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# IUS GENTIUM

## Paritary Rights

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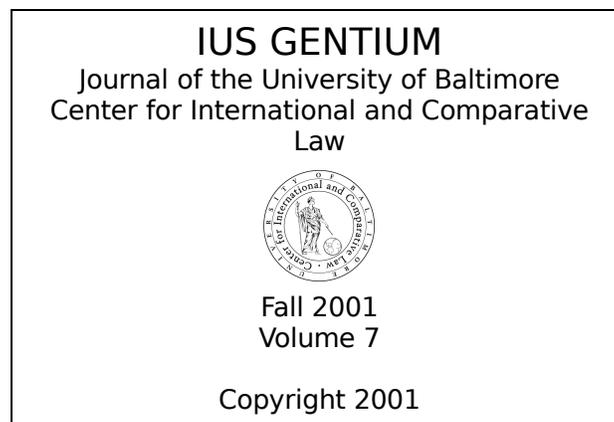
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## **ARTICLE**

# Paritary Rights for Women and Universal Human Rights in France

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<sup>1</sup> This text is based upon a conference held at the University of Baltimore in March 2001. The English version has been reviewed and rewritten with the great help of Mortimer Sellers.

### *Paritary Rights for Women*

On June 6, 2000, an act of the French National Assembly requiring “equal access by women and men to elective offices and positions” entered into force. This new system of “paritary” democratic rights to representation applies to all elections in which parties offer a list of candidates to the voters. Candidate lists in France must henceforth contain equal numbers of men and women, with equal precedence or status on the list, such that equal numbers of women and men will be elected to office. Any list of candidates that does not respect these requirements will be forbidden to go before the voters. French “paritary” rights provide an innovative model for securing the political equality of women in those parliamentary democracies that maintain systems of proportional representation, or multi-member electoral districts.

This new complex of paritary rights might seem at first to violate the French tradition of republican universalism, as elaborated since the French Revolution of 1789. The Constitution of the Fifth Republic, as adopted in 1958, expressly incorporates the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l’homme et du citoyen*) and the Preamble of the French Constitution of 1946, which assert the equal rights of all human beings before the law, without regard to gender. Special provisions for quotas or affirmative action have in the past been disallowed by French courts as contrary to universal principles. This makes the recognition of paritary rights particularly significant, in their direct provision for equal representation, according to the sex of the candidates elected.

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The history of French paritary rights begins with universal principles (Part I of this paper). New paritary principles of equality (Part II) must be reconciled with these universal rights as expressed in the French constitution, but also (Part III) with universal human rights guaranteed by multilateral treaties, and by international law.

#### I. LEGAL UNIVERSALISM

The French principle of universalism or “republican universalism” rests on the Constitution of France and the Revolution of 1789. The Constitutional Council (*Conseil Constitutionnel*), as created by the Constitution of 1958, may review parliamentary acts for their conformity with the constitution, including the principle of universality. This encourages uniformity in interpreting the Constitution, but discourages innovation. Contemporary positive law is strongly rooted in French history, and cannot be understood outside the context of its origins. The principle of universalism has served for two centuries as a template for evaluating public policy and private behavior in France, including questions of equality and gender.

##### A. Symbol of the Revolution

The politicians of the Revolution of 1789 did not view the rights of women as their primary concern. Despite their active participation in the Revolution, very few women gained entry into the assemblies, clubs and other ruling elites that determined revolutionary policy. The often-mentioned experience of Olympe de Gouge, who campaigned for the recognition of women's rights

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(1791) as a supplement to the Declaration the Rights of Man of 1789, remained an isolated case and in the end a bitter failure.

The revolutionaries had other preoccupations. As a whole the legal rights that they established also applied to women and determine the way in which questions about the constitutional and legal status of women have been resolved in the French system. This gives rise to two problems: First, the revolutionaries wanted to end the class divisions of the Ancien Regime. The old society was divided into three orders or estates (*les états*) with different legal prerogatives and formal inequality. These three estates (the nobility, the clergy and the “third estate”) inherited from the feudal ages had no place for France’s emerging bourgeoisie, who wanted social and legal recognition of their new wealth and prominence. The law of the Ancien Regime was in any case different throughout France, because each province and locality had its own legal rules. The Revolution responded by enforcing legal equality throughout France, including uniform legal rules and formal equality in all legal rights and duties. This “liberal” approach required the suppression of special privileges for guilds and other social groups. The emphasis was on formal equality before the law, and not on actual equality of condition. Napoléon perpetuated this approach in his codification of the laws, after the Revolution.

