

Contemporary
Issues

Corporate Boards, Quotas for Women, and Political Theory

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Policy Brief

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Executive Summary

- Across Europe, the question of whether quotas should be enforced for the highest ranking corporate positions as a means to addressing gender injustice is under vigorous discussion. Much of the debate has focused on the European Commission's (2012) draft Directive COM 614 which would place an 'obligation of means' on listed companies to ensure that at least 40% of non-executive directors (or 30% of all directors) of each corporate board are female by 2020.
- The latest Female FTSE report shows that only 17.4% of corporate board directorships are held by women — that is 541 out of a total of 3103.
- The three main objections to quotas relevant to the example of corporate boards are that quotas produce selection procedures whereby people are chosen not on merit but rather by their physical or social characteristics; that it is a form of affirmative action that is itself discriminatory and unjust; and that it serves to undermine the achievements of the women who have risen to senior positions on their own merit.
- The Critical Mass Marker approach seeks to overcome these objections and offers an alternative to EC policy, by providing a mechanism for identifying situations in which a disproportionate number of women occupy positions at a certain level and yet the natural progression one might expect to see does not materialize — where there is, in other words, a 'thwarted critical mass'.
- The Critical Mass Marker approach would ensure that people who are equipped with the relevant skills and experience are able to move up and across institutional structures irrespective of characteristics such as race or sex. The focus of such a policy effort would also be much wider than simply corporate boards at the very top ends of organizations, but all workers across the whole of their employing institutions.
- Overall, the Critical Mass Marker approach could be a much more effective and proportionate response to each institution's or collection of institutions' segregation patterns than blanket quotas aimed only at boards. Furthermore, the Critical Mass Marker approach provides a clear objective for equality which requires specific actions.

Corporate Boards, Quotas for Women, and Political Theory

Introduction

Across Europe, the question of whether quotas should be enforced for the highest ranking corporate positions as a means to addressing gender injustice is under vigorous discussion.

Much of the debate has focused on the European Commission's (2012) draft Directive COM 614 which would place an 'obligation of means' on listed companies to ensure that at least 40% of non-executive directors (or 30% of all directors) of each corporate board are female by 2020.¹

Bearing this draft Directive in mind, alongside the philosophical arguments that underlie the main challenges to quotas, this policy brief outlines the beginnings of an alternative quota policy called the Critical Mass Marker approach.

The political philosopher Louis Pojman is widely considered to have provided the definitive case against quotas in 1998, '[T]here are good reasons in terms of efficiency, motivation, and rough justice for holding a strong *prima facie* principle of giving scarce high positions to those most competent' (1998: 97–115). This is of course a compelling argument on the face of it, however, we might think about particular circumstances where we would countenance exceptions. There has, for example, been a great deal of work done on quotas in the context of group representation in democratic political arenas that are meant to respond to and act for diverse citizenries. The political theorist Anne Phillips, for example, has developed a compelling defence of female quotas for democratic political assemblies on the grounds that gender representation is one 'minimal condition for transforming the political agenda' in such a way that 'challenges the social arrangements which have systematically placed women in a subordinate position' (1995: 82). Another well-theorized example is that of racially sensitive affirmative action programmes for US

universities admissions procedures advocated by Ronald Dworkin, who argues that in this context quotas are vital as a means to reducing racial segregation in society which is, in and of itself, 'a social good' (1985: 294).

But what about contexts where these sorts of arguments both practical and philosophical are not so clearly applicable? One might argue that the primary function of the corporate board, for example, is not to act as a forum for representing or reflecting societal groups, but rather to manage an organization effectively. Should we still adopt quotas to correct segregation patterns irrespective of primary functions in such a context? The European Parliament and Council thinks we should. Dissatisfied with the long-observed efforts of listed companies across Europe to increase the number of women on their boards, the European Parliament and Council issued the draft Directive (COM 2012 614) in November 2012 to bring the number of female non-executives up to 40%.² Norway, for example, has already enforced this sort of quota policy for corporate boards, with some striking results. Several other countries such as France, Italy, Austria, the Netherlands, and Belgium have followed suit in some sense, whilst the UK has argued against.³

The Equality Act and gender balance on corporate boards

Whilst quotas are not currently permitted under UK law, equality and anti-discrimination laws have been supplemented with the introduction of positive action provisions in the 2010 Equality Act (Sections 158 and 159). The details of these provisions provide us with a set of characteristics very useful for theoretical discussion.

