attention of the prosecutor. Previously, the applicant had informed the police on various

4 Commonwealth Secretariat (1998), *Developing Human Rights Jurisprudence, Volume 1: First Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 24–26 February 1988*, Commonwealth Secretariat, London.

5 (2006) ZANCHS 88, High Court of South Africa.

6 *Carmichele v. Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA), 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

occasions that she feared the accused might harm her or someone else. He had twice strayed into her home and on a third occasion was found trying to open a window. The police repeatedly told the applicant there was nothing they could do since there was no law they could use to protect her. The accused finally trespassed into applicant's home and sexually assaulted her there, inflicting serious injuries. He was charged and convicted. The applicant sued the State for damages.

Both the High Court and the Supreme Court of Appeal dismissed the claim, finding that the police did not owe the applicant a legal duty to take steps to prevent her attacker from causing her harm. She successfully appealed to the Constitutional Court using Article 8(1&2) of the Interim Constitution, which provided that:

1. Every person shall have the right to equality before the law and to equal protection of the law and,
2. Prohibited discrimination on grounds of inter alia, sex.

The sentences that judicial officers impose may also strongly reinforce the message that domestic violence is a serious criminal matter for which the perpetrator will be held accountable. Any given sentence should be commensurate with the gravity of the crime committed and enhanced in the case of repeated offenders. In **Sekoto v. DPP**⁷ the appellant was convicted and sentenced to serve 12 years imprisonment for the murder of his live-in girlfriend. He had stabbed her with a knife 18 times, inflicting fatal injuries. This was after she ended their troubled relationship. He appealed against the sentence and accused the High Court of failure to give due weight to the mitigating circumstances raised in his defence.

In dismissing the appeal against sentence, the Botswana Court of Appeal seized the opportunity to send a strong message that domestic violence, which was on the increase in Botswana, would not be tolerated. The court recognised the right of the deceased to end the relationship and rejected the accused person's portrayal of himself as the wronged party. Finally, the court, in reiterating its duty to help in stamping out domestic violence, dismissed the appeal, finding that the circumstances called for a stiff sentence.

7 (2007) 1BLR 392 (CA).

It is important that judges familiarise themselves with international human rights law, particularly with regard to the issues of discrimination and violence against women, since a judiciary/magistracy that is insensitive to the rights of female victims of violence may serve as a further obstacle to the full realisation of the fundamental rights of those victims.

Preventing violence against women through legislation

Legislation is a powerful tool to prevent violence against women. States parties are called upon to enact legislation to protect women from all forms of violence. Such legislation should apply equally to all women, irrespective of their marital status, and should include a mixture of civil and criminal remedies.

Even when legislation does exist, courts may still impede women's human rights claims. It is only when judges adopt a gender-responsive approach in understanding domestic violence and in interpreting the law that they will be in a position to give the broadest definition possible to any behaviour that may constitute 'domestic violence'. Such a definition should encompass both physical and psychological harm. The case of **Savitri Devi v. Ramesh Chand**⁸ in the High Court of Delhi demonstrates common setbacks in defining 'domestic violence'.

Section 498A of the Indian Penal Code is relevant to the prosecution of domestic violence matters and provides that:

'Whoever, being the husband or relative of the husband of a woman subjects such a woman to cruelty shall be punished with imprisonment for a term which may extend to three years...'

In this case, the complainant's husband, brother-in-law, father-in-law, sister-in-law and wife of her brother-in-law, repeatedly made it clear to her that they disliked the customary gifts that she had bought for them as dowry. The husband and his brother and father constantly complained that she should have paid Rs50,000. They frequently told her that had her husband married her sister there would have been a

8 *Savitri Devi v. Ramesh Chand* [2003] (109) CRLJ 2759, Delhi High Court.

bigger dowry. Criminal charges were brought against the husband and some of his relatives accusing them of harassment and cruelty.

In dismissing the petition, the High Court gave cruelty a very narrow definition to mean, 'A series of systematic, persistent and wilful acts perpetrated with a view to make the life of the woman so burdensome or unsupportable that she may be driven into committing suicide'. The court found that those acts did not constitute cruelty because they could not have driven her to commit suicide.

Finally, the judge pointed out that cruelty is a civil and not a criminal matter for the police. He also recommended a review of Section 498A to reflect such a position in order to protect the family members of married Indian men.

