

Legal Victory in Kenya Can Serve as Model to Fight Impunity in Burma



The hands of some of the girls at the Tumaini Counselling Centre in Nairobi (Photo: The Equality Effect)

Girls and women in Kenya recently made history when the High Court of Kenya delivered a [favorable outcome](#) to a constitutional challenge in which 160 girls between the ages of 3 and 17 sued the Kenyan government for failing to protect them from being raped.

The girls brought the action under Section 22(1) of the Kenyan constitution, which provides that “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” The Kenyan criminal code contains laws that protect against rape, however they are not enforced and as a result rape has been on the rise. The petitioners accused the police of “neglect, omission, refusal and/or failure...to conduct prompt, effective, proper and professional investigations” into sexual violence complaints.

The High Court agreed with the petitioners, saying that the police had “unlawfully, inexcusably and unjustifiably” failed to respond to reports of sexual abuse in Kenya. It said police inaction and lack of

enforcement has created a “climate of impunity” that shows perpetrators they can commit crimes of sexual violence and not be punished. The Court found that the petitioners’ fundamental rights and freedoms had been violated, not only under the Kenyan Constitution but also according to international law. The Court found police inaction to violate fundamental rights that are protected by the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Universal Declaration of Human Rights. The Court also considered international cases that demonstrate a consensus that states may be held accountable for failing to properly respond to sexual violence because they have a duty “to protect all citizens from violence and ensure their security of person.”

Two days after the victory, several people contacted Fiona Sampson, the Toronto attorney who worked on the case. They wanted to use the case as a model in other countries for fighting impunity in the context of sexual violence, a problem that is hardly limited to Kenya.

For the women in Burma, for example, the problem of impunity in the face of widespread sexual violence is dire. The prevalence of abuse, documented by Burmese women’s groups, UN special rapporteurs, and even the [Security Council](#), is extensive. These violations are not anecdotal incidences of crime. Rather, the Burmese military uses [rape as a weapon of war](#) against the civilian population.

Although this problem has been [reported at length](#), the Burmese government refuses to take any action to punish such acts. In fact, the current 2008 Constitution provides complete impunity for sexual violence perpetrated by the military by including an amnesty provision that precludes the prosecution of military perpetrators of crimes. What’s more, current law requires that any amendment to the Constitution be supported by more than 75% of parliament. Because 25% of parliamentary seats are reserved for the military, all nonmilitary members plus at least one military member must support any proposed amendment. It is therefore unlikely that the amnesty provision will be overturned any time soon. Because of this, the International Center for Transitional Justice [has said](#) that Burma presents “one of the most difficult challenges in the world in relation to making progress toward combating impunity”.

As a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, Burma has an affirmative duty to ensure women are protected from sexual violence, which includes not affording immunity to its perpetrators. Like Kenya, Burma is bound under the Convention on the Rights of the Child and should be guided by the Universal Declaration of Human Rights in developing policies and practices that protect Burmese citizens from sexual violence. Burma is violating these international obligations when it relies on its 2008 Constitution to justify inaction.

The international community should look to the recent case in Kenya as a model and call for Burma to put an end to impunity if it wants to establish viable democracy in the country. Given the Burmese military’s reliance on aid, international pressure could be highly effective. While the government continues to fail to act to combat impunity, the international community must demand a change in the constitution so that girls and women in Burma, just as in Kenya, receive the protections their government owes them.

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