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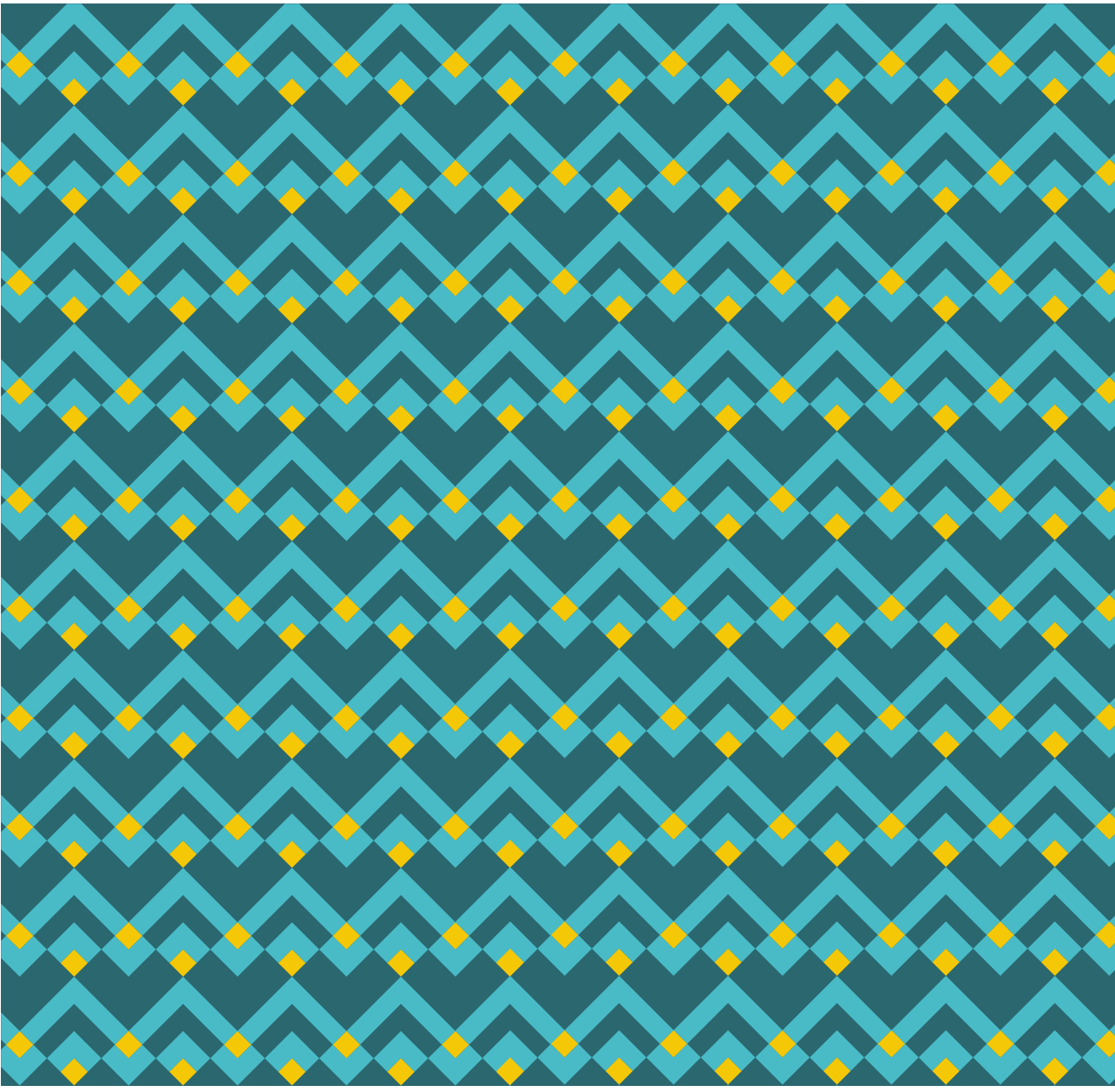

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WOMEN - THE 20TH ROMA TRE-POITIERS STUDY DAYS

Federica Rassu
Introduction 7

Céline Lageot
Does The European Court Of Human Rights Take Into Account Different Feminist Interpretations When Dealing With Violence Against Women? 9

Aurélie Virot-Landais
Gender Equality In French Civil Service Law 27

Barbara Cortese
Women And Roles: The Social-Juridical Roman Context 57

ARTICLES

Giorgi Amiranashvili
Digitalization Of Justice: A Georgian Perspective 71

Costanza Bruschi
Penitentiary Law In Europe: An Open Debate 85

MEETINGS & READINGS

Andrea Betti
Implementing The Nature Restoration Regulation: Legal Challenges And Opportunities 109

Antonella Brandonisio
Sustainable Soils For Sustainable Agriculture 123

Benedetta Rinaldi Ferri
Tools For Equality 133

FEDERICA RASSU*

INTRODUCTION

The examination of the legal status of women in a globalised legal order undergoing profound transformation – shaped by contradictory economic, social and political processes in which opposing trends concerning the affirmation or denial of rights coexist – was at the heart of the discussions held during the 20th Roma Tre-Poitiers Study Days, entitled "Women". This annual event marked the continuation of a collaborative endeavour initiated in 2001, which has made it possible to develop a historical and comparative analysis of the major concepts of law, alongside reflections on comparative legal methodology. The theme "Women" in particular fostered renewed reflection on a range of issues that had seemed relegated to the margins of public and legal debate, but which have once again moved to the forefront of political and legal discussion, in connection with the condition of women – traditionally situated at the intersection of the public and private spheres. In this context, the Poitiers – Roma Tre Study Days once again constituted a pluralistic forum for dialogue, aimed at capturing the most recent theoretical and legal developments, with particular emphasis on the diversity of national and European legal traditions, considered both within their specific legal contexts and from a comparative and forward-looking perspective. Accordingly, the key issues relating to the legal status of women were examined through alternating contributions in French, Italian and European law.

The three selected contributions reflect the diversity of these perspectives. First, **Barbara Cortese** analyses the social and legal status of women in ancient Rome, demonstrating that their inferior position did not stem from an immutable "nature", but rather from political and legal choices that subsequently shaped cultural norms. Her contribution clearly highlights the heterogeneity of Roman society, showing that the status of women varied according to historical periods, imperial policies, and above all the social, familial and legal position of each individual woman. It is therefore impossible to speak of a single, uniform "Roman woman", particularly given that the Roman world was entirely unfamiliar with the modern concept of gender. Secondly, **Aurélie Virot-Landais** explores the issue of gender equality in French civil service law, focusing on

* Maître de conférences en Droit Public - Faculté de Droit et de Sciences sociales de l'Université de Poitiers; Vice doyenne aux Relations internationales; Membre de l'Institut de Droit Public (IDP-UR 14145) - Co-responsable axe de recherche Les ordres juridiques.

the authenticity and effectiveness of the French parity framework, as well as its compatibility with the French model of the civil service. While clearly distinguishing parity from the mere principle of equality, the author rightly emphasises that, despite the significant feminisation of the workforce and the formal guarantee of equality under the law, women remain under-represented in positions of power. The corrective measures introduced to address these persistent inequalities have not resolved the underlying difficulties, which are compounded by an enduring tension between parity and the French civil service model, traditionally based on neutrality, merit, and the rejection of any representational logic. Finally, **Céline Lagéot** examines whether the European Court of Human Rights takes into account differing feminist interpretations when adjudicating cases involving violence against women. Her analysis unfolds in three stages, demonstrating that the Court adopts a particularly firm stance with respect to the most serious violations of women's integrity, thereby satisfying all strands of feminist thought through its condemnation of the gravest infringements of women's physical or psychological integrity. While this case law gives rise to greater reservations among feminists with regard to the issue of abortion, the author suggests that the Court's approach to domestic violence may nevertheless provide common ground for all feminist perspectives, united around the principle of human dignity.

CÉLINE LAGEOT*

FOR A SAD PROCESSION: DOES THE EUROPEAN COURT OF HUMAN RIGHTS TAKE INTO ACCOUNT DIFFERENT FEMINIST INTERPRETATIONS WHEN DEALING WITH VIOLENCE AGAINST WOMEN?**

ABSTRACT. *Where does the Strasbourg Court stand among the various feminist movements? Does it reflect a choice, a compromise, a third way? Does European human rights case law take into account the two latest feminist interpretations, going beyond the traditional logic of non-discrimination alone? the Strasbourg Court has long satisfied all feminists by severely punishing all cases of the most serious violations of women's physical or psychological integrity ; however, it leaves cultural and radical feminists more doubtful on the issue of abortion ; it may finally be able to reconcile all feminists on the issue of the treatment of domestic violence in Strasbourg.*

CONTENT. 1. I. The Court's uncompromising approach to the most serious cases of violence against women – 1.A. Rape – 1.B. Female genital mutilation – 1.C. Domestic slavery – 1.D. Sex trafficking – 2. The Court's incomprehensible procrastination on the issue of abortion – 3. At the point of convergence of all feminist currents: the Court's treatment of domestic violence

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** The author would like to thank for reviewing and helping for the translation of this article Philippe Cauvet, Professor of British Civilisation, University of Poitiers.

If the title of this paper has been inspired by a novel of Laurent Gaudé, *Pour seul cortège*, it is because it fits perfectly with the general topic of this article: the litigation that the European Court in Strasbourg has to deal with concerning serious violence against the physical or psychological integrity of women... For a sad procession...

The radical views defended by *some* women on this subject today can only raise questions, as they leave no room for nuance, precision or truth. Are they so blinded by a need to protect their specificity that they risk not appearing as equal to men?

No one would dispute – unless they agree with it – that paternalism has wreaked havoc and continues to do so, but is it precisely in an exclusive – or non-inclusive, to use the current term – and communitarian way – according to a very Anglo-Saxon view of things – that it must be combated? We do not think so, especially since many men – the majority of them – understand women's issues and are already striving with them to establish relationships other than those of domination[1].

No one would dispute that we are going through an unprecedented societal crisis due to the questioning of the paternalistic system and the questions it raises for criminal law, human rights and freedoms. Feminism and all its various strands can only be meaningful, however, if they emancipate themselves from the macho relationship imposed by *certain* men and if they offer a third way, that of balanced and effectively guaranteed relationships. If it is merely a repetition, reproduction or imitation of the same processes of domination and oppression, it will have failed. And liberal feminists will have no choice but to mourn its demise. Nevertheless, it is never too late to change course, to encourage the majority to come out of their reserve or silence, and to temper the excesses of a sometimes very vocal minority.

We must – and today even more than yesterday, so as not to lose our reason in these very unstable times – also remember the principles that underpin our democratic systems in Europe and promote the power of discussion, the power of words exchanged, even harsh ones, between opposing parties, especially when there is disagreement. And there can be disagreement on the subject of women, among women themselves, since different feminist currents have always existed since the movement was created. The process requires courage and lucidity, but it will lead, through a long process of conflicting opinions, to appeasement. Tolerance, pluralism, openness: this is how the Strasbourg Court has long described European democratic society. This was in its landmark ruling Handyside v. the United Kingdom in 1976. An essentialist ruling that

[1] Eric Corbaux, alongside Gwenola Joly-Coz, is a prime example of this. Eric Corbaux and Gwenola Joly-Coz 'Mieux juger les violences faites aux femmes' (2024) La Semaine juridique 1917.

has not aged a bit, as it has neither sex nor gender. Yet today, these democratic standards seem to be at odds with the brutalisation of certain political discourses, at odds with the polarity of certain opinions, at odds with the withdrawal into oneself or into one's own group that we are seeing, including with regard to women. As the Handyside case ruled, we would like to point out that democracy embodies the art of disagreement, since it sublimates discord through the emergence of peaceful channels. The subject of women must not be allowed to escape these fundamental principles of European democratic society.

The issue of violence against women cannot therefore be properly addressed without calm reflection, detached from any harmful passions, unresolved past issues or primitive resentments that lurk within each of us. The controversies that arose in France around Caroline Fourest's latest essay *Le Vertige MeToo* are interesting in that they reflect the different currents[2] that have always run through feminism since its origins. The term "feminism" emerged in the 19th century: initially used pejoratively to refer to unmanly men, it only took on its modern meaning at the very end of the century, thanks to the suffragettes and their demands for voting rights. Today, sociologists agree that the feminist movement is the most important social movement of modernity to have originated in the West. However, the history of feminism is discontinuous: it has unfolded in successive phases. The nineteenth century was marked by the struggle for civil rights. The second phase took place in the 1960s and 1970s. The struggles at that time focused on the freedom to control one's own body and to love. Many historians see the third phase as the struggle against intersectional oppression, while current debates are reactivating the fundamental question of desire. Christine Bard states that "*Feminism is more diverse than ever in its demands, in the generations involved, in its means of action, with an extremely broad philosophical, political and ideological spectrum*"[3].

European human rights cases heard before the Strasbourg Court have not escaped this trend towards feminisation of thinking and solutions, even if this has only happened recently, as the principles of subsidiarity and exhaustion of domestic remedies have somewhat slowed this development. We need to briefly point out that the rights protected by the European Convention on Human Rights of 4 November 1950 are mainly civil and political in nature. Since the 2000s, the Court has therefore mainly

[2] 'Répliques - émission du samedi 9 novembre 2024' (France Culture, 9 November 2024) <https://www.radiofrance.fr/franceculture/podcasts/repliques/repliques-emission-du-samedi-09-novembre-2024-6277720>; Camille Froidevaux-Metterie, *Patriarcat, la fin d'un monde* (Seuil 2024); Caroline Fourest, *Le vertige #MeToo* (Grasset 2024).

[3] Christine Bard (ed.), *Un siècle d'anti-féminisme (A Century of Anti-Feminism)* (Fayard 1999).

had to rule on violence against women's bodies, but also against their minds and psyches[4]. Other types of violence of a social, economic or cultural nature fall more within the scope of the 1961 Turin Charter, revised in 1996, and are not, for the most part, subject to litigation before the Court in Strasbourg[5], except in extreme cases of slavery, forced labour and trafficking in women, as these fall under Article 4 of the European Convention on Human Rights[6].

It is mainly from the perspective of the so-called non-derogable rights of the Convention, Article 2 (right to life), Article 3 (prohibition of torture and inhuman and degrading treatment), and Article 4 (prohibition of slavery and forced labour), that violence against women is dealt with by the Strasbourg Court. This reflects the serious question of the dispute and the extreme scrutiny given to it by the Court, since these articles protect the most serious violations of human dignity and are therefore considered to be rights that cannot be restricted or derogated from under any pretext or in any circumstances. But it is also through the prism of Article 8 – the right to respect for private and family life – that other types of violence, which we will outline as we discuss the Court's case law, can be understood, not to mention the possible combination of all these articles with Article 14, the principle of non-discrimination. The European convention arsenal is therefore rich. It has been expanded by the action of the Court, without which the provisions of the Convention would never have had such scope. As Laurence Burgorgue-Larsen points out in the 4th edition of her valuable work, *La Convention européenne des droits de l'Homme*[7], "*The Convention does not contain any specific provisions regarding women. It is the individual, without distinction, undifferentiated, non-communitarian and universal, who is protected by this landmark text of 1950*". As Laurence Burgorgue-Larsen further points out, "*For liberal feminists, the non-discriminatory logic – derived from Article 14 of the Convention and now also from Article 1 of Protocol No. 12 – is sufficient to achieve what matters, i.e. equality with men. This is not the view of other feminist movements, which believe that the law – particularly human*

[4] Read more on this subject in Yannick Lécuyer and Delphine Tharaud, 'From one body to another: abuse of women in the case law of the European Court of Human Rights'" in Jimmy Charruau and Caroline Duparc (eds), *Le droit face aux violences sexuelles et sexistes* (Dalloz 2021).

[5] The Turin Charter has its own control mechanism, which is less restrictive than that of the Court. For a very enlightening reading on this subject, see Jean-Pierre Marguénaud 'Le comité européen des droits sociaux, un laboratoire d'idées sociales méconnu' (2011) 3 RDP685. Tatiana Gründler 'Social rights within the European Charter of Human Rights' 7 International Yearbook of Human Rights, (2012-2013) 647.

[6] According to the provisions of Article 4 of the European Convention on Human Rights.

[7] Laurence Burgorgue-Larsen *The European Convention on Human Rights* (4th edn, LGDJ 2024), 62.

rights law – should recognise the difference and specificity of women, both in terms of reproduction (cultural feminists) and in terms of violence against women (radical feminists)." In an article published in 2018, she further clarifies: "*This egalitarian feminism, which seeks to grant women rights beyond factual considerations by separating legal qualifications from social and, above all, natural characteristics, no longer seems sufficient for a number of women and intellectuals*"[8]. This first major feminist movement has its roots in the thinking of philosophers Simone de Beauvoir and Elisabeth Badinter. The second has its roots in the thinking of Antoinette Fouque, who supported the radical movement during the development of the Women's Liberation Movement (MLF) in France in 1968. As Françoise Tulkens[9] and Laurence Burgorgue-Larsen point out, international human rights law has been successively influenced by contemporary feminist movements, either to promote the difference between women and men (*cultural feminism)* or to fight against male oppression of women (*radical feminism)*.

How does the Strasbourg Court approach violence against women in its case law? It defines it in accordance with the specific standards of international law on this subject: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 9 June 1994 and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, CETS No. 210[10]. Unlike the Inter-American Court, however, it does not use the term "feminicide"[11]. Although women are not the only victims of this type of violence, as revealed by the landmark judgments in Selmouni v. France of 28 July 1999 (rape of a detainee with a baton) and Konstantin Markin v. Russia of 22 March 2012 (refusal of parental leave to male soldiers), statistically they are the most affected[12].

Where does the Strasbourg Court stand among the various feminist movements?

[8] Laurence Burgorgue-Larsen, 'Women and case law, free comparative wanderings', 34 JCP (2018) 3.

[9] Françoise Tulkens, 'Human Rights-Women's Rights. Applicants before the European Court of Human Rights' in Lucius Caflisch and others (eds), *Liber amicorum Luzius Wildhaber. Human Rights-Strasbourg Views. Human Rights-Views from Strasbourg, Arlington*(NP Engel 2007), 423.

[10] Article 3(a): "violation of human rights and a form of discrimination against women, and (which) refers to all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, whether in public or private life."

[11] For a comprehensive study, see Luis-Miguel Gutiérrez, 'Les violences sexistes et sexuelles devant la Cour interaméricaine des droits de l'Homme'(2025) (14) RDLF <https://revuedlf.com/droit-international/les-violences-sexistes-et-sexuelles-devant-la-cour-interamericaine-des-droits-de-lhomme/>.

[12] 'Les chiffres de référence sur les violences faites aux femmes' (2023) <https://arretonslesviolences.gouv.fr/je-suis-professionnel/chiffres-de-reference-violences-faites-aux-femmes>.

Does it reflect a choice, a compromise, a third way? Does European human rights case law take into account the two latest feminist interpretations, going beyond the traditional logic of non-discrimination alone?

As Laurence Burgorgue-Larsen further explains, "*In this area, the solutions of the European Court of Human Rights are not marked by consistency and are clearly conditioned by the nature of the violations alleged by women. When third parties mistreat women's bodies, the Court is uncompromising and adopts solutions that could satisfy 'cultural' or even 'radical' feminists. On the other hand, when it comes to women being able to control their own bodies, the Court is more timid, keen to respect the customs of each society: we are aware of its difficulties in addressing the issue of abortion and its need to evolve on this subject*."

Nevertheless, with the development of the concept of domestic violence following the adoption of the Istanbul Convention in 2011, the Court's decisions now recognise that this is gender-based violence. This is certainly an encouraging development on the part of the Strasbourg Court, which mitigates its lack of boldness on the issue of abortion.

Ultimately, the Strasbourg Court has long satisfied all feminists by severely punishing all cases of the most serious violations of women's physical or psychological integrity (I); however, it leaves cultural and radical feminists more doubtful on the issue of abortion (II); it may finally be able to reconcile all feminists on the issue of the treatment of domestic violence in Strasbourg (III).

1. The Court's uncompromising approach to the most serious cases of violence against women

A. Rape

The Court does not particularly take into account the "specificity of women" in cases where third parties seek to appropriate women's bodies. Perhaps it simply does not need to, given how obviously specific the violation is. It refers to the dark social construct of women as sexual objects, against which changes are now underway at several levels: political, sociological and legal.

In this regard, Laurence Burgorgue-Larsen states that "Rape is obviously the most emblematic example of this complex issue. Since the M.C. ruling (ECHR, 4 December 2003, M.C. v. Bulgaria), the Strasbourg Court has considered that the fact that a 14-year-old minor did not resist rape in any way can be perfectly explained by an infinite variety of psychological factors. It therefore imposes on the respondent State the obligation to criminalise and effectively prosecute all types of non-consensual sexual abuse, including when they reveal the victim's lack of resistance"[13]. The Court highlighted the "specificity of women" more clearly when it condemned Turkey in the case of forced gynaecological examinations on very young women. (ECHR, 1 February 2011, Yasgül Yihmaz v. Turkey). After a long process of denunciation by feminists of violence against women in the 1970s, followed by the politicisation of the issue in the 1990s, it was not until the early 2000s that the first judgments were delivered in Strasbourg on violence against women. Its case law is ultimately recent and bold[14]. The Court does not hesitate to interpret rape in the light of today's society, rejecting the idea that it necessarily involves violence on the part of the perpetrator or resistance on the part of the victim and that it only contravenes Article 8, the right to respect for private life. The basis for the obligation to criminalise rape now stems from the prohibition of ill-treatment, Article 3 of the Convention. The Court has therefore raised its standards, which can only be welcomed.

The Court is also unanimous in its condemnation of female genital mutilation and other inconceivable forms of violence imposed on women on religious or customary grounds[15].

[13] Burgorgue-Larsen, *The European Convention on Human Rights* (n 7) 62.

[14] M.C. v. Bulgaria, §§ 154-166, application no. 39272/98, RTD civ. 2004, 364, note Jean-Pierre Marguénaud.

[15]See the very poignant film Desert Flower (2009) by Sherry Hormann, inspired by the life of Somali model Waris

B. Female genital mutilation

It is a practice that is strongly opposed by major international organisations, which have embarked on a campaign to achieve its complete abolition. It falls within the sad category of "sexual mutilation" in a broad sense (which includes, in addition to excision in the strict sense, clitoridectomy and infibulation), which the World Health Organisation, UNICEF, the United Nations High Commissioner for Refugees and the United Nations Development Fund for Women have deemed to be tantamount to torture[16]. And the European Court of Human Rights, always keen to draw inspiration from international institutions and courts, followed suit in the case of Izevbekhal and others v. Ireland on 17 May 2011. It was also in this context that the important Istanbul Convention of 11 May 2011[17] was adopted by the Council of Europe. It aims to prevent and combat violence against women in general and, in particular, requires States, in Article 38, to include the criminalisation of such practices in their criminal codes. What may have been tolerated until then is no longer tolerated, either under international human rights law or under European human rights law. Nevertheless, as Laurence Burgorgue-Larsen explains, the Strasbourg Court has not yet had the opportunity, in the cases brought before it, to condemn such practices *outright*: "*The particularities of the cases did not give it the opportunity to proclaim loud and clear (...) the unconventional nature of female genital mutilation and the vital need to prevent it* (ECHR, dec., 20 September 2011, Omeredo v. Austria)."[18] Only a conditional clause is used in this judgment and then repeated in the Sow v. Belgium judgment of 19 January 2016: "*It is not disputed that subjecting an adult, against their will, or a child to female genital mutilation would constitute ill-treatment contrary to Article 3 of the European Convention on Human Rights*"[19].

In addition to such outdated practices, there is also so-called "modern" slavery, with the first observation being that this term is poorly chosen. What is "modern" about enslaving a woman?

Dirie, who was circumcised at the age of five.

[16] Laurence Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (3rd edn, LGDJ 2019) 65.

[17] See the highly informative article by Blandine Chelini Pont, 'Rejection (or intended rejection) of the Council of Europe's Istanbul Convention on preventing and combating violence against women and domestic violence in 2019-2020 in the name of Christian and Islamic values" (2022) Fides et Libertas 46.

[18] Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (n 16) 66.

[19] ECHR, 19 January 2016, Sow, § 62.

C. Domestic slavery

France was unanimously condemned by seven judges for domestic slavery in 2005 in the Siliadin case (ECHR, 26 July 2005), but remained deaf to this shameful sanction , and was condemned once again in 2012 in the C.V. and V. case (ECHR, 11 October 2012). France had failed to act on its obligation to criminalise and effectively suppress all acts of slavery, servitude and forced labour for the first time. The Siliadin case sadly gave the Court the opportunity to examine the meaning and scope of Article 4 of the European Convention on Human Rights. The young Togolese applicant, who arrived in France at the age of fifteen, had been sent by her parents to live with a French national of Togolese origin. The facts of the case show that she was initially employed without pay, then "loaned" to a couple to look after their children and do all the housework, fifteen hours a day, seven days a week. After her passport had been confiscated, she was deprived of schooling and treated in an appalling manner[20]. On the basis of the international arsenal of the UN conventions of 1926 on the abolition of slavery and the slave trade, and of 1930 on forced labour, the Court considered "*that the young woman had at least been subjected to forced labour*"[21] and reduced, if not to slavery *in the strict sense of the term* – the young woman had not been objectified – then at least to servitude.

From domestic slavery to sexual slavery, there was only one step to take. The Court took that step during the dispute it had to examine in a case involving Cyprus and Russia.

D. Sex trafficking

The Rantsev v. Russia and Cyprus judgment of 7 January 2010 marked the Court's first significant stance on a case involving the trafficking of young women forced into prostitution, "*the dark side of globalisation, where vulnerable young women – poor and poorly educated, from developing and democratising countries – are 'exported' abroad through highly organised networks to be sexually exploited*."[22] This was the case of Oxsana Rantseva, 21, who was "imported" to Cyprus from Russia and exploited by the manager of a "cabaret" as an "artist", a term which, we learn, refers to prostitutes in Cyprus. After she tried to escape from the owner of the cabaret where she was being exploited, the Cypriot police ended up handing her back to him... She was found dead at the foot of a building, without it being possible to determine with certainty the cause of her death

[20] Siliadin v. France, ECHR, 26 July 2005, §§ 13-17.

[21] Siliadin (n 20)para. 122.

[22] Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (n 16) 74.

(following an attempt to escape or homicide). The Court began its reasoning by attempting to differentiate between the concepts in Article 4, as it had done in its judgment in Siliadin v. France, and presented the various conventions applicable to the case at the international level. However, the case was so serious that it did not feel the need to distinguish between the three concepts in Article 4: slavery, servitude and forced labour. It therefore concluded that "*it is not necessary to determine whether the treatment complained of by the applicant constitutes 'slavery', 'servitude' or 'forced or compulsory labour (...) in itself, 'trafficking in human beings, within the meaning of Article 3 of the Palermo Protocol and Article 4 of the Council of Europe Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention*"[23].

