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## Comparative Sex Regimes and Corporate Governance: An Introduction

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**COMPARATIVE SEX REGIMES AND  
CORPORATE GOVERNANCE:  
AN INTRODUCTION**

**Darren Rosenblum**

In February 2013, on the day of the worst snowstorm in many years, Pace International Law Review conducted a symposium on “Comparative Sex Regimes and Corporate Governance.” Despite a total shutdown of all transport networks and the consequent absence of a few stranded scholars, we met to discuss the fraught questions posed by corporate board quotas and formulate answers.

Led by Norway in 2003, several nations have begun to mandate certain levels of women’s inclusion on corporate boards. In the face of widespread exclusion of women from corporate power that suggests structural biases, these quotas appear radical and compelling. The wake of the financial crisis has accentuated this phenomenon, as stereotypes of women as more risk-averse prompt legislatures to attempt to ensure more economic stability.

A decade of thinking about quotas has left me with no easy

answers.<sup>1</sup> Sticky questions beset any attempt to understand the egalitarian redistribution of elite corporate positions. Archaic scripts dominate public debate, whether those scripts rely on sex difference, diversity's value, or the corporation's place in society. Scholars, too, fall into this trap, as some allow disciplines to cabin their understandings in ways that undermine fuller assessments of quotas. Strong scholarship may foreground one discipline only to lose sight of others' contributions. Corporate scholars may gloss over identity's complexity, both the subject of the quota (sex) and those affected by it (race, class, sexuality, nationality, etc.). Critical theorists may understand identity processes, but may misconstrue the process of how corporate power exerts itself. Non-corporate scholars may not fully apprehend how boards function in corporate governance. Data observed by social scientists may provide answers, but leave broad questions unanswered.

I organized this conference with the audacious hope to break out of these cloisters to engage in a truly collaborative, interdisciplinary, and transnational conversation on what quotas actually achieve and why they matter. I presented speakers with a series of questions: will corporate governance change once capital has been (partly) feminized?, how do different inequality remedies relate to each other?, are these measures designed to achieve good governance, women's empowerment, or gender balance?, are quotas an effective tool to realize those objectives?, if not, how might boards circumnavigate them?, and what are possible unintended consequences of quotas?

As the organizer, the preeminent question was this: would a group of disparate, even dissonant scholars come together to begin answering these questions?

The answer is clearly yes, as evidenced by our day of meetings in the quiet of the snowstorm and now by the publication of these short essays.<sup>2</sup> Each piece addresses distinct and yet

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<sup>1</sup> See Darren Rosenblum and Daria Roithmayr, *Sex Regimes and Corporate Governance* (work in progress on file with author); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2010); Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 46 FORDHAM L. REV. 2873 (2008); Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANS. L. 759 (2007).

<sup>2</sup> My gratitude also goes to those who participated in our symposium but not in this publication, including Ann Bartow, David Chekroun, Dan Dan-

overlapping areas of law evoked by the questions posed, and in so doing propels forward this contentious debate. Each of these scholars has fuller work on this and related topics within their fields, but here they reach toward each other in a conversation.

Kimberly Krawiec and Aaron Dhir have each performed empirical work that builds a fuller understanding of corporate board diversity. Aaron Dhir, in *Diversity in the Boardroom: A Content Analysis of Corporate Proxy Disclosures*, takes Norway as an example to compare against other nations' attempts to regulate corporate diversity. He asserts that this regulation has a dual nature as some nations adopt command-and-control regulation (Norway), while others (the U.S.) adopt disclosure regimes that urge or require diversity reporting. Dhir concludes that disclosure's efficacy relies on the internalization of diversity norms within corporate governance. He concludes with the hope that this potential may surface in his home context of Canada, where governance reform may blend the state mandates with disclosure.

Krawiec's work explores exactly what that internalization of diversity norms may (or may not) look like and how even where "diversity" takes root, it may lack substance. Her work with social science co-authors John Conley and Lisa Broome, attempts to understand how U.S. corporate board members think about diversity. Here, Krawiec distinguishes direct talk about race and gender, where the former seems impossible and the latter less so. Those outside "traditionally unrepresented groups" show reluctance to emphasize difference's relevance out of fear of essentializing members of underrepresented groups. A similar silence afflicts those within unrepresented groups, motivated instead by an interest in self-presentation as having succeeded by merit. These "difficult conversations" expose quite clearly the challenge of obtaining accurate and honest reflections of what happens in the boardroom. If accurate, Krawiec's work suggests the challenge in forming effective policies to advance a concept as nebulous and fraught as diversity.

In *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, Cheryl Wade argues that "diversity doublespeak" may obscure the complex interplay between race and gender equality efforts. This double-

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ielsen, Amy Dittmar, and Martin Gelter.

speak permits corporate leaders to feign respect for equality even as they ignore deeper inequities. Wade then addresses the SEC disclosure rule that permits firms to report on their diversity, asserting that it may persuade some firms to report, even if the SEC should have clarified the meaning of “diversity.” Quotas, on the other hand, hold little potential in the U.S. for Wade, given the conflicted history of race-related remedies.

Quota skepticism also informs Anne Alstott’s contribution in *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*. For Alstott, the states should diminish structural biases, but not through quotas, which are constitutionally problematic and run counter to the dominance of *laissez faire* economic frameworks. She notes *Citizens United* as a marker of the centrality of corporate power in U.S. law. Alstott’s novel assertion is that the tax context holds potential for advancing change because it already engages social policy so frequently and directly. Nonprofit governance holds special promise because of the extensive rules that mandate nonprofit behavior. Imposing quotas in nonprofits may be a feasible and fruitful way to begin shifting toward progress in the U.S.

Horatia Muir Watt layers both a transnational and a literary frame over the policy questions that other raised in *Corporate Governance Sex Regimes: Peripheral Thoughts From Across the Atlantic*. Muir Watt links French culture as a distinct factor in the interchange between public policy and private markets. Her probing questions inquire about the role quotas play in reframing global capital. For example, given French political concerns about commercial surrogacy and the wearing of veils by Muslim women, Muir Watt wonders “whether such womb-renters, wearers of veils, and new corporate board-members all belong, as it were, in the same deluded metaphorical boat?” The stark combination of these disparate French right concerns suggests the counterintuitive political import of quotas where gender equality may serve as a marker of “civilization” even as leaders regard the recognition of other kinds of difference as anathema. The success of quotas, for Muir Watt, hinges on whether they actually “herald the acceptance of other forms of diversity in one of the most powerful strongholds of non-difference.” Sex quotas that open up French society for other kinds of difference may prove extraordinarily important.

Indeed, it is the connection between quotas and “fundamental issues of global economic governance,” as Muir Watt puts it, which proves so challenging. This daunting topic inspired a rich discussion among the scholars who participated in the symposium and in this volume, including our student note by Kristen Carroll.<sup>3</sup> Drawing from these short essays, even among scholars for whom sex diversity comprises a shared goal, methods for realizing that laudable goal may vary across cultural lines. Further, as we adopt remedies, we must remain vigilant against unwarranted inferences regarding diversity, sex difference, and the efficacy of equality remedies more broadly. The cross-cultural and cross-disciplinary conversation begun here may not provide the neatest answers; however, the questions it leaves will inspire others to probe further into these frustrating and fascinating questions.

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<sup>3</sup> Other participants included, as noted above, Ann Bartow, David Cherkroun, Amy Dittmar, Dan Danielsen, and Martin Gelter.