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Making America Equal Again: An Interview with Robert Ahdieh

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**SPECIAL PRESIDENTIAL INAUGURATION ISSUE 2017:
AN INTERVIEW WITH ROBERT AHDIEH
MAKING AMERICA EQUAL AGAIN**

INTRODUCTION

During the recently completed presidential election cycle, a number of the most contentious issues concerned questions of equality—including debates around wealth distribution, access to health, women’s issues, and race relations. Robert B. Ahdieh is the Vice Dean and K.H. Gyr Professor of Private International Law at Emory University School of Law. He is a leading expert in corporate law and financial regulation, international trade, and administrative law. The *Emory Corporate Governance and Accountability Review* (ECGAR) is fortunate that Dean Ahdieh was able to take time to share his thoughts with Prasad Hurra¹ regarding the priorities for the next president—and particularly on the need to prioritize the nation’s pursuit of equality for all its citizens.

I. INTERVIEW

Prasad Hurra: Dean Ahdieh, thank you very much. ECGAR is very grateful to you for talking to us for the new Presidential Inauguration Issue we are publishing. You have cited equality as the highest priority for the next president of the United States. Can you tell us what you mean?

Dean Ahdieh: Among the most fundamental values of our nation is a commitment to equality. In particular, equality of opportunity. But also equal access. Equal treatment under the law. And the fundamental right to be protected against invidious discrimination. The Equal Protection Clause may date only to

¹ Prasad Hurra is a JD Candidate at Emory University School of Law. Previously a civil litigator in India for over five years, he received his LLM from Duke University School of Law in May 2015. Nicholas Torres, the Editor-in-Chief of ECGAR, would like to thank Prasad Hurra and Reuben Guttman, ECGAR’s co-founder and Senior Advisor, for their contributions to ECGAR. Prasad and Reuben originally approached Nicholas regarding this Special Issue of ECGAR. Prasad spent countless hours editing, communicating, and managing editors. Prasad also stood in as Editor-in-Chief during part of the production period for this Special Issue. Owing largely to Prasad’s passion, determination, and work ethic, ECGAR was able to produce the largest issue in its short history. It is fair to say that Prasad has played an invaluable role in advancing ECGAR’s growth as one of Emory Law School’s student-edited journals.

1868, but I believe the seed of equality—even if long dormant and unattended—was planted at the Founding.

Hurra: What are some of the ways in which equality will present itself as a challenge for the next president?

Ahdieh: While many areas could be cited, four particularly stand out to me: First, the growing disparity of wealth and poverty in the United States. Second, the substantial burden—and suffering—imposed on those of our fellow Americans who lack access to basic healthcare. Third, the persistent challenges facing women in their pursuit of equal treatment. And finally, the desperate need to mediate race relations in America.

Hurra: What do you mean by the disparity of wealth and poverty?

Ahdieh: When you look at the statistics, you see the ways in which the distribution of wealth is growing more and more extreme. That’s an international phenomenon, to be sure, but it extends to the United States as well. When you look at the allocation of new wealth, you find that as GDP grows, the rich are getting richer and the poor are getting (at least relatively) poorer. Equally important, there is a significant squeeze on the middle class, causing it to shrink. In broad strokes, that’s what I think of as the challenge of income disparity in the United States.

Hurra: What are some of the specific ways in which income disparity manifests itself in our society?

Ahdieh: Obviously, it starts with what I’ve already described: a reality in which a few enjoy access to tremendous wealth, while many struggle to make ends meet—or even survive.

I think part of it is also the way in which different worlds interact (or fail to interact) with each other in America today. It used to be the case—given the structure of our communities, a less stark urban-rural divide, and the greater role of various social institutions (including the church and other social organizations) in our lives—that there was a reasonable degree of interaction across class divides. My sense is that there is significantly less of such interaction in the United States today. Some of that is because we have less social structure as a society generally. Robert Putnam famously wrote about Americans “bowling alone”—the idea that we as a country do less communal

activity than we used to.² Some of it is geographic: it's a matter of where we live and where we work. Whatever the drivers, the trend is toward less and less interaction across classes. If I am in a certain income bracket today, my interaction with people of a meaningfully different class is diminished, compared to what it used to be.