The Court unanimously condemned Cyprus and Russia for violating Articles 2 (right to life), 4 and 5 (right to liberty and security), but it did so in a nuanced manner. Cyprus was not condemned for the death of the young girl as such, but for failing to conduct an effective investigation into her death. As violations are often easier to establish from a procedural rather than a substantive point of view, the Court no longer hesitates to adopt such an approach in order to punish as many serious violations as possible from this angle. Cyprus was also condemned on the basis of Article 4, for failing to establish a legal framework capable of curbing the phenomenon of trafficking, and for failing to put in place any measures to protect the young woman. The Court showed much more restraint towards Russia, even though it was established that Russia was a supplier of these young girls destined for sex trafficking. Many eminent specialists in the field, including Laurence Burgorgue-Larsen, regretted that the Court had not been more forthright with regard to Russia, given the "cross-border" nature of the phenomenon and its direct responsibility. In its defence, the Court did establish a kind of roadmap for states, setting out a series of positive obligations to curb human trafficking.

On the issue of abortion, however, the Court can only divide or disappoint feminists. Even though there is broad consensus among the 46 member states of the Council of Europe on the legalisation of voluntary termination of pregnancy, the Court still refuses to grant this right to women. Yet this is clearly a right that stems from a woman's freedom to control her own body, as enshrined in Article 8 of the European Convention on Human Rights (right to respect for private life).

[23] Concluding paragraph on Article 4; <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1143%22]}>.

2. The Court's incomprehensible procrastination on the issue of abortion

The Court is currently unable to satisfy cultural and radical feminists, as it still refuses to rule on the obvious issue that only women can carry a child and that they alone, therefore, should be able to decide, without pressure from anyone else.

The Court has consistently held that Article 8 cannot be interpreted as establishing a right to abortion for women (ECHR, Grand Chamber, A.B.C. v. Ireland, 16 December 2010)[24], arguing that while women do have the right to control their own bodies, the right to procreate poses a conflict of norms, since it must also take into account the protection of the embryo, or even the foetus.

As Julie Tavernier points out in the *Thematic Dictionary of the European Convention on Human Rights*, "*the Commission and the Court have always accepted the idea that the regulation of abortion constitutes an interference with women's right to privacy, which includes, in particular, the right to personal autonomy and physical and moral integrity*"[25]. In other words, such regulation will only be considered a legitimate restriction of the right to privacy if it is provided for by law, pursues a legitimate aim and is necessary in a democratic society, i.e. it meets a pressing social need and is proportionate to the aim pursued. However, the Court stated – and this is not without significance – that "*since when a woman is pregnant, her private life becomes closely associated with the developing foetus*" (Tysiac v. Poland, 20 March 2007)[26], "*the rights of the pregnant woman should be weighed against other competing rights and freedoms, including those of the unborn child*" (A.B.C. v. Ireland)[27]. This statement – which we find highly debatable and which is nevertheless conditional – must be understood jointly with another statement by the Court, which "*is convinced that it is neither desirable nor even possible at present to answer in the abstract the question of whether the unborn child is a 'person' within the meaning of Article 2 of the Convention* (Vo v. France, 8 July 2004)"[28]. Similarly, the Court has so far always refused to specify whether "*others*", as referred to in paragraphs 2 of Articles 8 and 10 of the Convention, "*includes the unborn child*" (Open Door and Dublin Well Woman v. Ireland, 29 October 1992)[29]. The European

[24] § 214.

[25] Julie Tavernier, [MISSING] in Carine Laurent-Boutot, Yannick Lécuyer, Delphine Tharaud (eds), *Dictionnaire thématique de la Convention européenne des droits de l'homme* (Pédone 2022) 51.

[26] No. 5410/03, § 106.

[27] § 213.

[28] No. 53924/00, § 85.

[29] Nos. 14234/88 and 14235/88, § 63.

Court of Human Rights is uncomfortable with this issue, as these statements show. As a result, its case law is far from linear, fully consistent and in line with what cultural and radical feminists advocate. All feminists may also be moved by its further statement, as Julie Tavernier points out, that "*while it cannot be ruled out that a woman's decision to have an abortion constitutes an interference with the right to respect for the private life of the potential father, her interpretation "must above all take into account the rights of the mother", since she is the one who is primarily concerned by the pregnancy, its continuation or its termination*". We could not settle for less. (Boso v. Italy, 5 September 2002)[30].

As mentioned above, Julie Tavernier also points out that "*Despite the existence of a consensus in Europe in favour of termination on grounds of health or well-being, the European Court of Justice paradoxically, and in contradiction with its overall reasoning, recognises a very wide margin of appreciation for national authorities, justified in particular by 'the extreme sensitivity of the moral and ethical issues raised by the question of abortion '* (A. B. C. v. Ireland, *op. cit.,* § 233)"[31]. Since when could sensitivity, a subjective feeling if ever there was one, support, or conversely destroy, a legal argument, which is essentially objective? There are other extremely "sensitive" subjects, moreover, on which, paradoxically, the Court has not hesitated to show boldness. In the area of transsexualism, for example, as evidenced by the Christine Goodwin v. United Kingdom judgment of 27 March 1996[32]. The position of the Strasbourg Court would therefore be justified by the lack of consensus on the starting point of life, as stated in § 84 of the Vo v. France judgment. However, we consider this justification to be inadmissible, since a woman's decision to have an abortion *strictly speaking* first and foremost concerns *her* freedom to control *her own* body and live *her* life as she sees fit, and not the life of another person and its beginning. The approach could now be taken in terms of priorities or concentric circles, with the decision to have an abortion being primarily a choice for the woman or the first concentric circle, with "others" only being able to intervene in a second stage or in a second concentric circle. Given that there is a very broad consensus in Europe on the legalisation and regulation of abortion[33], this should

[30] No. 50490/99.

[31] Tavernier (n 25) 51.

[32] N° 17488/90, <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62533%22]}>.

[33] Only Poland and Malta remain very resistant to abortion within the European Union. However, Poland has recently signalled its intention to regulate abortion, and Maltese legislation has somewhat relaxed the principle of prohibition. But Malta remains the only state in which abortion is prohibited. <https://www.touteleurope.eu/societe/droit-a-l-avortement-les-deputes-europeens-approuvent-l-inscription-de-l-ivg-dans-la-charte-des-droits-fondamentaux/>; Within the Council of Europe, 40 out of 46 member states recognise and have legalised abortion. <https://www.rfi.fr/fr/europe/20230619-droits-à-l-ivg-l-union-européenne-impuissante-face-aux-tentatives-de-retour-en-arrière>.

now be the sole basis for the Court's reasoning. The Court's position on abortion is all the more difficult to follow as it does not correspond in any way to the overall reasoning it usually employs: when there is a minimum common consensus on an issue (in our case, on the regulation of abortion in Europe), the national margin left to States is in principle narrow. This is all the more incomprehensible given that on other issues where consensus was far from existing, the Court did not hesitate to take extremely bold decisions[34]. This reasoning from Strasbourg is all the more open to criticism as it still puts forward the rather surprising argument that women always have the option of having an abortion in neighbouring countries where the procedure is permitted[35]. This is true for those who have the financial means, more so than for others... Until 2018, for example, Irish women who were prohibited from having an abortion in their own country for reasons of "*extreme sensitivity of the moral and ethical issues raised by this question*" could still have an abortion in Great Britain. The Court thus considers that women "*can, without breaking the law, go abroad to have an abortion and obtain adequate information and medical care in this regard*"[36]. It will refrain from making further statements until it dares to enshrine the right to abortion as a matter solely for the woman's private life. However, there is only a small step left to take, because although this right still cannot be inferred from the Convention, the Court is attempting to restore balance by ensuring that women can at least have effective access to abortion when domestic law allows it. This has been commonplace in its reasoning since it clearly stated in 1978 in the Tyrer v. United Kingdom judgment that the effectiveness of the rights set out in the European Convention on Human Rights was an end in itself. To this end, it also established its theory of positive obligations. In other words, not only must the State refrain from infringing on a freedom, but it must also do everything in its power to guarantee and ensure its effectiveness. In relation to our subject, the Court did not hesitate to condemn Poland in the Tysiac judgment for failing to put in place "*effective mechanisms to determine whether the conditions for a legal abortion (in this case*

[34] On the subject of transsexualism, for example.

[35] The ban on abortion will be removed from the Constitution by a historic referendum on 25 May 2018. Philippe Bernard, 'L'Irlande rompt catégoriquement avec des siècles de prohibition de l'avortement' Le Monde (26 May 2018) <https://www.lemonde.fr/europe/article/2018/05/26/l-irlande-rompt-categoriquement-avec-des-siecles-de-prohibition-de-l-avortement_5304876_3214.html>.

[36] A.B.C. v. Ireland, § 241. It had already applied the same reasoning in its judgments in Open Door and Dublin Well Woman v. Ireland, 29 October 1992, *op. cit.*, and Women on Waives and Others v. Portugal, 3 February 2009, No. 31276/05. It persists and confirms this in the judgment L. M. v. Poland, 14 December 2023, <https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-7828160-10867354%22]}> § 84.

a therapeutic abortion) were met"[37].

Julie Tavernier further clarified that, "*Guided by these same requirements of effectiveness and consistency in domestic law and practice, the Court found a violation of Article 8 of the Convention due to the absence of standards for the implementation of the constitutionally guaranteed right to abortion in cases of proven danger to the mother's life, which prevented the applicant from establishing whether she could legally have an abortion in Ireland (ABC v. Ireland §§ 250-268). The Court also criticised, under Articles 3 and 8 of the Convention, the impossibility for a woman, in cases of suspected foetal abnormality, to have timely prenatal genetic testing that would have enabled her to choose between continuing her pregnancy and having a legal abortion (R.R. v. Poland, 26 May 2011, No. 27617/04), or the impossibility of accessing, in a timely manner and without hindrance, reliable information on the conditions under which abortion is legally permitted and on the procedures to be followed in the event of pregnancy resulting from rape (P. and S. v. Poland, 30 October 2012, No. 57375/08)*"[38]. In her book on *the European Convention on Human Rights,* Laurence Burgorgue-Larsen particularly emphasised the breakthrough made by the Strasbourg Court in the R.R. judgment in 2011, as it courageously advanced the field of Article 3 and inhuman treatment. Nevertheless, she reached this conclusion in view of the very serious specificities of the case, since "*the applicant, after being informed of the likelihood of a malformation in her foetus, was repeatedly refused access to genetic testing during the period when she could have legally had an abortion. She gave birth to a child suffering from serious physical malformations due to genetic abnormalities. Her family life (she was already the mother of two children) was turned upside down when her husband left her after the birth of her disabled child. The Court, in a particularly bold move, ventured into the territory of Article 3, ruling that the state of uncertainty, tension, distress, in short, of extreme vulnerability that characterised the applicant while she was waiting for permission to proceed with prenatal testing caused her acute suffering constituting a violation of Article 3*"[39]. Unfortunately, it is only in the most serious cases that the Court sanctions even the most recalcitrant states in Europe for denying women the possibility of abortion, but not on the basis of respect for their private lives. This change of course has yet to materialise. Paradoxically, it may be encouraged by the issue of abortion, this time not consensual but imposed by a system, and raised by the G. M. and others v. Moldova judgment of 22 November 2022 in sordid circumstances. Moldovan women, interned

[37] 20 March 2007, application no. 5410/03, § 124.

[38] Tavernier (n25)52.

[39] Laurence Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (3rd edn, LGDJ 2019) 67; Laurence Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (4th edn, LGDJ 2024) 63.

in a psychiatric asylum for intellectual disabilities, were raped by a doctor and subjected to non-consensual abortions and contraception. The Court admitted explicitly in this case that "*forced abortion, sterilisation and contraception constitute forms of gender-based violence*"[40]. This ruling shows that gender, as claimed by culturalist and radical feminists, has well and truly entered the courtroom in Strasbourg, as the treatment of domestic violence already suggested. The Court should be able to reconcile all feminists on this issue, since it now recognises its gender-specific nature.

3. At the point of convergence of all feminist currents: the Court's treatment of domestic violence

This is another contemporary manifestation of violence against women, which is multifactorial. As Kiteri Garcia writes in the *Thematic Dictionary of the European Convention on Human Rights*, "*Since the Opuz v. Turkey judgment of 9 June 2019, the Court has emphasised the variety of forms that domestic violence can take and the difficulty of understanding it, insofar as this problem, common to all Member States, does not always come to light and often occurs within the context of personal relationships or small circles. It follows that women, children and men alike must be considered as potential victims of this form of violence. Since then, European case law has intensified and developed in recent years, whether in relation to Article 8, Articles 2 and 3, these three texts taken together, in relation to Article 14 of the Convention*"[41].

The plurality of these foundations that we mentioned earlier is coupled with reference to the Istanbul Convention, as the Court does not hesitate to incorporate it into the interpretation of its own provisions. According to the Convention of 7 April 2011, it should be pointed out that domestic violence corresponds to "*all acts of physical, sexual, psychological or economic violence that occur within the family or household or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same residence as the victim*."

In line with the case law developed by the Court concerning vulnerable persons, it does not hesitate to take into account the particular vulnerability of victims of such violence, requiring States to protect them. Laurence Burgorgue-Larsen states that the Court, in this unanimous *hard case* (Opuz v. Turkey, *op.* cit.), condemned Turkey for failing to adopt "*appropriate measures to remedy the domestic violence*" after considering

[40] <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13898%22]}> § 88.

[41] K Garcia, 'Domestic violence' in Laurent-Boutot, Lécuyer, Tharaud and others (eds) (n 25) 435.

that the violence suffered by the applicant and her mother (who had been abused and mistreated for many years by their son-in-law) should be considered as gender-based, thereby constituting "*a form of discrimination against women*". It also added that "*while many States have pursued legislative reforms, their implementation is far from satisfactory*". This is the case, for example, in Romania (E.M. v. Romania, 30 October 2012) and Turkey, where "*several cases have revealed the difficulty of implementing their positive obligations to protect women, whom the authorities generally know, after several complaints on their part, to be threatened in their family environment, most often by their husbands. Consequently, despite the introduction of action plans and new legislative measures to combat this endemic scourge, social reality is not changing easily or quickly*"[42]. For this reason, "*the Court now requires the State to put in place an appropriate legal framework to prevent and punish these acts of violence, protect victims and carry out effective investigations and prompt proceedings when such acts have been committed*" adds Kiteri Garcia[43].

The Court has thus raised its standards, requiring that "*the positive obligations arising from Articles 2 and 3 are no longer triggered by the mere risk of a real and immediate threat, but by the need for the authorities to assess that threat*"[44]. This is now the starting point for the State's positive obligation, which goes far beyond the mere risk of an immediate and real threat. This is particularly evident in the Talpis v. Italy judgment of 2 March 2017, a case of femicide, and the Kurt v. Austria judgment of 15 June 2021[45], a case of homicide[46]. Kiteri Garcia adds in this regard: "*It is precisely on the issue of the effectiveness of measures to combat violence that national systems are condemned. An appropriate state response must therefore exist before it is too late. Moreover, this response cannot be based on existing but ineffective legislation. In this respect, the Court is not fooled by a range of measures that appear comprehensive but are ineffective when the authorities remain passive. Such passivity constitutes gender-based discrimination. (...) The discriminatory attitude of a State thus results from a lack of seriousness in addressing the problem of*

[42] Burgorgue-Larsen, *The European Convention on Human Rights*, (n 25) 66 . § 200 of the Opuz judgment.

[43] Garcia (n 41) 436.

[44] Garcia (n 41) 436.

[45] In this Grand Chamber judgment of 15 June 2021, it confirms this position, even though Austria is not condemned in this case on the basis of a violation of Article 2. The applicant alleged that the Austrian authorities had failed to protect her and her children from her violent husband, which ultimately resulted in the murder of their son by the latter. By ten votes to seven, the Court nevertheless concluded that there had been no violation of Article 2 of the Convention. Why? Because the obligation incumbent on States under this article is an obligation of means and not of result (§159). And because Austria had not violated its obligation to put in place preventive measures to assess the threat of homicide.

[46] Burgorgue-Larsen, *The European Convention on Human Rights* (n 7) 63.

domestic violence and from widespread passivity bordering on discrimination against victims (Balsan v. Romania, 23 May 2017). In its most recent judgments, the Court criticises States for their inaction, reflecting a general tolerance of domestic violence, which is considered normal by the majority of the population. The lack of awareness of the problem of domestic violence is a recurring criticism levelled by the Court at the parties. Such violence, under the pretext that it occurs within the family circle, cannot be considered a private matter. By revealing indifference at best, and tolerance at worst, as the root cause of discrimination, the Court targets the heart of the societal and structural problem posed by domestic violence. The Court is also likely to deal with this violence under Article 8 when the acts are not limited to physical violence but include psychological violence or harassment. In this sense, it recently affirmed that cyberviolence[47] *constitutes an aspect of violence against women* (Buturuga v. Romania judgment, 11 February 2020)"[48].

A recent judgment by the Court shows that the fight against stereotypes also remains difficult to address. In the Carvalho Pinto de Sousa Morais v. Portugal judgment of 25 July 2017, Laurence Burgorgue-Larsen denounced the Portuguese Supreme Court's reduction of the amount of damages awarded to a 50-year-old woman following a failed surgical operation that left her in constant pain and permanently unable to have sexual relations. The Supreme Court had considered that she was "old" – sexual relations were no longer important at the age of 50 in its view – and that her role as a mother had already been fulfilled – her children were grown up and no longer needed her attention. Laurence Burgorgue-Larsen, a keen observer of the European Court's reasoning, pointed out that "*the latter had the courage to implement a new methodology that cannot be the traditional one derived from non-discrimination law. The first phase consists of identifying stereotypes that reveal prejudices. And to assert that, in this case, they are based on a 'traditional idea of female sexuality, essentially linked to the objective of motherhood and, in doing so, ignoring its physical and psychological importance for the fulfilment of women as individuals*'[49] *. (...) Given the harmful effect of the stereotype presented, the second methodological phase – that of contestation – was therefore set in motion. Here, according to the European Court, what matters is no longer the famous "comparability" test used in "classic" cases of discrimination, but rather the context in order to show that the application of a stereotype to a specific case is prejudicial. Such a methodology will not be easily understood by national judges, whether from developed or developing*

[47] L. Burgorgue-Larsen develops this aspect of the problem in particular in the new edition of his work, Burgorgue-Larsen, *La Convention européenne des droits de l'Homme* (n 7) 63.

[48] Garcia (n 41) 436-437.

[49] ECHR, 25 July 2017, No. 17484/15, Carvalho Pinto de Sousa Morais v. Portugal, § 52.

countries, even though it has already been deciphered and promoted by academic circles[50] *. It challenges habits and implies a different perspective on the law and its biases. There is still a long and steep road ahead in this area*"[51].

However, to conclude, we would like to note, along with Loïc Robert, that "*the Court's bold and dynamic attitude in this area contrasts with a general trend towards stagnation or even regression in protection standards*"[52].

All the latest decisions of the European Court of Human Rights mark progress for women, notwithstanding this sad procession, to which the Strasbourg Court is committed... That of the possibility of reconciling all feminists, and *with* them, all men who are sensitive to their cause. *Our* common cause is universal in spirit, for both men and women are essential to society.

[50] The reference work, R Cook and S Cusak, *Gender Stereotyping: Transnational Legal Perspectives* (John Hopkins University Press 2010).

[51] Burgorgue-Larsen, 'Les femmes et la jurisprudence, libres pérégrinations comparatistes' (n 8) 4.

[52] Loïc Robert, cit., 5.

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?*

CONTENT. 1. Introduction – 1.A. Concerns about gender equality in the French civil service – 1.B. The link between equality and parity – 1.C. The enshrinement of gender parity in French civil service law – 2. The translation of parity into French civil service law – 2.A. A circumscribed translation – 2.A.i. Qualification acquired for measures to increase the number of women on selection boards and in recruitment in the senior civil service – 2.Aii. Partial qualification for measures to increase the number of women in social dialogue bodies – 2.B. A rooted translation – 3. The contribution of parity to the general policy of professional gender equality within the civil service – 3.A. A disconnected contribution – 3.A.1. A limited female target – 3.A.2. Insufficient coordination with other aspects of the overall gender equality policy – 3.B. A hampered contribution – 4. The resonance of gender parity on the French model of public service – 4.A. *A priori* limited resonance – 4.B. Potential resonance

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[**] It's the translation of Aurélie Virot-Landais, 'De la parité en droit français de la fonction publique', in Federica Rassu (ed), *Femmes, Actes des 20e Journées Roma Tre*, organized in Poitiers on September 26 and 27, 2024 and published by Presses Universitaires Juridiques de Poitiers, 2026.

1. Introduction

"Women are on Earth to idealise everything" wrote Victor Hugo[1]. 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[2], 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-19th century[3], particularly in the teaching profession[4], 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[5]; 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

[1] Victor Hugo, 'Les femmes sont sur la Terre', in *Les Contemplations* (first published 1865).

[2] Directorate-General for Administration and the Civil Service (DGAFP), *Key figures on the civil service* (2022).

[3] 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 XXe siècle', in Georges Duby and Michelle Perrot (eds), *Histoire des femmes en Occident*, *t. V le Xme siècle* (Tempus/Perrin 2002) 590. See also Annick Davisse, *Les femmes dans la fonction publique. Rapport au Ministre de la function publique* (La Documentation française 1983) 15.

[4] This is not the case in all countries, for example in Germany.

[5] 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.

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"[6], 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[7], it should not be idealized. Formal equality is not real equality[8]! 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[9].

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[10] – as well as equal treatment of public

[6] Guarantees justified by a difference in technical circumstances are those relating to pregnancy or breastfeeding, for example.

[7] 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).

[8] For a detailed overview of the application of the principle of equality in civil service law, see Alexis Zarca, *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.

[9] 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.

[10] The principle of "the legal aptitude of women" for public office, subject to "reasons of service", established by the

servants[11]. 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[12]. 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[13]. 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[14]; 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

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 Édel, 'Deux siècles de principe d'égalité admissibilité aux emplois publics (2012) 142 Revue française d'administration publique 339.

[11] 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).

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

[13] Conseil d'Etat, ass., 30 Oct. 2009, *Mme Perreux,* No. 298348.

[14] Validation of principle by decision Conseil constitutionnel, No. 82-153 DC, 14 January 1983.

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[15]. 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"[16]. 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[17] or, in some countries, between ethnic or religious communities[18].

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[19]: the equal sharing of power

[15] 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.

[16] Geneviève Fraisse, 'La parité, un mot bon à tout faire' (2002) 1 (7) Travail, Genre et Société 117.

[17] 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 (19e-20e siècles)* (La Documentation française 2021).

[18] 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.

[19] 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[20]. 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

[20] 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.

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[21].

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)[22]. 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[23].

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[24] and local[25], are one of the key forums for

[21] Fraisse, (n 17).

[22] Janine Mossuz-Lavau, *Femmes/hommes. Pour la paritè* (Presses de Sciences Po 1998).

[23] 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.

[24] Joint Council of the Civil Service (CCFP) and the higher council for each branch (CSFPE, CSFPT, CSFPH).

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[26]. 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[27], 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+[28]. 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[29] 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[30]. Competition and professional examination panels

[25] Social Committee and Joint Administrative Committee (CAP) or its equivalent for contract workers (CCP).

[26] 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.

[27] Particularly the joint administrative committee (CAP).

[28] 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).

[29] Which varies according to the civil service.

[30] 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[31] aimed at public employers (primarily the State itself), before moving on to coercion[32]. The binding joint approach began for the first two "centers of power" with the Génisson Act 2001[33], following the Colmou report of 1999[34]. The Sauvadet Act 2012[35] marked a decisive

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.

[31] 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.

[32] 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).

[33] Law No. 2001-397 of 9 May 2001 on professional equality between women and men, known as the Génisson Law. Remedying 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.

[34] Colmou (n 31).

[35] 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.

step forward following the Guégot report of 2011[36]: 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[37], 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[38] 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

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

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

[38] 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".

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[39] 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

[39] Because there is no problem with access to higher education in particular.

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[40].

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[41]. 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[42], the other two substantive

[40] General Civil Service Code (CGFP), Art. L. 325-17, para. 4.

[41] 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 1th 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 1th January 2027 – with a three-year period to achieve compliance (CGFP, Art. L. 312-9-1).

[42] See *1.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[43] for representatives of public employers and, within higher-level bodies[44], 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[45] . 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

[43] For the record, the social committee and the joint administrative committee (or joint consultative committee).

[44] 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".

[45] 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[46] 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%[47] – 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[48]. 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

[46] CGFP, Art. L. 241-1 (cited above).

[47] 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.

[48] 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).

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[49]. 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[50]. 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[51]. The legislator is reluctant to constrain political parties[52] or trade unions[53] in their strategic

[49] According to Sauvé (n 8).

[50] 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.

[51] In 2000 for political elections, in 2012 for professional elections within the civil service.

[52] 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.

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[54] . 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[55].

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

[53] 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.

[54] 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.

[55] 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.

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[56] 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[57]. The latter mainly use positive discrimination tools or simply formal equality[58].

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

[56] 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.

[57] Consider the contemporary initiatives of certain local public employers to grant menstrual leave to their female staff.

[58] This is simply a matter of drawing conclusions from an objective difference in circumstances.

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[59] 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[60]. 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[61]. 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

[59] It borders more on a litany of biases and stereotypes, without offering some tools to try to remedy them individually and collectively.

[60] 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).

[61] One example is the Ministry of Foreign Affairs.

quality of working life[62] 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[63]. 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

[62] In particular by changing the systemic approach to meeting times, daily working hours and the use of teleworking.

[63] 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.

of 40% female first-time appointments was reached and even exceeded for the civil service as a whole[64], 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[65]. 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[66]. As a result, the reluctance of some is ultimately beneficial to the most convinced and committed employers[67]!

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[68]. 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 –

[64] 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).

[65] 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[1] January 2027). The amount – unchanged – of €90,000 is payable for each missing unit (CGFP, Art. R. 132-15).

[66] This fund comprises nearly € 1 million per year.

[67] Another weakness is that it is up to each administration to specify and schedule the amount of the penalty.

[68] 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[69] – 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[70]! Admittedly again, it is logical and pragmatic to exclude local authorities and smaller public inter-municipal cooperation establishments from the scope of application[71]. 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[72], or a whole range of jobs is excluded by targeting expertise jobs to the detriment of management positions[73]. The legal framework thus reinforces the sociological biases observed in the field[74], 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

[69] 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.

[70] As Hélène 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" (Hélène Pauliat, 'Haute fonction publique', in Manel Benzerafa-Alilat *et al.* (eds), *Encyclopédie du management public* (Institut de la gestion publique et du développement économique, 2022), 365). See also in the local civil service, Aurélie Virot-Landais, 'Emplois fonctionnels' (2022) 816 Jurisclasseur § 29.

[71] 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).

[72] Temptation in the hospital civil service, now including middle management positions.

[73] In particular, the judiciary remains largely excluded from the scope.