The Revolution also raised the question of sovereignty. For both theoretical (in Enlightenment constitutional discourse) and contextual reasons (after the flight of the King

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from Varennes), the revolutionaries modified their theory of sovereignty. French revolutionaries viewed the “Nation” as the ultimate sovereign. Actual human individuals could not hold sovereign power. As Raymond Carré de Malberg<sup>2</sup> has clearly shown, this change required a new conception of the relationship between government and those governed. This was not so much a question of representation as of the role of different organs of the state: the “representatives” (as in the French Parliament) do not represent something that existed before the state – they are creations of the state, designed to embody the sovereign. The representatives in parliament, the executives and the voters are all public “organs”, with specific constitutional prerogatives: voters have the right to vote and to be eligible (under certain circumstances) for election (see under II). Yet, the legislature seems to possess the “sovereign” right to alter the law (as an organ expressing a national will). In reaction against the broad jurisdiction of the Ancient Regime, the French revolutionaries limited the jurisdiction of courts to enforce statutes, or judicially to review the acts of the other powers. This established the “*legicentrisme*” of the French system, which subordinated the formal constitution to the laws, by limiting review for constitutionality.

#### B. The Legal Framework

The principle of universalism has several key components. First, the universal and inalienable natural rights of human beings, which implies the

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<sup>2</sup> Contribution à la Théorie générale de l’Etat, 1920.

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equality of rights among all persons without regard to other considerations, such as gender (Declaration of 1789 § 1).

Second, the unity and indivisibility of the Republic (Constitution of 1958, § 2), which significantly limits the possibility of legally recognizing separate social categories and divisions among citizens, whether natural or constructed. The principal of republican unity (§ 2) reinforces the principle of the universality of rights under § 1 of the Declaration of 1789, ensuring the equality of all citizens before the law. This forbids any categorization by national origin, race or religion (and doubtless similar distinctions, including gender, even if they are not expressly referred to by the constitution of 1958).

Finally, the principle of national sovereignty (Constitution of 1958, § 3) gives all citizens of both genders equal rights to vote and to be elected. This model, developed at the time of the Revolution, has several constitutional implications for women. The formal equality of universalism has prevented formal references to gender in the constitutional context. But universalism does not exclude and may even require a legislative structure that respects both genders, and protects their equal opportunity to participate in public life<sup>3</sup>.

### C. Constitutional Norm

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<sup>3</sup> For many years supposedly “universal” or “equal” treatment simply reproduced the common social image for each gender, in disfavour of women.

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The French Declaration of the Rights of Man and of the Citizen (1789) was first and foremost a political text designed to declare the aims of the Revolution as “the natural, unalienable and sacred rights of man.” Securing positive legislation to protect these rights should be “the aim of every political association.” Therefore, the statement in Article 1 that “men are born and remain free and equal in rights” is immediately qualified by the recognition that “social distinctions may be based only on considerations of the common good”. Article 6 says that “the Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employment, according to their ability, and without other distinction than that of their virtues and talents.” Article 16 confirms that “any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

Article 16 alone would not be sufficient to give the Declaration a binding force. French legal doctrine has considered two possible interpretations: either a) the Declaration is one of the constituent Acts that created the first revolutionary constitution of 1791, and lost all constitutional force with the adoption of the Republic in 1792 and the enactment of the first republican constitution in 1793; or b) the declaration was not part of the 1791 Constitution and never had binding force. Both these interpretations would reduce the text to a simple

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declaration of political principles, without legal force. In practice, the Declaration did not play a legal role until quite recently. But the situation changed with the adoption of a text that referred directly to the Declaration, at the end of the Second World War.