A third aspect of income inequality that I would cite is its tendency to self-perpetuate. If income disparity were not a multi-generational problem, we might worry less about it. The problem is that socio-economic mobility is not nearly what it used to be. If I am born to wealthy parents, the odds that I will end up in poverty or unemployed are exceedingly low. Perhaps more distressingly, if I am born into a poor family, the odds that I will be able to achieve significant wealth are relatively low. Of course, there are the anecdotal examples to the contrary; but those are less common than they used to be. And are far from common.

Hurra: What steps do you think the federal government should take to address the challenge of income inequality?

Ahdieh: I think there are two categories of federal intervention to consider. First, we should holistically assess the degree to which federal law and regulation—and policy more broadly—are optimally designed to create *opportunity*. For example, we need to assess whether our existing policies adequately support excellence in education, including educational opportunity, access to higher education, investment in skills development, and access to the basic capacities needed to survive in a high-tech economy. But education is just one example of a field in which the federal government should evaluate the degree of its commitment to opportunity for all citizens.

One might imagine the next president committing himself to an “opportunity economy”—intended to create equal opportunity across the length and breadth of the country and its citizenry. The president should also make clear that—irrespective of whether you were born wealthy, poor, or somewhere in the middle—if you have the work ethic to succeed, we as a country are going to help you do so.

And that highlights a more general line of action—applicable not only to income inequality, but to every aspect of equality: I think the next president would do well to focus on fostering a public discourse about the need for

² ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001).

equality, if we are to thrive as a society. Of course, the federal government is not going to mandate that people sit down in a room and talk. But it can encourage, facilitate, and even subsidize greater dialogue around the issue of equality. In schools, on college campuses, and in our workplaces, we should find ways to get all Americans more engaged with the ways in which class differences should not be impermeable barriers. The more we are talking along those lines, the greater progress we can make toward equal opportunity for all.

Hurra: Let us talk about healthcare. How does the increasing cost of healthcare relate to equality, and what can be done about those costs?

Ahdieh: I do think the two issues are deeply intertwined. If you look at families that are struggling financially or being forced to declare bankruptcy, health costs for a chronic condition or a health crisis are often a major driving factor. That is why it is essential to think about the cost of and access to healthcare not simply as an issue unto itself, but as a central part of how we should understand the economic landscape of our country today. For many Americans, if the cost of health insurance is above a certain amount, they forego coverage. When someone in the family gets sick, in turn, they only seek care if they have the ability to pay the doctor's bill out of pocket. And that means the person gets sicker, which increases costs—including through reliance on emergency rooms for basic care.

As to your question of why costs are going up, there's obviously a great deal of research out there, which goes well beyond my own expertise. Among other factors, experts have identified a range of end-of-life practices, as well as chronic-care issues and a continuing lack of preventive care, as significant drivers of healthcare cost increases. As to preventive care, for example, while we do much more than we used to, there is much more we might do as a society to prevent illness. The cost of pharmaceutical products is also a driver of costs. And regulatory and litigation costs play some—but sometimes exaggerated—role in driving healthcare costs up as well.

Hurra: Do agencies at the federal level contain costs properly? Should cost-cutting include some element of rationing?

Ahdieh: They do more than we give them credit for, but much less than they perhaps should be doing—given the amount of money the federal government spends each year, by way of both direct expenditures and the provision of block grants to states for healthcare services. In the healthcare arena, the federal government is a kind of monopsonist; as so massive a consumer of healthcare

services, the federal government is in a position to demand more effective cost management, in exchange for the scope of business it brings to a doctor, hospital, or other healthcare provider. Cost management devices are not always helpful, since they can sometimes lead to worse outcomes on net. But I think there is a good record of cost savings strategies that should be looked at—and implemented—more seriously.

That said, if we are serious about reducing the cost of healthcare in America, it may be important to recognize that some may not have access to every health service they have had previously. The operative goal—to be evaluated holistically—is the improvement of health outcomes at both the patient and population health level. That goal might be best achieved, however, by curtailing access to certain services, while increasing access to others. Those can be difficult choices—but they are ones that any well-functioning society must make, not only with regard to healthcare, but more generally. The critical thing is to be as systematic and thoughtful about those choices as possible.

