

It is necessary to revise Article 31 of the Greek Constitution and adapt the equality of the two sexes (Article 9, par. 2 of the Greek Constitution)

By **Elizabeth BESSILA-MAKRIDI**

Professor in the Department of Public Administration
of Panteion University of Social and Political Sciences

1. The Proposal for Revision

The proposals to revise the Constitution in force, which have been tabled in Parliament initially by the Main Opposition (20.1.1995) the political party of Political Spring on 26.1.1995 and then by PASOK (27.3.95) and the Communist Party of Greece on 17.4.1995, gave an opportunity to redress the inadmissible clash of two constitutional provisions that is: on the one hand, article 31 containing the restriction that President of the Republic can be elected anyone who is a Greek citizen for at least five years and is of Greek descent on the side of his or her father and, on the other, article 4, par. 1 which stipulates that «both Greek men and women have equal rights and obligations». So, according to article 31 of the Constitution, a man or woman who is a Greek citizen on the side of his or her mother¹, is excluded from the office of the President of the Republic.

2. Constitutional Consolidation of Authority

The Governments' Constitution Bill that was tabled in the Revisional Parliament did not contain any provision about equality of the sexes. The consolidation of this provision which was finally supported by all the political parties, was accomplished following a dynamic, mobilization of women's organizations. Indeed, in the second Subcommittee of the Constitutional Committee that dealt with the elaboration of the Constitution, amendments were proposed by members of Parliament of different political parties, which amendments contained an express provision about equality of rights and obligations of both men and women².

Following discussions, the provision of article 4, par. 2, was fashioned and voted by the Plenary session of the Constitutional Committee during the Session of April 22, 1975.

1. See E. Bessila-Makridi, The Constitutional Consolidation of the Principle of Equality of the Sexes, 1983, p. 231.

2. The amendments of the Members of Parliament proposed at the Second Subcommittee, see Provisions by Article, of Official Bills-Amendments of the final voted Constitution text 1975, 1976, p. 19.

The establishment of equal rights and obligations of both Greek men and women, as one of the happiest innovations of the 1975 Constitution. It's about equality before the law of both men and women who have Greek citizenship and it set out, on the one hand, in the equality before the law and, on the other, in the equality of the law, before them³.

3. There are no «sufficient reasons» which would allow deviation of Article 31 of the Constitution from the principle of equality of the sexes

The requirement of the Constitutional legislator to be elected President of the Republic only anyone who is of Greek descent on the side of his or her father, cannot be based on a sufficient reason which would justify deviation from the principle of equality of the sexes. The article 116 par. 6 provides that «Deviations from the definitions of par. 2 of article 4 are allowed only for serious reasons, from the cases stipulated specifically by the Law»⁴. This provision, although it has been placed among the «Interim Provisions» of the Constitution actually, it is not interim, but it belongs systematically in par. 2 of article 4 in which it should be section B of it, because it enacts a fixed regulation with an unlimited field of adaption from the point of view of time⁵. But it was finally placed in the «Interim Provisions» because the constitutional legislator thought that, this way, he prevented the eventuality that the established equality of both sexes would be adulterated». However, this kind of handling is indicative of the will of the Constitutional legislator to limit the provision on deviations of article 116, par. 2 of the Constitution. We should point out that while the mover of the majority in the Constitution Committee supported the express establishment of women's equality, he posed the question of «deviations» without, at the same time, clarifying their content, stressing only that deviations are justifiable in sufficient cases and mainly in favor of women. The issue of «deviations» has caused sharp disputes and objections during the debate of the relevant article in Parliament.

The equality of rights for both sexes has, of course, a character that is protective of human personality and, therefore, it cannot be absolute. The legislator is not restricted

3. See A. Manassis, *Constitutional Establishment of Equality of Men and Women Before The Law and Politics*, 1983, p. 9.

4. In the matter of deviations which will be the most serious problem in the interpretation of the principle of equality of the sexes, A. Papandreou objected strongly (See Minutes of the 1975 Constitution, p. 364) by saying, «Let's make our decisions. Either we believe in the equality of the sexes or not. What do deviations mean? Deviations as regards the rights and obligations?». Also G. Mavros objected strongly to the matter of deviations. «By reading this phrase», he alleged, «the impression is created that the legislator, that is, the constitutional man, could possibly reverse the principle of equality. It is an incentive to determine categories of rights, which women cannot enjoy». The same maintained that it would be advisable, with an interpretative statement, to clarify that the legislator can establish a special treatment of women for military obligations and issues concerning the protection of pregnancy (See Minutes of the 1975 Constitution, p. 368). - The reasons of deviations due to sex, in order for them to be sufficient, they must also be necessary. They are necessary only when they are of essential significance so that underrating them creates an unequal treatment of the sexes, because there is no separation of unequal needs, Consequently, differences only because of sex, are not suitable to justify «sufficient» reasons from the principle of equality of the sexes (See I. Androulidakis - Dimitriadis, *Husband and Wife Equal Before the Law*, 1977, p. 141).