This was done in 1946, when the Preamble of the Constitution of the IVth Republic opens with these words: "... the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic". This constitutionalization of the Declaration had little immediate practical effect, because of the absence of any effective control of constitutionality. The present constitution of 1958 has changed this. The Preamble maintains the constitutionalization of the Declaration: "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946"; and Chapter VII gives the Constitutional council the power - from 1971 (when the first case of amendment was presented before the Conseil) - really to control the actions of the legislature by enforcing the Declaration of 1789. So the principle of universalism, which was the political inspiration of the Revolution of 1789, only gained full constitutional force nearly two centuries later.

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The Constitution of 1958 is silent on questions of gender, although Article I provides that the state "...shall ensure the equality of all citizens before the law, without distinction of origin, race or religion". The Constitution of 1958 does, however, encompass the Preamble of the Constitution of 1946, which proclaimed it "especially necessary to our times, [and to] the political, economic and social principles enumerated below" that "the law guarantees women equal rights to those of men in all spheres."

### D. Complex implementation of gender politics

The implementation of the principle of universalism depends on the legal status of men and women, and on the constitutional control of their legal status.

#### 1. Controls

The Constitution of the Fifth Republic significantly changed the powers of constitutional control. The creation of an organ to regulate the constitutionality of the laws limited the power of the legislature to disregard the Constitution, with certain limitations.

The first limitation arises from the procedures used to control constitutionality, which take place prior to the adoption of a statute. Once enacted - once the text has become law and has binding force - statutes become indisputable. The judicial and administrative jurisdictions deciding cases cannot examine possible inconsistencies between

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the statute that rules the case and the constitutional texts (or declarations of rights) that might contradict the statute. A statute that has not been submitted to the Constitutional Council cannot be opposed and remains in force, unless amended. Only a small number of public actors have the power to submit laws to the Constitutional Council: the President of the Republic, the Prime Minister, the Presidents of the Chambers, or 60 members of one of the Assemblies. The citizens do not have this power.

The introduction of judicial review supposes that the organ of control has some standards to apply to the cases. The principle of universalism is wide enough to prevent almost any differentiation of social status. Laws that recognize differences between men and women would almost certainly fall foul of this universal principle, unless directly related to the general interest. In principle the general interest, as expressed in the Constitution, should guide all decisions of the legislature, as well as of the Constitutional Council.

In fact, cases concerning gender have seldom reached the Constitutional Council. The Council first emerged in France at exactly the same time that social differences between men and women began to decrease. The legislature has been less inclined to pass laws that damage the social status of women, and constrained by the knowledge that such laws could be challenged in the Constitutional Council.

Unfortunately, the very principle of universalism that prevents active discrimination against

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women may also undermine affirmative action in their favor. The constitutional requirement of formal equality before the law restricts efforts to advance the status of women, by any method that amounts to “discrimination” against men. The case of women is similar to that of France’s regional minorities. The Constitutional Council has used the principle of universalism to oppose the symbolic recognition of the Corsican People, on the grounds that this would divide France’s national community.

The scarcity of cases has meant that the Council has made no comprehensive statement on gender, beyond the issue of political representation (see under II). Certainly the Council would not tolerate formal legal discrimination against women, but such laws have become rare. The established rationale of universalism threatens the validity of affirmative action in favor of women, which might seem to divide the “unitary” national community.

## 2. Realization of Universalism

The principle of universalism is implemented by different political authorities, depending on the circumstances. Many rights are simply legislative assertions. They are not mentioned in the Declaration of Rights, nor in the text of the Constitution, recognizing such rights may simply rely on non-interference by the Constitutional Council. Some such rights have differentiated between men and women, or recognized women’s particular rights. For example, the right to birth control was authorised in 1967. The right of abortion was enacted in 1975, and confirmed

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and reinforced recently by statute. The Constitutional Council has never disallowed these laws as unconstitutional.

Since the end of the nineteenth century the French legislature has gradually put an end to most formal discrimination against women. Provisions designed to “protect” women in dangerous jobs were finally removed in 2000. Equal pay for equal work was secured in 1972. Yet women still make less than men. Women are more often unemployed (13.6% against 10.2%) and poorly represented among managers, or in the intellectually superior professions.