Under the Act, and distinct from quotas, positive action is permitted in relation to *actual* candidates for a particular job or promotion as opposed to setting impersonal targets which prescribe the

employment or promotion of people endowed with a certain characteristic (e.g. race or sex). Positive action in this context means that employing institutions are permitted to adopt ‘special measures’ aimed at alleviating disadvantage or under-representation experienced by those with any of the ‘protected characteristics’. These specified protected characteristics are as follows: ‘age; disability; gender reassignment; marriage and civil partnership; pregnancy; maternity; race (including ethnic or national origins, colour and nationality); religion or belief; sex and finally; sexual orientation’ (UK Equality Act 2010, Section 159). Each can be invoked, for example, as reason for an employer to favour one applicant with a protected characteristic over another who does not have the protected characteristics but nevertheless is of a comparable standard.

There is a crucially important question raised by the idea of the protected characteristics: which groups, commonly known to experience discrimination (the protected characteristics), should be eligible for quotas and in which circumstances? If we look, for example, to the context of the UK Equality Act’s promotion of positive action for guidance, it is merely determined that positive action should only be used as a ‘proportionate means of achieving the aim’ (UK Equality Act 2010, explanatory notes, para. 512). However, how proportionality should be interpreted is left open, and this is an important point to which I’ll return in my discussion of Critical Mass Markers.

The motivation for current debate on female quotas for corporate boards is clearly illustrated by the top 350 companies of the London Stock Exchange. The latest Female FTSE report shows that only 17.4% of corporate board directorships are held by women — that is 541 out of a total of 3103. These figures become even more noteworthy when we consider that it is within the non-executive director positions that we find the majority of female board members (the category that the Draft EU Directive is aimed at). In the FTSE 100, only 6.9% of Executive Directors are women, whilst the figure amongst non-executive directors is 25.5%.

In stark contrast, women make up 44% of Norwegian corporate board members. In 2003, Norway

introduced legislation that set quotas of no less than 40% women (or men) on all company boards (Norwegian Ministry of Children, Equality and Social Inclusion, 2011). Non-compliance is set against heavy legislation threatening fines and, in extreme cases, liquidation. Certainly, no one can be in any doubt that, in terms of equality of outcome, the Norwegian approach has been extremely successful. However, such an approach attracts a barrage of criticisms which not only emerge regularly throughout the press and policy discussions but dominate theoretical debates on quotas. Those most relevant to the context of female quotas for corporate boards can be summarized into three main objections:

- 1) that quotas will produce selection procedures whereby people are chosen not on merit but rather by their physical or social characteristics, which reduces the talent pool within institutions and their potential to function optimally;
- 2) that affirmative action is a form of compensation that is itself discriminatory and unjust;
- 3) that affirmative action serves to undermine the achievements of the successful minority who have risen to senior positions on their own merit.

Challenge 1: from meritocracy to mediocrity

Pojman suggests there are two fundamental features of meritocracy which should compel us to reject quotas. The first is that people should be treated as ends not means: ‘By giving people what they deserve as individuals rather than as members of groups, we show respect for their inherent worth’. The second is that we will be ‘better off’ if we employ the ‘best leaders, teachers, policemen, physicians, generals, lawyers, and airplane pilots that we can possibly produce in society’ (1989: 112).

Monitoring performance, devising business strategies, controlling capital expenditure, risk management, and securing maximal profits for shareholders: these are the sorts of functions that easily spring to mind when thinking about the purpose of corporate boards. Undoubtedly, we would expect corporate board members to be highly competent as they manage some of the largest and most powerful economic entities in the world. Evidently, what is needed are the very best corporate

executives around, and certainly, if we were to look to any number of highly successful companies, we might deduce from the composition of their corporate boards that a certain type, or more likely, a certain type of male, fits best. However, these sorts of assertions tell us nothing of the *reasons* why things are as they are.