Hurra: Are there particular steps that you believe federal or state agencies should undertake to curtail costs?

Ahdieh: When the Affordable Care Act was enacted into law, there were questions about the appropriate scope of federal authority to bargain with healthcare providers to reduce costs. Those questions remain unresolved. If we want to reduce costs, however—and especially if we want to do so without significant rationing of care—then the allowance for such bargaining should perhaps be broadened. I also think there is more federal and state authorities could do to incentivize the healthcare system to focus on preventive care. We are doing much more than we used to, but it would behoove us to do yet more. Finally, I believe a greater focus on outcomes—and the linkage of compensation to desired outcomes—would be well-advised. In a market-based system, keying compensation for healthcare services to the quality of outcomes makes good sense. Of course, any such linkage must be constructed thoughtfully. But with our substantial capacity for innovation, I'm confident we can find the right balance.

Hurra: I also wanted to ask you if you think there is too much privatization of the healthcare system?

Ahdieh: We have a private healthcare system today. The federal government, as well as state governments, provide financial support for individual consumption

of private healthcare services. But, with select exceptions such as the veterans' health system, healthcare in the United States is provided privately.

In healthcare, as elsewhere, the resulting market competition can have salutary effects. I do not think, as such, that our healthcare system on the whole is overly privatized. I *do* believe, on the other hand, that we need to think carefully about who pays for care. Even if we were not to shift to a single-payer system, as in Canada and many other industrialized states, we might move further in that direction than we stand now. That need not mean the provision of healthcare should be less privatized. Given the amount the federal government is spending on healthcare, however, we should be getting better results.

Hurra: Would you consider the potential privatization of healthcare payment services—such as Medicare—a threat?

Ahdieh: The challenge with privatization schemes is that they rely on a set of assumptions that—perhaps especially in our current healthcare system—may not be well-grounded. If everything goes according to plan, there is no question there are certain efficiencies in privatization. But the question is one of risk tolerance. If one's tolerance for bad outcomes (if our assumptions prove wrong) is high, then privatization may make sense. On the other hand, in context of healthcare—perhaps particularly for senior citizens—we have tended to be fairly sensitive about risk. If so, privatization makes less sense. Critically, thus, we need to guard against the notion that we can have our cake and eat it too: that we can privatize, but preserve a safety net, if it should prove unsuccessful. It doesn't work that way.

Hurra: Turning to the next aspect of equality you mentioned, you spoke of the continuing struggle to secure equal treatment for women, including in the workplace. Are you saying that Title VII does not work?

Ahdieh: In terms of where we should be as a society, yes, I definitely think Title VII has not worked. It works better than not having it, of course. But Title VII is trying to legislate against strong social and cultural norms and practices. So, almost by definition, it's not going to work. While the law has done tremendous things, thus, it has done less than it should have.

Here too, I see the need for us to better acknowledge equality as a core dimension of who we are as a nation. Do we believe that women should have equal opportunity in America today? If so, what are the continuing barriers to that goal? As a nation, we need to engage in a dialogue about those questions,

one that I believe can help move us toward to a more closely aligned set of values, beliefs, and policies.

Hurra: I want to talk about court decisions. Which court decisions concern you, in terms of the treatment of women, and which ones need legislative redress?

Ahdieh: As it's not my area of expertise, I'm not in the best position to assess particular cases. I believe the sexual harassment jurisprudence of the last twenty years has taken us significant strides forward. But there are also significant policy changes that are needed—regarding equal pay for equal work, parental leave, support for working parents generally, and especially support for part-time employment, which remains a particular need for women, given their persistently greater degree of responsibility at home.

Once again, though, I think there's a foundational need for dialogue about what our goals are for women's equality in America. And about what must happen—across both the public and the private sector, and at the federal, state, and local level—to accomplish those goals.

Hurra: Finally, let me ask you about race relations. Earlier, you said that “race relations—particularly between black and white, but also more generally—is the most challenging issue we face as a nation. Until we can work through that, I do not think that the United States will be able to achieve its potential.” Are you suggesting that the civil rights legislation of the 1960s has not worked?

Ahdieh: I think the civil rights laws of the 1960s worked tremendously, in getting us to a certain point. To be sure, judicial interpretations of some of the statutes—and of the Constitution to limit the scope of their application—have reduced their potential impact. But I do think the law has done tremendous things.

