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# Gender, Health, and Sustainable Development

**Proceedings of a  
Workshop held in  
Nairobi, Kenya,  
5-8 October 1993**

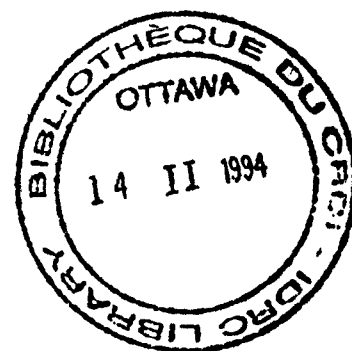
Edited by  
Pandu Wijeyaratne,  
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Jennifer Kitts

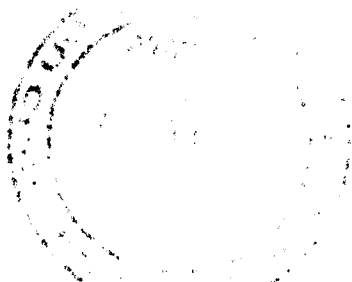
The International Development Research Centre  
Le Centre de recherches pour le développement international  
El Centro Internacional de Investigaciones para el Desarrollo

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## **Ethics, Gender and Health: A Brief Legal Perspective**

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Seble Dawit<sup>1</sup>

For this workshop, I have been given the task of discussing ethics, gender, and health. Naturally, I have done this by using some of my own work on the human rights implications of harmful cultural practices. I began by asking myself relatively simple definitional questions. What are ethics, gender, and health, respectively?

Let us agree that ethics are principles that govern standards of conduct; that gender is the construction of sexual difference to reflect a particular view; and that health is one standard by which to measure the quality of life. Let us also agree that ethics, gender and health are concepts that are socially and culturally defined and as such, their definitions differ from place to place. To help focus our thinking, let us use the virtually global preference for male children as the problematic.

The ethics of a community are its customs and the basic building blocks of its culture. From a legal perspective, ethics as custom are the foundations of the body of rules known as customary law, which can be distinguished from formal written or statutory law. To the extent that ethics are "laws," they are also arguable and refutable. Therefore, to the extent that "culture" is based on a body of ethics, it too must be arguable and refutable. Yet time and time again, as we work on issues pertinent to the lives of women around the world, we find ourselves stymied by questions of cultural relativism. Particularly as an African woman, I find myself either defending my culture to a Western barrage or trashing it to its misguided defenders. To guide myself out of this predicament, I began by asking myself, among other things, at what point is a cultural imperative no longer useful and even harmful. It is clear to me now that such an imperative is no longer useful when it begins to undermine its own reason for being.

Much of ethics or those principles that govern conduct within a given community are passed on implicitly and explicitly in a variety of ways, ranging from teachings, to sanctions, to reward and punishment. The preference for male children is one such ethic. It governs the life of a community in a myriad of ways, for example, it influences political clout, access to resources and social ascendancy. This particular ethic is greatly influenced by a specific understanding of gender, the construction of sexual and biological difference. Male child preference evolved from the need to perpetuate a family, a lineage, a nation. Ostensibly, before a boy could be preferred he had to have properties that made him more desirable. In purely biological terms, there is nothing to recommend the male over the female of our

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<sup>1</sup>Independent Consultant on International Human Rights Law, New York, USA.

species. What took place, then, before the advent of male child preference must have been the engendering of biological difference to reflect and project the priorities of a powerful elite. All things in the image of this elite came to be equated with moral fortitude, righteousness, intelligence and physical strength, and were seen as powerful and desirable traits. The flip side of this point of view is necessarily that all things not male are not as valuable, and are perhaps even worthless.