[74] 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[75]. If they manage at least 50 employees, they must also publish a professional equality index[76] 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

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

[76] 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[77], which have been applied in the administration in the United States[78], and on the other hand, human rights doctrine[79].

[77] 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.

[78] 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[80]. 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

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.

[79] 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.

[80] 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.

the people or even the elites, but rather "the mirror of the state"[81]. 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"[82]. In concrete terms, women's access to administrative jobs from the end of the 19th 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[83]! 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

[81] Jean-Michel Gaillard, *L'ENA, le miroir de l'État. De 1945 à nos jours* (Complexe Editions, coll. Questions au XXème siècle 1995).

[82] Luc Rouban, 'La féminisation des élites administratives : avancée sociale ou nouvelle discrimination?' (2013) 1 (145) Revue française d'administration publique 7.

[83] Rouban (n 83) 8.

security, increased competition between civil servants and contract workers, and significant "*pantouflage*"[84] 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 1of 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[85]. However, intrinsically – and regardless of the response

[84] Practice of former senior civil servants taking up positions in the private sector.

[85] 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[86], 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[87]. 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.[88] 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

[86] Conseil Constitutionnel, dec. No. 83-168 DC of 20 January 1984.

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

[88] 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.

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.

BARBARA CORTESE[*]

WOMEN AND ROLES: THE SOCIAL-JURIDICAL ROMAN CONTEX

ABSTRACT. *This short essay brings together some of my reflections presented during the international conference in Poitiers entitled 'Les Femmes'.*
From a still preliminary review of the Roman approach to regulating the legal status of women in society, it seems to me that we can discern an economic and legal policy choice that had nothing to do with the ideology of female inferiority and subordination.
This is clearly a complex issue, which I reserve the right to return to.

CONTENT. 1. 'Gender' in not a roman concept – 2. Who is the roman woman? – 3. The Legal rules and the legal language giving the roles – 4. Women and political legal choises

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1. 'Gender' in not a roman concept

These reflections are intended as an initial analysis of the continuity or discontinuity of women's roles between antiquity and modernity, a topic I reserve the right to return in greater depth.

However, some preliminary remarks are necessary.

When we talk about Roman women, we must consider the complex history of Roman society, which imposes distinctions, albeit fairly generalised ones, between ancient Rome, republican Rome and imperial Rome.

We must also take into account the fact that, even within these periods, political influences, which varied according to the policies adopted by each emperor, had a considerable impact on the social and legal status of women.

Another preliminary remark concerns the total unfamiliarity of the Roman world with concepts such as 'gender identity'. Eva Cantarella argues: «A concept such as that expressed by the term 'gender' linked to sexual belonging did not exist at that time. In fact, it has only been in use for a few years, translating the English word 'gender', introduced by feminism to indicate that the difference between the sexes is not only biological but is socially and culturally constructed»; she goes on to say that «male and female identities were truly different»[1].

It must be said that men were not subject to identity definitions either: the male figure was by no means homogeneous in terms of social and legal status. To be clear, men, like women, were not the focus of generally recognised rights simply because they belonged to the male gender. Therefore, in the Roman context, the issue of gender did not even arise in a broad sense: women and men were different creatures, and, again quoting Cantarella, «this diversity had consequences not only on men's attitudes towards women, but also – and above all – on the social and legal rules they established».

Whereas the main corollary of this principle of difference was inferiority: «difference equals inferiority, therefore, and consequently subordination»[2].

This is one of the fundamental points, in my opinion.

[1] Eva Cantarella, 'Identità, genere e sessualità nel mondo antico, in "Homo", "caput", "persona". La concezione giuridica dell'identità nell'esperienza romana. Dall'epoca di Plauto a Ulpiano' in Gagliardi Lorenzo and Maffi Alberto (ed), *Diritto e società in Grecia e a Roma. Scritti scelti*, (Giuffrè, 2011) 941.

[2] Cantarella, (n 1) 944.

2. Who is the roman woman?

Since Cantarella sees a sort of causal link between perception (and therefore male behaviour) and social and legal rules; that is to say, that the law and society recognise diversity as a consequence of male sentiment.

In truth, it seems to me that although the perception of diversity is purely empirical, a natural awareness, the socio-legal consequences in terms of inferiority are the result of a "political" choice that has been made since the days of mores.

Many studies have shown that matriarchal family organisation was not unknown to archaic European civilisation: the idea that the cell of society was constituted by the monogamous patriarchal family is not corroborated by the sources, which, on the contrary, seem to point in the opposite direction, (epigraphic sources would account for the centrality, if not the cruciality, of the female presence in sacred symbolism)[3].

Therefore, the positioning of women at a lower and different level than men would be the result of a political line of law dictated immediately after the birth of the Roman community with the clear intention of placing men at the centre of social, economic and institutional relations.

Roman legal tradition thus provides the first example of a well-articulated special discipline imposing a discriminatory legal status on females. In other words, the difference between men and women was linked to their belonging to a different gender.

It should be borne in mind that, since women did not have access to the political institutions of the Roman world, it was impossible for law and politics to produce forms of recognition and/or protection. The subjective situations of women in the Roman world were therefore modelled on parameters of exclusion from constitutional structures, inferiority in legal relations and exclusion from the exercise of political power. Suffice it to say that women were part of the populus, in the anthropological sense, but even though they were *civis*, they did not participate in public functions.

In other words, what Eva Cantarella famously described as the "Roman paradox" came into effect, operating through numerous legal mechanisms with the specific aim of entrusting Roman women with the preservation and transmission of male morality and patriarchal tradition, imposed on them by men. This established the legal relevance of a difference between the sexes as such and, consequently, the special status of women, the purpose of which seems to be to establish complementary regulatory regimes for

[3] Marija Gimbutas, *The language of Goddess. Unearthing the hidden Symbols of Western Civilization*, (Harper & Row, 1989).

the male and female sexes, to which a predetermined legal function is assigned. Thus, women are predestined to complementarity with men, not equality. In this world, in which women are not born free and with the same rights as men, the perspective appears to be legally androcentric[4].

This represents the basis of the status of women throughout the Roman era, with fluctuations depending on political, territorial and economic factors that determined the history of Roman civilisation. The legal status of women, affected across the board by this rationally conducted sexual discrimination in political and legal terms, then diversified significantly according to the individual social status of women.

In fact, there were different types of women in Roman society[5]: types that established a real social and therefore legal status, sometimes not explicit but inferable from a series of limitations and prohibitions. This means that when talking about Roman women, it is necessary to indicate which type is being referred to, as there could be a huge difference between one and another.

Based on birth: free women, slaves, freedwomen.

Based on social status: aristocrats, plebeians, workers, prostitutes.

Based on role: matrons, priestesses,

Based on family status: wifes, mothers, daughters, servant.

Each with her own status; a status made up of recognition or exclusion of rights and/or duties: it is not the woman who is entitled to them or not: it is her role, her social status, her function.

Women are not recognised as subjects of law as such[6].

This is the other fundamental issue.

Women are constructed as different, inferior; this inferiority is modulated and declined according to the needs of an androcentric society, attributing roles and functions that are oriented towards complementarity with male needs[7].

[4] D. 1.5.9 (Papin. 31 *quaest.*): *In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.*

[5] Leo Peppe, *Posizione giuridica e ruolo sociale della donna romana in età repubblicana* (Giuffrè, 1984) 54 ff.

[6] Eva Cantarella, *L'ambiguo malanno. Condizione e immagine della donna nell'antichità greca e romana* (1981).

[7] Patrizia Giunti, 'Il ruolo sociale della donna romana di età imperiale: tra discriminazione e riconoscimento' (2012) 40 Index 342ff.

3. The Legal rules and the legal language giving the roles

It is clear that on a hypothetical scale of importance, free women of high social standing, integrated into a family context, occupy the highest position[8]. However, this is still a subordinate position. The legal status of such women began to take shape with the typical features of a special discipline in Roman history, when it took on defined contours, not only in terms of *mores*[9], but also in legislation, a status specific to persons of the female sex, which prescribes different rules from those for males in crucial areas of legal experience, such as family law, with particular reference – in an emblematically significant way – to marriage[10], but also to legal proceedings, obligations, contracts, succession due to death, etc.

Since ancient Roman times, restrictions have been imposed on these women to shape their behaviour towards typical continence. The rules specifically aimed at regulating women's lives are part of a context that is, as is well known, much broader than the discipline of family and kinship, as well as the extremely accurate terminology used in Roman legal practice.

Women are identified with the role of wives and mothers, while there is no provision for a legally independent female figure, free from the authority of a man. In fact, marriage ideally fulfils the institutional function that the Roman world assigns to women: to produce descendants for citizens, providing children for their husbands, who can always repudiate them[11].

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[8] Leo Peppe, *Civis romana*, *Forme giuridiche e modelli sociali dell'appartenenza e dell'identità femminili in Roma antica* (Edizioni Grifo 2016) 58ff.

[9] Maria Pia Baccari, 'Alcune osservazioni sulla condizione della donna nel sistema giuridico-religioso', in *Fides, humanitas, ius. Studii in onore di L. Labruna*, vol. 1 (2007) 253ff.

[10] Roberto Fiori, *'La struttura del matrimonio romano'* (*2011) 105* BIDR 197ff; Antonio Corbino, 'Il matrimonio romano in età arcaica e repubblicana', (2012) 40 Index 155ff; Maria Vittoria Sanna, *Matrimonio e altre situazioni matrimoniali nel diritto romano classico. Matrimonium iustum – matrimonium iniustum*, (2012); Luigi Capogrossi Colognesi, 'Matrimonium, «manus» e trinoctium', in *Marriage: Ideal- Law-Practice. Proceedings of a conference held in memory of H. Kupiszewski* (2005) 63 ss.; with extensive discussion, in turn, clarifies aspects and problems Patrizia Giunti, *Consors vitae. Matrimonio e ripudio in Roma antica* (2004) 145ff.

[11] Giunio Rizzelli, *Le donne nell'esperienza giuridica di Roma antica. Il controllo dei comportamenti sessuali*, (2000); Eva Cantarella, 'Virtù della donna, onore del maschio', in Eva Cantarella and Paolo Ricca, *Non commettere adulterio* (2010) 109 ff, Eva Cantarella, 'La causa d'onore dalla «lex Iulia» al Codice Rocco', in *Testimonium Amicitiae* (1992) 73 ss. (now in Cantarella (n 1) 553 ff). In ancient times, the penalty for repudiation was particularly severe, as it compromised the moral and social status of a person, who suffered a regression, but above all, it irreversibly compromised their legal, religious and economic status. Gaius recalls how repudiation, even in classical times, extinguished

Marriage is reserved for the purpose of procreation, which in practice must be carried out by the wife, and the child is then born into the legal status of the father at the time of conception, in the case of a regular marriage.

The legitimacy of filiation appears to be a constant, especially for the senatorial aristocracy, which seems to leave no legal room for the offspring of women's "sinful" unions. Full rights and public life could not, therefore, be enjoyed by those who did not boast a precise agnatic line into which they could neatly fit. Thus, the Lex Minicia (I sec. A.D.) deprived Roman women who were not married in a lawful marriage of the right to give birth to a Roman citizen: once again, the ultimate aim of the law was to limit citizenship to the descendants of Roman citizens alone.

The mother does not have parental authority over her children. She cannot therefore adopt. Women are prohibited from remarrying before a widowhood period of ten months has elapsed, otherwise they may be liable to erroneous attributions of paternity, which the nascent city community already intended to avoid, with a view to a series of marital duties inspired by female continence, which I mentioned at the beginning, suitable for consolidating, through legally formalised values imposed on women, the city community, which since the time of the kings had symbolically provided for the asymmetrical punishment of adultery.

Other rules restricting women's position included a total ban on drinking wine[12],

the marriage but not the manus. The second reason that justified repudiation was, as mentioned, the woman's drunkenness: in fact, she was forbidden from drinking pure wine (*temetum*). Both Cicero and Gellius report similar information in their works, confirming what Plutarch says about punishment for drunkenness, but also informing us about what women were allowed to drink: they were only allowed to drink beverages that were sometimes mistakenly considered non-alcoholic, or at least less alcoholic than pure wine, such as *passum* and *loream*. The reason for this prohibition is explained by Valerius Maximus: drunkenness led to lust and, therefore, if married, a lustful woman would certainly be an adulteress, although the fact that it would also lead to abortion cannot be ignored. Therefore, the woman was punished not so much for disrespecting her husband as for the questionable legitimacy of the children who would be born to a woman of easy virtue. The third reason for which legitimate repudiation was permitted was if the woman committed adultery. It has already been mentioned that in earlier times, women were punished with death in cases of adultery. However, in later times, when marriage began to be subject to repudiation, the death penalty for adulterous women could only be applied if the husband caught her in the act. Otherwise, the husband could only repudiate his wife for just cause. It can therefore be concluded that, both in the case of adultery and in other cases where repudiation could be imposed, the punishment applied evolved over time: thus, the punishment went from capital punishment to the husband's right to terminate the marriage bond, leaving the woman in a situation of both economic and moral hardship.

[12] Linked to the prohibition of female adultery, which also dates back to the royal age: of "sexual taboo and alcohol taboo" at the same time, he speaks evocatively; Patrizia Giunti, *Adulterio e leggi regie. Un reato fra storia e propaganda* (1990) 155ff. About this also Eva Cantarella, *Passato prossimo. Donne romane da Tacita a Sulpicia*, (1996) 62ff; and

linked to the fact that a drunk woman could behave inappropriately and perhaps jeopardise the legitimacy of any child she might have.

In terms of legal capacity and ability to act, women had no choice: they were subject to their father or husband. In the case of a woman *sui iuris*, on the other hand, it was compulsory to submit to guardianship. And even when the rigidity of guardianship was relaxed, leaving room for greater autonomy, the *auctoritas interpositio* of the guardian was still necessary. But here too we see the fluctuations mentioned above, as regulatory measures had introduced prohibitions on the negotiating activities to which women were admitted: consider the *Lex Voconia* of 169 BC, which affected women's inheritance rights (even Cicero described it as damaging to women). This law established that no legatee could receive more than the heir had received. However, it was easy to circumvent the purpose of the provision by arranging a large number of legacies that did not exceed the share allocated to the legatee. It also limited women's inheritance rights, more precisely prohibiting anyone who left an inheritance worth more than one hundred thousand in their will from appointing a woman as heir.

One of the main reasons for the enactment of this law was to safeguard the male line of descent.

Trough the *SC. Tertullianum*, enacted in 178 AD, containing provisions relating to succession mortis causa between mother and children, it established, in particular, that only first-degree descendants (and not further descendants) could participate in the intestate succession of the deceased mother, and that they had precedence over other agnatic collateral relatives, who were therefore excluded.

In the Hadrianic era, in terms of the duties imposed on mothers, who were thus finally able to become civil heirs of their children. The turning point was the establishment of the mother's responsibility and the symmetrical recognition of an inheritance expectation. Women are therefore now assigned a "parental" role with legal significance, albeit in constant compliance with male authority over guardianship of minors. In fact, it is established that the mother, in the interests of her minor child, must comply with the duty to request a suitable guardian for the latter. However, this legitimisation of the mother's right to postulatio tutoris, during her child's lifetime, entails the sanction for the mother herself of exclusion from her child's legitimate inheritance in the event of non-compliance, on grounds of unworthiness.

The *Senatus Consultum Velleianum*, dates back to the 1st century AD and is a senate act that can be dated to approximately the middle of the 1st century AD, established a limit on women's legal capacity, prohibiting women from *intercedere pro aliis*,

156ff (ntt. 59-64); C. Cascione, 'Matrone «vocatae in ius»: tra antico e tardo antico' (2012) 40 Index 238.

i.e. from assuming obligations on behalf of others. It prevented women from interceding, assuming guarantees and obligations for third parties, by granting the female debtor sued by the creditor a procedural exception against him. In theory, it guaranteed the defence of women's interests, who, being considered the weaker sex, were unable to resist their husbands, brothers, male relatives and friends who demanded their help. But beyond any false intention to protect them, through the Velleian senate consultation, women became unreliable contractors and therefore less active in the public and commercial sphere[13].

4. Women and political legal choises

The legal superstructures that seek to instil cultural characteristics that justify the logic of inferiority also pass through the terminology used by both jurists and legislative or edictal measures. The terms[14] used in legal language to designate female weakness are usually '*infirmitas*' and *imbecillitas* or the soft '*levitas*' (used by Gaius).

'*Infirmitas*' and '*imbecillitas*' are usually used in the sense of physical and mental infirmity, referring to weakness as a characteristic of the female gender.

Less discriminatory and certainly less offensive is Gaius, who significantly uses '*levitas animi*', in the sense of volatility, lack of firmness, a vulnerability that is more psychological than anything else.

In this way, an attempt is made to justify the discriminatory logic of the law by indicating that women, due to their congenital weakness (*infirmitas*), lack the faculties to go beyond the narrow sphere of their personal interests and are therefore unable to fulfil civil duties or perform functions of public constitutional importance.

Women are different, and in their difference (their physical fragility and psychological weakness) they cannot be considered capable of performing roles and functions that are useful to society and which therefore become exclusively male[15]. The classic example is that of guardianship, which is inaccessible to women. In other words, women are made to feel that they do not exist outside the roles they play or the functions they perform.

[13] Tiziana J. Chiusi, 'La fama nell'ordinamento romano. I casi di Afrania e di Lucrezia' (2010-2011), 6/7 Storia Delle Donne 89-105.

[14] Renato Quadrato, "Infirmitas sexus' e 'levitas animi': il sesso "debole" nel linguaggio dei giuristi romani', in '*Gaius dixit' la voce di un giurista di frontiera* (2010) 137ff.

[15] Felice Mercogliano, 'Deterior est condicio feminarum…' in *Fundamenta*, (2nd edn, 2012) 205ff.

However, various anecdotes and facts testify to the gap between models and reality.

Giunti and Cenerini[16], each in different ways, have in fact highlighted that the real social perception of women is one thing, but how they were expected to be seen is another. Models are one thing, practice is another.

So, if the predominant model «is relentlessly structured around the marital-reproductive function and the domestic role»[17], it is also true that in the reality of the domus, social circles and daily activities, the situation was different.

This can be seen in the reactions, even inconsistent ones, that men had when faced with women who escaped the tight mesh of this model.

This is particularly evident in the case of Afrania, which touches on the issue of legal representation closely related to the social standing enjoyed by a particular individual, a connection that demonstrates how extremely important it was for Roman society to be able to represent someone in court. In fact, anyone who could not represent a friend in court was marginalised by society. It was customary for women to be represented in court by a person they trusted, obviously of the male sex. However, this was not mandatory.

In this unclear context of the late Republican era, we find the figure of Afrania, a citizen and wife of Senator Buccone[18], who used to conduct trials not only on her own behalf but also on behalf of others, and apparently did so with passion.

The first of these is by Valerius Maximus and is rather negative towards women[19]:

«*C. Afrania vero Licinii Bucconis senatoris uxor prompta ad lites contrahendas pro se semper apud pretore verba fecit, non quod advocatis deficiebatur, sed quod imprudentia abundabat. Itaque inusitatis foro latrati bus adsique tribunalia exercendo muliebris calumniae notissimum exemplum evasit, adeo ut pro crimine improbi feminarum moribus C. Afraniae nomen obiciatur. Prorogavit autem spiritum suum ad C Caesarem iterum P. Servilium consules: tale enim monstrum magis pro tempore extinctum quam quo sit ortum me-*

[16] Francesca Cenerini, *La donna romana. Modelli e realtà* (2009).

[17] Giunti (n 7) 356.

[18] We only know about Licinius Buccone from Valerius Maximus' account of his wife Afrania.

[19] Afrania is described as a reckless woman who used to speak personally before the magistrate in her own defence, not because she did not have lawyers who could defend her, but because of her strong and bold character. She was therefore labelled a troublemaker in court and soon became a famous example of female slander, so much so that her name was used to refer to a crime committed by women of easy virtue. She lived until the consulate of Gaius Caesar and Publius Servilius and, according to Valerius Maximus, it is more important to remember the moment of her death than the moment of her birth.

moriae tradendum est.[20]

"Caia Afrania, wife of Senator Licinius Buccone, naturally inclined to quarrelling, always spoke personally in her own favour before the magistrate, not because she lacked lawyers, but because she was abundantly impudent. And so, by continually harassing the courts with her barking, unusual in the forum, she became a well-known example of female slander, to the point that the name C. Afrania is used to indicate the crime of women with brazen customs. She lived until the second consulate of Gaius Caesar and Publius Servilius: indeed, the memory of such a monster should be handed down from the moment of her death rather than that of her birth".

The reason why Valerius Maximus lashes out so violently against women who speak in public, in the forum and in court, is that he clearly perceives a danger in women attempting to assume a role that is typically reserved for male Roman citizens: that of defence counsel in court and public speaker[21]. Having the opportunity to defend a friend who cannot defend his own interests in a trial is a very important factor in the social life of Roman citizens, as it demonstrates that they are both supporters and supported members of the network of friendships without which social and political success is unattainable. Afrania, clearly, with her *inverecondia*, proves to be a danger to that model, as she attempts to enter a world that does not belong to her and that should absolutely not belong to her. For this reason, her words are defined as "barking" that annoys the magistrate, her attitude not at all in line with the commonly accepted model of female behaviour.

The other description belongs to Ulpian and, compared to the previous one, seems to be much more lenient:

D. 3.1.1.5 (Ulp. 6 *ad ed.)*: «*Secundo loco edictum proponitur in eos, qui pro aliis ne postulent: in quo edicto excepit praetor sexum et casum, item notavit personas in turpitudine notabiles. sexum: dum feminas prohibet pro aliis postulare. Et ratio prohibendi, ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virili bus officiis fungantur mulieres: origo vero introduca est a Carfania improbissima femina, quae inverecunde postulans et magistratum inquietans causam dedit edicto*».

"Secondly, the edict is directed at those who are prohibited from petitioning for judgement in the interests of others: in this edict, the magistrate has established exclusion on the basis of gender and physical disability, and has also indicated those who may be punished for disgraceful conduct. With regard to gender, it prohibits women

[20] Valerius Maximus, *Facta*, cit. 8, 3, 2. About this Valeria Viparelli, 'Donne avvocato a Roma (Val. Max. 8.3)', in *Fides, humanitas, ius. Studi in onore di L. Labruna*, vol. 8 (2007) 5843ff.

[21] Luigi Labruna, 'Un editto per Carfania?' in *Adminicula*³, (1995) 167ff.

from petitioning for judgement in the interests of others. The reason for the prohibition is that women should not interfere in the disputes of others in contrast to the modesty proper to their sex and should not exercise masculine functions. Indeed, the origin of the prohibition was given by Carfania, a very impudent woman who, by petitioning for judgement in a brazen manner and annoying the magistrate, gave rise to the edict".

Ulpian's text refers to a praetorian edict that decreed the impossibility of *postulare pro aliis* for certain categories of people, including women, who cannot defend anyone other than themselves in court.

The text explains the reasons behind this decree: "*ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virilibus officiis fungantur mulieres*".

It seems that the reasons for this decree can be found in the prohibition on women interfering in other people's cases, thereby failing to observe the modesty required of their sex, and, on the other hand, in the prohibition on women performing tasks reserved for men. Immediately afterwards, Ulpian adds the episode that gave rise to the decree: "*origo vero introducta est a Carfania improbissima femina, quae inverecunde postulans et magistratum inquietans causam dedit edicto"*.

The jurist, therefore, refers to a female character whose figure is outlined with great rhetorical care through the use of three terms, "*improbissima", "inverecunda"* and "*inquietans"*, which share the same negative prefix in- and belong to the sexual sphere.

The adjective *improbus*, in fact, despite having a specific legal meaning, is often used to describe someone who is "*impudicus, audax, saevus, speciatim in re amatoria*".

It is clear, therefore, that the reason for the prohibition lies in preventing women, who are expected to be modest as befits their gender, from performing tasks that are strictly masculine.

The jurist, on the other hand, does not take into consideration the emotional aspects of Afrania's character, but focuses solely on the prohibition whereby women cannot and must not perform tasks that are strictly masculine, and must remain outside public life. And so, poor Afrania becomes the bearer of the blame for the introduction of the prohibition on women of *postulare pro aliis*.

Another late classical jurist, Paul, also explicitly contrasts those who are unable to exercise the functions of a judge due to their natural condition with those who are unable to do so. I am referring to the deaf, the mute, and also the mentally ill or the prepubescent, who are temporarily or permanently lacking in judgement; above all, women, who are excluded from this office only because of custom, and not because they lack judgement[22].

[22] D. 5.1.12.2: «*Non autem omnes iudices dari possunt ab his qui iudicis dandi ius habent: quidam enim lege impediuntur*

Gaius seems to be more favourable to women[23]. Regarding the need to protect women, he writes that, unlike minors, this cannot be based on *ratio naturalis*. Gaius does not consider the argument of frivolity, which is normally put forward, to be valid because it does not correspond to reality: women resolve their own affairs and sometimes the praetor must compel their guardian, if he refuses, to give authorisation (which is always necessary from a legal point of view) for the transaction that the woman wishes to conclude, even against his will.

Regarding the difficulty of managing rebellious women, a difficulty that translates into outright schizophrenia, we note that women of a certain calibre are not always treated so badly by authors: Valerius Maximus, in fact, while malevolent towards Afrania, attests only to a masculine spirit in Mesia[24]. The same author then describes Hortensia, the daughter of the famous orator Hortensius, as a woman who, through a brilliant speech worthy of her father, manages to convince the triumvirs Antony, Octavian and Lepidus not to tax the wives of their political opponents[25]. These two cases, however, appear to be mere exceptions: Mesia's personal problem, the taxation of noble women; in the case of Hortensia, her brilliant speech is not attributed entirely to her own ability, but there is a reference to her father, who is considered a co-author of the speech itself.

Afrania, on the other hand, does not speak only for herself, and her behaviour is not characterised by the exceptional nature of a specific situation. This is what determines her bad reputation, what has made her remembered negatively.

Ultimately, Afrania represents the emblem of opposition to a system that assigns a secondary role to women, believing that they should live behind the scenes of public life, in the shadow of men. Her bad reputation stems from this behaviour, and other women are, just like her, subject to the prohibition that effectively limits their ability to act. Afrania is often cited in reference to the prohibition on women holding the office of solicitor, but this reference is reductive. In fact, we have said that *postulare pro aliis* is first and foremost a noble officium towards friends, and therefore a duty that constitutes the network of social relationships that enable a citizen to enjoy good esteem and have

ne iudices sint, quidam natura, quidam moribus. Natura, ut surdus mutus: et perpetuo furiosus et impubes, quia iudicio carent. Lege impeditur, qui senatus motus est. Moribus feminae et servi, non quia non habent iudicium, sed quia receptum est, ut civili bus officiis non fungantur».

[23] Gai. 1. 190: « *Nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera* ».

[24] Valerius Maximus, *Facta*, cit., 8.3.

