

Customary Law and Women's Rights

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Abstract

The paper by Mary Eberts and Trish Monture is a contribution to a comparative analysis of the role of customary law in dealing with issues of intimate violence. Scholars and activists from Canada, Ghana, Kenya and Malawi met in Nairobi in February 2010 to consider the legal treatment of marital rape in the law of the four jurisdictions; an important aspect of that exploration was to look at the role of customary law in promoting, or inhibiting, women's equality, within the overall context of the legal systems of the four states. The Eberts/Monture paper begins with a critique of the term "customary law" as applied to Indigenous law-making in Canada. The term "customary law" carries the implication that such laws are somehow less than the positive laws emanating from Parliament or the legislatures, and entitled to less respect. This problem is not restricted to the issue of intimate violence, but is a common problem in articulating the relationship between the Canadian state and Indigenous law-making. Eberts and Monture then examine the role of Indigenous law-making in the domains of what Canadian law describes as criminal and family law, arguing that Indigenous law-making would take a wholly different approach from Canadian law, infused with different values and perspectives. They also identify areas in Canadian law where an effort has been made to include, or appropriate, elements of Indigenous philosophy (ie in sentencing) and show that badly informed efforts can undermine, rather than promote, women's safety and equality.