

## AURÉLIE VIROT-LANDAIS\*

### GENDER EQUALITY IN FRENCH CIVIL SERVICE LAW\*\*

*ABSTRACT. This contribution does not aim to offer yet another legal and historical overview of the advent of parity in the French civil service, but rather to question the possible theoretical and practical relationship between parity and French civil service law. Parity is deliberately defined strictly, based on its etymology, as the equal sharing of power between identified and asymmetrical groups, which distinguishes it from the concept of equality. Three complementary questions are addressed in turn: how “authentic” is the translation of parity into French civil service law? What is the place of parity in the promotion of gender equality in the public sector? Conversely, what is the resonance of the logic of parity within the French civil service model?*

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\* Maître de conférences, Droit public. University of Poitiers.

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## 1. *Introduction*

“Women are on Earth to idealise everything” wrote Victor Hugo<sup>1</sup>. In a less romantic but no less useful way, women are... in the French civil service to... contribute to the fulfilment of public service missions!

The French civil service has been distinctly feminized for a long time. Women occupy nearly two-thirds of public sector jobs<sup>2</sup>, as civil servants or contract workers, but only 46% of jobs in the private sector. In 2021, 78% of the hospital civil service was female, 61% of the local civil service and “only” 57% of the state civil service – but with a massive presence in national education and the judiciary. This feminization is long-standing and has been relatively rapid since the mid-19<sup>th</sup> century<sup>3</sup>, particularly in the teaching profession<sup>4</sup>, nursing, typing and secretarial work. There are two main reasons for this. On the one hand, public service roles are largely in areas that are popular with women: social services, health, education, administration, justice, *etc.* On the other hand, the French career model provides guarantees that make it easier than in the private sector to balance work and family life, not to mention job security and pay rises as one progresses through one’s career.

On the surface, the French civil service appears to be the ideal professional sector for women. From a strictly legal point of view, everything is done to ensure strict gender equality: a formal ban on any discrimination based on gender, which has long been enshrined in the civil service regulations; equal pay for identical or similar qualifications and jobs<sup>5</sup>; career advancement rules that are strictly neutral and based on merit; equal access to public employment through competitive examinations and the gradual elimination of examinations reserved for men, as well as promotion through professional

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<sup>1</sup> Victor Hugo, ‘Les femmes sont sur la Terre’, in *Les Contemplations* (first published 1865).

<sup>2</sup> Directorate-General for Administration and the Civil Service (DGAFP), *Key figures on the civil service* (2022).

<sup>3</sup> The proportion of women in the civil service almost tripled between 1886 (just over 11%, or 32,000 women out of a total workforce of 280,000) and 1936 (nearly 30%, or 280,000 women out of a total workforce of 810,000). Figures and trends taken from Rose-Marie Lagrave, ‘Une émancipation sous tutelle, éducation et travail des femmes au XX<sup>e</sup> siècle’, in Georges Duby and Michelle Perrot (eds), *Histoire des femmes en Occident, t. V le X<sup>me</sup> siècle* (Tempus/Perrin 2002) 590. See also Annick Davaisse, *Les femmes dans la fonction publique. Rapport au Ministre de la fonction publique* (La Documentation française 1983) 15.

<sup>4</sup> This is not the case in all countries, for example in Germany.

<sup>5</sup> In fact, remuneration is calculated according to the index to which the employee belongs, which is based on their grade and seniority in that grade.

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examinations. In addition, female civil servants can benefit from guarantees related to their status as mothers. Although male civil servants who are also fathers were for a time deprived of some of these guarantees, despite there being no difference in their situation “technical”<sup>6</sup>, equality has since been duly restored, either by extending the benefit of the guarantee to fathers or by abolishing it for all civil servants who are parents!

While the situation is objectively better than in the private sector<sup>7</sup>, it should not be idealized. Formal equality is not real equality<sup>8</sup>! A number of extra-legal parameters guide and influence the destinies and choices of workers, both public and private: more chaotic or less linear and less rapid career paths; unequal levels of remuneration and pensions; unequal levels of professional responsibility as careers progress, despite comparable initial qualifications and age. As a result, women remain under-represented in law enforcement and defense professions, in diplomacy, in sport, and generally in the upper echelons of the administrative hierarchy. Although they are very present in the administrative sector, very few are prefects, directors-general of large local authorities or hospital directors. Similarly, the feminization of the positions of presidents of courts or chambers is inversely proportional to that of clerks or magistrates<sup>9</sup>.

### ***1.A. Concerns about gender equality in the French civil service***

With the help of the judiciary, legislator has gradually worked to strengthen professional equality between women and men. He initially proceeded by relying on the traditional approach of the principle of formal equality (equality of all before the law) to gradually guarantee equal eligibility for public employment – without gender interference and based solely on merit and ability<sup>10</sup> – as well as equal treatment of public

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<sup>6</sup> Guarantees justified by a difference in technical circumstances are those relating to pregnancy or breastfeeding, for example.

<sup>7</sup> According to JM Sauvé, Vice-President of the Council of State, “In many respects, the administration has always been ‘ahead’ of the private sector in recognising equal rights for women and men” (speech entitled ‘L’administration et les femmes’ delivered at the Historic Symposium on 27 May 2011).

<sup>8</sup> For a detailed overview of the application of the principle of equality in civil service law, see Alexis Zarcia, *L’égalité dans la fonction publique* (Bruylant 2014). For a summary presentation, Olivia Bui-Xuan, ‘Le principe d’égalité dans le droit de la fonction publique et de la haute fonction publique’ (2020) 4 Les Cahiers du Conseil constitutionnel 212.

<sup>9</sup> Women represent 70% of all magistrates in the judicial system, but only 39% of them held the position of first president and only 37% that of public prosecutor in 2023 (Guillaume Gouffier Valente, *Rapport visant à renforcer l’accès des femmes aux responsabilités dans la fonction publique* (Assemblée Nationale, No. 1330, June 2023) 28.

<sup>10</sup> The principle of “the legal aptitude of women” for public office, subject to “reasons of service”, established by the

servants<sup>11</sup>. Then, under the influence of European Union law attached to the principle of non-discrimination – but still within the framework of what formal equality allows –, the legislator began to censor and correct differences in treatment that were unjustified from a gender perspective, *i.e.* gender-based discrimination<sup>12</sup>. To this end, soft law has been regularly mobilized over the last twenty years: creation of the “professional equality between women and men label” in 2004; signing of the Charter for the Promotion of Equality and the Fight against Discrimination in the Civil Service in 2013; creation of the gender equality officer within administrations; planning of a gender equality strategy within each administration... In addition, professional equality between men and women has become a subject of collective bargaining since the 2013 and 2018 memoranda of understanding. Finally, the legislator has gradually taken up the issue of violence, moral and sexual harassment and sexist behavior, and the judge has taken care to adjust the burden of proof<sup>13</sup>. However, it has proved difficult to achieve real equality without resorting to differentiated actions to put an end to persistent *de facto* inequalities. Moreover, as the overall professional status of women has improved, society’s expectations have become more demanding, with persistent inequalities becoming increasingly intolerable in the eyes of society. It is difficult to pinpoint the exact date when differentiated measures based on quotas were first introduced, as the change has been gradual: the former Ecole Nationale de l’Administration (ENA) introduced measures to promote women’s access to this senior civil service school at a very early stage<sup>14</sup>; minimum quotas by gender were established in the 2000’s and reinforced in 2012 for the composition of social dialogue bodies, competition and professional examination panels, and even for recruitment to senior civil service positions. Since the adoption of the first memorandum of understanding on gender

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*Dlle Bobard* ruling (Conseil d’Etat, ass., 3 July 1936, No. 43239 et 43240, Lebon Collection) did not yet fully equate to equal eligibility for public sector jobs. The generalization of the principle of access to the civil service through competitive examinations marked a decisive extension of this case law. However, it was not until the Law No 75-625 of 10 July 1975 that most civil service bodies were opened to both sexes. See in particular Frédérique Édél, ‘Deux siècles de principe d’égalité admissibilité aux emplois publics (2012) 142 *Revue française d’administration publique* 339.

<sup>11</sup> For example, enshrinement of the general legal principle prohibiting the dismissal of a pregnant contract civil servant (Conseil d’Etat, ass., 8 June 1978, No. 80232).

<sup>12</sup> *J Griesmar v Minister for the Economy, Finance and Industry*, Court of Justice of the European Union, 29 November 2001, case C-366/99.

<sup>13</sup> Conseil d’Etat, ass., 30 Oct. 2009, *Mme Perreux*, No. 298348.

