

OTI
online
Winter 2009

Twisted Treaty Shafts U.S. Women by Janet Benshoof

We asked leading thinkers to describe New Revolutions We Need for a feminist and progressive future. Here's one response.

American women need legal tools to fight patriarchy. Women outside of the U.S. are pushing for and getting far reaching gender equality guarantees, albeit appallingly unenforced, that put American constitutional guarantees to shame. This is a revolution we can join.

A revolution in the structure of legal guarantees to gender equality in the U.S. will see the adoption of international treaty law and engraft it to be above our constitution.

But this legal revolution must be preceded by a revolution in the way we think. The mantra our politicians chant is that somehow the United States has a superior structure of rights and equality. They seem to believe that laws have just come off track due to the right-wing appointments to the U.S. Supreme Court and other correctable misadventures. That thinking is wrong.

The fact is that gender equality is a right that transcends national laws and constitutions and the cultural norms of any country.

No one questions that American women enjoy a higher standard of rights and freedoms than do most people in the world, but these rights mainly arise from a patchwork of remedial statutes, not from our constitution. The U.S. constitutions protections for women's equality now fall far short of international law standards. Our constitution is simply not written in a way that requires the government to take affirmative steps to eradicate systemic historic inequalities.

Nondiscrimination on Sex In U.S. Faces Bumps and Turns

In fact, it was not until the 1970s that the United States Supreme Court even acknowledged that women have constitutional rights to nondiscrimination. In the case of *Reed v. Reed* in 1971, the high court made this important initial step by invalidating a state law that mandated a preference for males over females when appointing the administrator of an estate, finding it to be a violation of the Equal Protection Clause of

the Fourteenth Amendment. Unfortunately, women's equality rights have since developed in a way that excludes from protection the vast majority of sex discriminatory laws currently in place - those laws based on physical differences between men and women, including abortion and other pregnancy-related laws.

How could this be? Well, the legal reasoning goes like this: since only women get pregnant, denying women abortions or, say, maternity benefits, is gender neutral since if men could get pregnant they would be subject to the same restrictions. Chief Justice John Roberts, in his then position as Deputy Solicitor General, in the early 1990s' clinic protest case of *Bray v. Alexandria Women's Health Clinic*, dismissed the very idea that anti-abortion laws - no matter what their effect on women - could ever be sex discriminatory and stated the idea was wrong as a matter of law and logic.

Fortunately, on the international scene, women are moving past this nonsense and securing much stronger gender-equality guarantees.

For example, CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), the international treaty for women now ratified by 185 countries, broadly defines equality, requires all laws be examined for their impact on women and imposes affirmative obligations on governments to dismantle systemic gender discrimination.

CEDAW's broad equality mandates were cited by the constitutional court in Colombia as legal support when the court struck down as invalid the Colombia criminal abortion law in 2006. Today, poor women in Colombia are entitled to paid abortions even in Catholic hospitals, a far cry from the rights enjoyed by American women.

If CEDAW were fully implemented in the United States it would revolutionize our rights. By requiring strict scrutiny of all laws that have a differential impact on women, we could invalidate discriminatory abortion restrictions and maternity-related insurance costs. Under CEDAW, we could also sue the government to address the shameful fact that there is only one woman on the Supreme Court, no women running the Pentagon and a Congress with only 16 percent women.

U.S. Proposals Make CEDAW Worthless

So, where is the whole U.S. CEDAW ratification movement?

Not only has the U.S. not ratified CEDAW, but most supporters of ratification, including new Vice President Joe Biden, treat its ratification like voting for a national flower, taking pains to reassure the public that ratification would not impose any new burdens on the government. Of course, this is true, because with the full support of the Democratic Congress and the women's movement, the version of CEDAW now pending in the U.S. Senate has been gutted to the core by some eleven reservations, understandings and declarations (RUDs). (A full listing of RUDs is available at thomas.gov under Human Rights Treaties.) The support by liberal proponents of CEDAW, including Nancy Pelosi

and President Barack Obama, is not qualified by the important distinction that the treaty should only be ratified without reservations. These leaders, while well intentioned in their efforts to ratify the treaty, do not realize that if passed with the qualifiers currently in place, CEDAW will threaten the advancement of equality rights globally.

The twisted sister CEDAW would preclude women from challenging laws based on the physical differences between men and women, including discriminatory maternity coverage or criminal abortion laws.

The most deceptive RUD, unopposed by CEDAW supporters, states, “Nothing in this convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.” This language is touted as neutral or benign but is not. Drafted by the late Republican Senator Jesse Helms, a vociferous opponent of abortion, this language can and has been used as an anti-abortion weapon. Without the right to govern decisions about their own bodies and health, women will never achieve full equality.

Ironically, if the U.S. intention in ratifying CEDAW is to send a supportive message to women globally, our twisted sister version will, in fact, do the opposite. Although the RUDs seemingly apply solely to American women, they eviscerate the core of CEDAW, the definition of equality and provide legal authority to those who want to undermine women's rights.

Although reversal of the United States isolationist stand on international law is atop the wish lists of lawyers in the human rights legal field, engagement via this gutted CEDAW poses even more danger than continued U.S. isolation. The Senate should advise and consent to the ratification of a clean CEDAW unencumbered by reservations. They should not ratify a CEDAW that limits the full scope of women's equality rights. There is no quick fix to undo the decades long erosion of women's fundamentally protected rights in the United States, both in real terms and compared to a sea change in international equality guarantees. Although the election of 2008 has created an unprecedented opportunity for women, it must be accompanied by a revolution in thinking and actions about how we want our legal future to evolve.

Yes, we can! And we must.