[25] *Ibidem*, 8, 3; Quintiliano, *De institutione oratoria libri* XII, 1.1.6.

a certain influence in the society in which they live. But in this context, there is no room for a role to be attributed to women, who are kept away from the rest of society.

Therefore, in my opinion, the problem of women's inferior status should not be attributed primarily to cultural factors, but rather to political and legal choices, which only subsequently became a cultural phenomenon, albeit not always consistent or continuous. We must also take into account how much this phenomenon has been reinforced by Christian doctrine, which in turn is difficult to say where it drew some of its dictates on the role of women and their subordination, if not from the cultural substratum then present in the Romanised territories.

Now, if we look at modern societies, especially Italian society, we see how it is grappling with the opposite problem: it is trying to eradicate a cultural phenomenon through political and regulatory choices. The legal mechanisms used by the Romans are now being reversed.

If we refer back to the sociological studies of Talcott Parsons[26] and Margaret Mead[27], it is perhaps possible to identify the origins of certain paradigms in the Roman world, to the detriment of a neutral condition. Parsons highlights how, modern society has greatly changed the dynamics between people, replacing bonds that were previously based on the family with bonds that the individual establishes: a society of individuals rather than families. However, in this evolution, balance is still maintained by the family unit, albeit reduced in scope to "wife-husband, mother-father". In this sense, roles guarantee the stability that allows society to go through changes without falling into imbalance, as long as women are assured a position of reproduction and domestic care and fathers of sustenance and guidance, roles that children, both male and female, internalise and can reproduce. In this sense, women would not find themselves in a position of inferiority, but in the only position possible for them.

In other words, the distinction between male and female roles and the associated functions would not only be indispensable to social balance, but would be the natural state of affairs.

On the other hand, through her observation of populations far removed from civilised experiences, Mead learned of organisations in which roles are spontaneously distributed differently from the dichotomy we are familiar with, highlighting how, without external conditioning (political, economic and legal), it is possible to develop different social models in which there is no preordained division of roles corresponding to ours. The difference between male and female, while clearly recognised in terms of

[26] Talcott Parsons, *Social Systems and the Evolution of Action Theory* (Free Press,1977).

[27] Margaret Mead, *Male and Female: A Study of the Sexes in a Changing World* (W. Morrow, 1949).

sexual reproduction, does not translate into the assignment of roles that imply a hierarchy and, consequently, inferiority for women.

At this point, therefore, it seems possible to observe that while the Parsonian model is steeped in the traditional culture that was imposed on Roman society by political and legal superstructures, Maes' observations demonstrate that the distinction between roles and the hierarchy between them are phenomena that have no natural roots but represent the cultural precipitate of choices that are clearly political.

GIORGI AMIRANASHVILI*

DIGITALIZATION OF JUSTICE: A GEORGIAN PERSPECTIVE**

ABSTRACT. *The digital transformation of judicial systems has become a central component of contemporary legal reform, raising important questions concerning efficiency, transparency, judicial independence, and the protection of fundamental rights. This paper examines the digitalization of justice in Georgia as a case study of reform within a transitioning legal system aligned with European standards. It analyses the development and implementation of key electronic justice instruments, including the Electronic Court Case Management System (ECCMS), electronic filing and service mechanisms, and the system of random electronic case distribution introduced during the "Third Wave" of judicial reform.*

The study evaluates the effectiveness of these reforms in enhancing efficiency, access to justice, and transparency, while critically assessing persistent structural challenges, such as broad exceptions to automated case allocation, institutional ambiguities, and uneven technological integration. Particular attention is given to the impact of the COVID-19 pandemic, which accelerated the use of remote hearings and digital communication, exposing both the resilience and vulnerabilities of the existing framework. The paper further explores the emerging debate on the potential introduction of artificial intelligence in the judiciary, emphasizing the risks of algorithmic bias and the necessity of robust ethical and regulatory safeguards.

Drawing on CEPEJ evaluations and international assessments, the article concludes that while Georgia has made substantial progress in modernizing its judicial infrastructure, digitalization alone cannot resolve deeper governance and independence concerns. Sustainable reform requires coherent

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legal regulation, strengthened institutional accountability, and continued alignment with European standards to ensure that technological innovation reinforces – rather than undermines – the rule of law.

CONTENT. 1. Introduction. – 2. Electronic Judiciary Reforms. – 3. Court Digitalization Processes. – 4. Use of AI in Judiciary – 5. Evaluation of the Judicial System by CEPEJ. – 6. Electronic Justice during Covid-19 – 7. Conclusion.

1. Introduction

The digital transformation of justice systems has become a defining feature of contemporary judicial reform across Europe and beyond. Driven by technological progress, increasing caseloads, demands for transparency, and the need for efficient access to justice, courts are progressively integrating digital tools into their daily operations. Electronic case management systems, online filing mechanisms, remote hearings, and algorithm-based administrative processes are no longer experimental innovations but essential components of modern judicial administration. At the same time, digitalization raises complex legal, institutional, and ethical questions, particularly concerning judicial independence, procedural fairness, data protection, and the preservation of fundamental human rights.

Georgia represents a particularly instructive case study in this regard. As a country undergoing continuous judicial reform while simultaneously pursuing closer integration with European legal standards, Georgia has invested significantly in the development of electronic justice mechanisms over the past decade. Legislative amendments, strategic planning by judicial governance bodies, and the introduction of nationwide electronic systems have aimed to modernize court administration, improve efficiency, and strengthen public trust in the judiciary. These reforms have taken place both in response to domestic challenges – such as court backlogs and concerns over impartiality – and within the broader framework of Georgia's international commitments, including obligations arising from cooperation with the European Union and the Council of Europe.

This paper examines the digitalization of justice in Georgia through a comprehensive and critical lens. It explores the evolution and functioning of key electronic justice instruments, including the Electronic Court Case Management System (ECCMS), the electronic distribution of cases, and online filing and service mechanisms. Particular attention is given to strategic policy documents shaping these reforms, as well as to the practical challenges identified during their implementation. The paper also situates Georgia's experience within a broader comparative and evaluative context by referring to assessments conducted by international institutions such as the European Commission for the Efficiency of Justice (CEPEJ) and by analyzing the impact of the COVID-19 pandemic on digital justice practices.

Finally, the study addresses emerging debates surrounding the potential use of artificial intelligence in the judiciary, emphasizing both its perceived benefits and inherent risks. By assessing existing achievements alongside unresolved shortcomings, this

paper seeks to contribute to the ongoing discussion on how digital tools can be effectively integrated into judicial systems while safeguarding the core principles of independence, impartiality, and access to justice in a developing legal environment such as Georgia's.

2. Electronic Judiciary Reforms

i) Electronic Court Case Management System of Georgia (ECCMS)

The legislative changes enacted from 2012 introduced regulations designed to ensure effective case management in the courts.[1] Like in many European countries, in the Judicial system of Georgia all the information about each case (procedural documents of parties, data of participants in the proceedings, information about procedural activities and events, procedural documents of courts, audio records) is stored in the centralized information system of all courts called Electronic Court Case Management System of Georgia (ECCMS). All documents related to the ongoing litigation are received through the electronic case management system. In Georgia, this system is implemented at all levels of courts, in all three instances and throughout the country. The involvement of the parties in the electronic case management system is limited to access to their cases. At the commencement of the proceedings, the court clerk assigns a username and password to the court user. As a result, the party is able to get acquainted with their case and with the documents submitted to them, which have already been certified as a final document.[2]

ECCMS facilitates the accumulation of information on civil, criminal and administrative proceedings in all instances of courts. This program is operated by the Department of Common Courts. In the courts of Georgia, electronic case proceedings are carried out through the electronic case management program. Case proceeding in the court begins by filing an application or lawsuit through the electronic case registration system (ecourt.ge). In order to register in the electronic system, the user must fill in the user registration application, agree to the terms of use of the electronic system and use

[1] Maia Bakradze and Kakha Tsikarishvili, *The Problem of Case Delay in Common Courts of Georgia* (Democracy Index Georgia, Tbilisi 2023) 6 <https://democracyindex.ge/uploads_script/studies/tmp/phpB8XAL1.pdf> accessed 14 December 2025.

[2] *Development of UJITS: Challenges and Perspectives* (Pravo-Justice, November 2020) 18 <https://www.pravojustice.eu/storage/app/uploads/public/5fc/a27/ad7/5fca27ad70c2c822820370.pdf> accessed 14 December 2025.

the user activation link received on the phone. A unique barcode for differentiation is assigned to every application or lawsuit electronically submitted to the court. The court issues in an electronic form all documents and information that are produced through electronic case management program.[3]

ii) The Judiciary Strategy and Action Plan for 2017-2021

In 2017, for the first time in the history of independent Georgia, the representatives of the judicial power developed and approved the Judiciary Strategy and Action Plan for 2017-2021. Based on the strategy and action plan, the activities of the High Council of Justice will be implemented in a specific direction and will ensure the further development of the judiciary by carrying out preplanned activities. The Judiciary Strategy and Action Plan were elaborated by a Strategic Committee created specifically for this purpose within the framework of obligations taken under the Association Agreement between Georgia and the European Union.[4]

The strategy reflects real challenges of each direction, a special place is given to the development of the electronic system of court proceedings, and accordingly, a specific development plan is introduced.[5]

iii) Electronic Distribution of Cases

Rule of electronic distribution of cases in the Common Courts was adopted by the Parliament of Georgia as part of the "Third Wave" of judicial reform and it was one of the most significant positive changes in the Georgian judiciary system. The rule entails the random distribution of cases to the Supreme Court as well as city/district, appellate courts throughout Georgia through an electronic program.[6]

The introduction of the new case distribution system in the Third Wave amendments was intended, among other things, to ensure the proper functioning of the electronic system.[7]

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[3] *Ibidem* 19.

[4] *Ibidem.*

[5] *Ibidem* 20.

[6] Ani Mukhigulashvili, *Electronic System of Case Distribution in Courts* (Human Rights Education and Monitoring Center (EMC) 2020) 6 <https://socialjustice.org.ge/uploads/products/covers/ENG_WEB_1586245543.pdf> accessed 14 December 2025.

[7] *Judicial System Reform in Georgia (2013-2021)* (Georgian Young Lawyers' Association, Tbilisi 2021) 54 <https://gyla.ge/files/news/ფონდი/2021/JUDICIAL SYSTEM REFORM-2.pdf> accessed 14 December 2025.

For the purpose of enforcement and management of the electronic system of case distribution, the above mentioned Action Plan envisages four activities. Development of a new system of distribution of cases in common courts is one of the most important reforms of recent years, which should answer many challenges in terms of the impartiality and independence of courts. The system of distribution of cases among the judges should, first of all, ensure impartial review of cases, protection against external interference in a trial, as well as timely and efficient implementation of justice and fair distribution of labour among judges. The new system of electronic distribution is based on the principle of random distribution of cases between the judges.[8]

As a result of the "Third Wave" of judicial system reform, the High Council of Justice exercised its delegated authority and determined the rules for random distribution of cases in the Common Courts of Georgia through an electronic program. Since the introduction of the electronic system of case distribution many challenges were identified that required timely and effective response.[9] In Particular, as monitoring of the implementation process after the system's introduction has revealed the issue has lost its pertinence within the judiciary and the will to further reforms in this direction is weakened.[10] In addition, unduly implementation of the electronic system of case distribution and the unequal workloads of the judges generates additional incentives for improper use of the system and pressure on individual judges.[11] Moreover, wide-ranging exceptions to the rules regarding random assignment of cases and unlimited discretion of court chairperson's permits arbitrary use of the electronic case distribution system in specific cases.[12]

[8] Mariam Mkhatvari, Ketevan Kukava and Maya Talakhadze, *Implementation of the Judicial Strategy and the Action Plan (Shadow Report)* (Human Rights Education and Monitoring Center (EMC), Tbilisi 2018) 95-96 <https://idfi.ge/public/upload/IDFI_Photos_2018/general/ENG_WEB.pdf> accessed 14 December 2025.

[9] Ani Mukhigulashvili, *Electronic System of Case Distribution in Courts* (Human Rights Education and Monitoring Center (EMC) 2020) 10 <https://socialjustice.org.ge/uploads/products/covers/ENG_WEB_1586245543.pdf> accessed 14 December 2025.

[10] Mariam Gobronidze, Ketevan Kukava and Salome Chkhaidze, *Implementation of the Judicial Strategy and the Action Plan (Second Shadow Report)* (Human Rights Education and Monitoring Center (EMC), Tbilisi 2020) 77 <https://idfi.ge/public/upload/EU/ENG_WEB456.pdf> accessed 14 December 2025.

[11] Ana Papuashvili, Nino Nozadze, Gvantsa Tsulukidze and Giorgi Davituri, *10 Years of Judicial Reforms: Challenges and Perspectives* (Coalition for an Independent and Transparent Judiciary, Tbilisi 2023) 9 <https://www.coalition.ge/files/reporma_170x240_eng_1.pdf> accessed 14 December 2025.

[12] Mariam Gobronidze, Tornike Gerliani and Ana Papuashvili, *Access to Justice in Georgia* (Social Justice Center, Tbilisi 2021) 15 <https://socialjustice.org.ge/uploads/products/pdf/Access_to_Justice_in_Georgia_1632406837.pdf> accessed 14 December 2025.

According to the Assessment Report, in some cases, the powers of the bodies involved in the electronic case distribution system and those in administrative positions in the courts are still vague and problematic. This hinders the full achievement of the goals set by the introduction of the case distribution system, jeopardizes the independent work of individual judges, and impedes access to impartial and well-functioning justice.[13]

3. Court Digitalization Processes

i) Most Recent Developments

In May 2020, the European Bank for Reconstruction and Development (EBRD) conducted a survey among 20 countries of operation of EBRD to obtain information about the most recent developments in their court digitalization processes. All of the selected countries are jurisdictions where EBRD currently has operational projects, which facilitated significantly the collection of data.[14]

The information was provided by law firms from those 20 jurisdictions, including Georgia. The questions focused on the risk of postponement and backlogs amid COVID-19, the availability of a case management system for courts and online information system available to litigants and attorneys, as well as the use of remote hearings by courts.[15]

ii) The Findings of the Survey

From among surveyed EBRD countries of operation, jurisdictions where there are online filling systems include Georgia. The adoption of this practice has been an overarching trend among the examined countries, as Georgia has adopted online filling in its courts in 2015.[16]

[13] Ana Papuashvili, *Electronic System of Case Distribution in Courts (2020-2021 Assessment Report)* (Social Justice Center, Tbilisi 2022) 28 <https://socialjustice.org.ge/uploads/products/pdf/Electronic_System_of_Case_Distribution_in_Courts_ENG_1657114427.pdf> accessed 14 December 2025.

[14] Veronica Bradautanu, Christina Chelioti, Patricia Zghibarta and Liubov Skoryk, *From Digitisation to Digital Transformation: A Case for Online Courts in Commercial Disputes? Draft Discussion Paper October 2020* (European Bank for Reconstruction and Development 2020) 7 <https://app.glueup.com/resources/protected/organization/1136/event/27964/99358ddf-99c4-4026-b5c7-21c882fddfbc.pdf> accessed 14 December 2025.

[15] *Ibidem.*

[16] *Ibidem* 18.

Online service of process is another essential part of a digital court function. It promotes time efficiency, reliability and lowers the cost of the litigation. Electronic service may be performed directly by a party, by an agent of the party (who could be the party's attorney) or through an electronic filing service provider. The domestic legislation must provide for service of process and allow for e-signatures. Electronic service has been adopted by several jurisdictions in the EBRD regions, including Georgia.[17]

4. Use of AI in Judiciary

It is common sense that AI may be appropriate for judgment and decision making due to its impartiality, while humans are prone to cognitive bias, AI would make justice fairer, and moreover, unlike human judges, AI does not get tired and does not depend on its glucose levels to function.[18]

In Georgia there were some suspects on case distribution to judges and for prevention in 2017, the principle of electronic distribution of cases through a computer program was introduced.[19]

But it is clear that the impartiality of AI is another legend, though its characters largely depend on its creator, on the person who gives artificial intelligence access to information and tasks. AI has not inherent biological properties or social skills. Even if these features can be attributed to it, they are programmed by its creator.[20]

That is why the European Parliament in the non-binding resolution of 2021 emphasized the risk of algorithmic bias and that human supervision and strong legal powers are needed to prevent discrimination by AI. Human operators must always make the final decisions and subjects monitored by AI-powered systems must have access to remedy.[21]

Some of the authors draw conclusion that the myth that artificial intelligence is impartial, should be replaced by its strict and detailed regulation by the states. Arti-

[17] *Ibidem*.

[18] Nino Kharitonashvili, 'Expediency and Scope of Using AI in Civil Justice' (2022) 9 *European Journal of Economics, Law and Politics* 4, 4-5 <https://elpjournal.eu/wp-content/uploads/2023/04/01-ELP-March.pdf> accessed 14 December 2025.

[19] *Ibidem* 5.

[20] *Ibidem*.

[21] *Ibidem*.

ficial intelligence should be deployed based on a transparent algorithm for tightly regulated purposes, especially if it is used in developing countries like Georgia.[22]

According to recent studies, as of today, the Georgian justice system does not yet incorporate AI tools, nor does it have the necessary ethical or legal frameworks in place. Therefore, it is essential for the country to prioritize the development of an ethical framework that ensures the protection of fundamental human rights in the use of AI. At the same time, it is necessary to gradually introduce AI technologies into the justice system, which would con-tribute to streamlining processes, increasing transparency in decision-making, and alleviating pressure on an overburdened system.[23]

5. Evaluation of the Judicial System by CEPEJ

i) CEPEJ & ECN

The European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe supports the Organization's member States in improving the efficiency and quality of their judicial systems in order to ensure that they operate in line with the standards of the Council of Europe and meet the needs of those seeking justice.[24]

The European Cyberjustice Network (ECN) allows the exchange of good practices and helps to define future initiatives by the Council of Europe to support its member States in the digital transformation of their judiciary in line with Human Rights standards. The network supports the activities of the CEPEJ and its working groups (CEPEJ-GT-CYBERJUST et al.). The Network was inaugurated on 16 November 2021.[25]

ii) The Findings of Evaluation

The CEPEJ decided, at its 35th plenary meeting, to launch the ninth evaluation cycle 2020 – 2022, focused on 2020 data. The CEPEJ wished to use the methodology

[22] *Ibidem* 6.

[23] Mariam Beruashvili, 'The Capabilities and Challenges of Artificial Intelligence in the Justice System' (2025) 11 Law and World 35, 157 <https://lawandworld.ge/index.php/law/article/view/848/475> accessed 14 December 2025.

[24] European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Declaration: Lessons Learnt and Challenges Faced by the Judiciary During and After the COVID-19 Pandemic* (Ad hoc virtual plenary meeting, 10 June 2020) <https://rm.coe.int/declaration-en/16809ea1e2> accessed 14 December 2025.

[25] 'European Cyberjustice Network' <https://www.coe.int/en/web/cepej/european-cyberjustice-network-ecn-> accessed 14 December 2025.

developed in the previous cycles to get, with the support of its national correspondents' network, a general evaluation of the judicial systems in the 47 member states of the Council of Europe as well as three observer states (Israel, Morocco and Kazakhstan). The questionnaire was adapted by the Working group on evaluation of judicial systems (CEPEJ-GT-EVAL) in view of the previous evaluation cycles and considering the comments submitted by CEPEJ members, observers, experts and national correspondents. The aim of this exercise was to increase awareness of judicial systems in the participating states, to compare the functioning of judicial systems in their various aspects, as well as to have a better knowledge of the trends of the judicial organisation in order to help improve the efficiency of justice.[26]

According to the findings of evaluation, the court system uses the electronic case distribution system, which has been introduced across common courts since 2018, to calculate the workload of judges. As for the burden on the prosecutor, the judiciary does not in itself have an obligation to assess the workload of prosecutors, but in the interests and demands of the prosecution, the court's electronic system provides e-mail. The service automatically shows the time spent at the prosecutors' meeting, which ultimately participates in the prosecution system in their workload calculation coefficient.[27]

Besides, electronic registration service ecourt.ge has been launched in the system of common courts, which allows individuals and legal entities to send cases electronically. The legislative framework for its use was adopted by the High Council of Justice decree 1 / 209 of December 6, 2013.[28]

Finally, there is the possibility to try online mediation at all stages of court hearing (also, this includes the possibility of non-formal format, called: "informational sessions" with mediators if all parties agree to it, or there is mechanism - judge's order about transferring of the case to the mediation with or without parties agreement, which can be used at any court hearing stages, including the preparatory hearing with the judge.[29]

[26] The European Commission for the Efficiency of Justice (CEPEJ), *Evaluation of the judicial systems (2020 - 2022): Georgia (Reference data 2020)* (Council of Europe 2022) 1 <https://rm.coe.int/georgia-2020-en/1680a85c7f> accessed 14 December 2025.

[27] *Ibidem* 48.

[28] *Ibidem* 49, 52.

[29] *Ibidem* 50.

6. Electronic Justice during Covid-19

i) The Impact of the Pandemic

In the first half of 2020, the modern world faced a new challenge in the form of the Covid-19 pandemic that had emerged at the end of 2019 and spread across 213 countries within 6 months. Georgia was not immune from the pandemic either. While the country was less affected in terms of the spread of the virus, the pandemic had its impact on almost every field of everyday life, including justice.[30]

The Decree of the President of Georgia, issued on 21 March 2020, declared an emergency in the country and restricted a number of civil rights. While the restrictions did not apply to the right to a fair trial, the presidential decree gave preference to online participation of parties in court proceedings.[31]

ii) The Administration of Justice in Times of Pandemic

The new reality affected the administration of justice throughout the country: a significant number of court hearings were adjourned and the rest continued with the online participation of parties; movement in court buildings was restricted and the public nature of court hearings was restricted as well. While online hearings ensured administration of justice in urgent cases, they also gave rise to the worsening of the quality of justice and breach of court users' rights. Under those circumstances, where the delay in court proceedings was a systemic problem, adjournment of hearings during the pandemic was bound to worsen this problem.[32]

On the other hand, the large-scale resort to videoconferences gave rise to the necessity to introduce new technologies in the justice sphere which should continue after the end of the pandemic as well.[33]

[30] Rights Georgia, *The Effectiveness of Electronic Justice during the Pandemic (an Evaluation Report)* (July 2020) 4 <https://www.rights.ge/en/accountnew/8> accessed 14 December 2025. For more details about the impact of the pandemic on the judicial system of Georgia, see: Giorgi Amiranashvili, 'Impact of the Covid-19 Pandemic on Civil Litigation in Georgia: Challenges and Perspectives' in Serkan Kaya and Okeoma John-Paul Okeke (eds), *Law, Business and Innovation Studies (LBIS) Conference, (9-10-11 September 2021) London, United Kingdom, Full Paper Proceedings Book* (2021), 143-148.

[31] See Rights Georgia, *The Effectiveness of Electronic Justice during the Pandemic (an Evaluation Report)* (July 2020) 4 <https://www.rights.ge/en/accountnew/8> accessed 14 December 2025.

[32] *Ibidem*.

[33] *Ibidem* 5.

iii) Beyond the Pandemic: The Ongoing Need for Digital Justice Reform

The COVID-19 pandemic has accelerated the use of digital communication. The need for digitalization of justice is self-evident in an increasingly digitalized society. Advantages for justice include easier access to legal proceedings and relevant legal information for citizens and more efficient work processes for judges and lawyers. In the past decade governments have invested in digitalizing justice, but the level of digitalization differs from country to country. There is significant room for improvement, but matching technology to legal needs, including protection of fundamental rights, is complex.[34]

It is noteworthy that Georgia has been developing its electronic judiciary reforms long before the outbreak of COVID-19. Since 2010, Georgia has introduced its own platform for first instance courts for digital proceedings which allowed parties to track updates and access electronic case materials. Additionally, with the implementation of legislative reforms allowing for qualified e-signature, courts of Georgia have launched yet another novelty allowing online submission of claims, complaints, and applications. Regrettably, despite such developments, a unified digital system has not been drawn up yet.[35]

Recent studies have shown that the Georgian judiciary is not fully utilizing technology as a tool to enhance transparency and efficiency of the court system.[36] Indeed, according to Commission Staff Working Document/Georgia 2025 Report, the quality of justice needs to be improved. More efforts are still needed to further align it with European standards and best practices on effective and efficient administration of justice, including the use of CEPEJ tools. The efficiency of justice could be further improved as well. The modernization of court management needs to be addressed, including through implementation of new IT justice tools and full application of the court case management system for automatic/randomized case allocation. The number of cases allocated by the system remains high (95-100%). More efforts are needed to digitalize the justice system.[37]

[34] 'ELI Digitalisation of Civil Justice Systems in Europe' <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/digitalisation-of-civil-justice-systems-in-europe/> accessed December 14, 2025.

[35] Archil Giorgadze and others, *COVID Times: A unique opportunity to transform our judicial system and the way matters are litigated'*(MG Law, 26 November 2020) <https://bm.ge/en/news/covid-19-a-unique-opportunity-to-transform-the-judiciary-system/69565> accessed December 14, 2025.

[36] Ketevan Kukava, *Open Justice and User-Centered Court Services in Georgia: Challenges and Recommendations* (Law and Public Policy Center, Tbilisi 2024) 5.

[37] European Commission, 'Commission Staff Working Document: Georgia 2025 Report Accompanying the Doc-

7. Conclusion

The digitalization of justice in Georgia represents a significant and largely irreversible transformation of the country's judicial system. Over the past decade, Georgia has introduced a range of electronic tools – most notably the Electronic Court Case Management System, electronic filing and service mechanisms, and random electronic distribution of cases – that have substantially modernized court administration and aligned domestic practice with prevailing European trends. These reforms have contributed to improved efficiency, greater accessibility for court users, and increased transparency in judicial proceedings, particularly when assessed against the structural challenges traditionally faced by the Georgian judiciary.

At the same time, the analysis demonstrates that digitalization alone cannot remedy deeper institutional and governance-related shortcomings. The electronic distribution of cases, while conceptually designed to strengthen judicial independence and impartiality, continues to suffer from excessive exceptions, vague institutional responsibilities, and insufficient safeguards against administrative influence. Similarly, despite the existence of advanced technical infrastructure, the absence of a fully integrated and consistently applied digital justice framework limits the overall effectiveness of ongoing reforms.

The COVID-19 pandemic served as both a stress test and a catalyst for further digitalization. While remote hearings and electronic communication ensured the continuity of justice during emergency conditions, they also exposed deficiencies in procedural safeguards, equality of arms, and the practical realization of the right to a fair trial. These experiences underline the necessity of embedding digital solutions within a coherent legal and ethical framework rather than relying on *ad hoc* technological fixes.