Intrinsic to the assumptions built into the sorts of arguments that Pojman makes is that we are *already* operating in a meritocratic selection process and that the reasons why women do not rise to senior positions is something to do with their ability. Even when employing institutions fulfill their legal obligations by not overtly discriminating against women, opinions on which individuals 'fit best' are far from neutral. In Phillips's work on quotas for women in political assemblies she argues, 'there is no process of ... appointment that operates by a single quantifiable scale, and the numbers are always moderated by additional criteria. These more qualitative criteria ("personality", "character", whether the candidates will "fit in") often favour those who are most like the people conducting the interview' (1995: 61). Similarly, Iris Marion Young argues that 'criteria of evaluation often emphasize norms of conformity which contribute to the smooth maintenance and reproduction of the existing relations of privilege, hierarchy, and subordination' (1990: 205).

From this it would seem a good idea to secure a greater number of women as role models on corporate boards who would serve to disrupt some of these biases. But is this enough of a reason to inject women into corporate boards simply on the basis that there are very few at present? Even if we are wholly convinced that certain patterns of segregation indicate stark injustice and demand action, the objection to quotas that they might result in the promotion of inexperienced individuals to the boardrooms of some of Europe's most specialized and powerful corporate positions remains.

Challenge 2: from compensation to discrimination

The second popular objection to quotas and one that is particularly relevant to the case of corporate boards is the idea that such policies are in fact a form of compensation between advantaged groups and

disadvantaged groups (in our case, men and women respectively). Pojman, an avid critic of what he describes as 'reverse discrimination', sarcastically parodies the argument for affirmative action: 'young ... males are innocent beneficiaries of unjust discrimination ... and have no grounds for complaint when society seeks to level the tilted field. They may be innocent of oppressing ... women, but they have unjustly benefitted from that oppression or discrimination. So it is perfectly proper that less qualified women ... be hired before them' (1998: 101). In other words, Pojman is asking 'why would two wrongs make a right?'

In Dworkin's defence of racially sensitive university admissions policies in the US, however, he argues that whilst it may seem as if a 'merit candidate' is to be replaced by a 'quota candidate' on the simple grounds that the latter is an African American, this would be to misframe the situation. Dworkin argues that no one has a *right* to a particular position such as a university place and that the only entitlement any candidate genuinely has, or should expect, is not to 'suffer from the prejudice or contempt of others' (1985: 298). On this view, the quota policy becomes one of many features central to the university admissions process, including, for example, restrictions on total numbers of admissions offers available. For Dworkin, then, an unsuccessful admissions candidate has no grounds for complaint against an admissions quota policy. This approach would seem to fit similarly well in the context of female quotas for corporate boards; because appointment to the corporate board is not a question of right, implementation of a quota policy could not be said to infringe upon the rights of any man to sit on the board.

Despite this insight, we are still faced with overcoming the objection that quotas will lead to the promotion of women who lack the right experience or ability to function at the corporate board level. Before turning to this specific point, let us first consider the third objection relevant to the example of female quotas and corporate boards.

Challenge 3: from insult to injury

It is often argued that quota policies are degrading to those who did not attain their high-status posts through them. By introducing quotas, so the

argument goes, the view that women have usurped senior positions merely in virtue of their sex will become overwhelming. Consequently, all women, whether genuinely competent or not, become stigmatized by the mere presence of quota policies and in turn, these negative assumptions become yet more injurious in the form of sexism and sex-based inequality — the very grievances that quotas are supposed to address. Pojman (1998: 110) consolidates this form of criticism by asserting that affirmative action is ‘sexist’ as it fails to treat women with dignity as individuals. The first response to this sort of argument is simply that if we were to accept quotas as an effective mechanism for change then the small numbers of senior women who might be offended by them is surely disproportionate to the overall gains. Secondly, it is likely that the more women are present in the corporate context, the less degrading labelling would occur.