So what should be the next step? Formal equality before the law has not been enough to overcome actual inequality in the workforce. Yet the Constitutional Council seems committed to a paradigm of formal equality. This calls for constitutional amendment, to facilitate a more dynamic conception of equality and secure the equal rights of women.

## II. PARITY, A MODERN FORM OF UNIVERSALISM?

The introduction of “parity rights” in France responds to the contradictions and difficulties of constitutional universalism, by applying modern feminist theory to law. Launched by the feminist movement in the early nineties to accommodate the Constitutional Council’s interpretation of universalism, the idea of parity came into general use in political debate and culminated in a change in the positive law. French “paritary” rights avoid some of the

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constitutional difficulties of quotas, and offer an interesting model for the rest of the world.

#### A. Context

The idea of parity arose in response to two problems: first, to the endemic under-representation of women in French politics and institutions; second, in response to the limitations of the universalist tradition.

##### 1. Correcting the under-representation of women within the political sphere.

Traditionally in France, political responsibility has belonged to men. Whereas women represent a little more than 51% of the population, and 53% of the electorate, they comprise scarcely 10% of the National Assembly, less than 6% of the Senate, less than 10% within the departmental councils, and hardly a quarter within the regional councils. While women constituted more than 20% of the town councillors, less than 10% of mayors were women.<sup>4</sup> On the other hand, 40% of French European deputies are women (1999), and a third of the ministers (1997). The reason for this state of affairs are numerous and complex, and only some of them depend on the law.

Paritary rights arose from the observation that National Sovereignty does not necessarily entail direct representation, since the organ to be

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<sup>4</sup> Data for organs in function on January the First, 2001 (before the enforcement of the paritary reform, which began in the March 2001 elections to town councils).

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represented is not the real population, but a constitutional fiction, the “Nation”. Voting exists, not as a personal right (on this theory) but rather as a vehicle for choosing representatives of the nation. Following this rationale, women and men of limited “capacity” (based on wealth) were excluded from the vote. When suffrage finally became “universal”, during the Third Republic (1875-1940) <sup>5</sup>, it retained limitations regarding nationality, age, dignity, and sex : women were still excluded. In spite of numerous claims (expressed by feminists and by a great number of jurists, lawyers, and constitutionalists), it was not until 1944 that women gained the right to vote and to run for office. This happened in the end through asserting a very strong concept of universalism, that negated almost all distinctions between citizens, so that “all French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute” (article 3 of the 1958 constitution).

#### 2. Learning from a failure

Despite their technical eligibility for election, women remain a small minority within political organs. Some suggested affirmative action as a corrective measure, and a movement began to implement this change.

The move towards affirmative action or quotas to secure equal representation resulted in 1982 in reforms in the manner of balloting for elections to French town councils. The new rules required

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<sup>5</sup> Universal suffrage was first adopted during the 2<sup>nd</sup> Republic (1848-1851).

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that candidate lists should not comprise more than 75 per cent candidates of the same sex. A broad political consensus appeared to support this provision. Nevertheless, the entire new statute was referred to the Constitutional Council by the parliamentary opposition.

The Constitutional Council stated that the establishment of quotas was contrary to the Constitution (Decision 82-146 DC November the 18<sup>th</sup>, 1982). This decision rested on the traditional principle of universalism. The court held that quotas violate the principles of national sovereignty and the universal right of suffrage. Since “no section of the people nor any individual may arrogate to itself, or to himself, the exercise [of the National Sovereignty]” (article 3 of the Constitution of the Vth republic), suffrage must be “equal” (id.) and therefore, according to Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789: “all citizens, being equal in the eyes of the law, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents”. This means that “citizenship gives the right to vote and to be elected under the same conditions to all those who are not excluded on grounds of age, of incapacity or nationality, or for a reason aiming at preserving the freedom of the voter, or the independence of the elected person” and that “any division or categorization of the electorate, or of eligible persons, would be against these principles, which have a constitutional force”.

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This decision would support two interpretations. On the one hand, the Constitutional Court could be seen as having prohibited any categorization by gender at all, so that affirmative action would require a constitutional amendment to be valid. In this case, only the people in their constituent capacity could make an exception to universalist principles. Most jurists adopted this view. On the other hand, the Constitutional Council could be understood as having disallowed the statute because it separated the sexes into unequal groups (75% and 25%). On this theory an equal division would be acceptable – thus the concept of parity.