Looking forward, the potential introduction of artificial intelligence into the Georgian judiciary presents both opportunities and risks. While AI-based tools may enhance efficiency and administrative capacity, their deployment without robust regulation, transparency, and human oversight could undermine fundamental rights and public trust. The Georgian experience, viewed in light of CEPEJ evaluations and European standards, suggests that technological innovation must remain subordinate to

ument Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2025 Communication on EU Enlargement Policy' SWD(2025) 757 final (4 November 2025) 29-30 <https://enlargement.ec.europa.eu/document/download/b3089ad4-26be-4c6a-84cc-b9d680fe0a48_en?filename=georgia-report-2025.pdf> accessed December 14, 2025.

the core principles of judicial independence, accountability, and human dignity.

In conclusion, Georgia's progress in the digitalization of justice is tangible and noteworthy, yet incomplete. Sustainable reform requires not only continued investment in technology, but also clearer institutional governance, stronger legal safeguards, and systematic alignment with European best practices. Only through such a balanced and rights-oriented approach can digital justice serve as a genuine instrument for strengthening the rule of law rather than merely modernizing its appearance.

COSTANZA BRUSCHI[*]

PENITENTIARY LAW IN EUROPE: AN OPEN DEBATE

ABSTRACT. *'This article analyzes the contradictions of the European penitentiary systems resulting from the European Union's lack of binding competence over detention matters. Due to the latter, EU Member States continue to apply divergent prison rules, leading to significant disparities in detention conditions. These differences undermine mutual trust and increasingly obstruct the functioning of the European Arrest Warrant (EAW), causing delays and refusals in its execution. The study explores the impact of the Court of Justice's Aranyosi and Căldăraru ruling, which requires national courts to assess the risk of inhuman or degrading treatment before executing an EAW. Although this case law clarifies the relationship between fundamental rights protection and the principle of mutual recognition, it also exposes the limits of a system relying on judicial solutions rather than legislative harmonization. To address these shortcomings, the article supports a broad interpretation of Article 82 TFEU as a legal basis for EU-wide minimum detention standards. It concludes by examining the significance and limits of the Commission Recommendation of 8 December 2022, arguing that stronger and binding EU involvement is necessary to ensure uniform fundamental rights protection and effective judicial cooperation.*

CONTENT. 1. The European double soul in the penitentiary field. – 2. Is there space for a binding European Union? – 2.1. Case law on the matter: the Aranyosi and Căldăraru ruling. – 2.2. Article 82 of the Treaty on the Functioning of the European Union: towards a broad interpretation. – 2.2.1. Rethinking the Union's role. – 2.3. A cautious recognition of the Union's competence in the penitentiary area: Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.

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1. The European double soul in the penitentiary field

This paper aims to analyze the contribution of Europe to the evolution of the penitentiary system, highlighting how, even today, the lack of recognized EU competence in penitentiary matters exposes it to insurmountable contradictions, as well as to a regulatory system that has been repeatedly highlighted by the European institutions themselves because of its shortcomings. Particular attention will be devoted to the impact of these shortcomings on judicial cooperation in criminal matters, with specific reference to the European arrest warrant.

Against this background, the paper engages with the scholarly debate on possible avenues for overcoming these constraints, focusing in particular on a broad interpretation of Article 82 TFEU. This approach, regarded by some commentators as a viable solution to the absence of explicit competence, is strongly endorsed by the author.

To begin with, a distinction between the different areas of European intervention is required: on the one hand, the Council of Europe has assumed a leading role in the development of common minimum standards in the field of penitentiary law[1] through the introduction of the European Prison Rules[2] and thanks to the active role

[1] The European Court of Human Rights (ECtHR) has played and continues to play a crucial role in the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), representing an essential point of reference for the protection of detainees' rights. Its rulings have helped establish minimum standards for the protection of human rights, defining the threshold beyond which prisoners' treatment amount to inhuman or degrading treatment, in breach of Article 3 ECHR. Examples include the *Sulejmanovic v Italy* case and *Torreggiani and others v Italy* case, in which the ECtHR identified the standard of 3 sqm of space for each prisoner as the minimum requirement necessary to prevent violation of Article 3 ECHR.

[2] The European Prison Rules constitute a genuine European soft law prison system that aims to harmonize Member States prison policies by promoting the adoption of shared standards and best practices. They date back to February 1987, when the previous Standard Minimum Rules (adopted in January 1973 by the Committee of Ministers of the Council of Europe) were revised and the rules took on the new name of European Prison Rules. Further amendments were made in 2006 through Recommendation R (2006)2 of the Committee of Ministers to Member States on European Prison Rules and, more recently, in 2020 with the aim of adapting the content of the rules to the profound changes that have taken place over time, also in light of the case law of the ECtHR and the standards progressively developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). As amended in 2020, the rules are divided into nine parts and comprise a total of 108 provisions. Each section deals with a specific area, ranging from the fundamental principles that prison administrations are required to follow in the management of prisons, to hygiene, physical conditions of detention facilities, recreational and work activities, healthcare, contact with the outside world, role of prison staff and internal security.
As a soft law instrument, the Rules do not impose binding legal obligations on Member States, but rather serve as guiding principles and reference models that national legal systems can draw on to improve their prison systems. However, despite their original 'weak' legal nature, in recent years the European Prison Rules have acquired increasing

of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);[3] on the other, as mentioned, the European Union still suffers from a competence deficit that prevents it from adopting binding common standards in prison matters.

relevance in the supranational context, gradually becoming rules with substantially greater force than soft law instruments, to the extent that some legal scholars recognize them as having the force than hard law instruments: from a merely indicative instrument to an established parameter of legitimacy. They are frequently referred to as an interpretative parameter in the ECtHR case law. At the same time, the Rules are systematically mentioned in the CPT reports and recommendations, which contribute significantly to strengthening their effectiveness in supranational practice. In this sense, we can speak of a 'hybridization' between soft law and hard law: the absence of formal coerciveness is compensated by growing substantive authority. See Revised Rules and Commentary to Recommendation CM/REC (2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2018 (*European Committee on Crime Problems (CDPC), Council for Penological Co-operation (PC-CP)*); Jim Murdoch, *The treatment of prisoners-European Standards* (Council of Europe Publishing 2006) 34; Giuseppe Capoccia, 'Introduzione' in Dipartimento dell'Amministrazione penitenziaria. Ufficio Studi Ricerche Legislazione e Rapporti Internazionali (ed), *Le Regole Penitenziarie Europee Allegato alla Raccomandazione R(2006)2 adottata dal Comitato dei Ministri del Consiglio d'Europa l'11 gennaio 2006* (Ministero della Giustizia 2007) 7; Patrizio Gonnella, 'La soft law internazionale e la sua cogenza in ambito penitenziario' (2014) 3 *Democrazia e Diritto* 133.

[3] As Cassese observed, the creation of the CPT constitutes a 'step of extraordinary importance' because for the first time a group of experts from outside the state concerned was allowed to exercise oversight and formulate an opinion on places of deprivation of liberty, spaces in which state authority has traditionally reached its most intense expression. The establishment of the Committee thus marks a significant milestone in the gradual process of transparency and public accountability that began with the Enlightenment in the second half of the eighteenth century: through the CPT, public scrutiny was extended beyond the trial phase to the execution of sentences. This development entails a profound limitation of state sovereignty in an area that had long been shielded from any form of external supervision, replacing exclusive national control with a framework of cooperation. In this sense, we can speak of a process of 'internationalization' of human rights protection, whereby a supranational body is entrusted with the authority, although not binding, to conduct independent scrutiny of detainees' treatment. This shift is particularly significant given the historical reluctance of states to accept external control in the field of fundamental rights.
Against this background the CPT has, through its inspection activities, progressively developed a body of standards governing the treatment of persons deprived of their liberty. These non-binding standards, which are regularly updated, are widely regarded as considerably more detailed and operational than the European Prison Rules. See Antonio Cassese, 'A new approach to human rights. The European Convention for the Prevention of Torture' (1989) 83 (1) *American Journal of International Law* 128; Antonio Cassese, *Umano-Disumano. Commissariati e prigioni nell'Europa di oggi* (Laterza 1994) 5; Murdoch, (2006), 45; Mauro Palma, 'Dignità e diritti delle persone private della libertà all'alba del nuovo millennio' (2008) 3 Italianieuropei <https://www.italianieuropei.it/it/la-rivista/archivio-dellarivista/item/588-dignità-e-diritti-delle-persone-private-della-libertà-allalba-del-nuovo-millennio.html> accessed 5 January 2026.

2. Is there space for a binding European Union?

As mentioned, the Council of Europe has developed useful instruments for the protection of fundamental rights in prison detention. These tools, which are nonbinding in nature, have played a fundamental role in the development of European penitentiary systems. However, it is important to remember that these instruments pertain to the geographical space of the Council of Europe.

Moving to the internal front of the European Union, the following paragraphs will seek to show how the failure to recognize Union competence in prison matters and, consequently, the lack of legally binding instruments, leaves States a wide margin of freedom in adopting standards and rules in this area making. Hence, a highly heterogeneous prison landscape can be witnessed: prison conditions vary across different States.

The consequences are many: on the one hand, a marked unevenness in terms of the rules of treatment which differ among Member States, making a real and actual comparison of the data difficult; on the other, and in continuity with this issue, a discrepancy in the data regarding overcrowding and prison conditions, which vary considerably among Member States.

The latest data from the European Space I project, dating back to January 31, 2024, clearly show this gap. Data on overcrowding range from countries with a low level of concentration of prisoners such as Luxembourg with 62 prisoners per 100 places rising in Latvia to 67 and in Lithuania to 68, to countries exceeding the maximum capacity provided for prisons. Among the latter are Croatia with a percentage of 110%, Italy with 118%, France with 124% and Slovenia with 134%.[4] Nevertheless, as already clarified, the data are based on the domestic regulations of individual countries, each of which defines the overcrowding index according to its own criteria. This reliance on divergent parameters makes meaningful comparison particularly difficult. In its Resolution of 5 October 2017, the European Parliament affirmed that 'Member States calculate prison capacity and, therefore, overcrowding rates in accordance with spatial parameters that differ radically from one Member State to another, making it difficult, if not impossible, to make Union-wide comparisons'.[5]

[4] Marcelo F. Aebi and Edoardo Cocco, 'Prisons and Prisoners in Europe 2024: Key findings of the Space I survey' (2025) 3 Series UNILCRIM 1 <https://wp.unil.ch/space/files/2025/07/250715_keyfindings-space-i_prisons-europe-2024_full.pdf> accessed 5 January 2026.

[5] European Parliament Resolution (2017)/0385 of 5 October 2017 on prison systems and conditions of detention

Significant disparities also emerge from data on the ratio between the number of prisoners and prison staff. In Serbia and in Poland the ratio is one officer for every 2.7 and 2.6 inmates respectively, in Italy there is one officer for every 1.4 inmates. By contrast, other countries show a high availability of staff: Luxembourg, Netherlands and Norway have more than one prison employee per detainee.[6]

Divergences in the available data also concern the protection of detainees' fundamental rights under the European Prison Rules. According to these rules, detainees should have access to sanitary facilities at all times and, as far as possible, in conditions that ensure privacy. In some countries, however, sanitary facilities are located outside the cells or do not assure any possibility of privacy. For instance, as evidenced by the CPT reports, both Cyprus[7] and Bulgaria[8] have failed to meet the standards set for sanitary facilities.

Furthermore, among EU Member States there are considerable differences in the number of hours detainees are allowed to spend outside their cells.[9] Some countries, such as Poland,[10] grant prisoners no more than one hour of outdoor exercise per day,[11] whereas others allow three or four hours. In Italy, for example, detainees are entitled to

(2015/2062(INI)) [2018] OJ C346/14; Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023).

[6] See n 4.

[7] Council of Europe, *Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 17 May 2023* (CPT Strasbourg 2024) 16.

[8] Council of Europe, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 13 October 2021* (CPT Strasbourg 2022) 26 ff.

[9] Rule n. 25.2 of the European Prison Rules states: 'This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction'. See Revised Rules and Commentary to Recommendation CM/REC (2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2018 (*European Committee on Crime Problems (CDPC), Council for Penological Co-operation (PC-CP)*) 25.

[10] Council of Europe, *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017* (CPT Strasbourg 2018) 34.

[11] As stated by the European Prison Observatory the Council of Europe has stressed that it is 'unacceptable to keep prisoners in their cells for 23 hours a day'. See Marie Crétenot, 'Dalle prassi nazionali alle linee di guida europee: iniziative interessanti nella gestione penitenziaria' (Antigone Edizioni 2013) 10.

four hours per day outside their cells. Cyprus stands out in a positive sense, as in its prisons detainees spend most of the day outside their cells.[12]

Profound divergences are also evident in the field of pre-trial detention. National legislation determines the maximum duration of pre-trial detention, ranging from limits of less than one year (as in Denmark and Germany), to a maximum of five years (as in Italy and Romania), and extending to countries where no maximum limit exists at all (such as the Netherlands and Cyprus).[13]

This lack of uniformity in detention conditions among EU Member States increasingly constitutes a concrete obstacle to the functioning of the principle of mutual trust, which underpins the execution of the European Arrest Warrant (EAW). As a result of these divergences, recent years have witnessed the development of derogatory practices in judicial cooperation instruments, later endorsed by the Court of Justice of the European Union, which has found itself compelled to fill legislative gaps, particularly with regard to the interpretation of the Framework Decision on the European Arrest Warrant. As will be explored in greater depth, the core issue lies in the complex coordination between the principles of mutual recognition and mutual trust[14] on the one hand, and compliance with Article 3 of the European Convention on Human Rights (ECHR) and the corresponding Article 4 of the Charter of Fundamental Rights of the European Union (CFR), on the other.

The execution of the European Arrest Warrant is in fact increasingly delayed or postponed on grounds related to the protection of detainees' fundamental rights. As early as 2022, when the Commission reported in the so-called non-paper the number of cases involving delays or refusals in the execution of EAWs, these amounted to 300. As stated therein, 'available statistics on the EAW demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, in particular based on inadequate material conditions of detention'.[14] These data reflect the increase in refusals following the 2016

[12] See n 7.

[13] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 3. For further information on the principle of mutual recognition as a prerequisite for judicial cooperation see Anna Iermano, 'La cooperazione giudiziaria e di polizia in materia penale' (2025) <https://www.slsg.unisa.it/osservatorio/coop.penale/coop.penale#:~:text=82%20del%20TFUE%20co nsente%20di,diritti%20delle%20vittime%20della%20criminalità> accessed 10 January 2026. See also Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and Comparative Law 704.

[14] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 13.

Aranyosi and Căldăraru judgment, from 21 cases prior to that decision to 81[15] cases[16] thereafter.

Against this backdrop, both the European Parliament and the European Prison Observatory[17] have repeatedly called on the Commission to adopt rules on detention recognising its competence in this field. In light of these repeated calls, on 8 December 2022 the Commission adopted the Recommendation on minimum standards for detention to be applied within the Union, thereby taking a first, albeit cautious, step towards acknowledging competence in this area. This development is the outcome of a long and gradual process, shaped by judgments of the Court of Justice, which opted for a compromise solution, partially departing from its previous strict approach.[18] Among these rulings, the *Aranyosi and Căldăraru* judgment is emblematic: it played a key role in clarifying – albeit through a solution that appears transitional – the relationship between the execution of the EAW and prohibition of inhuman or degrading treatment.

Nevertheless, it must be emphasised that the current framework remains neither fully clear nor fully effective. As a result, the question of recognising EU competence in the penitentiary field has attracted renewed attention. Such competence would enable the Union to foster adherence to the EAW by reducing legislative and practical divergences – an outcome that would otherwise hardly be achieved over a very long period of time.

[15] *Ibidem*.

[16] Among the cases cited is the refusal by the Westminster Magistrates' Court in London to comply with the Palermo Public Prosecutor's Office's request for the extradition of Domenico Randacodore, a fugitive wanted since 1994 and sentenced to seven years' imprisonment (for criminal association of a mafia type, extortion and other serious crimes) relying on a prior ruling of the High Court of Justice in *Hayle Abdi Badre*. In line with the *Torreggiani v Italy* ruling, the Court found a risk of inhuman and degrading treatment in Italian prisons and, having regard to the 'structural nature of the violation found in the *Torreggiani* case', reversed the burden of proof requiring Italy to demonstrate that detention conditions would comply with Article 3 ECHR. See Adriano Martufi, 'Sovraffollamento carcerario e mutuo riconoscimento delle decisioni giudiziarie: le alternative al carcere nel diritto dell'Unione europea' (2015) 3 Diritto Penale Contemporaneo 38.

[17] The European Prison Observatory is a EU-funded project coordinated by the Antigone Association that analyses national prison systems and alternatives to detention, assessing them against international human rights standards and promoting best practices in line with CPT standards.

[18] The Court presumably deemed necessary such compromise in light of the positions taken by the ECtHR and the German constitutional court, increasingly focused on the protection of rights, which it 'prioritizes' over EU law.

2.1. Case law on the matter: the Aranyosi and Căldăraru ruling

The growing attention to the difficult coordination between respect for human rights in detention conditions and the effectiveness of judicial cooperation between Member States has resulted in the *Aranyosi and Căldăraru* judgment of the Court of Justice of April 5, 2016, which combines cases C-404/15 and C-659/15 PPU, preliminary rulings on the interpretation of Article 1(3) and Articles 5 and 6(1) of the Framework Decision on the European Arrest Warrant.

First, it is worth briefly clarifying the scope of this instrument. The EAW is governed by the Framework Decision 584/2002 and is based on the principle of mutual recognition of judicial decisions and measures, which in turn is based on mutual trust between States. In principle, the latter not only requires that no higher standard of rights than those shared by the Union be demanded among States, but also precludes verification of compliance with those rights in practice, on the basis of a presumption of compliance.[19]

For the purposes of this discussion and within the scope of the EAW, the principle of mutual recognition may be departed from only in the circumstances expressively provided for in the Framework Decision, which lists the mandatory grounds for nonexecution in Article 3 and the optional grounds for refusal in Article 4. Article 5, then, provides that in certain circumstances the executing State may subject the surrender of the person concerned to the conditions set out in that article.

It should be noted, however, that these grounds do not include any explicit reference to the risk of human rights violations as a reason for refusing to execute the EAW. Still, the Framework Decision acknowledges the importance of protecting fundamental rights. On the one hand, Article 1(3) clarifies that 'this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'; on the other, recital 10 provides that the implementation of the EAW 'may be suspended only in the event of a serious and persistent breach by a Member State of the principles set out in Article 6(1)[20] of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof'.[21]

[19] Case 128/18 *Dorobantu* [2019] ECR I-, para 46.

[20] Article 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

[21] Framework Decision on EAW [2002] L 190.

The interpretation of Article 1(3) has given rise to doubts among Member States and their courts, resulting in divergent interpretations and, consequently, different regulatory implementations.[22] In particular, it was unclear whether it should be interpreted as an implicit reason for non-execution or just as a confirmation of the obligations arising from the Treaties, the violation of which triggers the procedure described in Article 7 TEU.[23]

These doubts were addressed in the *Aranyosi and Căldăraru* judgment which, as mentioned above, resolved two preliminary questions raised in two different cases in a single ruling. The first case concerned Mr. Aranyosi, a Hungarian citizen for whom two European arrest warrants had been issued for the purpose of criminal prosecution by the Hungarian authorities before the Bremen Court.[24]

The Hanseatic Court of Appeal in Bremen found that there was evidence to suggest that, if the warrant were executed, the defendant could be subjected to conditions of detention contrary to Article 3 ECHR and Article 6 TEU. In particular, the Court referred to the ECtHR case law, which had condemned prison overcrowding in Hungary, further corroborated by the CPT reports on visits carried out between 2009 and 2013, which revealed a high rate of overcrowding.[25]

However, being unable to reach a decision on the basis of that information, the judge referred two questions to the Court of Justice for a preliminary ruling:

Is Article 1(3) of the Framework Decision to be interpreted as meaning that a request for surrender for the purposes of prosecution is inadmissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the admissibility of the request for surrender conditional upon assurances that detention conditions are

[22] Some Member States have introduced an additional EAW non-execution ground based on the risk of violation of the person concerned fundamental rights. Among these is England whose Extradition Act 2003 provides in Section 21 that the judge is always required to verify the extradition compatibility with the rights protected by the ECHR and that, in the event of incompatibility the judge must order the release of the person concerned. See Extradition Act 2003 s 21.

[23] Wouter Van Ballegooij and Petra Bard, 'Mutual Recognition and Individual Rights: Did the Court Get it Right?' (2016) 7 (4) *New Journal of European Criminal Law* 440.

[24] The charges related to two burglaries. See Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru [2016] ECR I-, paras 30-31.

[25] *Ibidem* paras 42-44.

compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?; are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?[26]

The same preliminary questions arose in the *Căldăraru* case. The person concerned was a Romanian citizen against whom an EAW had been issued for the enforcement of a final judgment, in which case the individual had not consented to surrender.[27] Consequently, in the light of a risk of flight in relation to surrender to the Romanian authorities, an arrest warrant was issued for the purposes of extradition.

In its ruling the Court of Justice introduces the so-called 'double check' mechanism, acknowledging that the execution of the EAW is subject to the essential limitation of compliance with Article 3 ECHR and Article 4 CFR.

Firstly, recalling the Opinion 2/13 (para 191)[28] and Article 1(3) of the Framework Decision, the Court acknowledges the possibility to derogate from the principle of mutual recognition and mutual trust, clarifying that limitations to these mechanisms are admissible 'in exceptional circumstances'.

Secondly, it reaffirms the absolute nature of Article 4 CFR, which prohibits inhuman or degrading treatment or punishment. This absolute nature is further confirmed in Article 3 ECHR that does not allow for any exceptions.

Hence, the Court's logical conclusion was that the execution of the EAW can never lead to inhuman or degrading treatment.[29] Accordingly, although the principle of mutual trust is upheld in abstract terms, it is nonetheless subject to concrete verification, thus guaranteeing that fundamental rights are effectively protected in each individual case.[30]

Having these fundamental principles been established, the Court introduces a

[26] *Ibidem* para 46.

[27] *Ibidem* paras 48-50. He had been condemned to one year and eight months' imprisonment for driving without a license.

[28] The paragraph affirms that the principle of mutual trust requires 'to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.

[29] See n 25 paras 81-88.

[30] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 708.

system based on the so-called 'two-step test'.[31] First, the executing judicial authority must rely on 'information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'.[32] Nevertheless, this abstract assessment is not sufficient in order to halt the EAW mechanism, as it does not automatically imply that the person will be subjected to inhuman or degrading treatment. Consequently, the Court requires a further step: where there is a proven risk of inhuman or degrading treatment, the judicial authority is required to verify in a concrete and precise manner 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'.[33] To this end, the executing judicial authority may request further information from the issuing State, setting a deadline for receipt in accordance with Article 15(2) of the Framework Decision.

If, following this double check, a genuine risk of inhuman or degrading treatment is identified, the execution must be postponed but not definitively barred.[34]

It should be noted that the Court, called upon to resolve the interpretative uncertainties surrounding the Framework Decision, appears to have adopted a compromise solution, refraining from explicitly introducing an autonomous ground for non-execution not previously codified, while affirming the primacy and non-derogability of fundamental rights, as enshrined in the aforementioned articles, over the principle of mutual recognition.[35] In this sense, the Court has introduced a ground for 'postponement of the execution of the EAW', which, according to some legal scholars, can be

[31] Marta Bargis, 'Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi" della Corte di giustizia tra compromessi e nodi irrisolti' (2017) 2 *Diritto penale contemporaneo* 34.

[32] These elements are ascertained on the basis of authoritative sources (ECtHR and national courts' rulings, CPT and UN reports). The ECtHR requires not only the absence of inhuman treatment, but also recurring positive conditions of detention that guarantee dignity, health and well-being of prisoners. See *Torreggiani e altri c. Italia* (2013); Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECR I-, paras 89-90.

[33] See n 25 paras 91-92.

[34] *Ibidem* paras 98-103.

[35] It seems to be an innovative turning point, as the Court of Justice appears to have changed its approach by scaling back the scope and 'intangibility' of the principle of mutual recognition. In the past indeed, the Court had 'prioritized' the principles of recognition and mutual trust, as seen in the judgments *Radu* and *Melloni*. See Case C-396/11 *Radu* [2013] ECR I-; Case C-399/11 *Melloni* [2013] ECR I-. See also Antonella Massaro, 'Mandato d'arresto europeo e rifiuto facoltativo di consegna del cittadino di un Paese terzo: l'ordinanza n. 217 del 2021 della Corte costituzionale' (2021) 3 *Nomos* 10 ff.

considered a 'disguised ground for refusal'.[36] In practice, in fact, the postponement of execution often turns into non-execution: this is referred to as a *de facto* ground for refusal.[37] Indeed, it would be arduous for the executing State to improve its detention conditions within a limited period for the purposes of EAW execution, especially considering that this is often a matter of structural and systemic inadequacy.

Some considerations arise.

First, in light of a Framework Decision that many scholars have regarded as unclear and open to interpretation, the ruling analysed has clarified several interpretative issues, reshaping the relationship between the principle of mutual recognition and fundamental rights.

Nevertheless, it is not immune from criticism. The operational criteria established by the Court have raised practical concerns, as they appear vague and complex to apply, at least until further clarification by the Court itself.[38] In particular, requiring judicial authorities to assess, on a case-by-case basis and according to general parameters, whether the execution of the warrant should be suspended exposes the system to the risk of divergent interpretations and, consequently, inconsistent application. This situation may have negative repercussions for the principle of legal certainty with the risk of exacerbating the already significant differences among Member States in the management of criminal enforcement and detention conditions, thereby generating substantial inequalities between individuals subject to similar procedures.

Moreover, the introduction of a double test mechanism inevitably leads to longer proceedings and entails a significant expenditure of resources. In judicial contexts already marked by structural delays, this additional burden risks undermining compliance with the principle of reasonable duration of proceedings.

Finally, a confusion of roles cannot be ignored. Urged to fill the legislative and structural gaps in the basic framework, the Court has delegated to the Member States the practical application of criteria whose boundaries are unclear. At the same time, the EU legislator has refrained from defining common standards and uniform parameters necessary to govern *ex ante* the balance between effective judicial cooperation and the protection of fundamental rights. The result is a fragmented protection, entrusted to

[36] See n (32) 39 ff.

[37] Francesca Graziani, 'Le "nostre prigioni" a cinque anni dalla sentenza Torreggiani' (2018) 2 Foroeuropa <www.foroeuropa.it> accessed 10 January 2026.

[38] Further clarifications were given by the Court in the Cases C-220/18 *Generalstaatsanwaltschaft* [2018] ECR I- and C 128/18 *Dorobantu* [2019] ECR I-.

hetero-integration through case law and the responsibility of individual Member States in specific cases, which does not guarantee effectiveness and uniformity in the long term.