The three objections challenged

From these discussions of the three main objections to quotas relevant to the example of corporate boards (‘meritocracy’, ‘compensation’, and ‘insult’), we might accept that the current segregation patterns do not reflect meritocratic processes. Secondly, calls for quotas should not be framed in terms of ‘merit candidates’ being substituted with ‘quota candidates’. Thirdly, any offence caused by the existence of quota policies should be set against the just gains; moreover, one would hope that if the extreme levels of sex segregation which currently dominate the corporate board environment were to diminish, then derisive tokenism and degrading stereotypical assumptions about women would cease to prevail. Nevertheless, the arguments of Dworkin, Phillips, and Young, whilst extremely helpful on all three counts, have not provided us with a solution to the objection against quotas that they will lead to the enforced placement of ‘non-optimal candidates’ in the highest positions key to the corporate board function.

Here I want to look a little closer at each of the theoretical perspectives of Dworkin, Phillips, and Young to perhaps get to the crux of why we can’t extend their arguments to provide a solution to this particular objection.

‘Equality of Resources’

Dworkin’s Equality of Resources theory is a very extensive and complex theory aimed at justifying large-scale insurance-based redistributive state welfare according to one’s bad luck.⁴ For the purposes of this piece however, I want to single out a core element of Dworkin’s theory: the ‘Principle of Independence’. The Principle of Independence requires that we find a way ‘to place victims [of prejudice] in a position as close as possible to that which they would occupy if prejudice did not exist’,⁵ an objective which chimes with the objectives of anti-discrimination and equality policies, as well as COM 614. Bearing this claim in mind, let’s think back to the protected characteristics defined in the 2010 UK Equality Act, (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation). *All* of these groups can legitimately claim they have suffered prejudice. However, there is nothing in the Principle of Independence that enables Dworkin to distinguish between groups (all of which have suffered prejudice) for particular interventions in particular contexts.

In line with the aims of the UK Equality Act 2010, let’s assume (without much difficulty) that we can empirically show that injustice negatively affects the livelihoods of the protected categories. Does this mean then, that under the Principle of Independence we should aim to compensate any group who has suffered prejudice and has little presence on corporate boards? If we introduce female quotas for corporate boards, should we not introduce sexual orientation quotas, age quotas, religious quotas, gender reassignment quotas, and so on for corporate boards also? This seems a step too far and alongside the argument against quotas breeding mediocrity, it is the most challenging objection to quotas. What might Phillips and Young offer by way of alternative?

Equality of outcome and workplace democracy

Both Phillips and Young advocate some form of ‘equality of outcome’ (Phillips, 2004; Young, 1990) in the sense that they both focus on the integration and presence of groups as a proxy for satisfactory equality of opportunity.

Both hold that stark disparities such as our example of extreme sex segregation on corporate boards demand intervention and correction. Indeed, Phillips supports the view that, '[t]here might be some minor and innocent deviations, but any more distorted distribution is evidence of intentional or structural discrimination. In such contexts (that is, most contexts) women are being denied rights and opportunities that are currently available to men. This is a prima facie case for action' (Phillips, 1995: 63). However, the *sort* of action we might adopt to correct patterns of sex inequality is not specified by Phillips once we leave the realm of the political representation within a democracy. So, what does Young have to say?

Whilst generally appreciative of the objectives of quotas, Young nevertheless views them as having 'only a minor effect in altering the basic structure of group privilege and oppression ... [s]ince these programmes require that ... sexually preferred candidates be qualified, and indeed often highly qualified' (Young, 1990: 199). Young's contention is that justice ought to demand a much wider focus on all oppressed social groups, by which she means those who similarly experience structural injustice.

What is needed, Young argues, is a much more radical approach aimed at the general structure of group privilege and oppression within employing institutions and across society. Such an approach should be based on a model of workplace democracy and includes the idea that workers and social groups within a given organization should be able to participate in 'top-level decisions through a system of representation' and to 'decide democratically the qualifications for jobs and who is qualified for them' (1990: 224). On this account, the structures of corporate organizations would be altered in such a way as to guarantee there would be 'no top executives with initiating and final authority over the operations of the enterprise'⁶ and women and other oppressed social groups would be less likely to be excluded from key positions that have traditionally been dominated by white males (such as corporate boards).