<sup>14</sup> Validation of principle by decision Conseil constitutionnel, No. 82-153 DC, 14 January 1983.

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equality in 2013, awareness of the issue has become systemic, and legislators have made it a priority, imposing new obligations on public employers. No fewer than five laws have been passed in nine years, some of which specifically target the issue of gender equality: Law No. 2014-873 of 4 August 2014 on real equality between women and men; Law No. 2016-483 of 20 April 2016 on the ethics and rights and obligations of civil servants; Law No. 2017-86 of 27 January 2017 on equality and citizenship; Law No. 2019-828 of 6 August 2019 on the transformation of the civil service; Law No. 2023-623 of 19 July 2023 aimed at strengthening women's access to positions of responsibility in the civil service. However, it takes time and much more than laws to change habits and prejudices, as well as the pool of civil servants.

### ***1.B. The link between equality and parity***

In parallel with the term “professional equality between women and men”, the term “parity” is used in French political discourses for twenty years and has acquired, like a fashion trend, a performative notoriety in normative texts as well as in many academic papers in the social sciences<sup>15</sup>. The temptation for both advocates and detractors of parity is possibly – and often – to turn it into “a catch-all term that encompasses everything related to gender equality”<sup>16</sup>. However, gender is not the only purpose of parity (in political, economic and social life). This one can also govern the balance of power between employers and employees<sup>17</sup> or, in some countries, between ethnic or religious communities<sup>18</sup>.

Defining parity is a challenge. Although the term is frequently used, it is rarely defined and, when it is, definitions vary widely. Without claiming to defend the only authentic meaning, we propose the following definition<sup>19</sup>: the equal sharing of power

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<sup>15</sup> Judith Butler, Éric Fassin and Joan Wallach Scott, ‘Pour ne pas en finir avec le «genre»... Table ronde’ (2007) 24 *Sociétés & Représentations* 285; Mathieu Gateau, Maud Navarre and Florent Schepens (eds.), *Quoi de neuf depuis la parité? Du genre dans la construction des rôles politiques* (Editions Universitaires de Dijon 2013); Eléonore Lépinard, ‘Faire la loi, faire le genre: conflits d’interprétations juridiques sur la parité’ (2006) 62 *Droit et société* 45.

<sup>16</sup> Geneviève Fraisse, ‘La parité, un mot bon à tout faire’ (2002) 1 (7) *Travail, Genre et Société* 117.

<sup>17</sup> There is even talk of parity in the management of the social protection system in France: Laure Machu and Vincent Viet (eds), *Pour une histoire plurielle du paritarisme. Fondements, formes et usages (19<sup>e</sup>-20<sup>e</sup> siècles)* (La Documentation française 2021).

<sup>18</sup> Any other subject could be addressed in any given legal system if it is deemed imperative to make it a structural societal priority and to promote equal representation in positions of power.

<sup>19</sup> This definition is based on the etymology and characteristics and posits that parity and equality are not synonymous.

between identified and asymmetrical groups.

Three elements of the definition are therefore essential. Firstly, the purpose of parity is focused on the sharing of power between groups; its aim is equal representation in the “places” of power. Secondly, parity is based on an obligation to achieve a result which can be quantified. Finally, parity is an accounting term, it belongs to the language of numbers in the mathematical sense of the term. It refers to the equal distribution of groups with a view to diversity. The quota is its implementation tool<sup>20</sup>. The target figure or percentage is, in principle, unrelated to the actual quantity. Parity conveys an ideal representation. This condition is twofold. Logically, it promotes a representation that is disconnected from actual numbers: a ‘balanced’ representation. Numerically, parity imposes a perfectly balanced representation: 50%/50% when there are two groups. Both aspects of the condition are extremely demanding, intrinsically and in light of the specific situations to be “rebalanced”. For the effective implementation of the parity requirement, a rigorous and pragmatic compromise consists of imposing *ab initio* the requirement of ideal representation, disconnected from actual numbers; but the quantitative ideal must be lowered initially. Since the initial quota is disconnected from actual staffing levels, a gradual approach and adjustments to the quota are logical and necessary in order to initiate the process in the presence of highly asymmetrical talent pools and to ensure the effectiveness of a system. However, in the medium to long term, the quota 50/50 must be implemented, with a few regulated exceptions.

These demanding conditions limit the scope of application and often, if not always, make it difficult to implement effectively. They make it possible to distinguish between parity and equality, which, more generally, consists of treating people in the same situation identically. Parity is merely a strict arithmetic application within the corridors of power and postulates a real imposed equality. Due to its obligation to achieve results, it differs strictly from equal opportunities and, due to its imposed nature, goes further than positive discrimination.

The potential of parity is both promising and limited due to its mathematical nature. Strictly defining parity promotes its, modest but real, effectiveness and, finally, avoids societal disappointment. Parity appears to be an elusive concept, not only in terms of its definition, but also in terms of its foundations (which are specific to each

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<sup>20</sup> However, the quota is not a systematic indicator of parity since this tool can also be used to promote diversity unrelated to the issue of power sharing. Examples from different legal systems include: the feminization of subordinate and intermediate jobs, geographical or racial diversity in university admissions, and access for people with disabilities to sports facilities.

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legal system that enshrines it) and in terms of its legalization. The issue of the effectiveness and efficiency of the measures implemented is twofold. At the level of a given rule of law, it is a question of assessing its quantifiable success. At the level of law, there is an additional existential question of an epistemological nature: what can a rule of law contribute to the advent of parity when its underlying drivers are essentially cultural, sociological and economic? What does parity have to gain or lose by mobilising the law? What does the law have to gain or lose by venturing into the subject of the equal sharing of power between identified and asymmetrical groups? The question is even more salient in the professional sphere than, for example, in the political sphere. Indeed, as Geneviève Fraisse points out:

While the political world of citizenship and representation can be quantified in terms of numbers and equal opportunities, the professional world uses categories of choice, real or supposed, of job distribution and individual transgression that place each individual in a constellation of rights and desires. The word 'parity' as an equivalent of equality is therefore inadequate: it cannot account for everything that relates to freedom in employment<sup>21</sup>.

### ***1.C. - The enshrinement of gender parity in French civil service law***

In France, the logic of gender parity first conquered the political arena, the seat of power *par excellence*, by attempting to force political parties to promote female candidates in national and then local elections (gradually since the 1980s)<sup>22</sup>. It then conquered the professional sector, erratically but systemically, at or near the same time in the private and public sectors (with the former slightly ahead). Parity was not unknown in the professional sectors, as it had been enshrined, after much struggle, in social dialogue between employers and staff. In terms of the feminization of professional positions of power, progress is currently less successful<sup>23</sup>.

In French civil service law, three areas of power have gradually attracted the attention of legislator: social dialogue bodies, competition and professional examination boards, and senior civil service. These three areas certainly fulfil this finalist condition. Indeed, social dialogue bodies, both senior<sup>24</sup> and local<sup>25</sup>, are one of the key forums for

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<sup>21</sup> Fraisse, (n 17).

<sup>22</sup> Janine Mossuz-Lavau, *Femmes/hommes. Pour la parité* (Presses de Sciences Po 1998).

<sup>23</sup> It goes without saying that gender parity measures consider the biological sex of individuals, as this is the only criterion that can guarantee their reasonable and effective application.

<sup>24</sup> Joint Council of the Civil Service (CCFP) and the higher council for each branch (CSFPE, CSFPT, CSFPH).

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exchange, dialogue and negotiation between trade union representatives and employers. They enable the production of opinions or recommendations, which must be collected, intended to inform decision-making on the functioning and human resources strategy of the public employer. Where applicable, their intervention may be decisive<sup>26</sup>. Admittedly, a position of power cannot be decreed, and the influence of social dialogue bodies seems, in practice, to be somewhat undermined by the reframing of the scope of their advisory role<sup>27</sup>, the dynamics of union representation, and the consideration given to them by public employers. For its part, the senior civil service is unquestionably a place of power, regardless of the public employer. Its jobs fall into the A and A+ hierarchical categories and involve the officials to participate in strategic political and managerial decision-making. They very often involve a specific relationship of trust that justifies a margin of discretion in the choice of official. This explains why the public authorities first focused their attention on the composition of the selection boards for competitions and examinations leading to entry into the civil service before “tackling” the recruitment phase itself. The selection boards for competitions and professional examinations are themselves decisive centers of power for the constitution of pools of personnel in the various corps and employment categories, and even more so in those of category A+<sup>28</sup>. These collegial bodies participate, to the extent of their powers, in human resources strategic decision-making by deciding on access to a corps or grade and then allowing the appointment process<sup>29</sup> to take its course. The feminization of this seat of power aims to renew the way juries perceive female candidates as well as the choice of written and oral subjects<sup>30</sup>. Competition and professional examination panels

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<sup>25</sup> Social Committee and Joint Administrative Committee (CAP) or its equivalent for contract workers (CCP).