Centralized regulation at EU level would be desirable instead. Among scholars, Bargis shares this view emphasizing that 'the issue of the real risk of inhuman or degrading treatment, addressed in *Aranyosi and Căldăraru* in the context of the EAW, obviously needs to be resolved in a general manner at EU level, in order to avoid (...) inequalities that would otherwise arise between persons detained under the EAW procedure and "ordinary" prisoners'.[39]

Hence, the solution proposed by the Court of Justice appears unsuitable as a definitive solution. Acknowledging the protection of human rights as a constraint on the execution of arrest warrants, without the concomitant establishment of binding minimum standards regarding detention conditions – achieved through a process of harmonization – risks engendering outcomes contrary to those intended by the Union. Such a scenario may precipitate the systematic non-execution of warrants, thereby undermining the efficacy of the instrument itself and exposing the system as inherently contradictory and structurally constrained. On the one hand, this system proclaims the absolute prohibition of inhuman or degrading treatment; on the other, it lacks effective and uniform mechanisms capable of preventing detention conditions that compel judicial authorities to suspend the execution of the warrant.

It is not surprising that, following the ruling in question, Member States, concerned about disregarding the Court's principle, have adopted a cautious approach increasingly refraining from executing the EAW. As mentioned, data from the European Commission's 2023 report on the functioning of the EAW show that refusals to execute warrants have grown exponentially. In 2023 there have been 1054 refusals to execute warrants for various reasons in 26 different Member States, an increase from the 1034 of 2021, 879 of 2018, and even more so from the 719 of 2016.[40] This trend not only affects the equal treatment of the individuals concerned, but also undermines the effectiveness of judicial cooperation and, ultimately, mutual trust between States which presupposes the effective sharing of the values referred to in Article 2 TEU. If this prerequisite is not met, mutual recognition is also undermined.[41] It follows that it would

[39] See n (32) 58.

[40] Commission, 'Statistics on the practical operation of the European arrest warrant-2023' COM (2025) 431 final.

[41] Case 128/18 *Dorobantu* [2019] ECR I-, para 45; see also Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 707.

be appropriate for the Union to acknowledge its own competence in the field of penitentiary law, a solution that would spare the Court the demanding task of filling the gaps with possible repercussions on the principle of legal certainty in a rather sensitive area.[42]

2.2. Article 82 of the Treaty on the Functioning of the European Union: towards a broad interpretation

As discussed, the Treaties do not confer explicit competence on the European Union in matters of detention: there is no explicit legal basis for such power. Nevertheless, the practical difficulties that have arisen in the implementation of judicial cooperation makes it urgent to debate the potential broad interpretation of the existing provisions. In recent years, both in terms of legislation and case law, there has been a development that seems to pave the way for a more incisive role for the Union. In particular, on several occasions, the European Parliament has expressed interest in the Commission playing an active role in the area of detention.

Already in its resolution of February 27, 2014 'with recommendations to the Commission on the review of the EAW', the Parliament had emphasized the close connection between detention conditions and the execution of the EAW,[43] calling on the Commission to assess 'the legal and financial means available at Union level to improve detention standards, including legislative proposals on conditions of pre-trial detention'.[44] Subsequently, in its resolution of October 5, 2017 'on prison systems and detention conditions', the Parliament took an even more explicit position, urging the Union bodies to adopt 'the necessary measures within their sphere of competence to ensure respect for and protection of the fundamental rights of prisoners, in particular vulnerable persons, minors, persons suffering from mental illness, persons with disabil-

[42] This opinion is supported by some authors in doctrine, albeit within different assumptions and boundaries. Among these, see Luca Lionello, 'Nuovi sviluppi per il test *Aranyosi e Căldăraru* ed il rapporto tra giurisdizioni: il caso *Dorobantu*' (2020) 1 *Eurojus* 120 ff.

[43] The European Parliament reiterates this concept in its Resolution of October 5, 2017, affirming that 'prison conditions are a determining factor in the application of the principle of mutual recognition of judgments in the area of freedom, security, and justice of the European Union, as stated by the Court of Justice in the *Aranyosi and Căldăraru* cases' and recalling 'the fundamental importance of the principle of mutual recognition of judgments enshrined in the Treaty on European Union'. See European Parliament Resolution (2017)/0385 of 5 October 2017 on prison systems and conditions of detention (2015/2062(INI)) [2018] OJ C346/14.

[44] European Parliament Resolution (2014)/0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) [2017] OJ C285/18.

ities, and women, including the adoption of common European standards for detention in all Member States',[45] a point of view which, by not referring exclusively to pre-trial detention, would seem to include the enforcement of sentences.[46] The call for the adoption of minimum European standards was then reiterated by the European Parliament in a resolution of 26 November 2020, in which the Parliament 'calls on the Commission to adopt common EU standards on prison conditions in order to protect prisoners' rights and promote detention standards in the EU'.[47] The same warning was reiterated in the 20 of January 2021 resolution on the EAW, in which the Parliament 'calls on the Commission to achieve EU minimum standards, in particular with regard to criminal procedural safeguards and prison and detention conditions, as well as to strengthen the information tools for national enforcement authorities on pretrial detention and detention conditions in each Member State', expressing concern that the lack of harmonization on maximum pre-trial detention periods could lead to long and unjustified periods spent in such detention.[48]

The case law of the Court of Justice has also moved in the same direction. In the *Aranyosi and Căldăraru* judgment, the Court clarified that the executing State must ensure compliance with Article 4 CFR in relation to detention conditions in the issuing State, without making any distinction between pre-trial detention and the enforcement of a sentence.[49]

Finally, the Commission showed significant openness with its Recommendation of December 8, 2022, which sets out minimum standards in the field of detention.

In this context, a broad interpretation of the Union's competence may be based on four different legal grounds: Article 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU), Article 82(2)(b) or (d) and Article 352 TFEU.

Article 82(1) affirms that judicial cooperation between States 'should be based

[45] See n 44.

[46] Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023) 271.

[47] European Parliament Resolution (2020)/0328 of 26 November 2020 on the situation of Fundamental Rights in the European Union – Annual Report for the years 2018-2019 (2019/2199(INI)) [2021] OJ C425/12, para 55.

[48] European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) [2021] OJ C456/2, para 37.

[49] See n (47) 270.

on the principle of mutual recognition of judgments and judicial decisions'.[50] The latter is a key instrument in the functioning of the EAW,[51] the aim of which is to ensure the enforcement of sentences even in cross-border cases.[52] This principle is based on mutual trust between Member States, which requires them to assume that each other will comply with EU law and fundamental rights of individuals within the area of freedom, security, and justice.[53] Consequently, the latter 'can only be achieved if respect for the fundamental rights of suspects and accused persons and procedural rights in criminal proceedings are guaranteed throughout the Union'.[54]

Letter d) of the first paragraph authorizes the Parliament and the Council to adopt measures aimed to 'facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions'.[55] In this sense, a broad interpretation would allow the 'enforcement of decisions' to encompass the definition of the methods of enforcement of judgments. This, in turn, would extend to the regulation of detention conditions, which constitute an integral component of the enforcement of sentences.[56]

In order to facilitate the functioning of the principle of mutual recognition, the second paragraph of the same article authorizes the Union to adopt minimum standards. The entire paragraph is reproduced below:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions

[50] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, pt III, art 82.

[51] According to Article 1(2) of the Framework Decision on the EAW: 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. See Framework Decision on EAW [2002] L 190.

[52] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 705.

[53] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECR I-, para 78.

[54] European Parliament Resolution (2014)/0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) [2017] OJ C285/18.

[55] See n 51.

[56] On the same opinion see Giuseppe Chiodo, 'Europa e regimi detentivi speciali' (2020) *Giurisprudenza Penale* 1.

> and systems of the Member States.
> They shall concern:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.
> Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.[57]

As can be read, letter b) refers to the rights of individuals in criminal proceedings. It is uncontested doctrine that this provision encompasses pre-trial detention, as this phase is intrinsically linked to the protection of the rights of the accused prior to the delivery of the final judgment. More controversial, however, is the question of whether the enforcement phase of a custodial sentence may be also included, since it is not traditionally regarded as a part of criminal proceedings *stricto sensu*.[58]

According to some legal scholars, a broad interpretation of the term 'criminal proceedings' should be adopted, extending its scope to the post-conviction phase and, consequently, to the enforcement of the sentence.[59]

A teleological interpretation grounded in the *effet utile* principle,[60] would appear

[57] See n 51.

[58] See n (47) 270. In particular, as emphasized by the author Susanna Marietti, the Union's competence regarding detention is a matter of debate, as there is no explicit confirmation of such competence in the Treaties. However, according to Marietti, 'there are strong arguments for interpreting EU protections in a broad manner to cover the entire detention process'.

[59] For a contrary opinion according to which the term 'criminal proceedings' could not include the post- trial phase and therefore Article 82(2)(b) does not serve as a suitable basis for harmonizing the detention rules among Member States see Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)(b) TFEU) fit for Purpose?' (2022) *European Journal on Criminal Policy and Research* 475 ff.

[60] About the use of the teleological criterion and the principle of effectiveness by the Court of Justice with the purpose of extending Union's powers see Ivan Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (Cacucci Editore 2017). The text discusses the tendency of the Court of Justice to use the teleological criterion, often in combination with its 'variant' of the principle of effectiveness. According to Ingravallo, 'the reason for the preference of the Luxembourg judges for this criterion can be attributed to the particular nature of the European Union, designed to evolve and promote progressive integration', so that it 'opposes a static interpretation and, on the contrary, requires a dynamic and evolutionary interpretation'.

to support a broad interpretation of the provision, thereby transcending the rigid distinction between preventive detention and detention *stricto sensu*. If the rationale underlying the provision empowering the Union to adopt minimum standards is indeed to facilitate the application of the principle of mutual recognition, it follows that a purely literal interpretation risks undermining the full effectiveness of the rule, potentially depriving it of its practical impact. Empirical experience shows that the fragmentation of detention conditions affects the operation of mutual recognition and constitutes a tangible obstacle to judicial cooperation, in some cases even leading to the suspension of the EAW execution.

A broad interpretation would enable the harmonization of detention standards across the Member States, ensuring a uniform level of fundamental rights protection within the Union and thereby preventing mutual recognition from being compromised by the risk of violations of Article 3 ECHR.

Moreover, this would not be an unprecedented approach, as the Union's competences have, in other contexts and under different circumstances, been interpreted expansively so as to encompass areas not expressly provided for in the Treaties.[61] In legal theory, this interpretative approach is shared by several scholars, including Marguery, who argues that the rights of individuals involved in criminal proceedings cannot be dissociated from the conditions of their detention. According to Marguery: 'conditions of detention may affect sentenced persons as well as persons on remand, thus the rights of persons in a criminal procedure'.[62] From this perspective, including detention within the scope of letter b) is consistent with the rationale of the provision and with the overall evolution of EU law, increasingly oriented towards the effective protection of fundamental rights.

Harmonizing detention standards would be consistent with the rationale of Article 82, and necessary in light of the Court of Justice case law, particularly *Aranyosi and Căldăraru*, which made the execution of the warrant conditional on respect for fundamental rights. As previously emphasized, in the absence of EU intervention, the system risks a paradox: Member States may be required to suspend or refuse the EAW execution due to detention conditions contrary to Article 3 ECHR and Article 4 CFR, while the Union lacks explicit competence to adopt binding rules to address those deficiencies.

[61] See, *inter alia*, the *Segi* case, in which the Court of Justice adopted an expansive interpretation of the Treaties in the field of criminal law, thereby extending its jurisdiction in the context of preliminary ruling proceedings. See Case C-355/04 P *Segi and Others v Council* [2007] ECR I-.

[62] See n (53) 716 ff.

The EAW system would therefore appear to be inextricably contradictory.

Some scholars argue that an additional legal basis for empowering the Union to adopt minimum standards on detention conditions may be found in Article 82(2)(d) TFEU,[63] which allows legislative intervention in relation to 'any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament'.[64] However, the procedure established is particularly burdensome as it requires, first, the prior and unanimous identification by the Council of the specific area of intervention and, second, the approval of the European Parliament. This procedural complexity substantially limits the practical utility of Article 82(2)(d), thereby rendering an alternative interpretation based on letter (b) of the same article preferable.

Finally, part of the doctrine identifies a possible basis in Article 352 TFEU,[65] which confers on the Union a general legislative power where, in the absence of specific legal bases, action is necessary to achieve the objectives set out in the Treaties. However, this route appears difficult to pursue too, given the need for unanimity in the Council and the consent of the Parliament.[66]

2.2.1. Rethinking the Union's role

The objection to such an expansion of the Union's powers might be grounded in the risk of excessive intrusion in states' sovereignty, given that the prison system has traditionally fallen within the exclusive competence of national authorities. This argument rests on the premise that prisons have historically functioned as a core expression of state sovereignty and as an instrument of state control. Under the traditional concept of sovereignty, the internal organization of prisons – including pretrial detention and the enforcement of criminal sentences *stricto sensu* – constitutes an exclusive prerogative of the state, one that is particularly resistant to transfer to a supranational level.

Yet, experience in recent years shows that this argument is gradually losing force

[63] Chiodo shares this view. While he places greater emphasis on a broad interpretation of letter b) of article, he also considers letter d) to be a suitable legal basis for extending the Union's competence in the area of detention. See n (57) 190.

[64] See n 51.

[65] This is a hypothesis considered by Marguery in Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and Comparative Law 717.

[66] *Ibidem*.

and risks degenerating into a form of ideological, rather than substantive, resistance. First, considerable progress has been achieved in the field of judicial cooperation, particularly through the principle of mutual recognition. If limitations on sovereignty are accepted in pursuit of this common objective, it becomes difficult to justify why a minimum harmonization of detention conditions – necessary to ensure the effective functioning of that mechanism – should be regarded as intolerable.

Furthermore, the activities of existing supranational bodies reveal that intrusions into national prison systems are not only feasible but already constitute an established reality. Consider, for example, the work of the Committee for the Prevention of Torture which for years has been visiting prisons and issuing recommendations about detention conditions. Such oversight, even if not binding, appears markedly intrusive with respect to state sovereignty, involving a degree of penetration arguably far greater than that which would result from the adoption, at EU level, of common minimum standards for detention. Indeed, if the 'invasion of sovereignty' by the CPT is 'concrete' and 'tangible', is it timely to introduce standards which, though binding, would constrain sovereignty at a regulatory and 'abstract' level?

Such a development would inevitably imply a reconfiguration of the Union's role and thus a readjustment of its legal and institutional position. However, in the author's opinion, that would not be an arbitrary evolution, but rather one consistent with the gradual evolution of the Union's functions. Although created to promote peace and prosperity in Europe, the Union has long focused on ensuring and promoting human rights respect. It is surprising that a particularly sensitive and problematic area such as the penitentiary system – where fundamental rights violations are frequent – has yet to be incorporated into the Union's sphere of competence.

From a broader perspective, the supra-nationalization of prison regulation would represent, on one side, a natural development of the Union legal and institutional evolution, on the other, it would be crucial in order to strengthen the fundamental rights protection. On the contrary, the exclusive national administration of prisons subjects the protection of fundamental rights to the shifting tides of domestic political debate, a debate often shaped by populist and security-driven narratives that consider prisons as emblems of state authority rather than as institutions dedicated to the reintegration of individuals.

In the absence of common standards, the risk is not merely the erosion of international cooperation, but also the politicization of prison conditions, which may become arenas of political confrontation. This dynamic fosters fragmented and inconsistent legislative responses, ultimately undermining stability in the protection of

the rights of persons deprived of their liberty. Notably, this risk has already materialized in part.

Harmonizing prison standards would, on the one hand, ensure stricter control over the respect for fundamental rights in prisons and, on the other, make the instruments of judicial cooperation work in practice, increasing the confidence of European citizens in the Union's ability to guarantee human dignity in the most sensitive contexts, such as the deprivation of personal liberty.

This is clearly a complex objective that will encounter resistance, but it is necessary in order to ensure uniformity and consistency in the protection of fundamental rights.

2.3. A cautious recognition of the Union's competence in the penitentiary area: Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention condition

The developments outlined above have led the Commission to take encouraging steps forward over time. This section highlights the main developments in this regard, which, although still limited and tentative, have important symbolic implications. Firstly, on December 2, 2022, the Commission adopted the so-called EU non-paper, which emphasized how the marked differences in detention conditions between EU Member States significantly hampered judicial cooperation highlighting how, in particular:

> divergences regarding important aspects of detention have adversely impacted the functioning of the EAW. Delays and suspensions of executions have become more common and a practice of seeking assurances from the requesting judicial authorities has arisen. Available statistics on the EAW demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, in particular based on inadequate material conditions of detention.[67]

This was the context for the Recommendation of December 8, 2022 'on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions', which represents the natural outcome of the process outlined above. It provides an overview of minimum standards in the field of detention,

[67] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 13.

to be interpreted, as highlighted by the Commission itself, in the light of the more detailed standards of the Council of Europe as well as the ECJ and the ECtHR case law.

The Recommendation's aim is to facilitate the proper functioning of the EAW.[68] In particular, in recital 18 of the recommendation, the Commission seems to openly recognize the need for harmonization of minimum standards[69] applicable to national detention systems as an essential prerequisite for effective judicial cooperation.[70] To this end, the Commission has expressed its intention 'to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case law of the Court of Justice and of the European Court of Human Rights. To this end, it is necessary to provide an overview of selected minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and material conditions of detention in key priority areas for judicial cooperation in criminal matters between Member States'.[71]

In the Recommendation the Commission reiterates the exceptional nature of pre-trial detention, emphasizing that this measure is used excessively in Member States. It therefore calls for periodic reviews to assess whether the conditions justifying its use continue to exist.

The Commission then focuses on some basic fundamental principles that should guide the management of detention, including the need to guarantee each prisoner a minimum individual space of at least 6 sqm in single cells and 4 sqm in shared cells, with a strong presumption of a violation of Article 3 ECHR if the space available is less than 3 square meters.[72] Further essential standards refer to health, hygiene, work, contact with the outside world and, in particular, the social reintegration of prisoners to be achieved through individualized measures, by guaranteeing access to reeducation programs.[73]

This Recommendation represents a significant development, as it appears to pave the way for a broad interpretation of Article 82 TFEU, aimed at harmonizing de-

[68] See European Commission Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2023] OJ L86/44.

[69] Ibid. These standards should cover different fields including accommodation, hygiene and health, work and education, healthcare, prevention of violence and ill-treatment. Similarly, they should cover the protection of the rights of vulnerable individuals such as women, minors, persons with disabilities, LGBTIQ persons and foreign nationals.

[70] *Ibidem*.

[71] *Ibidem*.

[72] *Ibidem*.

[73] *Ibidem*.

tention rules across Member States.

Nevertheless, it cannot be overlooked that the Commission has once again adopted a cautious approach, confining itself to adopting a non-binding instrument and thus avoiding more decisive legislative action.

This caution may be attributed at least in part to the Council of the European Union reluctance: unlike the European Parliament which has long been calling for action by the Commission, the Council has shown opposition to any expansion of the Union's powers in this area. In particular, the minutes of the Justice and Home Affairs meeting of 7 October, 2021 (12574/21) clearly reflect the Council's resistance to that extension: 'Ministers consider that no further legal instruments on minimum standards at EU level are necessary, as such standards are already defined in various international fora', referring in particular to the European Prison Rules. Still, as discussed, existing data show a clear gap between Member States in terms of prison conditions.[74]

Despite this negative response from the Council, the Commission had expressed its intention to adopt the above-mentioned Recommendation.[75]

The choice to rely on a non-binding instrument has not escaped scrutiny, prompting the question whether, had the Council given a favorable opinion, the Commission might have proceeded to adopt a binding legislative instrument. Such an outcome has been regarded by some as preferable, particularly in view of the persistent shortcomings in the implementation of existing soft law standards across Member States.[76]

Finally, it is worth mentioning the opinion adopted in February 2023 by the European Parliament's Committee on Civil Liberties, Justice, and Home Affairs (LIBE), addressed to the Committee on Constitutional Affairs, which was tasked with drafting a report on the 'European Parliament's proposals for amending the Treaties'. In the opinion, the LIBE Committee explicitly emphasizes the need to grant the Union, on the basis of Article 82 TFEU, specific competence for the adoption of minimum standards on pre-trial detention and detention conditions. In particular, it 'calls for the introduction of a Union competence in Article 82 TFEU to establish minimum standards for

[74] Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023) 273.

[75] Ibid. The Commission announced this intention in response to a parliamentary question submitted by four MEPs at the instigation of the European Prison Observatory.

[76] Policy Department for Citizens' Rights and Constitutional Affairs (European Parliament), *Prisons and detention conditions in the EU* (Brussels 2023) 72.

pre-trial detention and custody conditions, and for minimum standards on the admissibility of evidence, in full respect of the right to a fair trial in criminal proceedings'.[77]

It therefore remains to be seen how the Commission will position itself in response to these recent developments, and whether the emerging signals of openness will ultimately lead to a definitive consolidation of the Union's competence in the field of prison matters.

[77] Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Constitutional Affairs of 10 February 2023 Proposals of the European Parliament for the Amendment of the Treaties (2022/2051(INL)) [2023] para 27.

ANDREA BETTI*

IMPLEMENTING THE NATURE RESTORATION REGULATION: LEGAL CHALLENGES AND OPPORTUNITIES (UNIVERSITY OF ROMA TRE, 6-7 NOVEMBER 2025)

The conference "Implementing the Nature Restoration Regulation: Legal Challenges and Opportunities", held on 6-7 November 2025 at the university of Roma Tre, represented one of the first occasions to reflect on the practical and legal implications of the recently adopted Nature Restoration Regulation (NRR).[1] The event brought together academics, public authorities, environmental lawyers, economists and ecologists, fostering an interdisciplinary dialogue to tangle the Regulation's scope and ambitious requirements. As Prof. Chiara Cellerino (University of Genoa) explained, the conference represented the final public event of a collaborative effort involving three universities – Roma Tre University, the University of Genoa, and LUMSA University – brought together within the national research project "Restoring Nature for Children in Italy (RINASCI)", funded as a Project of Relevant National Interest (PRIN) under the National Recovery and Resilience Plan (PNRR), to explore the legal dimensions of ecological restoration in the Italian context. Nevertheless, the conference programme – Cellerino noted – clearly adopted a broader and more international perspective. This shift can be considered as both natural and necessary. The legal issues raised by nature restoration, indeed, transcend national boundaries and require comparative, interdisciplinary, and cross-level analysis. Within this wider context, the project's principal investigator, Dr. Morgan Eleanor Harris (University of Roma Tre), noted that the discussions of the conference would converge around three recurring themes: first, the coherence and interaction between the NRR and existing environmental legislation; second, the increasingly close relationship between scientific knowledge and legal reasoning; third, the economic dimension of biodiversity.

The first panel opened with an intervention by Prof. An Cliquet (Ghent Uni-

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[1] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L.

versity), who began by noting that the public debate surrounding the NRR had been marked by contrasting narratives. While some actors – particularly in the agricultural and land-use sectors – perceived the Regulation as a threat to legal certainty, even describing it as a form of "bullying" of farmers and landowners, others welcomed it as an overdue opportunity to correct decades of ecological degradation. In this context, Cliquet posed a central question: does the NRR create legal certainty or uncertainty? To answer this question, she clarified that legal certainty demands legal rules to be clear, precise and consistent, enabling individuals and economic actors to foresee their rights and duties. Nonetheless, Europe is already confronting multiple ecological threat such as nitrogen overload, soil degradation, poor water quality, declining biodiversity, and accelerating climate impacts, the environmental repercussions of which are now extending into the socio-economic sphere. This has resulted in courts increasingly compelled to intervene in existing permits, generating the very legal uncertainty that opponents of restoration claim to fear. Because of this reality, neither property owners nor businesses can reasonably anticipate that environmental or market regulations will stay constant and must consider the fact of advancing scientific understanding and pressing environmental emergencies. From this viewpoint, Cliquet argued that even if legitimate expectations safeguards reliance on current laws, it cannot ensure that damaging activities will be permitted to persist without end. In this perspective ambitious restoration rules are not only ecologically indispensable but also a source of legal stability. Furthermore, the national restoration strategies mandated by the NRR can improve clarity by specifying the locations, for restoration and the actions to be prioritized, thereby minimizing the regulatory uncertainty that have marked previous decades. According to her perspective the NRR could offer a chance to harmonize ecological integrity with legal consistency, but its effectiveness will rely on the way Member States execute their strategies.

The second speech, given by Prof. Hendrik Schoukens (University of Ghent) concentrated on the connection, between the NRR and private property rights. The speaker highlighted that conventional views of property – based on notions of control and ownership through labour as famously articulated by John Locke – are in tension with the extensive ecological restoration initiatives demanded by the NRR. This conflict is already visible in practice. In fact, land transformations, such as the drained peatlands in Belgium converted into productive agricultural polders, continue to create disputes between conservation authorities and landowners who view these areas as legitimate products of labour and investment. As restoration obligations expand, such frictions are likely to intensify. Schoukens, on this regard, examined recent CJEU case law, par-

ticularly the *Sātiņi-S* ruling[2] of 2022 where the Court clarified that environmental restrictions in Natura 2000 sites constitute controls on the use of property, not expropriations, and therefore do not automatically require financial compensation under Article 17 of the Charter of Fundamental Rights. A subsequent judgment[3] in the same dispute added that overcompensation for use restrictions may even qualify as unlawful State aid, effectively placing limits on how far Member States can go in compensating landowners. These principles are crucial for understanding the NRR. Indeed, although the Regulation does not directly redefine property rights, its ambitious restoration targets – including peatland rewetting – will inevitably interfere with existing land uses. The clause in Article 11(4) making rewetting voluntary for private landowners may reduce political resistance, but it risks creating unrealistic expectations about the scope of existing obligations under Natura 2000 and other EU environmental law. In conclusion, he called for moving beyond a purely defensive view of property rights. Restoration measures can also protect property, for example by reducing flood risks.

The second panel opened with a presentation by Prof. Niko Soininen and Prof. Suvi-Tuuli Puharinen (University of Eastern Finland), examining why even the most advanced restoration laws - including the NRR - struggle to deliver the scale of ecological recovery urgently needed across Europe. The speakers began by framing the problem: decades of habitat destruction, land-use expansion and insufficient conservation have generated a significant "ecological debt", leaving mitigation measures and traditional conservation tools unable to halt biodiversity loss. As they argued, restoring ecosystems at landscape scale – from forests to rivers – is now indispensable, and the NRR represents a major step forward in this direction. However, they noted that implementation continues to face systemic obstacles embedded in existing legal and economic structures. Through interdisciplinary work recently published in Restoration Ecology[4], they developed the idea of shifting from the familiar restoration continuum (which prioritises mitigation and incremental improvement) toward a restoration hierarchy, where full ecological restoration is considered first and downscaled only when strictly necessary. This shift is particularly important in sectors such as hydropower, where current legal frameworks still favour partial measures (e.g., fish passages) rather

[2] Case C-234/20 Sātiņi-S [2022] ECLI:EU:C:2022:56.

[3] Case C-238/20 *Sātiņi-S* [2022] ECLI:EU:C:2022:57.

