

THE LEGAL STATUS OF WOMEN:
THE JOURNEY TOWARD EQUALITY

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It gives me great pleasure to be here today and to give remarks on a subject in which I take considerable interest, the legal and social status of women. I would like to thank Ambassador Mejdoub, the Hannibal Club, and the President's Interagency Council on Women for providing this forum to discuss and promote women's issues.

Women from all countries have much to share with each other about their own cultures, experiences, successes, and failures. Today, as always, women are the primary caregivers worldwide. We bear and nurture the children, and we manage the household for our families. But we also work outside the home. We want and expect to have equal opportunities in business, in the professions, and in public service. We want and expect to be paid as much as men for the same work. While women have made tremendous advances in this century, the process of achieving gender equality is still an ongoing one, in this country and throughout the world. In many respects, we have traveled far, although we have a way yet to go. We remember the old adage that "[t]he test of every civilization is the position of women in the society."¹

Although the experiences of every country are unique, the path taken by American women can offer useful insight to the international observer. Here, as always, the past serves as prologue; the situation of women in nineteenth and early twentieth-century America demonstrates just how far we have traveled. Virhen Abigail Adams, the wife of future-President John Adams, implored her husband in 1776 to "remember the Ladies" in drafting our new nation's charter, her remarks fell on deaf ears. John Adams curtly dismissed her plea, prompting her to respond that "I cannot say that I think you very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist upon retaining an absolute power

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1. Dr. Shamsuddin Shams, *Socio-Legal Rights and Privileges of Women in Islam*, in *Women, Law and Social Change* 3 (Ashish Publg. 1991).

over Wives.”²

The American Constitution, signed on September 17, 1787, was produced by fifty-five men. “Although subject to the Constitution’s terms, women were unacknowledged in its text, uninvited in its formulation, [and] unsolicited for its ratifications”³ To be sure, provisions of the Constitution were broadly framed and did not, in and of themselves, aggravate the plight of women. Nonetheless, it is fair to say that in setting out the contours of American government in 1787, the framers of the American Constitution envisioned no role for American women.

Nor did the ratification of the Bill of Rights in 1791 have much effect on the legal status or rights of women. Although the Bill of Rights did not specifically deny equal rights to women, its authors did not contemplate meaningful protection for them, either. The carefully drawn limits of the Bill of Rights circumscribed only the federal government; the states were free to continue as before in fashioning the political and legal rights of their citizens. The States drew their legislation primarily from the English common law, which was based on a tradition in which gender defined “the geography of social.”⁴ As the great political observer Alexis de Tocqueville described it in the 1830s, “[t]he Americans have applied to the sexes the great principle of political economy which governs the manufactures of our age, by carefully dividing the duties of man from those of woman, in order that the great work of society may be the better carried on.”⁵ Men dominated the public arena of political and commercial activity; women, for their part, occupied the private realm of domestic and spiritual life. The notion of two distinct “spheres” had firm roots in the belief—embraced by virtually every major theologian and philosopher of the time—that women were subordinate, probably less intelligent, and definitely weaker. By law, wives could not hold, purchase, control, bequeath, or convey property, retain their own wages, make contracts, or bring legal actions. In the words of the English poet, Alfred, Lord Tennyson, a wife stood in legal relation to her spouse as something just “better than his dog, a little dearer than his horse.”⁶

The law reinforced a rigid distinction between genders, and did so most vehemently with respect to women’s efforts to join the bar. In

2. Joan Hoff, *Law, Gender, and Injustice* 62 (N.Y.U. Press 1991).

3. Deborah L. Rhode, *Justice and Gender* 20 (Harv. U. Press 1989).

4. *Id.* at 9.

5. Hoff, *supra* n. 3, at 37.

6. Alfred Lord Tennyson, *Locksley Hall* (McMillan Publ. 1842).

1869, Myra Bradwell applied to the Illinois bar and was denied admission. She appealed that decision all the way to the Supreme Court of the United States. In 1873, the Court agreed that she was unfit to practice law. Three concurring Justices expressed the following view: "man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."⁷

The marital relationship during this period, at least as it was reflected in law, was characterized by male dominance. Upon marriage, women suffered what Blackstone termed "civil death," as their individual identities merged into their husbands' in the eyes of the law.⁸ The married woman by herself was often legally classified with "lunatics, idiots . . . and infants."⁹ Men were under a legal duty to support their wives, but the law rarely stepped in to enforce this obligation. Judges took a similar stance toward domestic violence. "Early English law had recognized the husband's right to discipline his spouse, provided that he "neither killed nor maimed her."¹⁰

This, then, was the situation of American women until all too recently: They could not vote; they were excluded from the working world due in part to their supposed physical and mental inferiorities and in part to notions of their "moral" superiority, which required their protection and insulation from economic competition and political affairs; they generally lacked power to own or sell property; and their husbands were their undisputed legal masters. Socially and legally, America reflected and reinforced a highly gender-stratified order.