Some version of this practice seems appealing to address the vast inequity between people's opportunities to democratically influence who is

selected for the most powerful institutional posts and also decisions that in many ways affect us all. Young's caveats notwithstanding, it is, nevertheless hard to imagine how the practicalities of this would play out to effective ends. Challenges that come to mind are not only that the number of staff employed by large competitive multinationals run into the hundreds of thousands and are situated across many different countries, but also, more simply, the problem of guaranteeing that democratic debate would be justly translated into actual decisions. Whatever the number or variation of perspectives at play in democratic decision-making, selection criteria, and appointment of high-ranking personnel, it is not clear that effective outcomes would necessarily follow. By selecting decision-makers on the simple basis that they represent a social group (e.g. gender) may well improve the chances that such a group will not be overlooked or discriminated against, but it does not necessarily mean that such a representative is well equipped to also make good strategic decisions at the highest levels. Alternatively, I want to offer a simple idea which comes from my analysis of Dworkin's, Phillips's, and Young's work (see full-length article). I call this the Critical Mass Marker approach and suggest that it goes some way to provide a sharper mechanism not only for identifying suitable candidates *within* a group selected for a certain kind of quota but also distinguishing *between* groups who have *all* suffered prejudice but for some of whom nevertheless, quotas are not appropriate in a given context.

A mechanism for distinction: 'Critical Mass Marker'

Generally 'critical mass' is understood to be an *objective* of policy and carries with it a sense of a process that is self-sustaining which, once begun, requires no further external impetus. Often, 30% is identified in Critical Mass Theory as the threshold percentage of female representation necessary to improve the culture and practices of male-dominated political assemblies. Unsurprisingly, there is much debate of whether 30% is the most effective threshold and whether or not such an approach has sufficient impact. The Critical Mass Marker approach I wish to sketch here, however, is distinct from Critical Mass Theory. Whereas Critical Mass Theory rests upon assumptions regarding the consequences of

achieving certain degrees of representation at a given hierarchical level, the Critical Mass Marker approach is about identifying situations in which a disproportionate number of women exist at the level beneath that in question and yet the natural progression one might expect to see does not materialize — where there is, in other words, a ‘thwarted critical mass’.

To turn to our example of the corporate board, there are over 2550 women at senior manager level in the FTSE.⁷ These women are ‘strong candidates’ for corporate board status — suitably educated, already accustomed to the sometimes extreme working patterns of the corporate world, and primed. As we so often see reported in the FTSE Female Reports and related studies, there is much frustration that too few of these women are moving up from the very senior management levels to the corporate board context. Unfortunately, there is very little data publically available at the individual company level concerning the number of women and men at different pay grades and levels within a given private sector organization. But still we can imagine a scenario in which a critical mass marker would work. If it were the case that a persistent critical mass marker existed (that is a disproportionately large cluster of women [or indeed any other group] just *under* the context in question) at *any* level within an employing organization, then quotas, tailored proportionately to each context, could be applied. This would be an alternative to the blanket quota of 40% currently proposed for only the very highest level context: the corporate board. The levels at which quota numbers would be set would depend upon the size of the relevant critical mass markers. Accordingly, proportionate quotas would be set according to the particular segregation patterns of each institution (or collection of institutions) and in collaboration with and subject to a regulative body.

A further and crucial feature of this approach is that wherever a critical mass marker is identified and a quota set, the responsibility must legally lie with the institution to ensure that the quota is met. Failure to do so would require explanation by the institution on a case-by-case basis to the relevant regulative body. The burden of proof, that is, lies with the institution to successfully defend its segregation patterns against the critical mass marker. The Critical

Mass Marker approach would ensure, then, at the very least, that people who are equipped with the relevant skills and experience are able to move up and across institutional structures irrespective of characteristics such as race or sex which might otherwise render them subject to structural injustices — a social fact many workers find themselves facing in the modern workplace, even if as a consequence of unintentional actions of their peers and seniors. The focus of such a policy effort would also be much wider than simply corporate boards at the very top ends of organizations, incorporating instead all workers across the whole of their employing institutions.