In instances where the judiciary treats violence against women as a less serious matter in the absence of physical violence, the right of the injured party to be protected may be compromised. In **Rajeev Verma v. State of Uttar Pradesh**,⁹ the court once again refused to apply Section 498A of the Indian Penal Code. It also distinguished between violence punishable under Section 498A and other 'less serious' forms of violence that should not attract penal sanctions. The court was of the view that if a man subjects his wife to cruelty by, for example, venting his anger on her for loss of his job or because he had a difficult time at work, although this should be condemned, it was not desirable to bring criminal proceedings against him.

In discouraging recourse to the court and supporting an out-of-court settlement, the judge said that while the husband's imprisonment may serve to gratify the woman and her supporters, she would end up being the sufferer if she were economically dependent upon him.

Marital rape and the defence of honest and mistaken belief in consent

In many jurisdictions there is still a presumption that upon marriage, a woman consents to allow her husband sex on demand, irrespective of how she feels and even when it is prejudicial to her health.

9 *Rajeev Verma v. State of Uttar Pradesh* [2004] CRLJ 2956, Allahabad High Court.

Rape shield provisions

Rape shield provisions restrict the questioning of the injured party about her previous sexual history, whereas this line of cross-examination was previously supported in the defence of mistaken belief in consent to sex.

In **R v. B.J.S.**,¹⁰ the judge allowed evidence of two previous instances of sexual activity between the accused and the complainant. The first instance was seen to be relevant to the defence of mistaken belief in consent, while the second was seen to be relevant only to the credibility of the complainant as it involved a previous incident of alleged fabrication by the complainant following consensual sex.

Where rape shield provisions exist, judges must exercise caution in allowing the defence to question the victims concerning previous sexual activities.

Even in countries where marital rape is defined as a crime, some courts continue to struggle with the issue of consent. In **R v. A.W.S.**,¹¹ the accused person was charged with sexually assaulting his wife. The defence was confined to a denial that sexual intercourse had taken place. The accused failed to raise the defence of honest and mistaken belief in consent. It was his word against that of the wife. The judge nevertheless rejected the defence of the accused as a lie and found that sexual intercourse had in fact taken place. Remarkably, the judge then went on to consider the defence of honest but mistaken belief in consent, even though this plea was never entered by the accused, and subsequently found that the wife had not adequately communicated her lack of consent. He acquitted the accused. On appeal by the Crown to the Court of Appeal of Manitoba, the decision was reversed, primarily because the judge had considered a defence that was irrelevant in the circumstances and that was not supported by the evidence on record.

10 (2005) AJ No. 883, 2005 ABPC 158, Alberta Court of Appeal.

11 (1998) 4WWR 364CCC (3d) (CA).

Protection orders and judicial activism

Protection orders are a powerful tool for preventing domestic violence against women. Indeed, making protection orders available is one way the State assumes its obligation to protect victims from violence.

In countries where there is no legislative provision for protection orders, judges may, through judicial creativity, grant such orders.

In the Vanuatu case of **Taleo v. Taleo**,¹² the applicant applied for an order to restrain the respondent from assaulting her or contacting her at her parent's home. In the absence of a written law giving the court jurisdiction, the court relied on Article 47 of the Constitution, whereby a duty to act fairly is given to the court in instances where no legislation exists and in order to determine matters according to substantial justice.

Orders to vacate the matrimonial home

Some jurisdictions have legislation that provides for the granting of orders to remove the offending husband from the matrimonial home in order to protect the woman from further violence. Where such legislation exists, the court, in balancing the rights of the parties, must keep in mind that removing a spouse from the matrimonial home is a drastic measure and it may well be argued successfully that such orders are in violation of a person's right to shelter or to own property. An order directing a spouse to leave the matrimonial home does not however amount to a determination of property rights between the parties.

Dissolution of marriage orders on account of cruelty

In many divorce proceedings, judges are confronted with allegations of domestic violence as a ground for seeking dissolution of marriage. In the Malawi case of **Vaux v. Vaux**,¹³ the petitioner (wife) sought dissolution of her marriage to the respondent on grounds of domestic

12 Civil Appeal 83/96 unreported, SRM Court Vanuatu.

13 MWHC 127–H.C of Malawi (Lilongwe District Registry).

violence/cruelty, including drinking alcohol to excess and refusing to provide for the petitioner and daughter of the marriage.