<sup>26</sup> This is the case in disciplinary matters for the joint administrative committee (CAP – for civil servants) or the joint consultative committee (CCP – for contract workers) established as a disciplinary council, or in health and safety matters for the social committee.

<sup>27</sup> Particularly the joint administrative committee (CAP).

<sup>28</sup> Access through senior civil service schools, which are, at the state level, the *École Nationale d'Administration* (ENA), replaced by the *Institut national du service public* (INSP), at the local level, the *Institut national des études territoriales* (INET), and in the hospital sector, the *École des hautes études en santé publique* (EHESP).

<sup>29</sup> Which varies according to the civil service.

<sup>30</sup> In her 1999 report, the State Councillor, Anne-Marie Colmou, emphasized that “The results of recruitment competitions show that girls are selected more strictly than boys. If we accept, in view of their academic results, that this is not a general deficiency on the part of girls, we can also attribute this effect to the generally very male composition of the selection panels” (Anne-Marie Colmou, *L'encadrement supérieur de la fonction publique: vers l'égalité entre les hommes et les femmes: rapport au ministre de la fonction publique, de la réforme de l'État et de la*

are now places of power that are subject to competition, as the pool of civil servants is challenged by that of contract workers. This justified the legislator's decision to "invest" in the recruitment stage to promote the feminization of senior civil service positions. However, it remains a significant place of power as long as the French career model persists.

The process always began with incentives and encouragement<sup>31</sup> aimed at public employers (primarily the State itself), before moving on to coercion<sup>32</sup>. The binding joint approach began for the first two "centers of power" with the Génisson Act 2001<sup>33</sup>, following the Colmou report of 1999<sup>34</sup>. The Sauvadet Act 2012<sup>35</sup> marked a decisive

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décentralisation' (La Documentation française 1999) 63). The aim of this report was to continue to rectify biases and bring about change from within the tests designed by and for men.

<sup>31</sup> About the feminization of the composition of competition and professional examination boards, the encouragement and incentives promoted through circulars (notably that of 1983) did not receive sufficient response. The Génisson Act 2001 established a minimum quota for the representation of each gender in the civil service, but the Council of State substantially limited its scope by making it a target rather than an obligation (CE sect 22 June 2007, No. 288206, Rec. 253). The Sauvadet Act 2012 reinforced the obligation by setting a quota of 40% and extending it to the other two civil services – something that the *Colmou Report* had proposed as early as 1999! For pragmatic reasons, the legislator authorized the setting of lower minimum thresholds to consider recruitment constraints and the specific needs of the body or employment framework.

<sup>32</sup> With regard to the feminization of the composition of social dialogue bodies, the mandatory approach began with the Génisson Act 2001 for the feminization of public employer representation and only with the Act on Ethics and Rights and Obligations 2016 for the feminization of employee representation, following the 2015 Act on the private sector on the grounds that "it was necessary to wait until this sector was also ready" (Colmou (n 31) 57).

<sup>33</sup> Law No. 2001-397 of 9 May 2001 on professional equality between women and men, known as the Génisson Law. Remediating the veto imposed by the Constitutional Council on attempts to enshrine an obligation of balanced representation of men and women, outside the electoral sphere: Conseil constitutionnel, dec. No 2001-445 DC of 19 June 2001, *Organic Law on the status of magistrates and the High Council of the Judiciary* (concerning the ratio set at 50/50 for the composition of the High Council of the Judiciary in 2001); dec. No 2006-533 DC, 16 March 2006, *Law on equal pay for women and men* (concerning the 20/80 ratio on the boards of directors and supervisory boards of private companies and public sector enterprises, as well as the procedures for appointing staff representatives, labor court judges and joint bodies in the civil service); dec. No. 2001-455 DC of 12 January 2002, *The social modernisation law referred to the Council and the Génisson law of 9 May 2001* (concerning the one-third ratio in competition juries, civil service selection committees and bodies responsible for validating prior learning). For an analysis of the Constitutional Council's reasoning: Gwénaële Calvès, 'Le Conseil constitutionnel et les quotas par sexe : une fuite en avant', in Xavier Bioy and Marie-Laure Fages (eds), *Egalité – Parité* (Presses de l'Université de Toulouse Capitole 2013) 77.

<sup>34</sup> Colmou (n 31).

<sup>35</sup> Law No. 2012-347 of 12 March 2012 on access to permanent employment and the improvement of employment conditions for contract workers in the civil service, the fight against discrimination and various provisions relating to the civil service, known as the Sauvadet Law.

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step forward following the Guégot report of 2011<sup>36</sup>: it reinforced the first two measures by imposing a minimum threshold of 40% for each gender and, more boldly, enshrined an obligation for balanced appointments in senior civil service positions. The latter was reinforced by a law of July 2023<sup>37</sup>, which notably enshrines the fateful threshold of 50% by 2030 and adds an obligation of parity in the “stock” of senior civil servants. However, the initial voluntarism of the Sauvadet Law should not be overestimated. Indeed, if the constitutional revision of 2008<sup>38</sup> opened up new possibilities in terms of access to professional responsibilities, it was thanks to an amendment proposed by Ms Guégot, author of the eponymous 2011 report, that the much-vaunted 2012 Law established a quota for first-time recruitment to management and executive positions. Moreover, the quantitative results highlight the difficulty of implementing these so-called parity measures.

Under current law, four obligations governing the French civil service are presented as transposing the requirement for gender parity. In chronological order of appearance, these are:

- a minimum quota to be respected for the composition of candidate lists or for the appointment of representatives within professional bodies: 40% for employer colleges; in proportion to the share of each gender for staff colleges.
- a quota of 40% for each gender (or at least 1 if the jury consists of 3 people) – the threshold may be adjusted depending on the sector – and, since 2015, alternating chairmanship between men and women.
- a double quota for recruitment to senior civil service positions: for initial recruitment (flow): 40% since 2012; possibly 50% from 2026 onwards; and for subsequent recruitment (stock): 40% from 2026 onwards.

The presentation is not intended to offer yet another legal and historical overview of the advent of gender parity in the French civil service, but rather to examine the possible theoretical and practical relationship between gender parity and French civil service law. Three complementary approaches will be explored in turn: questioning

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<sup>36</sup> Françoise Guégot, Rapport public au Président de la République, *L'égalité professionnelle homme-femme dans la fonction publique* (La Documentation française 7 March 2011).

<sup>37</sup> Law No. 2023-623 of 19 July 2023 aimed at strengthening women's access to positions of responsibility in the civil service.

<sup>38</sup> Constitutional Law No. 2008-724 of 23 July 2008 on the modernization of the institutions of the Fifth Republic, Art. 1, adding a new paragraph to Article 1 of the Constitution: “The law promotes equal access for women and men to electoral mandates and elected office, as well as to professional and social responsibilities”.

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the “authenticity” of the translation of parity into French civil service law (I), questioning the place of parity within the approach to promoting gender equality in the public sector (II) and questioning, conversely, the resonance of the logic of parity within the French civil service model (III).

## **2. *The translation of parity into French civil service law***

Between the laudatory performative discourse of the public authorities and the criticism of activist movements, the state of positive law provides an overview of the reality of the legislator’s commitment to parity within the French civil service. The first angle of this assessment consists of comparing French regulatory mechanisms with the standards of parity requirements. It appears that gender parity is undoubtedly enshrined in French civil service law, to a much greater extent than in Labor Law or electoral Law (B). However, not all of the measures designed to achieve this goal can be described as truly “gender-equal” tools (A).

### ***2.A. A circumscribed translation***

French civil service law has undoubtedly been part of a parity approach since 2001. The term “parity approach” seems the most appropriate to subsume measures of varying intensity and conformity with regard to the characteristics of the strictly understood requirement of parity. With a narrow and operational definition of parity, not all of the measures labelled as such by the French legislature pass the qualification test. However, the majority do, which demonstrates a good theoretical acculturation of parity within the French civil service model.

The three sets of conditions are thus met by the measures to increase the proportion of women on competition and professional examination panels and to increase the proportion of women recruited to senior civil service positions (i). In contrast, they are fulfilled asymmetrically and partially regarding the measure to increase the number of women in social dialogue bodies, since the procedures for appointing employer and employee representatives differ (ii). As the condition relating to the seat of power does not pose any particular difficulty (see introduction), the discussion will focus on the two conditions that are more difficult to meet.