Overall, the Critical Mass Marker approach could be a much more *effective* and *proportionate* response to each institution’s or collection of institutions’ segregation patterns than blanket quotas aimed at boards. Furthermore, the Critical Mass Marker approach provides a clear objective for equality which *requires specific actions*, whereas positive action as set out in the Equality Act 2010 merely provides a *mechanism* that is only rarely invoked through individual court action or is too often avoided under schemes of institutional voluntarism. A critical mass marker has the advantage of indicating institutional biases and cultural prejudices (structural injustices) that can neither be reduced to chance-based explanations on the one hand, nor to the actions of an individual on the other. As such, policy based on the Critical Mass Marker approach would have to be administered in tandem with wider reaching equal opportunity policies⁸ and anti-discrimination legislation that is more focused on agent culpability. It is vital to clarify, however, that the argument here is not that where there are absences of a particular group but also no critical mass marker that this would not indicate a situation of grave moral importance. One can think of lots of examples (not least from Phillips, Young, and Dworkin) where this might be the case. Indeed, in some ways, the absence of a critical mass marker may be indicative of an even deeper or wider level of injustice (such as those stemming from class or education) — and such injustices may justify a degree of coordinated social action (including quotas) beyond that implied by the Critical Mass Marker approach.

The Critical Mass Marker approach is rather intended to identify and offer justification for action for the most obvious cases of structural injustice but at the same time avoids the most challenging objections to quotas which, as I have set out, are not addressed by Dworkin, Phillips, and Young. In the case of Young and Phillips, neither provides a mechanism for *restricting* action to suitably skilled candidates. Their call to action (in line with many advocates of blanket quotas) relates simply to an *absence of group representation*, leaving open the possibility of disproportionate levels of action aimed at individuals who, whilst having suffered from prejudice and injustice, are not necessarily strong candidates for particular remedial actions in particular contexts. A similar problem follows from

Dworkin's Principle of Independence, like much of our equality and anti-discrimination legislation, which does not provide a way of identifying which individuals, endowed with the protected characteristics, should be eligible for action in which contexts.

In conclusion, it is clear that we need to think hard about how to generate new public policy approaches to troubling and persistent segregation patterns and injustices. I suggest the Critical Mass Marker approach as a more productive and proportionate quota model than current policy proposals and also as a useful analytical device for detecting structural injustice and justifying intervention.

Notes

- ¹ For listed companies controlled by the public sector the deadline would be 2018. Small and medium-sized enterprises (SMEs) and companies with low numbers of female workers (10% or less) would be exempted. The Directive would terminate in 2028. See: <http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf>.
- ² For details see Directive Proposal COM (2012) 614 of the European Parliament and Council on improving the gender balance among non-executive directors of companies listed on exchanges and related measures. Available at: <http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf>.
- ³ See the UK Government commissioned Davies Reports 2011 (and 2012, 2013). Available at: <<http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>>.
- ⁴ See for example, Browne, J. and Stears, M. (2005) 'Capabilities, Resources, and Systematic Injustice: a case of gender inequality', *Politics, Philosophy and Economics*, 4/3, 355–73.
- ⁵ Dworkin, R. (2002) *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge MA: Harvard University Press, p. 162.
- ⁶ These would include 'what will be produced, or what services will be provided; the basic plan an organization of the production or service provision processes, including the basic structure of the division of labour; the basic wage and profit-sharing structure; the capital investment strategy etc.' (Young, 1990: 223).
- ⁷ I have used the 2012 data here (as it is not included in the 2013 or 2014 report) except for the total number of FTSE 100 senior managers and the total number of senior women in FTSE, which are not included in the 2012 report — for these I have used the previous report based on 2010 data. See FTSE Female Reports: <<http://www.som.cranfield.ac.uk/som/ftse>>.
- ⁸ For example, provision of sufficiently paid parental leave would inevitably reduce the rational calculus on the part of the employer that male workers are less of a negative risk in terms of employee working patterns. Also, we cannot be in any doubt that subsidized childcare enables both male and female parents to balance professional and domestic duties more efficiently. See, for example, Browne, J. (2013) 'The Default Model: Gender Equality and Structural Constraint', *Politics & Gender*, 9/2, 152–73.

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