In granting the dissolution, the High Court noted that the mistreatment the petitioner suffered at the hands of her husband caused her serious psychological suffering and since such mistreatment denied the petitioner equality in the marriage, it constituted gender-based violence as defined by the United Nations Declaration on the Elimination of Violence against Women (DEVAW). The court further held that the cruelty she was subjected to amounted to a violation of her fundamental human rights as well as those of the only child of the marriage.

Judges and magistrates may also declare special proceedings within the existing confines of the courts to ensure privacy and an environment within which survivors of violence feel comfortable to present their cases.

Conclusion

The courts have a duty to protect women from violence and to interpret and apply the law within the context of those applicable international obligations to which their respective countries have entered, thereby developing and strengthening a jurisprudence of equality in all cases.

Through judicial creativity and gender-responsive interpretation of national laws within the context of international human rights law and norms, judges and magistrates may contribute substantially to the protection of women and other vulnerable groups against further harm.

Secretariat interventions on CEDAW implementation and to address Violence Against Women and Girls in the Commonwealth



The Commonwealth Plan of Action for Gender Equality 2005–2015 (PoA) provides the framework for the Secretariat’s work in the area of Gender, Human Rights and the Law, jointly delivered by the Gender Section, Law Development Section of the Rule of Law Division and the Human Rights Unit through numerous interventions.

1. To heighten awareness on VAWG and adoption/ implementation of CEDAW, five Commonwealth regional colloquia on gender, culture and the law were convened to promote dialogue between judges, magistrates, traditional chiefs, religious leaders and women’s legal networks in order to reconcile customary norms and religious perspectives with more formal judicial processes, national laws and CEDAW.
2. To advance the implementation of the principles of CEDAW within jurisdictions of the Commonwealth, a substantive publication on the determination of women’s rights in the context of culture and CEDAW was produced. The publication serves as a practical guide for judges, adjudicators, lawyers and activists in Commonwealth jurisdictions historically connected by the application of common law.
3. Working towards implementation of CEDAW, the Secretariat provided technical assistance to Bermuda in the form of a review of national legislation prior to CEDAW extension.

4. Forging key partnerships with the judiciary, traditional and religious authority and women's groups to organise activities at the national level; included a regional 'training of trainers' workshop on women's rights, culture and the law for traditional authority and faith-based groups for sub-Saharan Africa.
5. To further inform on women's human rights and increase awareness on women's access to justice, a review of the pan-Commonwealth case law on VAW was commissioned at a Judges Panel held in Marlborough House in 2012.
6. Recommendations arising from the Judges Panel saw the convening of the first in a series of judicial forums for the Commonwealth's Southern and East African jurisdictions in 2013, to discuss strategies for judicial leadership in developing a jurisprudence of equality on VAW. A major outcome arising from the forum was the development of a framework for a Judiciary Resource Book and Judicial Bench-book on VAW for the Southern and East African jurisdictions.
7. In commemoration of the international theme for the 57th Session of the United Nations Commission on the Status of Women in 2013: *Elimination and Prevention of all Forms of Violence Against Women and Girls*, a Commonwealth Information Brief on *Strengthening Jurisprudence of Equality on Violence Against Women* was produced and disseminated widely in New York and across the Commonwealth, to further sensitise on VAW and implementation of CEDAW.

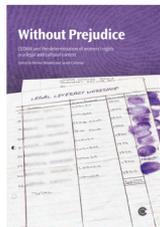
8. As part of the Commonwealth's contribution for the global campaign to eliminate VAW, and the importance of judicial leadership in the jurisprudence of equality regarding VAW, a Judicial Panel was convened at the 2013 Annual Consultation of Commonwealth National Women's Machineries in New York, discussing strategies for judicial leadership and strengthening women's access to justice.
9. For the first time in the history of the Commonwealth Law Ministers' Meeting, the Jurisprudence of Equality regarding VAW was included in the agenda. To advance discussions at the Ministerial Meeting, a technical paper on VAW was produced, focusing on key challenges experienced and various strategies employed by judicial authorities in Commonwealth regions in effectively addressing VAW.

Although not all of these interventions have a specific focus on VAW, they are all determining factors that have influenced outcomes on strengthening jurisprudence of equality on VAW.