***2.A.i. Qualification acquired for measures to increase the number of women on selection boards and in recruitment in the senior civil service***

The two measures to increase the number of women on selection boards and in senior civil service recruitment meet the three cumulative conditions: not only the condition relating to positions of power, already mentioned in the introduction, but also the very demanding conditions relating to the obligation to achieve results and equal representation.

The condition relating to an obligation to achieve results – and not just to take measures – is effectively met for both measures. Strictly speaking, in order to respond to the proactive nature of parity, it must be an obligation to achieve results “on arrival”! The aim is to influence the final composition within the place of power by imposing a balanced quantitative presence of each gender group. The parity mechanism must influence the actual composition of the bodies and talent pools of the various places of power identified, by overcoming the vagaries of chance and restricting the freedom of choice of employers and voters. This is how parity differs from positive discrimination. This condition is certainly met in the context of the feminization of the composition of competition and professional examination juries, with the quota relating to the number of members sitting on the jury. It is also met in the context of the feminization of recruitment within the senior civil service, because the quota relates to the number of recruits and not to the number of candidates interviewed. By focusing on the incoming “flow” from 2012 onwards, the legislator was banking on a gradual increase in the number of women in senior civil service positions in the medium to long term. After ten years, in order to counteract the bias of focusing on the initial flow, the legislator introduced an additional performance obligation, which has a greater impact on human resources strategy, relating to the actual “stock” of civil servants in senior positions.

Because of this obligation to achieve results, parity differs from positive discrimination, going beyond it. The measure to increase the number of women in senior civil service positions is a particularly good example of this conceptual overreach, as well as its bold and exceptional nature compared to the French approach to equality and the meritocratic concept of the French civil service. The aim is to help and give priority to a group – in this case women – who have the ability and aptitude to attain these jobs through ‘natural’ selection<sup>39</sup> but who are less successful in doing so because of structural barriers and biases, most of which are extra-legal. Rather than sticking to a transitional equal opportunities scheme, the legislator has imposed an obligation to

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<sup>39</sup> Because there is no problem with access to higher education in particular.

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achieve recruitment results.

Furthermore, from the outset, the French legislator has taken care to adopt the condition of equal representation, about the two measures currently under discussion. The measure to increase the number of women on competition and professional examination panels is based on a logic of balanced representation, unrelated to actual numbers, even though the quota remains below 50% (initially 30%, 40% since 2012). Even though the percentage has been lowered, it is still higher than the actual proportion of people of each sex. In addition, a minimum requirement stipulates that there must be at least one person of each gender if the panel is composed of three members<sup>40</sup>.

It is undoubtedly the feminization of recruitment to senior civil service positions that best embodies the requirement for parity in French civil service law. The obligation to increase the proportion of women in initial recruitment to senior civil service positions is based on a requirement for balanced gender representation, regardless of actual staffing levels, with an initial requirement of 40% in 2012 (unless adjusted) and possibly increased to 50% following the 2023 Law<sup>41</sup>. This will be the first “authentic” translation of the parity requirement into French law. The additional obligation to increase the proportion of women in the workforce in the medium to long term is also part of a logic of uncorrelated representation and retains the minimum threshold of 40% – which is likely to be adjusted downwards in bodies where there is a significant imbalance.

### ***2.A.ii. Partial qualification for measures to increase the number of women in social dialogue bodies***

The feminization of social dialogue bodies in the civil service is based on several approaches, not all of which fully meet the definition of parity. This long-standing measure has not changed in principle since the Génisson Act 2001, unlike the contemporary measure to increase the number of women on competition and professional examination panels. Beyond the question of compliance with parity requirements, it is the overall consistency of the mechanism that lacks unity.

Unlike the condition relating to positions of power<sup>42</sup>, the other two substantive

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<sup>40</sup> General Civil Service Code (CGFP), Art. L. 325-17, para. 4.

<sup>41</sup> The Law of July 2023 introduces a twofold change to the threshold: on the one hand, it provides for an increase in the level of representation for administrations that already comply with the 40% threshold, with a gradual transition to 50% (in phases, starting on 1<sup>st</sup> January 2026, CGFP, Art. L. 132-5); on the other hand, it requires the least “virtuous” administrations to comply with the minimum threshold of 40% from 1<sup>st</sup> January 2027 – with a three-year period to achieve compliance (CGFP, Art. L. 312-9-1).

<sup>42</sup> See *I.C.*

conditions are not systematically met.

As previously explained, parity is based on an obligation to achieve a “genuine” result. However, the legal framework for increasing the number of women in social dialogue bodies only very imperfectly fulfils this condition. It fulfils it for the portion of representatives who are appointed. Appointment guarantees effective presence within the social dialogue body and, subject to compliance with other conditions, contributes to its qualification as a gender-balanced body. This is the case within “local” social dialogue bodies<sup>43</sup> for representatives of public employers and, within higher-level bodies<sup>44</sup>, for representatives of public servants and many of those of public employers. In contrast, in the case of the election of representatives, the legislator has placed the obligation to increase the number of women at the stage of drawing up the lists, but without any guarantee of a sufficient increase in the number of women in the social dialogue bodies. This certainly makes it possible to initiate a movement, but in this watered-down form, parity then resembles the logic of equal opportunities and loses its specificity, if not its interest. Adopting a strict and finalist approach to the obligation to achieve results must therefore lead to the exclusion of measures relying on freedom of vote and the vagaries of the ballot. When it comes to gender, electoral logic and parity are fundamentally restive with each other, without necessarily being antonymous<sup>45</sup>. While parity between employers and employees is achieved by establishing colleges regardless of the terms of access, the introduction of an additional level of parity, in this case gender, implies constraining the very composition of these colleges. The law can constrain a nomination, but it cannot easily constrain the outcome of the ballot box without altering the electoral principle itself.

The condition of equal representation is also only imperfectly fulfilled by the measures to increase the number of women in social dialogue bodies. As explained above, equal representation is based on an ideal 50/50 representation *ratio*, which is

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<sup>43</sup> For the record, the social committee and the joint administrative committee (or joint consultative committee).

<sup>44</sup> Article L. 241-1 of the CGFP stipulates that “The respective members of the Joint Council of the Civil Service, the Higher Council of the State Civil Service, the Higher Council of the Local Civil Service and the Higher Council of the Hospital Civil Service shall be appointed under the following conditions: 1° The representatives of each trade union organization representing public servants that holds more than one seat shall be appointed by those organizations, each respecting a minimum proportion of 40% of persons of each sex; 2° Representatives of public employers shall be appointed, in each of the categories they represent, in accordance with a minimum proportion of 40% of persons of each sex. When they are elected, this proportion shall apply to each list of candidates by category.

When the number of seats mentioned in 1° or 2° is equal to three, the difference between the number of persons of each sex may not exceed one”.

<sup>45</sup> As illustrated by the voting system for cantonal elections.

unrelated to actual staffing levels. While this quota can only be achieved gradually, the minimum threshold must always be decoupled from the potential of the existing pool. This requirement for balanced representation is met within the higher bodies for both colleges<sup>46</sup> and within the local bodies for the college of public employer representatives. The initial quota of one-third of members of each sex imposed on the State as an employer alone was replaced in 2012 by a minimum threshold of 40%<sup>47</sup> – when it was extended to all branches of the public service. In contrast, about the feminization of the college of staff representatives within local authorities, the legislator has adopted a realistic feminization target and a logic of proportional representation: candidate lists must include a number of women and men in proportion to the share of men and women represented<sup>48</sup>. The quota must reflect the workforce; it provides an overview of the feminization of the electorate but without imposing increased feminization or additional effort. Although we understand the desire not to place too many constraints on trade unions, the measure is inherently inconclusive.

While the glass may seem insufficiently full at the end of this analysis, which focuses solely on civil service law, it seems a little less so when compared to the framework provided by Labor Law and electoral Law!

### ***2.B. A rooted translation***

It appears that only the measures specifically developed in French civil service law comply with the substantive conditions of parity, even though the 50/50% quota is not yet always imposed or achieved. Indeed, the measure to increase the number of women in social dialogue bodies is “stagnating” in the area of equal opportunities, like similar measures in Labor Law and politics. The scope of this partial exclusion is significant, since the framework on which these measures are mainly based is taken from the “parity” approach initiated in politics and developed for social dialogue bodies in Labor Law.

This harsh assessment, made solely from the perspective of the acculturation of parity in French civil service law, must therefore be placed in the overall context of

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<sup>46</sup> CGFP, Art. L. 241-1 (cited above).

