

# AN AGENDA FOR THE OBAMA ADMINISTRATION ON GENDER EQUALITY: LESSONS FROM ABROAD

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## INTRODUCTION

President Barack Obama came into office with a wealth of good will after winning the historic 2008 presidential election to become the first African-American commander-in-chief. Among the many daunting issues we hope he will tackle is one that Abigail Adams mentioned to her husband John in 1776: remember the ladies. How should our President and his new administration affect social justice for women? After all, also in 2008, a woman candidate for president, Hillary Clinton, received over 17 million votes in the primaries. She narrowly missed the opportunity to become the first woman major-party nominee. Sarah Palin became the second-ever female vice-presidential candidate. Additionally, 17 percent of the new Congress is female, an all-time U.S. record, and women are the majority of voters.

To answer our question, we will step outside the bounds of the United States and reengage with the world as our new President plans to do. Like the United States, most countries continue to struggle with gender equality because of deeply entrenched patriarchal customs or religious practices coupled with insufficient resources and a lack of political will. Surveying various nations helps us learn what legal approaches we might consider pursuing in order to achieve more gender equality.

There are four main overlapping possibilities to tackle these problems. The first method is to ratify the Convention on Elimination of Discrimination Against Women (“CEDAW”). The second approach, which is increasingly used in newly drafted or amended constitutions, embraces specific language regarding gender equality. The third method, followed in some constitutions, national legislation, or party rules, is the use of quotas reserving fixed numbers of seats for women in national or local legislatures. The final approach, followed by countries in the prior categories and others

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alike, is national legislation implementing gender equality in various spheres. We briefly examine each of these legal approaches and conclude with our recommendations for the Obama administration.

### I. THE FOUR APPROACHES

One-hundred-eighty-five countries have ratified CEDAW, the most comprehensive international agreement concerning gender equality. This convention maintains the dubious distinction of having the most reservations of any treaty. Reservations, understandings, and declarations (“RUDs”) limit a country’s obligations under a treaty, and a number of nations restrict CEDAW’s language to such an extent as to gut the treaty. For example, Saudi Arabia and many Muslim countries endorse the treaty so long as it does not conflict with Islamic law. Reservations are not supposed to conflict with an agreement’s object and purpose, and countries can object to RUDs that they believe go too far. Yet there is no global consequence for nations that severely limit treaty obligations. The United States, an instrumental drafter, signed the treaty in 1980, but has not ratified it.

The second approach involves adopting constitutional provisions with specific language pertaining to gender equality. Most nations follow this method, prohibiting gender discrimination and guaranteeing equal enjoyment of rights. For example, the equality clause in Germany’s Constitution simply states, “Men and women shall have equal rights.” The trend is applicable even in the Middle East in the new Iraqi constitution supported by the United States. Article 14 declares: “Iraqis are equal before the law without discrimination based on gender.” Some states follow South Africa’s technique, adopting one comprehensive equality clause that includes several items that implicate women in addition to specifically mentioning both sex and gender. Article 9 of the 1996 South African constitution is clearly aimed at tackling public and private discrimination. It says that neither the state, nor any person, may “unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” The United States tried the amendment approach, but ultimately failed to pass the Equal Rights Amendment (“ERA”). The last major effort ended in 1982, three states short of the 38 needed to pass the amendment.

The third approach uses parliamentary quotas via the constitution, national legislation, or political party rules to achieve gender equality. These efforts help improve upon the global national average of 16 percent female representation. It is often hoped that increasing the number of women is not only good in itself, but that it might also result in more emphasis on “soft” items that have been socially constructed as “women issues,” such as children, families, and health care. Post-genocide Rwanda has come closest to gender parity with women making up the majority of the national legislature following the 2008 elections. These remarkable results were achieved when women won both reserved and non-reserved seats. Seventeen countries in

Latin America have quotas for female political participation, as do increasing numbers in the Arab world. For example, Article 47 of the Iraq constitution mandates that 25 percent of the national parliament be female. Some countries like South Africa have political parties that mandate female participation in a party list system. Thus, the African National Congress mandates a 25 percent female quota, where every fourth candidate on the list of candidates chosen by the party must be a woman.