Some concrete examples come from an area that has come to be called harmful cultural practices, which are those practices injurious to individuals but part and parcel of a community's articulation of itself and its values. A host of these practices have developed over the millennia, and some of them have fallen into decline. Almost all of these harmful cultural practices are perpetrated on women and girls. These include child marriage and early pregnancy, forced feeding before a wedding, nutritional taboos, particularly during pregnancy, certain birthing practices, female genital mutilation, less food, education and health care for girls, dowry/bride price, widow inheritance and female infanticide. What all of these practices have in common is that they exist at the harsh intersection of communal identity and gender ideology. The result for individual women and girls is mitigation of their health or their quality of life. What these practices also have in common is that they evolve from or are in reaction to the preference for male children, the result of which is the disregard and neglect of girls or even the consistent harming of them.

This brings us to the question of when an ethic is no longer useful. For that we have to look at the results of male child preference for women and for their communities. Girls and women from societies that value males above females live with everything from low self-esteem to chronic ill-health and even premature death. In the context of community and national development, the diminished productivity is immeasurable. In Africa as a whole, women have the highest fertility rates, highest maternal mortality rates, lowest life expectancy rates, and we have even lost the eight year advantage nature gave us. The ethic of male child preference can be said, therefore, to be undermining its own reason for being, that is, the perpetuation of the lineage and continuation of a people. The cultural imperative of the ascendancy of maleness is no longer useful. In fact, it is compromising the lives of women and girls, as well as their communities.

There are many people, including myself, who are working to eradicate the harmful cultural practices mentioned above. What we lack is a perspective that unifies at least the impetus behind all of our efforts. My feeling is that this perspective will evolve out of a critical analysis of the ancient system of male child preference, as well as of the modern state system that tolerates and perpetuates it. It seems to me we are fighting the same war on different battlefields - we have yet to present a unified front. A long neglected arena for debate of issues such as these is the legal arena.

### *Some Legal Responses from African Women*

When we speak of harmful cultural practices, we must first drop the euphemisms that perpetuate them and call them what they are - culturally sanctioned gender discrimination. Second, while we do the more specific work of tackling each type of practice, it would be helpful to tie each one to the well-spring of its existence, specifically, the preference for male children. In doing so we not only challenge the effects, but also the root causes of such discrimination.

In the last few years, women have begun challenging the inequities of gender-based cultural practices, as well as the customary response to them. The strategies have changed perceptively. For example, in the past we laboured at defining custom and culture, and at finding places where we could squeeze our lives into the existing language of rights. When that was too daunting, we began speaking less of rights, and more of health, as if that would be any easier to secure. We have now begun to think of the basic minimum of good health and health care as rights in and of themselves. Women are also pursuing formal legal remedies for abrogation of their rights in the "private" sphere where most violations of women's rights occur. Few formal legal systems actively pursue violence in the family or community, and this refusal to scrutinize the smallest unit of society has serious repercussions for the overall protection of the rights of women in both the public and private spheres. In the last decade, more women are using the formal legal system, thereby circumventing the skewed customary law system. The cases are setting critical precedents for action regardless of the actual outcomes.

In the strategies that are being used, it has been critical to outline the strongest points in our arguments. First and foremost, in speaking of conflicts between culture and legal rights, we are necessarily speaking of what takes place in our families and communities. Accordingly, we will be alleging violation within our families and/or our communities for acts which ostensibly honour and protect the very same. In these cases, the common governmental position has been that these are not issues of violations of the rights of individuals but rather of the preservation of communal cohesion. The tactic, therefore, has not been to deny legal remedies, but instead to deny the very existence of a problem and thus preempt the question of remedy. Current practice has it that when the treatment of women in the "private" context is questioned we are suddenly not members of families and communities but family and community itself. This is the dilemma in a nutshell.

Legal challenges to this view are coming from groups like the Association of African Women on Research and Development in Senegal and Kenya, the Women, Law and Development in Africa with chapters around the continent, the Uganda Association of Women Lawyers, the many chapters of the International Federation of Women Lawyers, the Tanzanian Legal Aid Scheme for Women, Organizacao da Mulher Angolana, les Femmes Tunisiennes Democrates, the Women in Nigeria, the Women's Law in Southern Africa and

others. These groups are redefining the rights of women, reforming existing law and claiming what accrues. Several of them are tackling the issue of gender-based discrimination and violence within the framework of African and international human rights.