<sup>47</sup> When representatives are elected, the 40% quota applies to the lists of candidates, while it directly impacts the composition of the college when representatives are appointed.

<sup>48</sup> Article L. 211-4 of the CGFP stipulates that “In order to promote equal access for women and men to professional and social responsibilities, the lists of candidates presented by trade unions representing public servants in professional elections shall be composed of a number of women and men corresponding to the proportion of women and men represented within the body concerned” (codification of Article 9 *bis*-II of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants).

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French positive Law. At this macro-legal level, it is worth highlighting the pioneering role of civil service law in relation to the private sector and the political sphere, notwithstanding the necessary areas for improvement. Indeed, legislator and social science doctrine tend to present the latest advances in gender parity in civil service law as concomitant with and consequent upon advances in the private sector. However, over the long term, a systemic comparison favors civil service law<sup>49</sup>. In fact, the gender-based parity approach in French Labor Law is limited to measures to increase the number of women in social dialogue bodies – which cannot be described as parity measures as such – and does not include measures to increase the number of women in management positions in private companies. The laws have enshrined a parity mechanism for the benefit of female administrators in the management bodies of large private companies, and not female employees in the private sector<sup>50</sup>. This advance falls within the scope of Commercial Law but not Labor Law. Imposing parity is exorbitant, which may explain why French lawmakers are reluctant to interfere in the human resources strategies of private employers but impose greater restrictions on public employers – the State, local authorities, hospitals, *etc.* – who are expected to set an example.

Furthermore, still at this national macro-legal level, gender parity has only flourished in cases involving the appointment of individuals (female directors of large companies, female civil servants in senior positions, and some female representatives of public employers in social dialogue bodies). In contrast, under current law, measures aimed at acculturating parity into the elective process – whether political or professional – fail to meet the essential conditions for parity. As in the case of the feminization of social dialogue bodies in the civil service, they have failed to establish an obligation to achieve a specific result in terms of the composition of the political deliberative body and continue to be based in part on a logic of proportional representation so as not to constrain trade unions. The mechanisms relating to the election of representatives in positions of power have hardly changed in principle since their introduction<sup>51</sup>. The legislator is reluctant to constrain political parties<sup>52</sup> or trade unions<sup>53</sup> in their strategic

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<sup>49</sup> According to Sauvé (n 8).

<sup>50</sup> Law No. 2011-103 of 27 January 2011 on the balanced representation of women and men on boards of directors and supervisory boards and on professional equality.

<sup>51</sup> In 2000 for political elections, in 2012 for professional elections within the civil service.

<sup>52</sup> Lavau (n 23) 41; Eric Fassin and Christine Guionnet (eds), 'Dossier Parity in practice' (2002) 4 (60) *Politix*; Grégory Derville and Sylvie Pionchon, 'La femme invisible. Sur l'imaginaire du pouvoir politique' (2005) 78 *Mots*. *Les langages du politique* 53.

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and discretionary choices of candidates and representatives. Only cantonal elections are truly gender-balanced in practice, due to a binomial voting system that requires a mixed gender composition<sup>54</sup>. This demonstrates, if proof were needed, that gender parity and elections are “reconcilable”, even if the question of the allocation of portfolios and executive functions within the deliberative assembly remains unresolved<sup>55</sup>.

Now that the scope of gender parity within the French civil service has been clarified, it is time to assess the effectiveness of the “approved” measures: not only the intrinsic effectiveness of their legal regimes, but also their extrinsic contribution to gender equality in the workplace.

### ***3. The contribution of parity to the general policy of professional gender equality within the civil service***

French gender parity measures occupy – and can only occupy, given the approach adopted – a specific place within the overall gender equality policy in the French civil service. On the one hand, they are quite clearly disconnected from this overall strategy (A). On the other hand, their effectiveness is hampered by legal regimes that are insufficiently binding (B).

#### ***3.A. A disconnected contribution***

When adopting a practical perspective, gender parity measures appear to be doubly “separate” from the other aspects of the overall gender equality strategy within the French civil service. Not only is the approach insufficiently coordinated with these other areas (ii), but it also benefits only a quantitatively limited and elitist group of female civil servants (i).

##### ***3.A.i. A limited female target***

Access to positions of power is necessarily limited due to the limited number of seats or posts available and the responsibilities involved. However, if we cross-check the

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<sup>53</sup> Zoé Haller and Camille Noûs, ‘Dire les inégalités et porter le combat féministe dans les organisations syndicales’ (2021) 126 Mots. Les langages du politique 109.

<sup>54</sup> Electoral Code, Art. L. 191 created by Law No. 2013-403 of 17 May 2013 on the election of departmental councillors, municipal councillors and community councillors, Art. 3.

<sup>55</sup> For an analysis at the municipal level: Quentin Lippman, ‘Les politiques de quota en faveur des femmes ont-elles brisé ou surelevé le plafond de verre?’ (2018) 69 (5) Revue économique 849.

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respective targets of the measures meeting the conditions for gender parity, the French legislator has enshrined an elitist and confidential form of parity. On the one hand, the legislator has clearly lacked rigor in promoting the feminization of social dialogue bodies, while access to this sphere of power is more widely available due to the number of seats available in national and local bodies and whilst the conditions of access, which are largely based on motivation and trade union involvement. In short, female public servants only have the right to try their luck, with no guarantee of meaningful gender representation in many bodies. On the other hand, the feminization of senior civil service positions – an area of gender parity on which the legislator has focused its attention – is only accessible to a limited group of women – and men, for that matter – due to the limited number of positions of responsibility at this level and the nature of the skills and responsibilities required. Similarly, the feminization of competition and professional examination panels<sup>56</sup> only benefits a limited number of women.

Furthermore, the beneficiaries of the measures established within the civil service are not always civil servants. They may also include local elected politicians, who are called upon to sit on the colleges of representatives of local public employers within the social dialogue bodies that concern them, or on the panels for competitive examinations and professional examinations for the local civil service.

The inherently elitist nature of joint schemes and the resulting conceptual gap lead trade unions, legislator and public employers, alike to prioritise causes and issues that are well identified and beneficial for the majority of female workers: namely the fight against harassment or the improvement of material working conditions<sup>57</sup>. The latter mainly use positive discrimination tools or simply formal equality<sup>58</sup>.

### ***3.A.ii. Insufficient coordination with other aspects of the overall gender equality policy***

There is no need to emphasize the essential nature of the link between parity and other aspects of the overall strategy for gender equality in the workplace. On the one hand, the former is only a limited part of the latter, and the boundary with positive discrimination is not always clearly defined. On the other hand, legal voluntarism has its limits because gender parity must above all be the result of societal acculturation and

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<sup>56</sup> It aims to contribute to the creation of a pool of female competition and professional examination winners who are likely to be candidates for and recruited to jobs in the A or A+ hierarchical category.

<sup>57</sup> Consider the contemporary initiatives of certain local public employers to grant menstrual leave to their female staff.

<sup>58</sup> This is simply a matter of drawing conclusions from an objective difference in circumstances.

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evolution which cannot be decreed, let alone imposed, by coercion. However, the integration of parity into this systemic strategy seems to have been insufficiently clarified or even considered by the legislator, even at the stage of determining the legal regime. Furthermore, legislator and legal experts often remain under the illusion that gender parity is an omnipotent solution. As a result, under current positive law, the coordination with other levers of professional equality remains imperfect.

For example, the feminization of the composition of juries for professional competitions and examinations has only been accompanied by an obligation to train members since 2015. There is much to be said about the effectiveness of this training requirement and the relevance of its content<sup>59</sup> when it is offered. Moreover, beyond raising awareness of biases and stereotypes, is it really possible to teach how to remedy them? All this is not enough to change the mindsets, biases and prejudices of women and men. Furthermore, gender parity must be combined with other representativeness requirements expected of competition and professional examination panels and may be somewhat drowned out by a flood of representativeness constraints that are difficult to reconcile<sup>60</sup>. Moreover, in highly gendered sectors of activity, such as certain fields of higher education, this leads to over-solicitation of agents of the minority sex and, in doing so, to a requirement for representation that risks restricting the effectiveness of measures intended to guarantee a minimum presence of the under-represented sex. This reveals a reverse inequality for people of the quantitatively under-represented gender.