#### 3. Renewing the idea of affirmative action

The failure of the 1982 reform inspired a new approach to quotas. Parity could be viewed as true equality, or “concrete” equality, that would not discriminate, but simply realize the duality of the human race. Understood in this way, parity would not contravene the principle of universalism or the universality of rights. Parity of this sort no longer relied on arguments from equity or quotas, which could, in any case, have been unequally applied, but rather on the full and equal representation of men and women in the legislature.

The ambiguity of the term “parity” allowed it to transcend the conflict between universalists and differentialists. It recasts affirmative action in a more acceptable light, with useful implications for both European and for international law (Beijing Conference, 1995). In France, the concept of “parity” appealed widely both to politicians and

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to the population at large. The return to first principles helped to revive the discredited political class, by giving an idealistic tinge to public debate about democracy. Since “women have been excluded, by principle and by the law of democracy, they must be restored by the law, for it is by the law that a society shows itself” (Manifesto of the 577 for democracy <sup>6</sup>). Of course, politicians applied the concept of parity only to elections, while feminist theory would apply it to all sectors of society.

#### B. The Legal Reform

##### 1. Providing a constitutional basis

At first some politicians hoped to impose parity without a constitutional amendment. The first private bill to this end was written in 1994. Others have followed. A new statute, concerning the election at the Corsican Assembly, was adopted, providing that : “each list of candidates shall maintain parity between male and female candidates”. But the Constitutional Council, in decision 98-407.DC, stated on January the 14th 1999 that this provision was contrary to the constitution. Its argumentation expressly referred to the 1982 decision, in which the Constitutional Council disallowed quotas. This proved that, for the Constitutional Council, it was the very idea of gender categorization that was invalid, unless the Constitution was changed.

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<sup>6</sup> Published in 1993 by the newspaper *Le Monde*, 577 is a symbolic number, referring to the number of deputies in the National Assembly.

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So, a constitutional amendment became necessary, and was in fact adopted on June the 28<sup>th</sup> 1999. This was a minimal reform. Rather than insert paritary rules directly into the Constitution, the Congress simply removed the Constitutional barrier, by adding language to Article 3 requiring that the “statutes shall promote equal access by women and men to elective offices and positions” and at the end of article 4 that “Political parties shall contribute to the implementation of the principle [of parity] as provided by statute”. This left it up to the legislature to organize parity, on the basis of this new constitutional support for legislative action.

Parity requires a system of electoral lists to be effective. Once the Constitution had been amended the French legislature faced the question not only of how to implement parity in those elections that already required electoral lists, but also, whether the list method should be introduced into formerly single member districts.

2. The June the 6<sup>th</sup>, 2000 act dealing with equal access by women and men to elective offices and positions

The new act to implement parity concerns all the political elections except four: the presidential election, because the function is exercised by a single person; elections for the departmental councils, which are elections on majority basis for a single member in each district; elections to the Senate when they are elections on majority basis;<sup>7</sup> and elections for

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<sup>7</sup> Ballot modes vary according to the size of the department, which is the electoral district for elections to

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town councils in small towns (less than 3,500 inhabitants) because prior candidacy is not required.

In all elections governed by the new statute (elections for town councils in towns populated by more than 3,500 inhabitants, elections to regional councils, elections to Corsican Assembly, elections to the Senate when they are organized on the basis of proportional representation, and elections to the European Assembly), the electoral list must comprise 50 % candidates of each sex, submitted as one unit. Women may not be relegated to the low end of the list, where they might not be elected, because the law requires gender equality in each list of six candidates. For the elections to Senate and to the European Assembly, it is required that from the beginning to the end of the list, systematic alternation in accordance to sex shall be guaranteed. Any list that does not respect these requirements will not be allowed to compete.

In elections to National Assembly, for which the legislature did not wish to change the method of voting but felt that it was not desirable to leave this organ entirely without parity, political parties are entrusted with guaranteeing parity among candidacies. The requirement shall be satisfied, for each political party, if for each election, they nominate 50% female candidates and 50% male candidates, with up to 2% variation from this norm. Political parties which do not will be financially punished in the next round of public

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the Senate : for small departments (electing less than three senators), the election is organized on majority basis.