Against this backdrop, it is clear that women in my country have come very far indeed. In my own lifetime, I have witnessed a revolution in the legal profession that has resulted in women comprising nearly 30% of attorneys in this country, and over 40% of recent law school graduates. This progress is truly amazing when you consider that, at my graduation near the top of my class at Stanford Law School in 1952, the only position I was offered at a national law firm was that of legal secretary. In the span of a few decades, my options have blossomed. I have served as a state senator, a state judge, and a United States Supreme Court Justice. It is astonishing to contemplate how much change has occurred so quickly.

7. *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, Swayne & Field, JJ. concurring).

8. Hoff, *supra* n. 2, at 119.

9. *Id.* at 128.

10. Rhode, *supra* n. 3, at 27.

It was not until after our Civil War, however, and the resultant adoption of the 13th, 14th, and 15th amendments to our Constitution, that there were national guaranties for certain individual liberties that the states could not abridge. But even these additions to our constitution did not easily translate into concepts that benefited women as a group. As the Bradwell case illustrates, a century ago, society as a whole, including the court on which I now sit, generally accepted the separate and unequal status of women. Passage of the Fourteenth and Fifteenth Amendments to our Constitution inspired a sense of unity and identity among American women that gave new life to the women's suffrage movement. Suddenly, the right to vote became much more than a crumb; it was everything.

Securing the right to vote through the ratification of the Nineteenth Amendment to the Constitution in 1920 was an outgrowth of a remarkable alliance between Progressives, who touted women's need for protection in the workplace, and pioneer feminists like Elizabeth Cady Stanton and Susan B. Anthony, who sought full and equal citizenship for women. Passage of the Nineteenth Amendment remains the single greatest political triumph of the women's movement in the United States.

Despite the extension of the vote to women, many laws continued to enforce the exclusion of women from much of the working world. True victory for women at the workplace did not come until after passage of civil rights legislation by Congress in the early 1960s, and it arrived partly by accident. The Civil Rights Act of 1964, an outgrowth of our concerns about racial discrimination, was passed at a time when women's issues were not at the forefront of national attention. Indeed, the provision of the Act barring gender-based discrimination by employers was not part of the original legislation. As the story goes, a congressman named Howard W. Smith introduced an amendment offering protection against sex discrimination in a last-minute effort to defeat the entire legislation, because he believed that none of his peers would vote for protection for women. When the act as amended passed both houses of Congress, Congressman Smith, whose overriding purpose had been to prevent the antidiscrimination laws from going into effect, became an unwitting hero of the women's movement.

The late 1960s and early 1970s were a period of great activity in the women's movement. In a series of cases addressing laws that discriminated against women, the Supreme Court made emphatically clear that it would no longer accept without question the story that women are fundamentally different from men. The Court has

invalidated a broad range of statutes that discriminated on the basis of gender and, in the process, changed the landscape of gender law. Until 1970, the Court generally assumed that state legislatures and Congress did have good reasons for writing sex-based distinctions into the law. After that time, the Court refused altogether to entertain that presumption. In all of its recent cases, the Court has looked skeptically at the loose-fitting generalizations, myths, and stereotypes that previously kept women at home. The Court has instead looked to individual assessments of job qualifications, rather than the overinclusive generalizations of the past.

Reflecting on where American women started, where they are now, and how they got there, I have been struck by the parallels to the journey toward gender equality traveled by women from other countries, both in the context of their legal status within their own countries and under international law. As in America, early efforts to secure equal treatment of women under international law grew out of the women's suffrage movement. The League of Nations endorsed several conventions for the protection and promotion of women's rights in the early part of this century.¹¹ Prior to World War II, however, international law focused primarily on relations between states, rather than on individual human rights. The creation of the United Nations provided the first real mechanism to ensure individual rights under international law.

The Charter of the United Nations, which reaffirms the equal rights of men and women, was the first international agreement to proclaim gender equality as a fundamental human right.¹² And the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948, proclaimed that "[a]ll human beings are born free and equal in dignity and rights."¹³ The initial drafts of the Declaration were not so inclusive, however, proclaiming only that "[all men are born free and equal."¹⁴ When the original draft was debated, Eleanor Roosevelt, who chaired the Human Rights Commission, the U.N. body charged with drafting the declaration, initially argued in its favor, noting that "all men" really meant "all human beings."¹⁵ The other women delegates insisted that the language be changed, however,

11. The United Nations and the Advancement of Women 1945-1996 at 9 (United Nations 1996).

12. *Id.* at 3.

13. *Id.* at 126.

14. Felice D. Gaer, *And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights*, in *The International Human Rights of Women: Instruments of Change* 9-10 (Carol Elizabeth Lockwood, et al. eds., ABA Publg. 1998).

15. *Id.*

arguing that "if we say 'all men,' when we get home it will be 'all men.'"¹⁶ The women's lobby ultimately prevailed, giving us the Universal Declaration we recognize today.

