



**Global Justice Center White Paper Series:
“New Visions for International Law and U.S. Foreign Policy”**

Paper #1:

**How International Law Could Radically Change the Definition of Gender
Equality in the United States: CEDAW and Reproductive Rights**
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The United States and International Human Rights Law: A New Global Partnership

The Global Justice Center is a legal non-profit organization that seeks to enforce human rights laws using a gender equality framework. Our vision of a global justice regime requires that the United States become a full partner in applying international human rights law. The overwhelming mandate for change given to the new Obama administration is a transformational event which presents an opportunity for the United States to embrace a new vision of its role in the world and in promoting global justice.

No one questions that Americans in general and American women in particular enjoy a higher standard of rights and freedoms than do most people in the world. The United States Constitution is the oldest in the world and has proven itself, over and over, to be a flexible model for constitutional government. However, over the last thirty years there have been seismic changes in our global legal landscape, not the least of which is the growing consensus that human rights laws are an integral component of international law. The growth of treaty based and other human rights laws globally means that the US Constitution is no longer the singular “aspirational model” to protect women’s rights.

In particular, the narrow definition by the United States Supreme Court of what constitutes gender equality is increasingly at odds with the gender equality protections being developed globally. Human rights treaties, such as CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), along with international jurisprudence, set out a much broader definition of gender equality than that in the U.S.¹ These advances are exemplified by the African Protocol on the Rights of Women, which explicitly includes reproductive rights as integral to gender equality, imposes affirmative obligations on governments to dismantle systemic gender discrimination, and mandates parity for women in the judiciary.² Bringing the U.S. definition up to international standards is important not only for the long-term protection of women in the U.S., but because of the international precedent it sets for women around the globe.

The United States has long standing laws and policies which need to be revisited because they now retard instead of advance women’s legal rights. These include: the U.S. Supreme Court definition of gender equality, which excludes pregnancy related laws; the 1973 Helms Amendment to the Foreign Assistance Act;³ the Mexico City “gag rule” on USAID funding;⁴ and the bad legal precedents in place due to the corrupting legislative history of both the unratified federal ERA and by the Senate’s 1994 and 2002 political concessions on the unratified CEDAW.⁵

The GJC White Paper Series, “New Visions for International Law and U.S. Foreign Policy” will analyze various challenges and opportunities for the new administration to accomplish this new vision and partnership. There is no quick fix, nor any executive order which can, in and of itself, 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 that are being adopted elsewhere. Despite these challenges, there are many reasons to be optimistic. The election of 2008 and the state of international affairs has created an unprecedented opportunity. The Obama Administration should not miss this opportunity to reframe U.S. domestic and

international law to affirmatively advance women’s equality rights globally and at home.⁶

How International Law could Radically Change the Definition of Gender Equality in the United States: CEDAW and Reproductive Rights

Part I: Myths about U.S. legal protections - how American women are falling behind

The United States Legal Definition of Gender Equality and the Exclusion of Reproductive Health

It was not until the 1970’s that the United States Supreme Court acknowledged that women have enforceable rights to nondiscrimination under the equal protection guarantees of the United States Constitution. However, the Court continues to define very narrowly just what laws can be considered “sex discriminatory” and therefore subject to being invalidated as unconstitutional.

The Supreme Court excludes from gender equality scrutiny all those laws based on physical differences between men and women, including abortion and other pregnancy related laws. This narrow definition of gender equality accorded American women is very different from the developing jurisprudence for women globally including under CEDAW and other international human rights laws and treaties.

The current position of the United States Supreme Court on gender equality and reproductive issues is as follows; since only women get pregnant, denying women abortions or, say, maternity benefits, as a matter of federal constitutional law is gender neutral since if men could get pregnant they would be subject to the same restrictions.⁷ Chief Justice John Roberts, in his then position as Deputy Solicitor General, dismissed the very idea that anti abortion laws could be sex discriminatory as “wrong as a matter of law and logic”.⁸ This is a 180 degree difference from how CEDAW in a “perfect” court would be applied since it would apply strict scrutiny to all laws which impact women’s rights. In other words, if CEDAW were ratified and fully implemented in the United States as written, it would require a wholesale shift in abortion jurisprudence from privacy analysis to an equality analysis and the resulting increased scrutiny of restrictions on access to abortion through an equality lens.