[4] N. Soininen, S. Puharinen, A. Iho, S. Koljonen, J. Artell, K. Tolonen and A. Belinskij, 'Ecological restoration hierarchy as a lens to reveal the foundational economic and legal structures impeding restoration' (2025)Restoration Ecology e70216.

than transformative solutions such as dam removal – even though only full restoration would meaningfully recover riverine ecosystems. Drawing on case studies from Finland, they suggested that current laws often restrict the possibility of ambitious restoration because permits tend to be long-lasting and difficult to revise, property rights shield existing uses, and economic assessments typically consider single projects rather than whole ecosystems. Yet when evaluated through a systemic lens – for example, assessing an entire river rather than a single hydropower plant – full restoration can prove both ecologically necessary and economically advantageous. Lastly, they identified some foundational legal issues that consistently impede ambitious restoration across jurisdictions: property rights prioritise economic uses; restoration mandates are limited; natural resource permits are "sticky", slowing or preventing intervention; environmental law is centred on mitigation, reinforcing the *status quo*; businesses externalise ecological harm, leaving restoration burdens to the public sector; restoration obligations are narrow, triggered only in specific circumstances; expropriation is used to promote development but not ecological recovery. These structural features, they argued, explain much of the persistent implementation gap in restoration law.

The second lecture, given by Prof. Jerzy Jendrośka (Opole University; Institute of Environmental Protection, Warsaw) explored public participation in the drafting and approval of National Restoration Plans (NRP) under Article 14 NRR, placing it within the context of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention'). He emphasized that public participation should be viewed comprehensively – encompassing the right to information, participation in decision-making processes and access to justice – even though these elements are only briefly mentioned in the Regulation. A major portion of his presentation concentrated on the Strategic Environmental Assessment (SEA) Directive 2003/35/EC, which he claimed holds a practical function in organizing public participation. He argued that Article 14(20) indirectly requires SEA.

Access to justice represented is another issue. The robust provision on access to justice initially proposed by the Commission – aligning with Article 9(2) of Aarhus Convention – was eliminated during negotiations This passes the responsibility onto Member States and their courts to guarantee this right, possibly leading to inconsistencies throughout the Union, particularly in areas where access to justice is still limited. He further recalled that transparency duties stem from Directive 2003/4/EC indicating that all environmental information utilized in restoration strategies must be made available proactively (an element governments might undervalue). He concluded by warning that

"stakeholder involvement" cannot replace public participation under Aarhus: the latter must include the wider public and environmental NGOs, not only sectoral interests. Confusing the two, he argued, would undermine essential procedural guarantees.

Prof. Lorenzo Ciccarese, a leading Italian authority on biodiversity and climate, formerly director of the Protected Areas division of the Italian Institute for Environmental Research (ISPRA) and Italy's national focal point to the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), gave the first afternoon keynote. His lecture examined how law and science must interact to solve the biodiversity crises. Illustrating the gravity of the continuing biodiversity decline, he maintained that our failure to address the direct and indirect causes of biodiversity loss is the result of past policy failures. For this reason, the 2022 Kunming-Montreal Global Biodiversity Framework stresses "mainstreaming", which is the inclusion of nature's many values across all economic sectors. The NRR, in his view, is a major milestone because it incorporates scientific knowledge into legally binding duties. Its implementation calls for strong co-operation among different governance levels, regional coordination, and reliance in established scientific knowledge baselines, monitoring, indicators and methods for prioritising interventions. In this context, Ciccarese concluded, science can identify priorities, but law must operationalise them and governance must deliver them.

After the keynote, the floor passed to Eleonora Ciscato (State University of Milano) who introduced the theme of the session: the synergies between nature restoration and other EU environmental objectives. As she noted, much of the morning discussion had focused on the NRR itself, but the Regulation does not operate in isolation. Indeed, its implementation inevitably intersects with broader environmental frameworks, from water quality to air pollution, often with cross-border implications.

Within this context Ciscato, introduced the opening panellist, Nienke van der Burgt (Ghent University), who addressed how the required nature restoration initiatives might be obstructed by pollution controls, especially those connected to PFAS contamination. Focusing on the Scheldt estuary (Belgium-Netherlands), she observed that all potential restoration methods, such, as depoldering or creating wetlands, require either soil or water displacement. This creates a dilemma: while environmental law prohibits the spread of contamination, EU regulations require Member States to undertake ecological restoration. Van der Burgt provided two illustrations of how judicial bodies could handle this conflict. In the 2022 Hedwige polder case, objection to a restoration initiative based on concerns about PFAS was dismissed due to a documented pollution. Conversely, in the Belgian Oosterweel case the Council of State annulled authorizations, for the reuse of PFAS-polluted soil ruling that moving soil within an already compro-

mised area would breach the standstill principle. These judgments shows that future restoration initiatives will demand thorough, context-specific legal and environmental assessments, possibly even custom derogations to pollution controls, albeit with monitoring and risk mitigation measures.

The panel proceeded with a talk, from Elisa Cavallin (Ghent university), who analyzed how three EU instruments – the NRR, the Carbon Removals and Carbon Farming Certification Regulation[5] and the new Soil Monitoring and Resilience Directive[6] – work together in tackling Europe's escalating soil emergency. She started by highlighting the state of European soils: extensive pollution, buildup of pesticides and heavy metals decline in soil organic carbon, erosion, compaction and the continuous deterioration of farmlands and peatlands. She observed that these actions weaken efforts for climate mitigation, biodiversity conservation, food production and the overall wellbeing of humans. She recognized potential synergies among the three tools: restoration objectives can directly enhance soil quality; the Soil Monitoring Directive offers the essential data framework; and the Carbon Farming Regulation, while focused on carbon might promote ecological gains via sustainability standards. Meanwhile tensions persist. The three laws vary in their binding force, which could lead to inconsistent application. Conflicting land-use needs – restoration, carbon farming and agriculture – might result in disputes if not managed properly. Monitoring requirements may prove onerous and support from stakeholders and farmers should not be taken for granted. Cavallin concluded that, while these instruments have strong potential to reinforce each other, realising that potential will require coherent implementation, consistent monitoring systems, and careful management of trade-offs across Europe's landscapes.

The concluding presentation of the panel was given by Prof. Volker Mauerhofer (Meiji University, Tokyo) who provided an in-depth examination of the connection, between the NRR and three fundamental instruments in the EU nature law: the Habitats Directive,[7] the Birds Directive[8] and the Environmental Liability Directive

[5] Regulation (EU) 2024/3012 of the European Parliament and of the Council of 27 November 2024 on the certification of carbon removals, carbon farming and carbon storage in products [2024] OJ L.

[6] Directive (EU) 2025/2360 of the European Parliament and of the Council of 12 November 2025 on Soil Monitoring and Resilience (Soil Monitoring Law) [2025] OJ L.

[7] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L20/7.

[8] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

(ELD).[9] From the beginning Mauerhofer emphasized that the NRL was designed by the EU legislator with a clear goal of complementarity. The regulation does not supplant the existing framework, instead it extends its coverage particularly in domains that were either overlooked or only partially included before. This is underscored by the frequency with which the NRR refers to both the Habitats and Birds Directives affirming their status as the foundation of EU nature conservation legislation. A key aspect of his presentation focused on the connection, between the notion of "good condition" and the established "favourable conservation status" (FCS) as defined in the Habitats Directive. Mauerhofer argued that the NRL employs "good condition" not as a replacement of FCS, but rather as an instrument to render it operational: reaching good condition should aid in achieving favourable conservation status, which continues to be the more robust and legally enforceable target. Given that the NRL has more flexible rules it should be interpret in a uniform way that ensure that the stricter requirements of the existing directives take precedence in the event of any conflict. Mauerhofer also tackled matters such as the varying geographical scopes of the two systems (local for the directives national for the NRL) and the contrasting processes for exceptions and compensation measures. His main point is that when the two legal frameworks intersect, interpreters must prioritize the rigorous requirements of the Habitats and Birds Directives consistently with the principle of achieving a high level of environmental protection enshrined in the Treaties.

The final session of the day, devoted to the financing of nature restoration, opened with a speech by Francesca Leucci (Brussels School of Governance). Her talk focused on one of the most rapidly evolving and debated instruments in this field: biodiversity credits, a market-based tool to support ecosystem restoration. Leucci described biodiversity credits as instruments that embody quantifiable ecological enhancements – like rehabilitated forests or wetlands – which can be acquired by governmental or private entities. Numerous such projects are already underway worldwide demonstrating the growth of this sector. Nevertheless, she highlighted the difficulties associated with these initiatives. The first challenge is valuation: existing frameworks for quantifying biodiversity benefits are vague and unreliable. The second challenge involves measurement of gains, as biodiversity is intricate and hard to represent, using metrics raising the potential for greenwashing. Issues of fairness also emerge in relation to the rights of local communities and landowners. Within the EU, the NRR promotes the involvement

[9] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

of private funding in restoration efforts but provides minimal guidance on the functioning of these markets. This shortfall is currently being tackled by the Commission's 2025 Roadmap to Nature Credits,[10] which offers a certification framework inspired by carbon credits. Although it aims to enhance consistency and clarity numerous scientific and legal issues remain unresolved. Leucci concluded by stressing that biodiversity credits will likely play a growing role in EU restoration policy and that legal scholars should engage early to help shape a credible and equitable framework.

The second presentation of this panel, delivered by Mario Barbano (University of Genova), explored the relationship between state aid regulations and the funding requirements of the NRR. Barbano emphasized that restoration commitments impose financial burdens on Member States, which primarily draw from national budgets to support them. He stated that state support frameworks in biodiversity serve two purposes: they can effectively aid restoration initiatives and they must also stop public funds from bolstering environmentally damaging practices. He argued that national restoration strategies need to pinpoint and gradually eliminate subsidies. Barbano explained that restoration funding does not always count as state aid such as when the fall under the *de minimus* regime or entail conservation activities only. State aid rules can be relevant if projects entail purchasing land, yet the General Block Exemption Regulation may nonetheless exclude such projects from their scope.[11] He concluded by emphasising that while various legal tools exist to promote public financing of restoration projects, they differ in administrative complexity and offer varying levels of legal certainty. For this reason, clearer Commission guidance and closer monitoring of state-funded measures is essential. Ultimately, state aid can help bridge the financing gap, but direct EU funding would remain the most effective and distortion-free solution.

The concluding presentation, given by Paola Francesca Rizzi (University of Bari) explored novel incentive-driven approaches to restoring biodiversity in farming environments. Agriculture sits at the heart of the biodiversity challenge: it produces harmful externalities while EU bodies have historically sought to promote sustainability by enhancing positive impacts and minimizing negative ones through the Common Agricultural Policy (CAP). Nevertheless, the ongoing economic volatility in the sector renders sustainability efforts particularly challenging for farmers, reflecting Garrett Hardin's

[10] European Commission, 'Roadmap towards Nature Credits' (Communication) COM (2025) 374 final.

[11] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

"tragedy of the commons". The NRR establishes, for the first time, mandatory duties for agricultural ecosystems especially in Article 11 but also includes a contentious food-security safeguard clause that may broaden the leeway of Member States.Rizzi advocates for additional economic tools that narrow the profitability difference, between sustainable and unsustainable methods. This is where payments for ecosystem services (PES), voluntary arrangements through which one party remunerates another for providing an environmental service, become relevant. The most significant example is the French model of obligations *réelles environnementales*, introduced in 2016: real obligations attached to land that allow landowners to be compensated for conservation or restoration activities. This innovative mechanism, in the view of the speaker, combines environmental protection with economic incentives and, given its compatibility with civil-law traditions like Italy's, represents a promising candidate for legal transplantation.

The day finished with a round table focused on the technical and cultural obstacles facing Member States as they formulate their National Restoration Plans pursuant, to the NRR. Participants included Federica Luoni (LIPU), Vito Emanuele Cambria (La Sapienza), Francesca Leucci (IPBES) and Jerzy Jendrośka, who participates in creating Poland's restoration plan. Federica Luoni depicted a scenario the current process for the preparation of the Italian NRP by a lacking in transparency. Without open communication and genuine public engagement, the Regulation may be regarded as just another technical exercise. For this reason, she said that the Italian league for the protection of birds (LIPU) is attempting to raise awareness of nature restoration, advocating for more robust institutional actions. Vito Emanuele Cambria then recapped the results of a survey of the Italian community of restoration practitioners, which identified multiple common challenges: unreliable data, incomplete habitat mapping, disjointed vertical and horizontal governance and insufficient collaboration among agriculture, water and forestry sectors. In his view public engagement is crucial and it needs to be based on a more robust ecological knowledge. Jerzy Jendrośka discussed the situation in Poland, which he found to be influenced by domestic political debates. In preparing its NRP, Poland has formed working groups and implemented a participatory process along with a SEA, which should be completed, prior to sending the draft plan to the Commission in September 2026. Nevertheless, he pointed out that Member States have different approaches regarding the timing of participation and SEA, and many are unclear on their duties under the Aarhus Convention. He further emphasized some legal challenges inherent in the restoration planning: modifying land-use planning, water laws, environmental assessments and guaranteeing cross-border collaboration. Francesca Leucci highlighted that the challenge goes beyond administrative issue and is funda-

mentally systemic: embedding biodiversity into spatial planning requires navigating regulatory intricacies that span various levels and fields. Although public participation is essential numerous elements – like determining baselines – are fundamentally technical; hence suitable educational and mediation instruments are essential.

Addressing the question on how the NRR can foster the profound transformative change needed to tackle the biodiversity crisis, Luoni underscored the importance of emotional and behaviour involvement of the public. Unless there is a transformation in societal habits, such as diet, consumption patterns, transports and views of nature, restoration may continue to be a purely technical task detached from the life of communities. Cambria highlighted that nature continues to be viewed mainly as a limitation, which leaves political discussions open to oversimplified narratives. In his opinion a transdisciplinary method connecting science, law and public communication is essential to develop a cultural narrative, about restoration. In this context, Jendrośka emphasized again that public involvement often primarily aims to foster agreement and political backing, yet, for the NRR to succeed, environmental awareness needs to increase and access to justice must be available. In the absence of enforcement mechanisms, no law can be genuinely successful. Leucci concluded by assessing the need to rebuild our cultural relationship with nature, drawing on traditional knowledge and promoting direct educational experiences. Bringing students and citizens back into natural environments can trigger a lasting change in how nature is perceived and valued.

The first panel of Friday, chaired by Prof. Giuseppe Spoto (Roma Tre) opened with a presentation by Luigi Servadei of the Italian Agricultural and Agronomic Research Council (CREA). He emphasized that implementing the NRR poses both a challenge and an opportunity to enhance environmental governance across the Union. He stressed that the Regulation's success depends on Member States integrating it into their existing legal frameworks – from the Habitats Directive to the Water Framework Directive,[12] the Marine Strategy Framework Directive[13] to the laws addressing air pollution. He argued that a unified strategy is essential to avoid duplication, enhance collaboration and guarantee the success of restoration measures, particularly in the most sensitive ecosystems. The CAP may also contribute to this end, yet, its tools need to be harmonized with restoration goals and promote sustainable agricultural methods.

[12] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

[13] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.

The second presenter, Niels Hoek (European University Institute), explored how the NRR tackles the decrease in pollinators, which are vital to biodiversity and food security, given that 70% of crops grows in Europe are reliant on animal pollination. He noted that pollination is the product of an ecological network formed through millions of years of co-evolution, one that is increasingly disturbed by habitat destruction, pesticides, intensive farming, climate change and light pollution. Article 10 NRR establishes the critical environmentally objective to stop the decline of pollinators population by 2030 and promote their increase thereafter. Key actions include restoring native vegetation, minimizing chemical impacts and maintaining interconnected and diverse habitats. Nevertheless, Hoek emphasized that the implementation of these actions encounter policy obstacles. Weak pesticide rules, incentives for intensive production, slow invasive species controls, even EU lighting standards threaten to undermine the NRR's goals.

The next speech, given by Enrico Mezzacapo (University of Pisa), explained how the NRR and the CAP are two pathways that must now converge. Agriculture, he noted, is one of the main drivers of biodiversity loss in Europe due to pesticide use, landscapes simplification and climate change which are degrading ecosystems and making food systems increasingly fragile. Over the years, the CAP has tried to integrate environmental objectives, but often with limited results. The NRR is an important step forward, yet it has arrived weakened by political compromises: several measures targeting agricultural ecosystem were softened, and there is no specific funding commitment. Since the NRR does not impose direct obligations on farmers, he argued that the CAP becomes the key instrument to make restoration on agricultural land truly effective. There are important synergies between the two – such as GAEC[14] standards and eco-schemes – but the current CAP still risks slowing down restoration efforts, also because of derogations and the lack of reform in the most environmentally harmful sectors. Mezzacapo concluded that three reforms are essential: secure and dedicated public funding, conditionalities genuinely aligned with the NRR and the elimination of environmentally harmful subsidies. Voluntary carbon or biodiversity markets, he stressed, cannot replace the role of public policy to this end.

The last speaker of this panel, Siemen Kalders (University of Hasselt) focused on the recovery of grassland butterflies in Flanders, an area where losses have been severe: almost one-third of species have already disappeared, and numerous others continue to

[14] Good Agricultural and Environmental Conditions.

be at risk. The NRR's framework allows Member States to choose the grassland butterfly index as one of the metrics for assessing the health of agricultural ecosystems. If Member States choose to do so, they must adopt measures necessary to increase butterfly numbers until "satisfactory levels" are reached. Kalders described why butterflies serve as an important ecological indicator: they react swiftly to alterations in land use, nitrogen deposition, pesticide application and habitat fragmentation, and while their resurgence frequently indicates broader biodiversity gains. Nonetheless, he also pointed out legal issues with the index, particularly that of shifting baselines, given that most monitoring records start only in the 1990s, well after significant declines had already happened. This threatens to reduce restoration goals unless guided by evidence and the precautionary principle. He concluded that the NRR offers a real opportunity for Flanders to reverse decades of decline of its butterflies, but effective implementation will require clear EU guidance, coherent national baselines, and a broader ecosystem-based view that extends beyond the 17 species in the index.

The final session of the conference, chaired by Katia Lafussa (LUMSA University of Rome), explored constitutional and comparative perspectives on ecological restoration. Laffusa recalled the Italian constitutional reform which modified Article 9 to explicitly include the protection of the environment, biodiversity and ecosystems also in the interest of future generations, and Article 41, which places environmental sustainability as a limit on private economic initiative. Within this constitutional landscape, the panel examined how the NRR interacts with national constitutional principles, especially where restoration obligations may collide with private economic interests.

The session opened with a presentation by Eleonora Ciscato (State University of Milan) and Matilde Meertens (University of Ghent), entitled "Striving for Just Ecological Restoration: A Critical Analysis of the EU Nature Restoration Regulation"[15]. They emphasized that ecological restoration can be truly successful only if it incorporates environmental justice. For them, three key components are fundamental to achieve this goal: the fair distribution of burdens and benefits, the genuine involvement of affected communities, and the recognition of the different values people attribute to nature. Applying this framework to the NRR, they observed that the regulation contains references to fairness and participation, though often implicitly and without strong guarantees. Moreover, significant issues remain in certain sectors – such as agriculture and fisheries – where greater burdens will be sustained, and the quality of participatory processes

[15] E. Ciscato and M. Meertens, 'Striving for just ecological restoration: A critical analysis of the EU Nature Restoration Regulation' (forthcoming) Transnational Environmental Law.

will largely depend on how individual Member States choose to implement them. The speakers also warned of the risk that the NRR may be applied solely through a technical lens, overlooking the perceptions, values and needs of local communities. A genuine "just ecological restoration" instead requires national plans to explicitly address these dimensions, ensuring that restoration efforts are not only ecologically effective but also socially equitable.

The next speaker, Alberto Jaci (University of Messina), emphasized that private environmental litigation can have a role in ensuring compliance with NRR. Because the NRR imposes binding restoration obligations on Member States, disputes might occur between environmental objectives and individual economic concerns. In this scenario, Jaci highlighted the role of litigation by individuals and environmental groups, who may be empowered to initiate lawsuits to enforce restoration duties or claim compensation. He further explored how civil liability, and the "polluter pays" principle are enforced when environmental damage arises, while also acknowledging the importance of ADR (alternative dispute resolution). Overall, Jaci argued that private litigation may become a key instrument for ensuring the NRR's effectiveness and fostering a shared, multilevel responsibility for ecological restoration.

The third presentation of the session, delivered by Ilaria Costanzo (University of Ca' Foscari), explored the connection between NRR and the environmental principles of EU law detailed in Article 191 TFEU, which typically emphasize prevention, followed by remediation and the polluter-pays principle. The NRR, in her view, deviates from this hierarchy: instead of prioritizing the avoidance of environmental damages, it recognizes that Europe's environment is, presently, in a critical condition. Consequently, it places restoration above prevention, which take a supportive role. This represents a shift in principles, as the regulation encourages enhancing ecological status rather than simply preserving the existing situation from further harm. This innovation is both a strength and a vulnerability since the NRR still operates within a legal system still rooted in the logic of prevention. Ultimately, for her, it will be national implementation and judicial interpretation that determine which model will prevail.

Finally, the last speaker of the Conference, Franco Sicuro (University of Bari, Aldo Moro), proposes the NRR as a basis for a novel framework of "environmental governance" within Italy's constitutional framework. The NRR directly connects with the 2022 reform, giving rise to the accountability for organizations and economic actors for their impacts on ecosystems, aligning with the Constitutional Court's ruling in Judgment 105/2024. However, he pointed out those recent decisions – like hunting reforms – highlight the vulnerability of the existing framework and the danger of separating

species protection from ecosystem conservation. In his opinion there are four avenues to be investigated: the institutional impact of the NRR on territorial governance and the inclusion of biodiversity tools in special planning; the need to rethink urban environments so as to protect fauna; the potential limitation on legislative discretion regarding issues covered by the NRR, grounded in the constitutional "mandate to protect the environment" and the emergence of a new model of environmental governance, informed by supranational principles and a systemic reading of Articles 9, 11, 32, 41 and 117 of the Italian Constitution. Sicuro concluded that the NRR presents an opportunity to reshape Italian constitutional law according to a biocentric perspective.

In the end, the conference revealed that the NRR represents a change in EU environmental law. Throughout the panels, three overarching insights surfaced. First, the NRR demands systemic integration since its success relies on harmonious coordination with current EU frameworks – like the Habitats, Water, Soil monitoring and Environmental Liability Directives – alongside national constitutional tenets and sector-specific policies, including the CAP. Second, the Regulation highlights the increasing reliance of legal frameworks on scientific knowledge. Trustworthy data, tested environmental indicators and baseline evaluations are essential to convert restoration objectives in binding commitments. Third, restoration has a fundamental socio-legal nature, raising distributive issues, requiring public involvement and necessitating s economic and cultural changes that go beyond mere compliance with the law.

Overall, the conference has shown that the NRR provides an ambitious and innovative framework, but its success will hinge on Member States' capacity to implement it coherently, mobilise adequate resources and foster a renewed relationship with nature. It highlighted that despite the challenges inherent in the NRR, ecological restoration duties represent a critical opportunity to build the foundations for long-term social, economic, institutional and constitutional sustainability in Europe.

ANTONELLA BRANDONISIO*

SUSTAINABLE SOILS FOR SUSTAINABLE AGRICULTURE (ROMA TRE UNIVERSITY, 20-22 OCTOBER 2025)

The international conference "Sustainable Soils for Sustainable Agriculture", held in Rome from 20 to 22 October 2025, was part of the research, training, and dissemination activities of the European project ProLand – EU Partnership to Protect Agricultural Land in the Face of Climate and Environmental Challenges. Caring for Future Generations, funded under the Erasmus+ Programme – Cooperation Partnerships in Higher Education (KA220-HED).

The ProLand project is grounded in the growing awareness, at both European and international levels, that agricultural soil is a limited and vulnerable resource, increasingly affected by degradation processes, land take, sealing, and loss of fertility, exacerbated by climate change, urban pressure, land financialization, and intensive production models. Against this background, the project aims to strengthen European academic cooperation by fostering reflection on the role of law, public policies, and institutions in the long-term protection of agricultural land and in safeguarding the interests of future generations.

The project brings together five European universities representing different legal systems, agrarian traditions, and socio-economic contexts – Roma Tre University (Italy), University of Almería (Spain), Poznań University of Life Sciences (Poland), Slovak University of Agriculture in Nitra (Slovakia), and Taras Shevchenko National University of Kyiv (Ukraine) – thereby enabling a comparative and interdisciplinary approach combining agricultural and environmental law with agricultural economics, EU policies, rural sociology, and sustainable farming practices.

Within this framework, the conference was organized under the scientific and organizational direction of Professor Giuseppe Spoto (Roma Tre University), in his role as Local Project Coordinator, and represented a key milestone of the project, serving as a space for scientific synthesis and dialogue between theoretical research, institutional perspectives, and territorial practices.

Structured around scientific sessions and field-based workshops, the conference

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addressed the protection and sustainable management of soils as one of the most pressing challenges facing contemporary agriculture and environmental governance. Recognized as a fundamental natural resource, soil was discussed as a cornerstone of food security, ecosystem services, biodiversity conservation, and climate resilience, while also being increasingly threatened by erosion, contamination, sealing, loss of organic matter, and unsustainable land use.

The conference therefore promoted an interdisciplinary discussion on soil protection, integrating legal, economic, environmental, and policy-oriented perspectives, with particular attention to the evolving European framework on soil monitoring and resilience, the role of the Common Agricultural Policy, national legal systems, and the challenges posed by territorial governance, digitalization, and European integration processes.

The opening of the conference was marked by institutional addresses delivered by Antonio Carratta, Director of the Department of Law at Roma Tre University, Leonardo Pastorino, President of the World Union of University Agrarians (UMAU), and Maria Esther Muñiz, President of the European Council for Rural Law (CEDR). These institutional remarks emphasized the centrality of soil protection within contemporary legal and policy debates on sustainable agriculture and rural development.

Following the institutional addresses, Giuseppe Spoto (Roma Tre University), acting as Local Project Coordinator, delivered the conference presentation. His introductory remarks provided a comprehensive overview of the project's aims and governance structure, highlighted the strategic role of soil protection within contemporary European legal and policy debates, and framed the conference as a key moment of scientific synthesis and dialogue between academic research, institutional actors, and territorial practices.

The scientific sessions of the conference developed along a coherent thematic trajectory, moving from European-level reflections to national legal experiences and sectoral policy instruments. The first contribution framed soil protection within the broader debate on environmental sustainability and agricultural policy at EU level. In her presentation entitled "Protection of Soils from an Economic Perspective", Cristina Vaquero Piñeiro (Roma Tre University) examined the economic relevance of soil protection within the broader framework of environmental sustainability and European agricultural policy. Soil was presented as a fundamental resource for agricultural production whose degradation entails significant economic and ecological risks, including reduced productivity, loss of biodiversity, and increased vulnerability of agricultural systems.