The most notable of these are the cases of Unity Dow of Zimbabwe, Wambui Otieno of Kenya and Aminata Diop of Mali. Since 1987 these three most well-known legal cases brought by women in Africa have had either directly to do with conflict with cultural dictates or in one case, with how the cultural imperatives had translated themselves into the formal law. The Unity Dow case raised the question of gender discrimination relative to citizenship rights showing clearly where the formal law system had carried over from tribal structures. The case of Otieno, where the Gikuyu widow of a Luo man was not permitted to bury his body but had to relinquish it to his people, involved clear conflict between the customary and formal legal system. The case hinged on cultural and traditional dictates for burial. The last case which has not been adjudicated in Africa, is the case of Aminata Diop who fled Mali for France in order to avoid having her genitals mutilated. It was decided that she has a right of asylum in France on the basis that genital mutilation is a form of persecution under the terms of the Geneva Conventions of 1949. The politically expedient court stated, however, that because Diop failed to complain to Malian authorities, she has no recourse to French law. The case is being appealed.

Examples from the continent include the Uganda Women Lawyers Association which has been working to restrict, through the formal legal system, the cultural practice of a widow marrying her husband's brother. Much of this debate has been fuelled by the AIDS epidemic which has hit Uganda harder than any other African country. At issue is the idea of the perpetual marginalization of the women, their inability to own property and to be the primary guardians of their children. Ugandan women have also taken up a particularly thorny problem of protection from divorce and destitution for women who refuse sexual relations with their HIV-positive husbands.

FIDA-Nigeria are engaged in law reform work around domestic violence and spousal battery. One example that they give is that assault on a man is a felony punishable by three years in jail; the exact same assault on a woman in the same town and at the same corner is a misdemeanour with a small fine. The Women, Law and Development in Africa (WILDAF) network, headquartered in Zimbabwe, is concentrating on domestic violence as an issue of the human rights of women. WILDAF and the Southern Africa Women and the Law Project continue to do important work on legal literacy with grassroots women about their rights within the family and the community.

The experience of women in other parts of the world have been instructive and the sharing of experiences and strategies empowering. One very relevant example is the work of Brazilian women to abolish the traditional defense of honour plea often invoked by men who had killed their wives and lovers. Brazilian law no longer accepts this plea and all such killings are tried as murders. Also in Brazil, women have pushed for and succeeded in creating a women's police station, where all of the officers are women and where women can

bring complaints, particularly domestic violence complaints, without fear of ridicule. Valuable also is the work of women in the Indian sub-continent combatting through the legal system the practices of sati, bride burning and abortion of female fetuses following amniocentesis to determine sex.

Beyond work on the African continent, there is a need to support and inform African women who have immigrated to the West about the laws of the countries where they reside, with regard especially to harmful practices perpetrated upon children. In this vein, the work of the Foundation for Women's Health Research (FORWARD) in London is exemplary. FORWARD has been instrumental in getting the 1985 UK law against female genital mutilation passed as well as having that practice included in the priorities for the child welfare offices dealing with immigrant families. The French experience in this matter is also instructive as they have decided to throw people in jail regardless of their knowledge of the host country's laws.

One of the more recent and rampant problems we are seeing is a rise in the incidence of rape. Rape with the impunity that we are seeing in many parts of the world evolves out of a *traditional and cultural* disrespect for women. A great deal is made of the fact that rape is rare in Africa and that men rape most often out of a desire to marry a forbidden lover. Recent information refutes this view and, in fact, in Africa the traditional systems governing the abductions and rape of young girls where the abductor or rapist would be forced to marry the girl, have fallen away leaving a glaring crime and woefully inadequate legal responses.

The mass rapes of Somali and Liberian women as an act of war has no previous place in our consciousness and thus, no appropriate response has been available to us. The fact that we would even have to debate whether or not rape in war is a crime against humanity attests to the fracturing of our collective consciousness as well as to a profound ambivalence about the worth of a woman's life. Where domestic remedies are not available like in Somalia or Kenya and many other countries, there is often an international body of law that may be petitioned.