I would return to one of the recurrent themes of our conversation, though, to say that if we are to recognize equality—and racial equality in particular—as a one of the fundamental challenges for our nation, a significant part of the way forward will be public dialogue and engagement with the issue. And I think the president of the United States has a central role to play in fostering that dialogue.

At the most basic level, we must acknowledge that race continues to play a central role in shaping the opportunities open to an individual American. Consider the sharp contrast between the lived experience of most African-American boys and young men in the United States, and of a young white man. As a society, we should be gravely concerned with their divergent set of

opportunities. It speaks to the very character of our nation. It suggests that the color of one's skin is dispositive of the opportunities one is afforded in our country. Of course, in some abstract sense, anyone can do anything. But if that abstract truth has little relationship to our lived reality, we should be concerned.

There is, to be sure, an important place for doctrinal evolution, for legislative and regulatory action, and perhaps even for constitutional reform—to the extent the Constitution is interpreted to limit our meaningful engagement with the persistent harms of racial discrimination. Again, though, I would not understate the power of the presidency, in setting the tone for our engagement of these issues—including by engaging across racial lines, and particularly the line that continues to divide black and white America.

The divide between black and white could not be more deeply intertwined with who we are as a nation. It is at once a barrier to the nation's progress, if we do not address it, *and* a fundamental test of who we are as a nation. The skills, commitment, and effort that it will take to address the relationship between black and white and in America are thus precisely the ones necessary to establish the equality of women and men, to address disparities of wealth and poverty, and to reach a better place in terms of access to health. Even our engagement of other challenges—from climate change to the limitations of our educational system—will be enhanced by our forthright and honest efforts to navigate the racial divide. Concerted focus on the issue of race relations by the next president may thus have lasting implications not only for race relations, but for the future of the nation generally.

Hurra: Finally, do you have thoughts on what amendments might be made to the Constitution, or how should Congress should intervene, to advance equality among the races?

Ahdieh: As to amendments, if we continue to interpret the Constitution to limit our ability to respond to the ways in which the history of race relations and the structure of our economic order create divergent opportunity sets for different races, constitutional changes may be needed. Of course, the Constitution should be altered only with great caution. But given the strong empirical evidence of persistent bias in the employment market, in our educational system, and otherwise, cautious action may be justified.

As to legislation, I would say the same. Some years ago, the Urban League had an advertising campaign, whose message was that “A mind is a terrible thing to waste.” Every day, however, we continue to do just that. To the extent we can

recognize as much as a nation, one might imagine legislation designed to foster equal opportunity for young African-Americans, and perhaps African-American men in particular.

Ultimately, I would argue, this is not a zero-sum game—in which we take from one to give to another. Rather, we are asking how we can make the United States a more prosperous, safe, economically vibrant, and entrepreneurial nation. The fact that large swaths of our citizenry are not enjoying the benefits of equal opportunity is a terrible waste—for all of us.

Hurra: Do you have any concluding thoughts you would like to share with our readers?

Ahdieh: Perhaps just to say that half the country believes we are on the wrong track because of who won the presidency, and the other half believes we are on the right track, for the same reason. From that starting point, we would do well as a community to focus on the core challenges we need to address. I am an optimist by nature, and believe there is a far greater opportunity to find agreement on those challenges than many assume. If we can focus our collective attention on addressing those challenges, we might well be standing at a moment of real opportunity—a moment to determine who we want to be as a nation and what it will take for us to get there.

Hurra: Thank you so much, Dean Ahdieh, for sharing your thoughts.

Ahdieh: Thank you for the opportunity!

CONCLUSION

Dean Ahdieh has a pragmatic optimism about our society. His point of view is that our future remains hopeful—if we acknowledge and engage the essential requirements for our collective advancement. He sees equality as a critical force for social and economic development in a thriving, prosperous, and just society. The landscape of equality is ever-changing, creating tensions in the fabric of society. But a society that recognizes and navigates those tensions emerges stronger and more just. We thank Dean Ahdieh for distilling the complex challenges of economic inequality, healthcare reform, gender inequality, and race relations into a readily understandable analysis.