The presentation highlighted the main pressures affecting European soils – such as erosion, land-use intensification, sealing, contamination, and the decline of soil biodiversity – and emphasized the role of agroecology as an integrated approach capable of reconciling environmental protection with economic viability. Particular attention was devoted to the influence of public policies, especially the Common Agricultural Policy, in shaping farmers' production choices through eco-schemes, incentives, and support measures aimed at promoting sustainable land management practices.

Innovation and digital technologies were identified as key tools for improving soil monitoring and resource efficiency, although persistent implementation gaps related to funding constraints and limited knowledge transfer were also acknowledged. In this context, the presentation underlined the importance of coordinated, place-based public policies and collective initiatives in fostering effective investments in soil protection. Reference was also made to recent empirical research at territorial level, illustrating how policy incentives can influence farmers' interactions with soil biodiversity and sustainable land-use strategies.

Following this economic perspective, the conference shifted its focus to the scientific foundations underpinning the emerging European framework on soil protection. In his presentation entitled "Soil as a Legal Frontier: Edaphic Keys to the European Soil Monitoring Framework", Fernando de Moral Torres (University of Almeria) aimed to illustrate the soil-related premises of the current draft of the European Directive on Soil Monitoring and Resilience. Soil was presented not simply as a physical substrate supporting human activities, but as a living and vital entity responsible for a wide range of ecosystem functions. From an anthropocentric perspective, these functions were described as being translatable into essential ecosystem services, thus highlighting the central role of soil in environmental sustainability and human well-being.

The presentation introduced the technical concepts underlying the proposed Directive, with particular reference to the properties considered crucial for soil health and the indicators used to assess them. These elements were presented as fundamental tools for establishing a harmonized soil monitoring system across Europe. In addition, the main threats currently affecting European soils were discussed, emphasizing the extent to which soil degradation compromises the ability of soils to perform their ecological and productive functions. In concluding, the speaker stressed that soil protection should not be regarded merely as an environmental issue, but rather as a scientific, technical, and political imperative closely linked to ecological resilience and global food security. Ensuring living, healthy, and high-quality soils was presented as a prerequisite for building a truly sustainable future.

Building on these scientific premises, the subsequent contribution addressed the legal translation of soil health concepts within the European regulatory framework. In his presentation entitled "Legal Elements of the European Proposal for a Soil Monitoring and Resilience Directive", Lorenzo Mellado Ruiz (University of Almeria) examined the most significant provisions of the proposed Directive, focusing on its objectives, structure, and implementation mechanisms. The presentation highlighted the European Union's ambition to guarantee the health of all soils as a general and shared goal, recognizing that only healthy soils are capable of providing essential economic and ecosystem services.

Particular attention was devoted to the harmonization of objectives and risk assessment methodologies across Member States, combined with a degree of flexibility in national implementation. This approach was presented as a means of ensuring coherence at EU level while allowing adaptation to national specificities. The presentation also emphasized the close link between soil protection, the zero-pollution objective, and the EU's commitment to achieving climate neutrality by 2050. Within this framework, measures aimed at monitoring soil health, strengthening soil resilience and adaptive capacity, and ensuring the rational management of contaminated soils were discussed. In conclusion, the speaker underlined the ambitious nature of the proposed Directive, noting that its effectiveness will depend on extensive internal development and sustained implementation efforts within Member States.

Against this European policy background, the conference then explored the role of EU guidelines as instruments for promoting sustainable soil management. In her presentation entitled "The European Union Guidelines as Tools for Sustainable Soil Management", Monika Jakubus (Poznań University of Life Sciences) addressed the current challenges associated with proper and sustainable soil management in light of recent EU policy developments. The presentation discussed the importance and multifunctionality of soils, as well as the main factors and sectors exerting pressure on soil health, including intensive and unsustainable land use, pollution from industry and transport, and the expansion of urban infrastructure.

Within this context, the presentation reviewed the main EU legal and strategic instruments aimed at soil protection, including the Soil Strategy for 2030, the Zero Pollution Action Plan, the Farm to Fork Strategy, the Biodiversity Strategy, the European Climate Law, the Common Agricultural Policy, and the framework of Good Agricultural and Environmental Conditions. Particular emphasis was placed on Eco-Schemes as a direct and important tool supporting sustainable soil management. Together with GAEC standards, Eco-Schemes were presented as mechanisms designed to encourage

practices that increase soil organic matter, reduce erosion, and enhance soil biodiversity. In concluding, the speaker emphasized that the effective implementation of ambitious EU soil protection objectives largely depends on the knowledge, engagement, and commitment of farmers, whose role is crucial in translating policy goals into practice.

A national legal perspective on soil protection was subsequently provided through an analysis of the Polish regulatory framework. In her presentation entitled "Soil Protection in Poland – Selected Legal Issues", Izabela Lipińska (Poznań University of Life Sciences) examined the legal scope of soil protection under Polish legislation. It was noted that, in Poland, soil protection is not regulated through a single, comprehensive legal act specifically dedicated to nature or environmental protection. Instead, it is addressed through a set of provisions that overlap with regulations aimed at counteracting the negative effects of urbanization and industrialization.

The core legislative instrument governing soil protection was identified as the Act of 3 February 1995 on the Protection of Agricultural and Forest Land, which regulates land use, as well as the restoration and improvement of land use value. However, the presentation highlighted the insufficiency of the instruments contained in this legislation and the resulting limitations of national soil protection measures. Several key conclusions were drawn, including the recognition of soil in agricultural production as both a means of production and an environmental resource, the need to protect soil productive qualities from negative agrotechnical practices, and the relevance of legal provisions aimed at protecting terrestrial ecosystems. The absence of a unified EU legal act on soil protection and the lack of harmonized monitoring standards and soil health assessment criteria were also identified as critical challenges.

Further national challenges were addressed in the presentation entitled "Agricultural Land: Problems and Challenges in Terms of Legal Regulation" by Zuzana Bohátová (Slovak University of Agriculture in Nitra). Focusing on the Slovak context, the presentation examined the most significant issues related to the ownership and use of agricultural land. Particular attention was devoted to the extreme fragmentation of land ownership, which was identified as a major obstacle to effective land management and sustainable agricultural development. In addition, insufficient legal protection of agricultural land from conversion to non-agricultural uses was highlighted as a growing concern.

Environmental threats, including soil erosion and soil degradation, were also discussed as factors further undermining the productive and ecological functions of agricultural land. In conclusion, the presentation proposed a set of possible legislative and institutional measures aimed at eliminating or mitigating these problems and pro-

moting a more effective and sustainable use of agricultural land in Slovakia.

The role of European agricultural policy in soil protection was subsequently examined in the presentation entitled "Protection of Land in the Common Agricultural Policy" by Krzysztof Różański (Poznań University of Life Sciences). The contribution analyzed how the Common Agricultural Policy supports the protection of agricultural land through a combination of direct payments, conditionality requirements, and agri-environment-climate measures. Particular attention was devoted to cross-compliance and enhanced conditionality mechanisms linking financial support to the adoption of sustainable land management practices, including measures aimed at protecting soil structure, fertility, and biodiversity.

The presentation highlighted how CAP instruments contribute to preventing land degradation by promoting crop diversification, the protection of permanent grasslands, and environmentally friendly farming practices. At the same time, it was acknowledged that significant challenges remain, particularly with regard to ensuring uniform implementation across Member States and balancing environmental objectives with economic competitiveness. In conclusion, the speaker emphasized the importance of strengthening monitoring systems, increasing farmers' awareness, and further aligning CAP measures with climate and environmental goals in order to improve land protection outcomes and support the long-term resilience of European agriculture.

The legal dimensions of soil protection in sustainable agriculture were further explored within the Polish context by Katarzyna Leśkiewicz (Adam Mickiewicz University) in her presentation entitled "Land Protection Instruments - selected aspects". The contribution focused on the legal instruments available for soil protection, including soil classification systems, local spatial development plans, and other land-use planning acts. These instruments were described as performing a protective function by regulating land use and safeguarding soil resources.

However, the presentation noted that the practical application of these legal instruments is often ineffective. In some cases, soil classification mechanisms were described as being misused to circumvent existing legal constraints, thereby weakening the overall system of soil protection. In light of these shortcomings, the presentation emphasized the need to strengthen soil monitoring instruments in order to ensure more effective enforcement of legal provisions. In this regard, the prospective European directive on soil monitoring was presented as a potential response to existing gaps, offering an opportunity to enhance coherence and effectiveness in soil protection policies.

A particularly complex and evolving legal context was addressed in the final group of contributions.The conference then turned to the Ukrainian context, charac-

terized by profound legal, institutional, and socio-political transformations. In his presentation entitled "Legal Protection of Land: Ukrainian Realities and European Dimensions", Volodymyr Nosik (Taras Shevchenko National University of Kyiv) examined the legal nature of soil protection through the broader concept of land protection, situating his analysis within the context of European integration and the challenges posed by the Russian-Ukrainian war. The presentation traced the evolution of scientific ideas and regulatory approaches to soil protection across several historical periods, highlighting both positive and negative features in terms of legal protection.

It was emphasized that, in Ukraine, soil protection is implemented as part of the broader legal framework of land protection, as defined by the Law of Ukraine On Land Protection. Within this framework, soil protection was described as a system of legal, organizational, technological, and other measures aimed at preserving and restoring soil fertility, preventing degradation, and ensuring environmentally safe agricultural production. The presentation also outlined the extensive set of obligations imposed on land users in the course of economic activities, covering areas such as agriculture, land reclamation, forestry, water management, urban development, and the use of pesticides, agrochemicals, and waste. From a European perspective, the alignment of Ukrainian legislation with EU standards through the Association Agreement and the EU accession process was identified as a key driver of ongoing legal transformation.

This analysis was further complemented by the presentation of Tamara Sarkisova (Taras Shevchenko National University of Kyiv) entitled "Soil Protection Management System: Ukrainian Reality and European Dimension". The contribution focused on the structure, content, and functioning of state administration in the field of soil protection in Ukraine. The presentation examined agricultural land and soil as objects of legal protection, the competences of the authorities involved in soil protection governance, and the role of local authorities within the management system.

Particular attention was devoted to the challenges currently affecting the Ukrainian soil protection management system, including the suspension or complication of control measures due to wartime conditions, staff shortages, and the lack of a fully operational modern monitoring system. At the same time, the presentation highlighted recent legislative developments aimed at updating the environmental monitoring framework and aligning it with EU approaches, as well as the increasing role of digital instruments such as the State Land Cadastre, the State Agrarian Register, and emerging registers of contaminated territories. Despite the constraints imposed by the ongoing conflict, the presentation demonstrated that significant progress has been made in transforming Ukrainian legislation on agricultural land and soil protection in line with the

country's European integration trajectory.

The conference "Sustainable Soils for Sustainable Agriculture" provided a comprehensive and multifaceted overview of the challenges and opportunities related to soil protection in contemporary agricultural systems. Across the various contributions, a shared understanding emerged that soil protection is not merely an environmental concern, but a strategic priority encompassing legal regulation, economic sustainability, food security, and the long-term resilience of agricultural landscapes.

The presentations highlighted the central role of European policies – particularly the emerging Soil Monitoring and Resilience framework and the Common Agricultural Policy – in promoting sustainable land use and preventing soil degradation. At the same time, national experiences illustrated both progress and persistent gaps in the implementation and enforcement of soil protection measures, revealing the need for stronger monitoring systems, clearer legal frameworks, and greater coherence between planning instruments and environmental objectives.

Several contributions emphasized the importance of governance structures, digital tools, and institutional capacity in ensuring effective soil protection, especially in contexts affected by structural challenges or extraordinary conditions, such as armed conflict or extreme land fragmentation. In this perspective, the role of farmers and local authorities emerged as crucial, underscoring the need for awareness, incentives, and participatory approaches capable of translating policy goals into concrete practices.

Overall, the discussions reaffirmed that sustainable soils constitute a cornerstone of sustainable agriculture. Achieving this objective requires integrated legal, economic, and policy instruments, reinforced by scientific knowledge, reliable data, and coordinated action at European, national, and local levels. These shared reflections provided the conceptual framework for the field-based workshops that followed, allowing the theoretical and legal insights developed during the conference sessions to be explored through concrete institutional, cultural, and social experiences.

Alongside the theoretical and comparative sessions, the conference also included a structured programme of field-based workshops, conceived as an integral part of the scientific agenda. These activities were designed not as complementary or illustrative moments, but as methodological tools aimed at empirically testing and contextualizing the concepts of sustainability discussed during the academic sessions. Their purpose was to foster a meaningful dialogue between soil law, agricultural policies, sustainable land management practices, and the cultural and social dimensions that intersect with the protection of agricultural land.

The workshops followed a coherent conceptual progression, guiding participants

from a global and institutional perspective to more localized and socially embedded experiences. The first workshop took place at the Food and Agriculture Museum & Network (FAO MuNe), located within the headquarters of the Food and Agriculture Organization of the United Nations in Rome. This visit framed the discussion on agricultural soils within a global and multi-level perspective, consistent with the FAO's role in international food security governance and sustainable agricultural development. Rather than functioning as a traditional museum, MuNe operates as a narrative and educational space in which historical documents, objects, artworks, and immersive installations collectively convey the long-standing relationship between human societies, land, food production, and the environment. Within the context of the conference, this experience offered a key interpretative insight: soil sustainability cannot be understood solely as a technical or regulatory issue, but must also be recognized as a cultural construct rooted in historical memory, symbolic representations, and shared narratives. From a scientific perspective, the workshop reinforced the connection between soil protection, global food security, the right to food, and the role of international organizations in shaping long-term strategies and standards.

The second workshop shifted the focus to a historical, symbolic, and urban dimension through a visit to the Giardino dei Monaci at the Abbey of Saint Paul Outside the Walls. This site, representing a traditional monastic garden, allowed participants to reflect on soil sustainability as the outcome of a long-standing balance between human labour, natural cycles, and ethical responsibility towards the environment. The presence of medicinal plants and crops cultivated according to historical practices highlighted the value of traditional agronomic knowledge, often marginalized in intensive production systems but increasingly recognized as a strategic resource for building resilient and ecosystem-friendly agricultural models. At the same time, the garden's location within the urban fabric of Rome enabled a connection between discussions on soil protection, land take, spatial planning, and urban agriculture, demonstrating how soil can play a key role in environmental education, urban regeneration, and the strengthening of community–territory relationships.

The final workshop took place at the Garibaldi Agricultural Cooperative and offered a further expansion of the sustainability perspective by foregrounding its social dimension. The cooperative integrates agricultural activities with programmes of social and labour inclusion, actively involving young people with disabilities, particularly individuals on the autism spectrum. This experience illustrated how agricultural soil can function not only as a site of food production, but also as a space of inclusion, care, and social relations. In this context, agricultural work assumes an educational and form-

ative role, contributing to personal autonomy, skills development, and pathways of active citizenship. From the perspective of the ProLand project, the cooperative provided a concrete example of soil as a relational good, highlighting the need for soil protection policies to interact with labour, welfare, and social inclusion policies and to overcome fragmented, sector-specific approaches.

Taken together, the three workshops contributed to shaping an integrated and multidimensional understanding of soil sustainability. They reinforced the central message of the conference: the protection of agricultural soils cannot be addressed as a sectoral or purely technical issue, but must be embedded within a comprehensive strategy of sustainable development capable of integrating legal frameworks, public policies, cultural dimensions, and social practices. In this sense, the workshops functioned as genuine laboratories of applied reflection, in which the theoretical and normative categories discussed during the conference were concretely tested in the field. Within the framework of the ProLand project, these experiences played a crucial role in validating academic insights and in outlining a European model of soil protection grounded in an integrated conception of sustainability that brings together environmental protection, social justice, and intergenerational responsibility.

Taken as a whole, the conference Sustainable Soils for Sustainable Agriculture confirmed the relevance of soil protection as a cross-cutting issue that transcends disciplinary boundaries and policy sectors. By combining legal, economic, scientific, and institutional analyses with field-based and socially embedded experiences, the conference offered a coherent and multifaceted perspective on the challenges and opportunities associated with the sustainable management of agricultural soils.

The dialogue between theoretical reflection and practical observation highlighted the need for approaches capable of integrating normative frameworks, public policies, governance structures, and territorial practices. In this sense, the conference demonstrated how soil protection must be understood not only as a matter of regulation or technical standards, but as a broader societal commitment involving cultural values, social responsibility, and long-term planning.

Within this perspective, the conference fully reflected the objectives of the ProLand project, contributing to the development of a shared European vision of soil protection grounded in sustainability, resilience, and intergenerational responsibility. Rather than providing definitive answers, the conference opened spaces for continued research, cooperation, and policy innovation, reaffirming the central role of soils in shaping the future of agriculture and rural territories.

BENEDETTA RINALDI FERRI[*]

TOOLS FOR EQUALITY[**]

If one is looking for an exhaustive, scholarly analysis of inequality today, this short volume, *Equality: What it Means and Why it Matters*[1], by Thomas Piketty and Michael J. Sandel, is probably not that book, nor what the authors have set out to provide. If, however, one wants to engage in an open-ended, politically grounded discussion of equality – what it means, why it matters and why it should concern us – the work offers a valuable starting point.

The volume originated as an in-person discussion, held at the Paris School of Economics on May 20, 2024. Given a relatively loose outline – a conversation about the meaning and relevance of equality – the exchange unfolds between two distinct intellectual perspectives.

Thomas Piketty is an economist at the Paris School of Economics – or, as he prefers to describe himself, a "social and economic historian" – who has devoted much of his career to the study of inequality. Michael J. Sandel teaches political philosophy at Harvard University, where he has offered widely acclaimed courses on justice, merit, and public virtue. This disciplinary and thematic distance, however, proves no obstacle to fruitful engagement. The book reads like a collaborative process of intellectual discovery: questions and conjectures are repeatedly taken up, reformulated, and mutually extended. The result is a 128-page dialogue spanning numerous arguments that, ultimately, converge on a shared concern.

The nine chapters of the book focus on different aspects of the unequal distribution of goods, merits and dignities in contemporary Western societies. Rather than merely listing these disparities, the authors recast each topic into a broader conceptual question. As Chapter 1, "Why worry about inequality?" makes clear, the

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[**] This review has been proofread by Damon Hager, whom I thank for his meticulous attention and advice. Any remaining errors are, of course, my own.

[1] I have consulted the EPUB version. See also the Italian translation: *Uguaglianza. Che cosa significa e perché è importante* (Feltrinelli 2025).

authors seek to interrogate what a lack of equality implies in contemporary times, before proceeding to discuss the possible remedies.

The chapters on money and markets – specifically, Chapter 2, Should money matter less? and Chapter 3, "The moral limits of markets" – are perhaps the most interesting for an extended academic audience. A case is made concerning the space societies are willing to grant market mechanisms in distributing goods and granting value. Building on Piketty's proposals progressively to decommodify many areas of social life, Sandel extends the argument and radicalizes it. The central question becomes whether market institutions can adequately evaluate goods and social practices, or whether they corrupt the meaning of the things they price – such as health, education and culture. Thus, the speculation about the modes of valuing carries into a "how-to", foundational one, that arguably exceeds economic scholarship (cf. also ch. 4, 5 and 7).

> Economists – many mainstream economists – take for granted the de facto modes of valuation, the de facto preferences that consumers bring to economic life, and ask how to maximize their satisfaction subject to certain distributional considerations. But the corruption argument for decommodification, if we can call it that, would require that we debate the appropriate way of valuing health, education, cultural activities. And that would require us to put up for a political debate whether certain modes of valuation are higher, are worthier, than others. It would make economics and also public discourse more judgmental than many social democrats, and certainly libertarians, would be comfortable with.[2]

Meritocracy is arguably a significant test case for evaluating the relevance of an assessment model. Chapters 5, "Meritocracy" and 6, "Lotteries: should they play a role in university admission and parliamentary selection?" lead the reader through a perceptive critique of how society evaluates merits and distributes dignities. The discussion springs primarily from the case of education, university admissions, and the meritocratic mechanisms that often underpin them. Chapter 7, "Taxation, solidarity and community", meanwhile, widens its scope. The way we reward merits and dignities is closely related to the way we reward labour, and the means by which we make sense of collective contributions.

Up to this point, Piketty and Sandel's book provides progressive readers with substantial material for discussion. Chapter 4, "Globalization and Populism", offers

[2] Ch 2.

pointed insights into the way left-wing elites have navigated the post-1980s neoliberal hegemony. Chapter 8, "Borders, Migration, and Climate Change", considers how they may have to evolve in the emerging international order, particularly under the impetus of Donald Trump's presidency. Finally, chapter 9, "The future of the left: economics and identity", explores some possible strategies via which the left may prosper in the years ahead.

Nonetheless, this is also where one senses a certain lack of grounding. The analysis cannot be easily applied to more specific arenas without a careful discussion of its relevance. References to the intended beneficiaries of the left are very loose – e.g. "the middle class" or "the working people". Readers who are not familiar with American progressive agendas[3] may find it difficult to translate them into comparable terms and may perceive at times a slight tendency toward overextension. It is also pertinent to ask whether this analysis holds across more context-specific configurations of the private and public sectors. "The state in itself is not pro-inequality or pro-equality" (Piketty, ch. 2). As reservoirs of jobs, ranks, dignities and long-lasting status, states can be primary engines of social division.

This book is contemporary with many attempts across the Western world, scholarly and otherwise, to make sense of our communities. While preparing this review in Rome, I have encountered *TOOLS*, the site-specific work by Elisabetta Benassi: ten 14-meter silos now stand in Piazza Venezia, wrapped with the image of twelve workers' hands raised against the sky, each gripping a different tool – a paint roller, a trowel, a jackhammer, a wrench, among others. These hands tower over the metro construction site in the city center. One can think of few more powerful ways to recalibrate our gaze towards the places where communities take shape and achieve self-recognition.

To an extent, this is also how *Equality* reads. As a work of intellectual discovery, this volume provides readers with a valuable toolbox to debate the ways societies construct inequality. It is less a conclusion than a point of departure that scholars and activists can productively build on.

[3] *Bernie Sanders on Economic Inequality*, <https://feelthebern.org/bernie-sanders-on-economic-inequality/> (consulted on 4 February 2026). For a current archive of pertinent political news, see among many: <realclearpolitics.com/search/?q=inequality>.

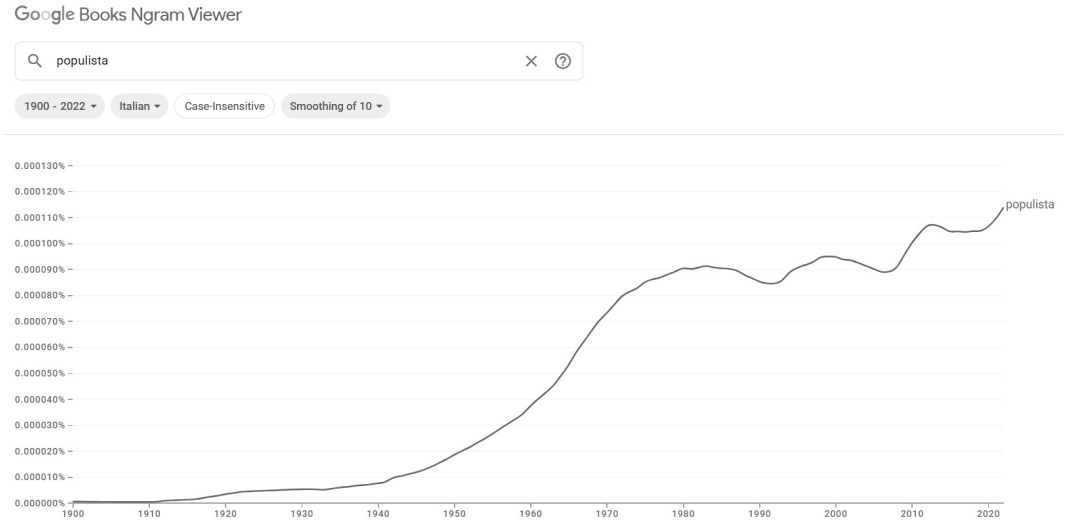

Fig. 1. Google Books Ngram Viewer (consulted on 4 February 2026).

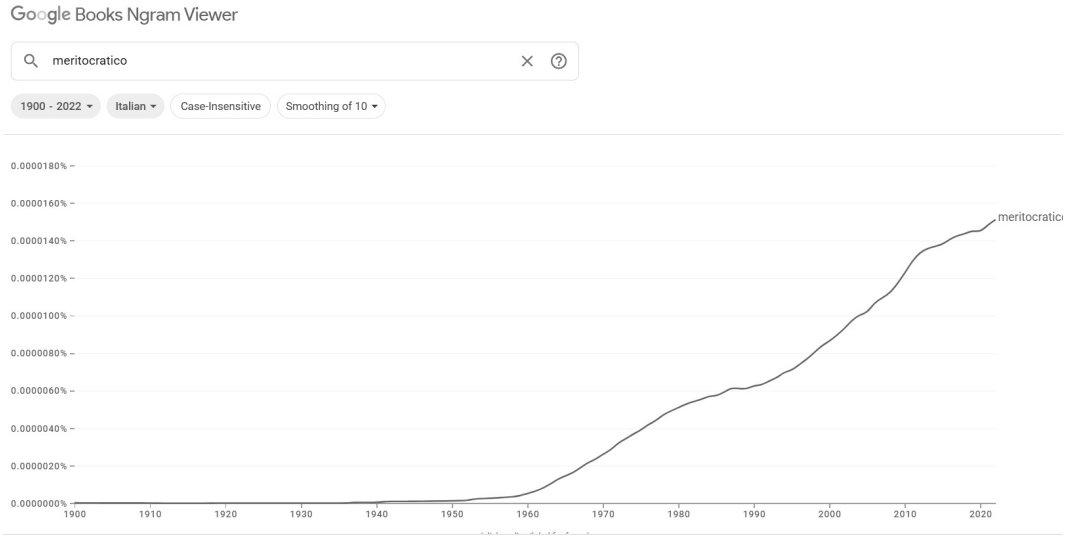

Fig. 2. Google Books Ngram Viewer (consulted on 4 February 2026).

WOMEN - THE 20TH ROMA TRE-POITIERS STUDY DAYS

Federica Rassu
Introduction

Céline Lageot
Does the European Court Of Human Rights Take Into Account Different Feminist Interpretations When Dealing With Violence Against Women?

Aurélie Virot-Landais
Gender Equality In French Civil Service Law

Barbara Cortese
Women And Roles: The Social-Juridical Roman Context

ARTICLES

Giorgi Amiranashvili
Digitalization Of Justice: A Georgian Perspective

Costanza Bruschi
Penitentiary Law In Europe: An Open Debate

MEETINGS & READINGS

Andrea Betti
Implementing The Nature Restoration Regulation: Legal Challenges And Opportunities

Antonella Brandonisio
Sustainable Soils For Sustainable Agriculture

Benedetta Rinaldi Ferri
Tools For Equality

Roma Tre
DIPARTIMENTO DI GIURISPRUDENZA