The legal impact of the CEDAW equality definition on women’s reproductive health goes beyond abortion. For example, the costs of health care are higher for women as a result of reproductive health care needs, even for women who do not have children.⁹ Thus, an analysis of health care law under the equality definition of CEDAW would find that the differential impact on women resulting from biologically differences is discriminatory treatment under the law.

Although this paper focuses on the impact and importance of implementation of a clean, reservation-free CEDAW, it is important to note that U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1992 created obligations for the U.S. to promote gender equality, including reproductive rights, which would in turn be strengthened by ratification of CEDAW. The Human Rights Committee (HRC), which is charged with interpreting and monitoring the implementation of the ICCPR, in its July 2008 concluding

observations to Ireland expressed concern with the legal restrictions on abortion, referencing Articles 2 and 26, which prohibit discrimination based on sex. In the U.S. the ICCPR is still under-utilized and under-implemented, in part due to highly restrictive reservations. Although these reservations should be removed, meanwhile it is part of U.S. law and there are other ways the ICCPR can be implemented, such as via the executive branch. For example, President Obama could cite to the ICCPR as rationale for repealing the “global gag rule.” (The “global gag rule” will be the subject of a forthcoming GJC White Paper).

Part II: Ratification of the current “gutted CEDAW” pending in the U.S. Senate would undermine equality for women in the U.S. and around the globe

What is the “gutted CEDAW”?

Most *supporters* of ratification of CEDAW, including Vice President Elect Joe Biden, state that ratification of CEDAW would not impose any new burdens on the government.¹⁰ This is only true because these Democrats are supporting the seriously politically compromised gutted CEDAW; which if ratified is a step backward in developing equality law, not forward.

CEDAW’s transformation into the U.S. gutted version came about with the political concessions made in response to the late Senator Helms. The Senate Committee on Foreign Relations in 1994 and again in 2002 appended some eleven “reservations, understandings and declarations” (RUDs) to the original clean CEDAW signed by President Carter in 1980.

Although the RUDs seemingly apply solely to American women they strike at the heart of CEDAW; its definition of the right to gender equality which subjects even laws which are facially neutral to be examined for their actual effect on women’s lives. The U.S. gutted version upends this standard and substitutes a narrow definition which would preclude women from using CEDAW to challenge 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, is the RUD on abortion which reads: “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.*” (emphasis added) Although this last phrase may appear to be neutral in fact it was drafted to be used as an antiabortion tool. Under U.S. law nearly all abortions, including those needed by women due to serious health problems or fetal abnormalities incompatible with life are defined as abortions as a “method of family planning”.¹¹

If it were to be passed as it, these RUDs and the discussion around them would be looked at by a court when interpreting and enforcing CEDAW. The 2008 U.S. Supreme Court decision *Medellin v. Texas* found that U.S. courts interpreting treaties can look to the legislative history from the Senate. Thus reinforcing the negative impact these RUDs would have on U.S. implementation of CEDAW.¹²

Passage of the “Gutted” CEDAW Would Undermine Women’s Access to Reproductive Rights Around the Globe

This U.S. “understanding” is in stark contrast and stands to undermine the developing

jurisdiction on abortion by treaty bodies and domestic courts around the globe. Numerous domestic courts in other countries have cited to CEDAW when striking down laws criminalizing abortion. The increasing use by courts of foreign or comparative law means that a U.S. interpretation of CEDAW as inapplicable to reproductive rights would undermine the cases of those advocating for reproductive rights under international law. For example, CEDAW’s broad equality mandates were cited by the constitutional court in Colombia as legal support when they struck down as invalid the criminal abortion law. And just this past August, the Mexican Supreme Court upheld liberalization of the abortion law in Mexico City and although the written opinion has yet to be released the court’s statements raised CEDAW as authority.¹³ Cases such as these would be undermined by a U.S. position to the contrary.

Ironically, if the U.S. intention in ratifying this gutted CEDAW is to send a supportive message to women globally, it will do the opposite. The U.S. version of CEDAW eviscerates the foundational core of CEDAW and, if ratified, could be cited as a legal authority in support of restrictions on abortion rather than as a legal tool to challenge them. The anti-abortion RUD will be used in the fight against a broad definition of equality, which includes reproductive rights. Although lawyers in the human rights legal field have at the top of their wish list that the United States reverse its isolationist stand on international law, “engagement” via this “gutted” CEDAW poses more danger than continued U.S. isolation.