The principles in the U.N. Charter and in the Universal Declaration of Human Rights, like our own Bill of Rights, are not self-enforcing. Instead, they must be transformed into treaties to make them legally binding on the ratifying countries. Even then, these treaties, or conventions, rely for their enforcement in each country primarily on political pressure and on public acceptance of the values these treaties seek to promote.¹⁷

Attempting to put these lofty principles of equality into practice in the daily lives of women around the globe was, and remains, an enormous challenge. In the early years of the U.N., the focus was on codifying women's rights to address the legal barriers they faced in the public sphere of their lives—improving educational opportunities, enabling property ownership, improving employment conditions and pay, and securing basic political rights such as the right to vote.¹⁸ The next step was to address customs and practices that were harmful to the health and wellbeing of women and girls, such as forced marriage and child marriage.¹⁹ To date, U.N. bodies have produced more than 20 different international legal instruments dealing specifically with women.²⁰ The biggest challenge, however, was not simply to codify these rights in international treaties, but to ensure that women could actually exercise these rights.

Largely through the efforts of non-governmental organizations (NGOs), and through a series of U.N.-sponsored world conferences on women, the concept of women's rights as human rights began to emerge in the 1970s. These principles found their expression in what has been called the international bill of rights for women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which entered into force in 1981.²¹ CEDAW is the most comprehensive and detailed international treaty to date that addresses the rights of women.²² It seeks to codify women's equality and to promote women's

16. *Id.*

17. *Rights of Women: A Guide to the Most Important U.N. Treaties on Women's Human Rights 7-9* (Intl. Women's Tribune Ctr. 1998).

18. *The United Nations and the Advancement of Women*, *supra* n. 11, at 3, 17-19.

19. *Id.* at 23.

20. Winnie Hazou, *The Social and Legal Status of Women: A Global Perspective* 8 (Praeger 1990).

21. *The United Nations and the Advancement of Women*, *supra* n. 11, at 5, 42, 72.

22. Fact Sheet from Senior Coordinator for International Women's Issues, Dept. of State,

participation in the political, social, and economic fields. Not all nations have approved and ratified CEDAW. Indeed, the United States has not done so.

It is clear from this short recitation that the legal status of women under international law, like the legal status of women in America, has seen tremendous change in this century. Although there are a wide array of legal institutions in place to protect the legal rights of women, the ultimate responsibility for promoting equality must rest with each of us as citizens in our own countries.

I think we can draw some lessons from our experiences that may be useful for women across national and cultural borders. I see three lessons about the relationship between democratic institutions and public opinion. First, change, whether by court or by legislature, has a much better chance of succeeding when it follows, rather than leads, public opinion. Women have been quite effective in the United States at obtaining legal protection against discrimination and sexual harassment and domestic violence. Legal protection means very little, however, if society is ambivalent about its necessity, or its wisdom. This lesson is true on the international scene as well, where NGOs and grassroots organizations have worked hard to promote gender equality.

Second, the American experience shows that all of us as women must participate in political life. It is not enough to build a constitution and democratic institutions, even an independent judiciary. Women have to be active in parliaments and local politics to help shape the public policies that will affect them as citizens, workers, wives, mothers, and daughters. And the visible presence of women in significant and powerful positions has a real and tangible effect on the lives of other women striving to advance both personally and professionally. But as we look around the free world we simply do not see as many women in high office or in positions of national leadership as we might expect.

Finally, I think that the experience of women in the United States shows that dramatic change can occur only when members of a large group surmount their individual differences and unite in pursuit of a concrete goal. The two most significant accomplishments of the American women's movement—winning the vote and gaining mass entry to the working world—were the products of a rare consensus among adherents of widely divergent philosophies. It has only been when we women have cast aside our differences and forged common ground that we have achieved meaningful change.

Building such consensus for liberty and equality of all people, women as well as men, depends at bottom on custom, tradition and the efforts of millions of ordinary citizens. No matter how grand are the principles set forth in our constitutions and laws, we as citizens must be committed to working together to achieve our goals and to make them work in practice.

All of us as women must help to work out our own community problems. I believe that society as a whole, whether American, Tunisian, or other can benefit immeasurably from a climate in which all persons, regardless of gender, have the opportunity to earn respect, responsibility, advancement and remuneration based on ability. Women in the United States and elsewhere are still engaged in a struggle against social attitudes that impose barriers to the achievement of this goal. That same challenge is faced by women in Arab and Muslim countries. In this regard, Tunisia can rightly claim to be the pioneering state with regard to women's rights among the Arab states of North Africa and the Middle East. Tunisia was the first Muslim country to abolish polygamy and restrict the husband's traditional right of repudiating the marriage at will, to raise the minimum age of marriage and to free women from the need to have a guardian to approve marriage. It gave women the right to vote and to hold office.²³ The progress Tunisia has achieved in instituting legal rights for women serves as a guidepost for other nations. Success for women throughout the world depends on changing minds at home, in the streets, and at the workplace—not just in legislatures and the courts. Each and every one of us has an important role to play in completing that task wherever we may live and work.

23. Report for Congress, *Women-Their Status and Rights Under International Law and the Laws of Selected Foreign Nations* LL 96-4, 95-2550, at 222 (Feb. 1996). A "Survey of the laws affecting women's rights in 23 different countries" prepared by the staff of the law library, Lib. of Cong.