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electoral financing. There is, however, no restriction on results, so it is possible that winnable seats will not be allocated fairly.

#### 3. Constitutional validity

This statute has been referred to the Constitutional Council. The parliamentary opposition argued in doing so that parity was not required by the constitutional amendment which simply encouraged promoting “equal access by women and men to elective offices and positions”. To promote women’s participation in this way need not deny the voters full liberty of choice, as paritary rights would, by excluding surplus candidates from the “wrong” gender. Instead, according to this argument, universal principles should have been respected by making parity a “goal” and not a mandate. Under full mandatory parity, some men would have to give their places up to women.

The Constitutional Council did not agree with this argument. In decision 2000-429-DC, of May the 30th 2000, the Council concluded that the new constitutional provisions had modified the old principles (i.e. the principle of universalism) and that these modifications were “intended to permit the legislator to institute any mechanism aiming to give effect to the equal access by women and men to elective offices and positions; to this end, it is now possible for the legislature to pass provisions that create either incentives or restraints” so long as the legislature “reconciles the new constitutional provisions with other constitutional rules and principles, from which the constituent power did not intend to

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derogate". The Council concluded that in this case the "criticized provisions of the statute, setting obligatory rules dealing with the presence of candidates of each sex in the candidate lists for elections taking place through proportional representation, were within the discretion of the legislature to implement the new provisions of the third article of the constitution:" such measures "do not ignore any constitutional principles which the constitutional amendment did not intend to repeal." The Constitutional Council formally recognized that that constitution had been amended, giving the legislature a broader jurisdiction to implement parity.

#### 4. Implementation

It is too soon to appreciate the real consequences and effects of the new statute. According to the supporters of parity, it is obvious that the new provisions do not go as far as was claimed. Most of the real centers of power in French democracy are still beyond the reach of parity, which is to say, the executive functions, at both the local and the national levels, and even Parliamentary elections are only imperfectly subject to paritary rules.

The first elections to be ruled by the new provisions were the elections to town councils in March 2001. Opinion polls confirm the attachment of the population to the principle of parity, which has forced the political parties to modify completely their practices in selecting candidates. On the one hand, many male incumbents had to be deselected. On the other, women had to be found who would be willing to

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run for public office. In some cases, men have been replaced by their wives or daughters, but this still represents a massive change of personnel. Some believe that this will result in short-term inexperience, but also quite possibly a whole new outlook among the newly-selected female politicians. Parity will bring excluded voices into politics, which is worth the cost of any short-term disruptions this brings with it.

The results of the March 2001 elections confirmed the importance of the parity movement, and its imperfections. In the towns where paritarian candidacies were required, the town council members are now 47.5% women (compared to the prior 20%). Nevertheless, the mayors (elected by the council) remain in a great majority men: in the towns concerned by the paritarian requirement, women lead the executive in only 6.9% of the towns (181 towns). Curiously, it seems that the political parties avoided, as far as they can, a direct struggle of man versus woman: frequently, when a woman was heading a list (and implicitly designated to the mayor office), the other main parties supported a woman on their own<sup>8</sup>. An interesting point is to compare the profiles of councillors men and women. The main differences, which were expected, remain the age (women are older, certainly due to the greater difficulty for women working, and new in politics, to find time and freedom, while they work and are much more involved in domestic and family life than men<sup>9</sup>)

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<sup>8</sup> For that reason, women mayors are not limited to the smaller towns, and there are more female mayors in the big towns than in smaller ones.

<sup>9</sup> All the studies show that there is no parity at all in that sphere.

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and non-political belonging (due to the necessity for political parties to find female candidacies everywhere, and mainly outside of their members, traditionally men).

On the same day were held the elections for department councils, for which there was no parity requirement. There were only 20.1% women candidates, and only 9.8% of the elected councillors were women. As far as the parity claiming was to call for greater presence of women in political spheres, it is obvious that it was necessary to adopt this reform (and that it should be generalized to all the elections), and that the new reform is efficient.