In international human rights law, if a domestic legal system does not address a *visible problem*, that is, if there is no domestic remedy, then people have access to remedy outside of their particular government provided, of course, there is a body outside of their country to which they can address complaints. Along with legal rights in the domestic context, in the last few years there has been a determined effort to reach the human rights mechanisms of the United Nations and those specific to Africa. Since 1986, the most likely target of efforts on the continent has been the African Commission on Human and People's Rights which interprets the African Charter by the same name.

Last year, the African Commission, in the face of mounting criticism, and to the surprise of many, stated that it had yet to receive a complaint from a woman. While the possibility of bringing cases on harmful cultural practices seemed virtually impossible two years ago, cases of culturally sanctioned gender discrimination are guaranteed to appear in the next two years.

Others are also working on a more conciliatory approach by asking the Commission to render one of its other services of either requesting a study on the human rights of women in Africa, offering an opinion on the role of culture in the life of the community, asking for more extensive information from women's groups about their work on human rights, etc. There is the hope that the Commission will take note of Resolution 19 of the Convention on the Elimination of All Forms of Discrimination Against Women which considers harmful practices against women to be gender-based violence and calls for their eradication.

## Discussion

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- Much discussion focused on the lack of access to the legal world. Non-lawyers are often unaware of the law. Measures are needed to inform women of their legal rights. Children should be educated about the law through the school system. Messages need to be disseminated through mass media such as television and newspapers.
- The presenter noted that the law is intentionally confusing and that mystification is in part a job creation device. Lawyers have a vested interest in denying access to the legal system and using confusing legal language - if individuals can take a case to court on their own, then a lawyer is unnecessary. Despite this, there are legally trained women who can educate other women, and who can bring a case before the international court of justice on behalf of an individual woman.
- Significant problems exist concerning the implementation of existing laws. There are laws in place that are meant to protect girls. For example, every African country has laws concerning the education of children, as well as laws setting a minimum age for marriage. The problem, however, is that these laws are often not implemented.
- Legal issues cannot be looked at in isolation. Instead, the whole patriarchal system needs to be addressed. There are a number of harmful beliefs and practices concerning issues such as property rights, widow practices, mandatory children, preference for male children, and the treatment of older women, that must be confronted.
- There are also numerous structural problems within the legal system which may prevent a woman from asserting her legal rights. For example, if a woman decides to take legal steps when a rape occurs, she may be ridiculed. She may find it painfully difficult and humiliating to go before a court of law and tell her story. Also, there may be an inherent bias against women on the part of male judges and lawyers.
- It is necessary to look at the extent to which women internalize oppression and the way in which the system rewards those who internalize oppression. For example, some women look forward to becoming older because this may be the only time in their life that they have any power over someone else.

- The importance of activism was also discussed. Women's rights have not been adequately addressed by state policy. Women must fight for their rights themselves, with the assistance of the numerous women's legal organizations. Women also must recognize their power. For instance, no man can run for president unless he has the support of women. Also, older women are the custodians of law.
- The presenter emphasized that bodies of rules are not immutable. What is ethically acceptable in one culture, may not be in another. Traditional practices can be questioned and revised by members of the culture, and culture generally is in a constant state of change.
- During the presentation, the author explained that in front of Westerners, she defends the positive sides of African culture and practices, while with Africans, she knocks down the negative aspects. When asked about the positive aspects of African culture, she responded that there are many, including respect for elders. However, the positive aspects are often not as sensationalistic as the negative cultural practices.
- The presenter discussed the case in France of mothers being jailed for aiding in the circumcision of their daughters. A question was raised concerning why fathers are not being jailed. She responded that only one father has been jailed - this man personally performed the circumcision on his daughter and killed her in the process.
- The point was raised, of the necessity of publicizing the existence of legal options and institutions. Many participants were unaware of the Hague Court or the African Commissions on Human and People's Rights, or how to access them. It was suggested that donor agencies invite representatives of these institutions to international meetings on health, to give them greater exposure and visibility.