This issue raises the question of the “talent pool”, which further underpins the challenge of increasing the number of women in senior civil service positions. At this stage in the acculturation of gender parity, the ministries most committed to professional equality are not always those that meet the quota, due to a lack of a sufficient talent pool<sup>61</sup>. And for good reason: the feminization of senior civil service jobs depends on a whole chain of training and professional careers. Without a female talent pool, it is difficult to give priority to recruiting women with equal skills. Without improving the

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<sup>59</sup> It borders more on a litany of biases and stereotypes, without offering some tools to try to remedy them individually and collectively.

<sup>60</sup> For example, in the local civil service, competition juries and professional examination boards must balance the minimum requirement of 40% of each gender with the triptych of colleges based on the quality of elected officials, agents and qualified persons, but also geographical origin, since the organization of competitions and examinations for categories A, B and C categories is shared between several local civil service management centers. Similarly, the composition of recruitment committees for senior lecturers must combine this quota with two other criteria of representation: statutory (equal numbers of members belonging to the body of professors and senior lecturers) and geographical (equal numbers of members from outside the recruiting university and members belonging to it).

<sup>61</sup> One example is the Ministry of Foreign Affairs.

quality of working life<sup>62</sup> some women will not aspire to take on high-level positions and remain in them. All these elements fall under negotiation and the internal organization of professional structures, thereby highlighting the intrinsic limitations of the law, or more precisely, of legal constraints. Should these issues be addressed within the framework of social dialogue? Should binding rules be imposed at the risk of excessive interference in the managerial organization of administrations? The law is indeed facing limitations, as is the requirement for parity.

There are many persistent obstacles to the effectiveness of gender parity measures.

### ***3.B. A hampered contribution***

In French civil service law, acculturation to the parity approach remains too dependent on the goodwill of employers and trade unions, even though it is up to the legislator to organize and guarantee the binding and effective nature of the mechanisms. Such fragility is hardly surprising in the case of the mechanism for increasing the number of women in social dialogue bodies, which is based on a proportional representation requirement and an elective process<sup>63</sup>. It also affects the mechanisms for increasing the number of women on competition and professional examination panels and in senior civil service recruitment, which nevertheless have a performance obligation. The methods for implementing this obligation to achieve results are relatively soft and flexible. This may raise questions about the legislator's real motivation for enshrining parity or, at the very least, a parity-based approach. The two systemic limitations stem from insufficient constraints on compliance with the obligation to achieve results, to the point of distorting it, and on the production and communication of quantified information.

The example of measures to increase the number of women in senior civil service positions is emblematic. Although in 2021 – for the first time since 2012 – the threshold

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<sup>62</sup> In particular by changing the systemic approach to meeting times, daily working hours and the use of teleworking.

<sup>63</sup> The legislator is not very demanding when it comes to the intensity of the gender representation obligation within social dialogue bodies, nor is it very demanding when it comes to the conditions for implementing the proportional representation obligation thus enshrined. It has ensured that the conditions for the effectiveness of this watered-down obligation do not place too many constraints on trade unions, to the extent that one might question the usefulness of the mechanism. Unlike the equivalent mechanism in the private sector, trade unions are not required to alternate genders on the list, which further reduces the chances of election! Furthermore, the respective share of each gender is calculated by counting full members and alternates together, and if it does not correspond to a whole number for one of the genders, the trade union organization chooses to round down or up to the nearest whole number, which can lead to the absence of candidates of one gender.

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of 40% female first-time appointments was reached and even exceeded for the civil service as a whole<sup>64</sup>, the reality remains mixed and nuanced for several reasons: the largely voluntary nature of the obligation to achieve results, the deliberately limited and therefore reductive scope of jobs and functions, and the insufficiently rigorous production and dissemination of data to assess the margins for change.

Firstly, despite the introduction of an obligation to achieve results, it is “only” an accountability approach that has been established, and the transition to a 50% quota for new hires does not change this. The constraint is voluntary because public employers can choose to pay the financial penalty due in the event of non-compliance with the quota. The terms of which were certainly strengthened by the legislator in 2023<sup>65</sup>. The logic of paying a penalty is duplicated in the event of non-compliance with the minimum obligation of a 40% quota for each gender, which will come into force in 2027, or in the event of non-compliance with the obligations to publish results. In contrast, legislator has always refused to establish the nullity of appointments in the event of non-compliance with quotas. Although radical for civil servants, this penalty would be expected in order to guarantee a genuine obligation to achieve results. The alternative of paying a penalty even becomes a vicious circle, since the amounts collected are used in part to finance the professional equality fund, created in 2019 and extended to all civil service functions in 2022<sup>66</sup>. As a result, the reluctance of some is ultimately beneficial to the most convinced and committed employers<sup>67</sup>!

Secondly, the material scope of application is too narrow. The scope of senior civil service jobs affected by quotas is too small and remains so despite gradual extensions over the decade<sup>68</sup>. The list is limited to a portion of these jobs: 5,000 according to Minister Sauvadet’s idea at the time of the adoption of the eponymous law in 2012 –

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<sup>64</sup> Specifically, 42% in the civil service, 55% in the hospital sector and 45% in the local authority sector. It should be noted that as of 31 December 2020, of the 5,796 employees in senior management and executive positions covered by the Sauvadet Act, 35% were women, compared with 27% in 2015 (Martine Filleul and Dominique Vérien, ‘Rapport d’information fait au nom de la commission aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur le bilan d’application de la loi Sauvadet, dix ans après son adoption’ (Sénat No. 723, june 2022), 16).

<sup>65</sup> As a result of the introduction of a minimum obligation to comply with the 40% quota, the 2023 law tightens the penalty provisions by removing the flexibility in favor of “virtuous” employers (CGFP, Art. L 132-9 repealed as of January 2027). The amount – unchanged – of €90,000 is payable for each missing unit (CGFP, Art. R. 132-15).

<sup>66</sup> This fund comprises nearly € 1 million per year.

<sup>67</sup> Another weakness is that it is up to each administration to specify and schedule the amount of the penalty.

<sup>68</sup> The 2023 law should make it possible to include some 800 additional jobs by incorporating a number of national public institutions.

gradually increased to some 6,000 management and executive positions<sup>69</sup> – out of the approximately 21,600 senior management positions in the civil service. Admittedly, the definition of what constitutes senior civil service is a very French subject of debate that could occupy us for a long time<sup>70</sup>! Admittedly again, it is logical and pragmatic to exclude local authorities and smaller public inter-municipal cooperation establishments from the scope of application<sup>71</sup>. However, the fact that the lists of job types by corps or employment framework are adaptable and adapted – in order to facilitate compliance with the threshold and thus limit the feminization of these jobs – remains problematic: either the threshold is stretched to allow quotas to be met<sup>72</sup>, or a whole range of jobs is excluded by targeting expertise jobs to the detriment of management positions<sup>73</sup>. The legal framework thus reinforces the sociological biases observed in the field<sup>74</sup>, by organizing an unsustainable feminization of certain senior civil service jobs and perpetuating the “glass ceiling” for managerial and executive positions. It is proving difficult to break free from the “gender segregation of professions”.

Thirdly, the conditions of the production, analysis and dissemination of data

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<sup>69</sup> Of the approximately 6,000 jobs targeted by the balanced appointment scheme, 3,750 are in the civil service, 2,300 in local government and 600 in the hospital service (Valente (n 10) 28). The circular of 3 July 2024 on the application of Decree No. 2012-601 of 30 April 2012, as amended, on the procedures for balanced appointments to senior management positions in the civil service (NOR PRME2418558C, 2) confirms the exclusion, from the scheme, of senior military posts (not governed by employment status), senior management positions within deliberative assemblies, judicial positions within the judicial system, positions within the administrative services under the authority of the Secretary General of the Council of State and the Secretary General of the Court of Auditors, as well as positions within public institutions not covered by the 2023 Act.

<sup>70</sup> As H el ene Pauliat summarizes: “The term ‘senior civil service’ does not refer to a specific legal reality. It encompasses very senior public positions, for which recruitment is often carried out through schools. These positions are not to be confused with senior positions for which appointment is left to the decision or discretion of the government (CGFP, Art. L. 341-1 and 341-2). Until now, personnel occupying senior positions in the civil service were subject to the general civil service regulations” (H el ene Pauliat, ‘Haute fonction publique’, in Manel Benzerafa-Alilat *et al.* (eds), *Encyclop edie du management public* (Institut de la gestion publique et du d eveloppement  conomique, 2022), 365). See also in the local civil service, Aur elie Virot-Landais, ‘Emplois fonctionnels’ (2022) 816 *Jurisclasseur* § 29.

<sup>71</sup> The balanced appointment system only applies to local public employers with a population of at least 40,000 (previous threshold of 80,000 and abandonment of the plan to lower the threshold to 20,000 envisaged in the initial bill that led to the adoption of the law of July 2023).