C. Parity: technique of representation within the frame of universalism, or representativeness against universalism?

This still leaves open the question of how or whether parity can be reconciled with universalism. The feminists who introduced paritary principles into the French debate claimed to be acting within the republican universalist framework, but if that were so, it is hard to imagine why a constitutional amendment become necessary. Clearly the Constitutional Council thought that parity derogates from France's old universalist principles.

#### 1. Parity within the universalistic framework

The issue comes down to representation, which need not necessarily require parity. In a universalistic system, sovereignty is national, and this national sovereignty, under the Fifth republic,

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belongs to the people (article 3 of the Constitution). But the French theory of representation dematerializes the question of sovereignty, by displacing it onto the people's representatives.

Elections do not necessarily aim at exactly reproducing the national society in the legislature. The purpose instead has been to encourage that expression of the national will that is most consonant with common good, according to prevailing social conceptions. For a long time this sort of reasoning justified the legal exclusion of women from politics. There is no reason why the same principles should not now be applied to support paritary rights of equal representation as conducive to the common good.

In a democracy, the common good requires that the electorate shall be formed by the people as a whole (through universal suffrage) and that each citizen shall be entitled to an equal right of suffrage. The common good requires free access for all to elective positions, so that voters have an effective choice.

Parity fulfills each of these requirements. Parity respects equal and universal suffrage, and leaves room for all citizens to become candidates, so long as they create their own paritary list of candidates. Parity does not limit anyone's eligibility for office. Instead it shapes the nature of one of the essential organs of the state.

By changing the conditions in which political organs of the state are created, parity renews

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political life in France. By involving men and women equally in all decisions, parity will overcome the inbuilt male prejudices of government, to better grasp the common good. Affirmative action, if one must call it that, does not exist in this case for the benefit of women alone, but for all citizens. Parity better fulfills the French conception of the Nation, as defined by Renan: “a dream of a shared future, a desire to live together”.

Viewing parity in this way reconciles it with national sovereignty and republican universalism. The point should not be to think of paritary rights in terms of representation, but rather of better structuring the organs of state to serve the common good.

Now, the constitutional texts ruling this issue necessarily maintain, beyond their purely legal qualifications, an important rhetorical force. Saying that national sovereignty belongs to the people obviously has no legal meaning until it has been made concrete in the legal conditions under which someone acts as a member of the electorate, i.e. has the right to vote. This makes the “people”. But rhetorically and politically, such texts, such occurrences, have consequences. In a democracy, the national sovereignty cannot politically cut itself off from a logic of representativeness. And here, indeed, parity may undermine universalism.

## 2. Parity and representativeness

Some would say that parity is required by fairness or justice, according to the principle of

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representation. This may be true, but it was not the basis on which France created its new constitutional provisions. That is why the Constitution needed to be amended.

There is still no guarantee that the new provisions will lead to a paritarian presence of men and women within the National Assembly, and parity is still far from fully worked out. The new legislation considered the parity of men and women within political organs, without tackling global questions about the political process, and the status of those elected. Parity creates a double presence or legislative partnership between men and women, without considering the dynamic that this presence will generate. This limitation is intensified by the fact that the new provisions introduced into the legal order are without limits in time: the change will be permanent, not simply a correction but a principle. Thus, the purpose of parity, as seen by the constituent power, was a complete renewal of politics. Simple affirmative action was replaced by a new recognition of the duality of the human condition. The idea of representation has been replaced by a new principle of measurable "representativeness".

Now, the question that the logic of representation could ignore can no longer be avoided, once the common good is set aside as its primary justification. If parity depends on the claim that all sociological groupings should be represented in proportion to their presence within society, why should representativeness be restricted to gender? It was possible to not worry about this question when arguing from the

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common good, inasmuch as human duality is politically useful for the whole of the society, no other considerations are needed, and the debate is strictly a political debate. But if the reason for parity is a question of justice, on the criterion that what really exists has the right to be represented, what distinguishes gender from ethnicity, religion, language, and the like? This issue has frequently been discussed within the networks promoting parity, both from a practical point of view (any breach within universalism will provoke new claims), and from a theoretical point of view (is it still possible to think universalism on such a basis, without swinging towards differentialism?).