Forthcoming GJC White Papers for “New Visions for International Law and U.S. Foreign Policy” include:

- The 1973 Helms Amendment to the Foreign Assistance Act and the Mexico City "gag rule" on USAID funding
- The International Criminal Court
- U.S. Implementation of Security Council Resolutions 1325 and 1820 on Women, Peace and Security

¹ The international definition of gender equality is found in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW): “Article 1: For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

² Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005

³ The Helms Amendment was added to the Foreign Assistance Act (FAA) in 1973 and prohibits the use of “funds made available to carry out subchapter I of this chapter...for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions” 22 U.S.C. § 215 1b (f)(1) (1992). 1978 AID regulations on Helms codified the 1974 Policy Determination by similarly prohibiting “information, education, training, or communication programs that seek to promote abortion as a method of family planning...” [48 C.F.R. 752.7016(b)(1992)] In 1987 AID elaborated on the scope of the Helms Amendment in the context of the formal Mexico City clauses adopted in 1987, AID defined the phrase “abortion as a method of family planning” as follows: Abortion is a method of family planning when it for the purpose of spacing births. This includes, but is not limited to, abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape of incest (since abortion under these circumstances is not a family planning act. [AID Handbook at 4C-47 par. (d)(10)(I)]

⁴ See Memorandum on Restoration of the Mexico City Policy, 37 Wkly. Comp. Pres. Doc. 216 (Jan. 22, 2001). The global gag rule prohibits non-governmental organizations from receiving US funds for family planning if they provide any abortion related services even with other funds. This “GAG” effects NGO’s in about 56 countries receiving such US funding.

⁵ CEDAW, *FN 1 infra*, is the second most widely ratified UN treaty and is considered the international bill of rights for women. It has been ratified by 185 countries worldwide and has been used in more than 400 court cases since 1979 to overturn discriminatory laws against women include being one basis for the invalidation of the Colombia criminal abortion law in 2005. “Gutted” CEDAW refers to the version currently awaiting ratification in the U.S. Senate that includes an “understanding” that the treaty cannot be used to interpret issues related to abortion and the reproductive rights of women.

⁶ Thomas, Dorothy Q., “Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy,” 9 Harv. Hum Rts. J. 15, 21 (1996) “[r]ather than downplaying the domestic significance of international law, activists should emphasize the benefits of meaningful ratification and the relevance of international norms and solidarity to today’s domestic environment. For example, CEDAW -- absent crippling reservations -- could offer American women expanded protection against sex discrimination.”

⁷ See *Geduldig v. Aiello*, 417 U.S. 484 (1974)

⁸ Oral Argument, *Bray v. Alexandria Women's Health Clinic*, 1991 WL 637112, at *19 (U.S., Oct. 16, 1991).

⁹ Elizabeth M. Patchias & Judy Waxman, *Women and Health Coverage: The Affordability Gap*, Commonwealth Fund pub. 1020 Vol. 25, (April 2007) available at: http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=478513 (as of Nov. 11, 2008)

¹⁰ U.S. Congress. Senate. Committee on Foreign Relations, “Treaty Doc. 96-53; Convention on the Elimination of All Forms of Discrimination against Women, Adopted by the U.N. General Assembly on December 18, 1979, and signed on behalf of the United States of America on July 17, 1980.” Hearing, June 13, 2003. 107th Congress, 2d Session. Washington, D. C., U.S. Government Printing Office, 2002, S.Hrg. 107-530, p. 3.

¹¹ The phrase “abortion as a method of family planning” was used in the Helms Amendment to the Foreign Assistance Act in 1973, see “Memorandum on Restoration of the Mexico City Policy,” 37 Wkly. Comp. Pres. Doc. 216 (Jan. 22, 2001), see also Mehlika Hoodbhoy, Martin S. Flaherty, and Tracy E. Higgins, “Special Report: Exporting Dispair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya,” 29 *Fordham Int'l L.J.* 1 (December 2005). The definition of the phrase came later in 2001. See “Memorandum for the Acting Administrator of the USAID: Restoration of the Mexico City Policy,” 66 Fed. Reg. 17,303 (Mar. 28, 2001) at 17,311. The memo defines what constitutes abortion in the context of family planning: “Abortion is a method of family planning when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).”

¹² *Medellin*, 128 S.Ct. 1346 (2008)

¹³ Communication with Global Justice Center