<sup>72</sup> Temptation in the hospital civil service, now including middle management positions.

<sup>73</sup> In particular, the judiciary remains largely excluded from the scope.

<sup>74</sup> Fearing that they may feel illegitimate and wishing to reconcile their professional and family lives, women are more inclined to apply for jobs requiring high technical expertise (and are more likely to be appointed to them) than for very senior management positions. Due to the temporary nature of these positions, they do not allow women to develop the management experience required to access the highest positions.

by public employers are insufficiently constraining. If public employers are required to produce and disseminate data, the legislator has not taken care to define a deadline for their reporting and dissemination. As a result, as the quota for women in senior civil service appointments has increased, a gap has gradually emerged and the reports are now being disseminated at N+2. Public employers have control over the scope, collection and timing of the dissemination of reports. This leads to the figures and their relevance for assessing efforts, developments and prospects being put into perspective. Admittedly, in 2023 the legislator finally began to address this lack of transparency by choosing to introduce an additional indirect constraint on the obligation to achieve results. Employers are required to publish annually the number of appointments by gender, failing which they will be required to pay a lump sum by 30 June each year<sup>75</sup>. If they manage at least 50 employees, they must also publish a professional equality index<sup>76</sup> specifying the pay gap between women and men, corrective actions and indicators, as well as other data that is in principle already included in the single social report or the multi-year plan for professional equality between men and women. The expected benefit here is greater clarity and accessibility. The requirement for transparency, combined with budgetary constraints, is an incentive for the State, large hospitals and local authorities concerned about their employer brand to set an example. As professional equality between men and women becomes a priority and a focus of societal attention, it would be awkward for a public employer concerned with being attractive to disregard the requirement for transparency, even if it means publishing unflattering figures! Nevertheless, the fact remains that increased transparency remains at the discretion of employers.

While the logic of gender parity is porous to the legal and societal framework in which it is enshrined, it is in turn likely to call into question the foundations and models that structure legal systems. Its theoretical and practical influence on the French model of public service should be assessed.

#### **4. *The resonance of gender parity on the French model of public service***

Unlike other legal systems, the French legal system is generally not very open to the logic underlying parity. This is particularly evident in the French civil service

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<sup>75</sup> Amounting to €45,000 – €25,000 for municipalities and EPCIs with between 40,000 and 79,999 inhabitants (CGFP, Art. R. 132-14).

<sup>76</sup> CGFP, Art. L. 132-9-1 et seq.

model and explains the reluctance of legislator to tackle head-on the question of the basis for enshrining the various parity mechanisms (A). Nevertheless, it is possible prospectively to outline and question a few hypotheses of practical resonance that could promote the effectiveness of parity mechanisms and to draw conclusions from the logic of representation (B).

#### **4.A. A priori *limited resonance***

Every effort has been made to introduce parity into the French civil service model smoothly, without conceptual upheaval. The French legislator's strategy has been to enshrine gender parity mechanisms *bon an mal an*, without explaining or even addressing the issue of their basis! However, while it is always possible to introduce a mechanism without thinking about it, this risks opening Pandora's box without being able to control it.

As we know, while the answer certainly varies from one legal system to another, observation of different legal systems and reading of the relevant literature allow us to identify, in broad terms, two main underlying principles for the establishment of a parity measure: on the one hand, theories of representation<sup>77</sup>, which have been applied in the administration in the United States<sup>78</sup>, and on the other hand, human rights doctrine<sup>79</sup>.

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<sup>77</sup> Theories of representation argue for the idea that representatives should resemble those they represent. This principle, which is fairly spontaneously applied in the political sphere, means that in the public sector, staff must resemble civil society and reflect it quantitatively.

<sup>78</sup> J. Donald Kinsley was the first in American literature to develop the theory of administrative representativeness through the recruitment of staff from all walks of life (*Representative Bureaucracy* (Antioch Press, 1944)). His work is based on two ideas that form the analytical framework for studies on bureaucratic representativeness through staff diversity: on the one hand, for the administration to be representative, members of all social categories and/or geographical regions must be recruited into the civil service; on the other hand, the social composition of administrations influences the decisions and actions they take. The first representation, which is purely static, is called "passive", while the second representation is called "active" and manifests itself in the development of policies that effectively reflect the interests and aspirations of the people. Thus, unlike the role model theory, the theory of representative bureaucracy does not consider that a civil service that is "reflective of the population" produces social or political effects as such. F. Mosher attempted to theorize the functions of a civil service that is "representative of the population" (*Democracy and the Public Service*, Oxford University Press 1968): to offer everyone "a symbol of openness and equal opportunities within the civil service"; to enhance the expertise of the administration, as civil servants relay the aspirations and interests of their communities of origin to their superiors; to guarantee the administration a truly democratic legitimacy, insofar as each community can identify with at least a fraction of the administrative staff who appear, implicitly or explicitly, to be the spokespersons for its interests. Although specifically American, the theme of representativeness in the civil service (generally translated as "diversity") has spread to Europe through the Council of Europe ("the composition [...] of any public administration should normally be representative of the community it serves", in order to create "a more trusting climate" and give the administration "a fairer, more respectful and more sensitive view of the various ethnic or racial groups") and then by the European Union. For a

In French civil service law, the basis is never clearly stated but can be more or less easily gleaned from discourses and characteristics of the mechanisms. It also varies according to the “place” of power concerned. Quite simply, the basis for the measure to increase the number of women in social dialogue bodies can be found in representation theory, in line with the initial basis for the introduction of gender parity in the political sphere. Here, agents are understood in their capacity as representatives. With regard to the measure to increase the number of women in senior civil service positions, the basis, which is not clearly explained, is to be found more in human rights than in theories of representation. In contrast, the basis for the measure to increase the number of women on competition and professional examination juries is more vague, falling somewhere in between.

The legislator’s reserve – if not silence – seems to be explained by at least three sets of reasons. Firstly, the foundations usually retained by the various legal systems are in contradiction with the French civil service law approach. The aim was therefore to allow gender parity to be integrated without venturing into controversial axiological debates. Indeed, both of these foundations intrinsically and directly clash with the foundations of the French model of the civil service, which is characterized by a career-based approach. On the one hand, the French civil service remains marked by the Weberian approach to bureaucracy<sup>80</sup>. Traditionally, the French administration does not serve the population but the general interest. It makes no claim to “resemble” civil society, which it is instead intended to overhang. According to Jean-Michel Gaillard’s apt phrase, the former ENA – and now the INSP – does not appear to be reflective of

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summary of the limitations of representative bureaucracy, see Kenneth J. Meier and Daniel P. Hawes, ‘Le lien entre représentation passive et active de l’administration’ (2006) 2 (18) *Revue française d’administration publique* 272.

<sup>79</sup> Human rights doctrine essentially argues that humanity is both male and female and that women, as subjects of law, must occupy half of the public sphere. More recent and championed by many contemporary feminists, this foundation is more versatile, intrinsically postulating the equal dignity of natural and patrimonial rights. According to some French feminists, women are destined to occupy a range of social positions, including senior civil service roles, in order to fulfil their rightful place simply by virtue of being women. This harks back to classical naturalism, and it is not uncommon to read in doctrine or public reports that women are expected to enrich public action. However, essentialism is a double-edged sword: while it can break the glass ceiling, it can also perpetuate glass cages and a gendered distribution of responsibilities and functions.

<sup>80</sup> The “special virtue” of the ideal-type bureaucracy is its ability to “dehumanize” bureaucrats by “eliminating from public affairs love, hate and all forms of irrational and emotional elements that hinder reasoning” (Max Weber, *From Max Weber*, (translated and edited by HH Gerth and CW Mills, Oxford University Press 1958) § 8, quoted by David H. Rosenbloom and Julie Dolan, ‘La bureaucratie représentative’ (2006) 2 (18) *Revue française d’administration publique* 259.

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the people or even the elites, but rather “the mirror of the state”<sup>81</sup>. Within the core values of public service (equality, neutrality, competence), the aspiration to “representativeness” has no place. Of course, the French civil service is not closed-minded to diversity, but it approaches it from a perspective of openness and social integration, rather than representativeness. The service provided to citizens must be ‘asexual’, guided by the requirements of neutrality and meritocracy. On the other hand, French civil servants are viewed as both workers and citizens apart, which means that they are subject to exorbitant requirements of professional discretion and exemplary behavior, including in their personal lives, as well as exorbitant rules of transparency.