### III. FRENCH UNIVERSALISM IN THE FACE OF INTERNATIONAL LAW

French universalism may also be evaluated in the light of international law. The French have taken a dualistic view of the relations between national and international law, insofar as they do not consider international law to be directly binding until it is validated by national authorities. At that point international law has a superior force to national statutes. There is a procedure for reviewing statutes to reconcile them with international law, but this procedure is optional. According to article 54: "If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve

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the international commitment in question may be given only after amendment of the Constitution.”

The Constitutional Council refuses, when reviewing the constitutionality of statutes, to invalidate statutes on the ground of their contradiction with international law, or other international commitments. For example, when the Constitutional Council had to evaluate the statute allowing abortion under certain conditions (Decision 74-54.DC, January 15th 1975), the Constitutional Court denied that a statute could be judged to be contrary to the right to life protected by the second article of the European Convention on Human Rights (“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”). The Constitutional Council did not analyse whether, materially, there was an inconsistency between the women's right to abortion and the right to life; it refused to consider the international text, on the grounds that violations of international commitments had no bearing on the legal validity under the French Constitution. The argumentation used by the Constitutional Council arises from the fact that article 55 of the constitution gives legal validity to a treaty within the French legal order only if this treaty is effectively put into operation by the other committed State (according to the condition of reciprocity). The Constitutional Council, held such conditions to vary with circumstances, depending on the facts of each specific case. Since the Constitutional Council only reviews statutes *a priori*, before they are

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enforced, the constitutional judges considered that they were not in a position to know the necessary facts.

This argumentation adopted by the Constitutional Council is debatable. On the one hand, as to the questions concerning human rights and multilateral agreements, it seems difficult to require such strict reciprocity, unless one is willing that such agreements should always be without effect. To justify human rights violations a state could simply point to other states' violations. On the other hand, because the European Convention on Human Rights is so closely linked to the development of other European institutions, including the European Union, organs of the Union, such as the Luxembourg Court, have considered the Convention to be part of European law, and directly applicable to the member states of the European Union.

Nevertheless, the Constitutional Council's statement has encouraged ordinary courts to enforce international law within the French system, when deciding ordinary cases. In principle, courts should examine if there is an inconsistency between international law and the texts or acts relevant for the case, but French courts differ in their appreciation of the direct enforcement of international law, i.e. their views on whether the parties to the case may invoke a right deriving from international law. The *Conseil d'Etat* (supreme administrative court) considers that in each case courts must decide if the relevant international agreements have created such rights, or if they merely intend to provide

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directives for the committed State, letting its legal authorities act to satisfy those directives.

European law (including the European Convention on Human Rights) is different in that the direct enforcement doctrine is adopted by all the ordinary courts, and international law prevails over contrary national provisions. Drawing conclusions from the doctrine of the Constitutional Council, the *Conseil d'Etat* has been led to examine the consistency between the women's right to abortion protected by French statute and the European right to life. The court stated that there was no inconsistency so long as the woman's right to abortion was conditioned and limited by the French statute (as to time: 10 weeks; consent: women must be fully informed; safety: the operation should be by a physician) (*December 21<sup>st</sup> 1990, Confédération nationale des associations familiales catholiques*).

But, even if European laws may be applied to French laws at the ordinary court level, it does not necessarily follow that French universalism will be challenged. The European Convention of Human Rights itself seems to rest on a universalist philosophy of freedom and formal equality. The European Court of Human Rights has been very suspicious of discrimination by quotas or affirmative action.

France has been condemned by the Luxembourg Court for maintaining certain formal inequalities unfavourable to women. For instance, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access

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to employment, vocational training and promotion, and working conditions, obliged France to review some of its legal provisions, including the so-called provisions protecting women and motherhood, which forbade women to work at night, and the French policy for access to civil service employment, which restricted some jobs according to sex.

So the question to be asked now is whether the European Union can create a new interpretation of universalism, which might allow some distinctions justified on the grounds of the necessity "to promote equal opportunities for men and women" (article 2 of the aforesaid directive). With regard to this question, it must be said that this has not been done yet, but that European law could lead France into a third stage in its conception of universalism, now that the new conception of paritary rights has already made inroads into the old ways of thinking.

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# COMMENTS

[...]