The final approach uses national legislation to foster gender equality—a path taken by the United States. Norway has been globally recognized for successfully exemplifying this method. It ranked first in gender equality in the World Economic Forum's 2008 Global Gender Gap Index, which measures inequality between men and women in economic participation, educational attainment, political empowerment, and health and survival. Instead of modifying its constitution, the country chose to pass The Act relating to Gender Equality in 1978 with the purpose of “promot[ing] gender equality and . . . improving the position of women.” Further, the Act proclaims that “[w]omen and men shall be given equal opportunities in education, employment and cultural and professional advancement.” Norway enforces the Act through the Equality and Anti-Discrimination Ombud, a politically independent government body.

Additionally, Norway applies the quota representation concept with a law mandating that 40 percent of the board members in public corporations over a certain size be female or else the companies must dissolve. Consequently, the nation now has the highest percentage of women serving on corporate boards in the world. Conversely, the United States has female board membership of only 15 percent. Still, while Norway pursues quotas in private bodies, it refuses to apply quotas to government representation, with no gender quota for its parliament.

## II. APPROACHES FOR THE OBAMA ADMINISTRATION

We can assume that the new administration will need to continue to use a disproportionate share of its honeymoon period and initial political good will to tackle what appears to be the most daunting economic crisis facing the United States since the Great Depression. Most other priorities may need to take a back seat. By the time the administration can seriously focus on other issues, including a significant improvement in gender equality, its power to achieve its ambitions may be severely circumscribed—particularly if pursued after the 2010 midterm congressional elections in which more conservative politicians may regain seats lost in 2008. Thus, we caution against excessive zeal, as such exuberance might result in failure.

With respect to prioritization, we urge the fourth approach—national legislation. Thus, the administration should work with Congress to urge passage of laws that will achieve the equivalent of what CEDAW, constitutional provisions, or quotas would achieve. The administration should look to laws from around the world to learn from other nations' experiences, even though their legislation may have occurred in different historical, political, reli-

gious, and cultural contexts. Universities and nongovernmental organizations would no doubt assist the executive and congressional branches in obtaining and assessing the comparative information in a comprehensive fashion. Additionally, President Obama should, as the chief executive, more explicitly enforce legislative measures improving gender equality and urge the implementation of administrative procedures within the executive branch. The President started off on the right foot by signing, as his very first law, a statute giving women greater options in pursuing equal pay for equal work.

Pursuing a reconceptualized ERA should not be a priority. The original proposal simply stated: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The enormous political energy involved on the state level in passing a constitutional amendment is far more daunting than any option involving only the national legislature. If and when this approach is dusted off, we should study the language and legislative history in other constitutions quite closely. Even though other societies have numerous distinctions from the United States, we still may be able to learn from them. Co-author Wing did a global analysis in her three experiences advising on the three distinctly different constitutions of South Africa, Palestine and Rwanda. The latter two jurisdictions follow South Africa and the global trend with the inclusion of gender in their equality clauses. Additionally, the U.S. amendment should retain the language found in several of our constitutional amendments and also proposed in the original ERA as well: “The Congress shall have the power to enforce this article by appropriate legislation.” There is rich constitutional jurisprudence on the various enforcement clauses that could be useful in the interpretation of a gender equality amendment.

We do not recommend prioritizing CEDAW ratification over the prior two approaches. The treaty has never made it to the full Senate floor for a vote. Attempting to push it through will be a major political battle, and there will be enormous political compromises involved concerning the various RUDs necessary to reach a resolution. The resulting U.S. RUDs could gut the treaty. Even if adopted, the treaty is unlikely to be self-executing, so both Houses of Congress would need to pass implementing national legislation as well—another exhaustive political battle.

Quotas in the national constitution, legislation, or by political parties, are nonstarters in the United States. The affirmative action debates dating back to *Bakke* have resoundingly rejected the quota idea. The remaining concept of goals remains controversial in itself as the *Grutter* and subsequent Supreme Court educational cases illustrate. Since the United States does not use a party list system, it would be impossible, or certainly extraordinarily difficult, to mandate both political parties run only one gender in elections to ensure a safe female seat would result.

## CONCLUSION

With respect to gender equality, can the United States humble itself to learn from the world rather than ignore it? The Obama administration should emphasize national legislation, and should review international approaches in the debate. Subsequently, it should reinvigorate a discussion over passage of a gender equality amendment. Finally, it should invite new discussion over CEDAW ratification. While the challenges are daunting, this administration presents our best chance to date to make significant progress in this regard. Let us hope that the many other problems confronting the United States do not make us once again forget the ladies.