Secondly, in addition to these theoretical disputes, there is a motivation that is probably less “noble” because it is purely pragmatic and politically less easily admissible. Is it really only the cause of women that is driving legislative change? There is reason to fear that the establishment of gender parity is tinged with a certain utilitarianism, if we pay particular attention to the timing of this establishment in relation to the significant changes in the French civil service model. The early stages of the feminization of the civil service workforce were already driven by a clear instrumentalization that was far removed from egalitarian considerations and even reflected a certain “contempt for the social status of low-level civil servants”<sup>82</sup>. In concrete terms, women’s access to administrative jobs from the end of the 19<sup>th</sup> Century onwards was intended to combat social deprivation and offer them jobs suited to their abilities and natural aptitudes (e.g. typing), so that men could move on to jobs more worthy of their abilities within the administration or be encouraged to move into the private sector<sup>83</sup>! Similarly, in the contemporary period, the advent of gender parity in the civil service coincides in part – and this cannot be entirely coincidental – with the identification of specific human needs. Indeed, the lever of parity within social dialogue bodies was initially wielded in a context of marked decline in trade union investment, even more so in the private sector than in the public sector. Similarly, parity was enshrined in recruitment to senior civil service positions in a context of creeping “functionalization” of these positions. However, this “functionalization” is characterized by an emphasis on employment logic and on managerialization, contributing to the technicalization of functions (which can make them less attractive and prestigious), but also by a certain precariousness in job

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<sup>81</sup> Jean-Michel Gaillard, *L'ENA, le miroir de l'État. De 1945 à nos jours* (Complexe Editions, coll. Questions au XX<sup>ème</sup> siècle 1995).

<sup>82</sup> Luc Rouban, ‘La féminisation des élites administratives : avancée sociale ou nouvelle discrimination?’ (2013) 1 (145) *Revue française d'administration publique* 7.

<sup>83</sup> Rouban (n 83) 8.

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security, increased competition between civil servants and contract workers, and significant “*pantouflage*”<sup>84</sup> among male executives. Furthermore the constrained budgetary context may lead some to pay attention to the increase in the proportion of women in senior management. Indeed, the majority of them are entitled to lower remuneration than their male colleagues for the same tasks, due to asymmetries in career development. As Luc Rouban sums it up:

the feminization of senior jobs could therefore be seen not so much as social progress as a sign of the decline of the senior civil service in the face of the undoubtedly more attractive careers offered by large private companies immersed in globalization. If women can benefit from a more precise definition of job profiles and duties, it is because the senior civil service has at the same time changed its model, losing its intellectual charm and the real power it enjoyed at the beginning of the Fifth Republic in the conduct of public action in order to gain budgetary and technical efficiency, but within the framework of fragmented and contractualized interventions. The victory of equality would then be rather bitter, as it would only lead to relatively precarious and difficult jobs that do not necessarily open up long and promising career paths where collective strength is added to individual success.

Thirdly, the reluctance of the French lawmaker to tackle head-on the issue of the foundations of parity and the question of whether or not the French civil service is representative is also due to the fact that in many countries – and primarily in the United States – the issue is centered on racial and ethnic identity rather than gender identity. However, France is more than reluctant to address the issue of societal diversity outside the prism of gender or disability. Female representation is one of the few areas where statistical data exists. On the other hand, the French administration completely ignores the concept of race. The provisions of Article 1 of the 1958 Constitution, which states that France “ensures equality before the law for all citizens without distinction of origin, race or religion”, are interpreted in an absolute manner as strictly prohibiting any distinction based on ethnic origin. The legislator occasionally attempts to circumvent this prohibition by introducing positive discrimination measures based on geographical criteria, particularly “neighborhoods”, in order to promote diversity in the talent pool and a certain representativeness of civil service employees, with a view to enhancing the effectiveness of public action<sup>85</sup>. However, intrinsically – and regardless of the response

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<sup>84</sup> Practice of former senior civil servants taking up positions in the private sector.

<sup>85</sup> Consider the army and the police. For a reserved reading of the measures: Gwenaële Calvès, ‘Reflecting the Diversity of the French Population: Birth and Development of a Fuzzy Concept’ (2005) 57 (183) *International*

provided – the issue of representativeness is of renewed interest in the contemporary societal context and deserves to be debated. Indeed, the crisis of meaning in public action and the role of public servants is becoming more acute; the rise of digitalization in relations between the administration and citizens raises questions about the qualitative importance of human relations and, in doing so, the representativeness of digital interfaces, particularly those using artificial intelligence.

The reluctance to explicitly state the rationale for parity is also due to the practical implications that could conflict with certain key values and characteristics of the French civil service model, without, however, directly calling it into question.

#### ***4.B. Potential resonance***

From a pragmatic point of view, the potential resonance of the parity principle could find its way into the already fragile interstices of the French civil service model and reinforce questions about this model. These prospective developments will focus on two angles that deserve particular attention.

Firstly, improving the effectiveness and efficiency of parity could, in absolute terms, involve making symbolically significant changes to the current statutory framework, including access and careers of civil servants, could improve. While we do not subscribe to this view, it is nevertheless worth considering. On the one hand, the absolutist requirement for gender parity may call into question the procedures, if not the principle, of competitive examinations. Indeed, in order to have an impact on the pool of civil servants in senior positions, in addition to measures targeting school and university education, the logic of parity could lead to the reintroduction of competitive examinations reserved for one sex or the other, or at the very least to quotas for places in an attempt to redress the imbalance in the workforce of certain administrations. Critics of competitive examinations could even see this as an additional argument in favor of abolishing this principle or even the civil service itself. However, in view of what has been explained above, it is not convincing that women are more likely to apply spontaneously and that employers are more likely to recruit women in a generalized context of contractualization. Moreover, from a skills perspective, the introduction of reserved competitive examinations, like the abolition of competitive examinations, would mark a significant symbolic step backwards, whereas success in senior civil service competitive examinations guarantees the technical legitimacy of successful candidates regardless of their gender, prior to recruitment. On the other hand, it has previously been lamented that the gender parity approach is largely based on a logic of making

public employers accountable, who may prefer to pay rather than strive to meet quotas. However, it must be recognized that it is difficult to gauge the degree of severity of the obligation to achieve results with regard to public employers, particularly local public employers. The constitutional principle of free administration must guarantee them a margin of choice, particularly at the recruitment stage<sup>86</sup>, even though we know that the Constitutional Council has been able to nuance and bend its binding force. Finally, from the point of view of civil servants, while gender parity is an objective of general interest, its implementation in conjunction with the principle of adaptability could lead to the establishment of a system of automatic mobility for civil servants based on gender – combined with requirements in terms of skills and experience. The aims would be to distribute staff more evenly across loss-making departments. This absolutist proposal could at least be considered in the state civil service due to the uniqueness of the employer and would be facilitated by the generalization of interministerialization of bodies of civil servants. While the measure may seem particularly excessive, it should be remembered that the TFP law of August 2019 opened the door by establishing an automatic mobility for civil servants in the event of the outsourcing of public service management.

The other prospective approach concerns the relationship between the administration and the citizen. As we know, equality and neutrality require equal treatment of users regardless of the competent agent, but also adaptability on the part of both the agent and the user, who must adapt to the realities and constraints of the service's operation. However, invoking the representative logic of the civil service and resorting to gender parity techniques leads some to emphasize the complementarity and therefore the specific characteristics of men and women. It is then only a short step to reactivating the question of the right of the user or citizen to choose the gender of the official who provides the service. The issue had already been in the news in hospitals from the specific perspective of secularism<sup>87</sup>. It could very well be reactivated in the name of the better understanding that a given user might expect from an agent of a particular gender in matters of health, education, social support, etc.<sup>88</sup> The legislator's refusal would be reinforced here by the significant theoretical and practical issues at stake, such as the disruption to the functioning of public services, the difficulties in

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<sup>86</sup> Conseil Constitutionnel, dec. No. 83-168 DC of 20 January 1984.

<sup>87</sup> For a reminder of the legal situation: Circular DHOS/G No. 2005-57 of 2 February 2005 on secularism in healthcare establishments (NOR: SANH0530037C).

<sup>88</sup> Lael R. Keiser, Vicky M. Wilkins, Kenneth J. Meier and Catherine A. Hollet, 'Lipstick or Logarithms: Gender, Identity, Institutions and Representative Bureaucracy' (2002) 96 (3) *American Political Science Review* 553.

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finding a suitable pool of candidates, and the unreasonable nature of imposing an obligation on public authorities to guarantee this choice. Although these developments are fictional, they illustrate the complex and potential relationship between gender parity and the French model of public service in the name of professional equality between men and women.