This information brief is drawn from commissioned research on violence against women case law and outcomes from the Commonwealth judicial colloquium held in Botswana March 2012.

For further information on the work of the Commonwealth Secretariat in this area please contact gender@commonwealth.int

Related publications



Without Prejudice: CEDAW and the determination of women's rights in a legal and cultural context

Edited by Meena Shivdas and Sarah Coleman

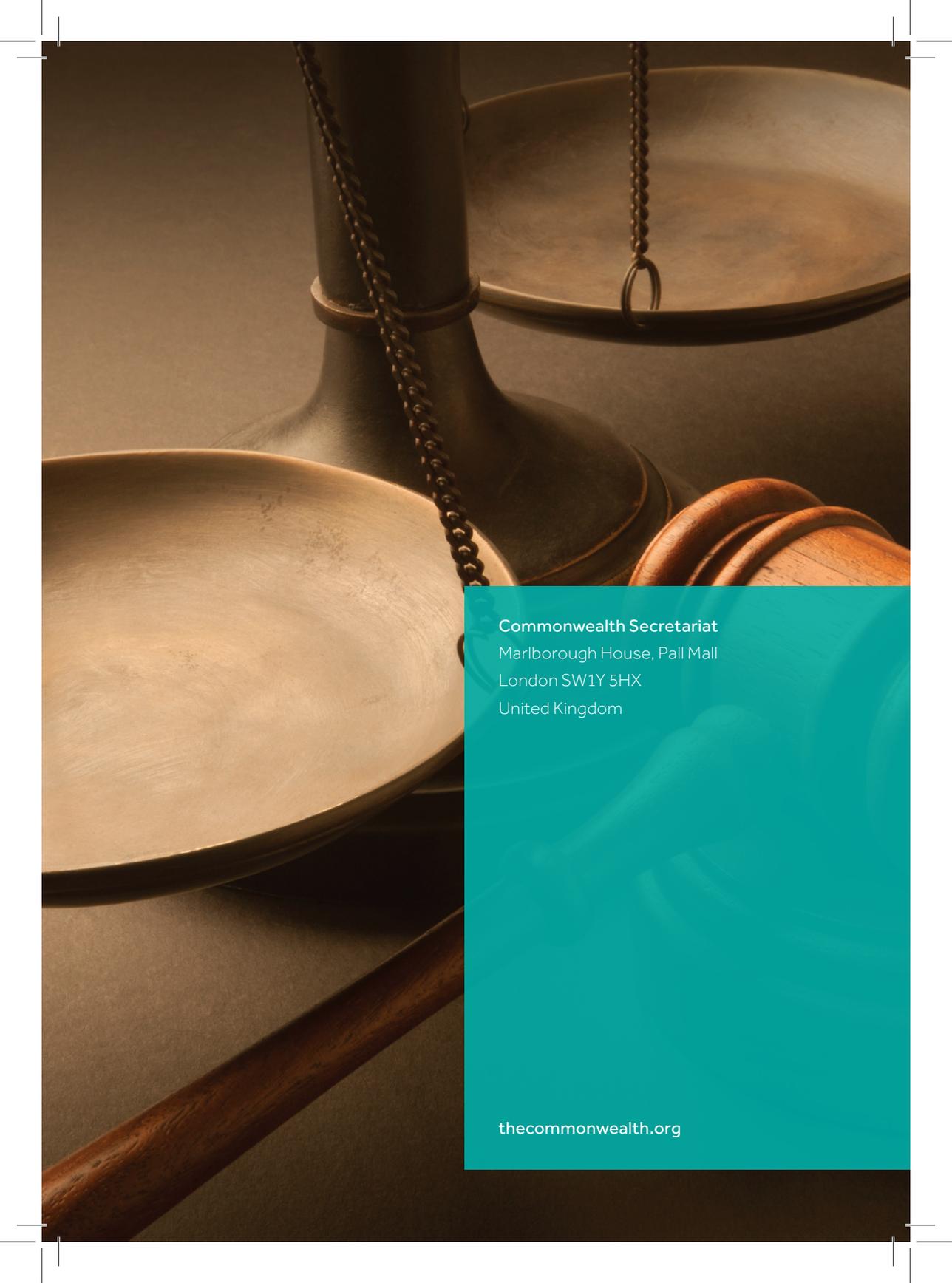
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