5. That it is not a matter of an interim provision, the following persons agree on it: Mr. A. Gazis, See *Influence of the Constitution on Civil Law*, «Publications of the Geeek Institute of International and Foreign Law» (1976), p. 10. D. Kallivoka, *Principle of Equality of Both Sexes in the Case-Law of Council of State*, «Honorary Volume Council of State» (1979), p. 458-459, A. Manassis, *op. cit.*, p. 15.

by the constitutional consolidation of it to enact differentiations on the basis of only biological differences⁶. Generally speaking, differentiations are allowed by the principle of equality of the sexes, in which case, they are imposed by the principle of the protection of human value and personality. Special needs of the State (its defence), the need to protect motherhood and childhood, to protect the institution of marriage and family, and balance the peculiarities that both sexes present, impose on the legislator and individuals, legitimate and justifiable inequalities, with which the principle of equality of the sexes is formed and it functions. Despite these things, the case of the legislator to create inequalities between the sexes with the aim of achieving equal treatment of them, has as a highest point, the respect for the value of man - imposed by the Constitution in article 2, par. 7 and it stipulates that «The respect and protection of man's value, constitute the primary obligation of the State»- as well as the freedom to develop one's personality as it is safeguarded in article 5, par. 1 of the Constitution, which stipulates, that, «Every person has the right to develop his or her personality freely and participate in the social, economic and political life of the Country, as long as he or she does not infringe upon the rights of others and does not violate the Constitution or the decent morals»⁷.

Deviations from the principle of equality of the sexes would be constitutionally permissible even if there was not an express constitutional provision which would allow that different treatment to be based on objectively given and connected to the trait of the sex differences. The correct meaning of article 116, par. 2 of the Constitution is that it introduces a rule of an excellent law, which should be interpreted closely and, consequently, it rules out the analogy.

The Constitutional legislator, without there being any sufficient reasons that would justify deviation from the principle of equality, he enacted a differentiation from the principle of article 31 by excluding from the office of the President of the Republic anyone who has Greek citizenship from his or her mother. During the debate of Article 31 in the Fifth Revisional Parliament, no special debate was caused about the obvious clash of this article with the principle of equality of the sexes which has been consolidated constitutionally by Parliament (article 4, par. 2). In fact, when the debate about article 31 in the Plenary Session of Parliament, the Member of Parliament K. Kapos remarked, «This is the equality between men and women that we establish in the Constitution», he received no reply whatsoever, while the Member of Parliament N. Gazis remarked that article 31 establishes an inequality at the expense of women and he went on, «One asks, why persons cannot be elected who have a Greek mother from the time they are born? It is well known that, in families living abroad, where there is a Greek mother the children speak also Greek and they are Greek orthodox in their

6. See I. Androulidakis - Dimitriadis, *op. cit.*, 1997, p. 140-141; D. Kallivokas, *op. cit.*, p. 464; E. Bessila-Makridi, *op. cit.*, p. 99. But the principle of equating the sexes, beside biological differences, has not found stable criteria to allow the creation of special rights and obligations between the sexes. Even biological differences do not allow deviations from the principle of equality of the sexes, when the facts between men and women, in comparison, present such similarities as, for example, mental ability and ability to work so that they would rule out a different treatment of the sexes. A. Gazis, agrees to physical, biological and psychological differences (See *Influence of the 1975 Constitution on Civil Law*, in «Publications of the Greek Institute of International and Foreign Law», 1976, p. 10).

7. See I. Androulidakis-Dimitriadis, *op. cit.*, p. 232, A. Manessis, *op. cit.*, p. 18.

religion, whereas, when there is only a Greek father, that does not happen»⁸. At any rate, a special constitutional provision of article 31 constitutes a basic political decision of the Fifth Revisional Parliament that reflects the political and social reality at the time it was voted upon.

4. Proposals and Speculations

The provision of article 31 is unfortunate. Of course, according to the prevailing view, this provision is prevailing as a special one (*lex specialis*) opposite the general provision (*lex generalis*) of article 4, par. 2 of the Constitution. Also the opposite view was hold, that is, that the provision of Article 31 is impracticable because, on the one hand, it comes up against the individual rights, in fact, against the principle of equality of the sexes because, without sufficient reason, it excludes Greek citizens who have Greek mothers from the office of President of the Republic and, on the other, it comes up against the principle of equality before the Law (article 4, par. 1 and 2 of the Constitution), since those provisions as individual rights, prevail over article 31 of the Constitution. That view is based on the theory of the «anticonstitutional constitutional provisions»⁹ that accepts the existence of anticonstitutional primary constitutional rules because of their clash with the principles of natural or superlative law even in the case where those principles had been included in the Constitution. Because such principles which bind the constitutional legislator legally, do not exist. In a society, of course, certain basic political and moral principles are created each time, which however, do not bind the constitutional legislator legally, at all. The constitutional legislator decides dominantly if and to what extent those principles will be included in the Constitution¹⁰.

Despite the theoretical problematics of a clash between the two constitutional provisions (articles 4, par. 2, and 31), the possibility is given for a second time to revise the Constitution and it is necessary to adapt article 31 to the principle of equality of the sexes. Despite the fact that the 1986 revision concerned the provisions about the President of the Republic, and specifically his responsibilities, the women Members of Parliament did not propose amendment of article 31, but also women's organizations did not make any effort in that direction. In the new revision of the Constitution, the principle of equality must be restored in article 31 so that a person who is descended from a Greek mother, would be able to be elected also as President of the Republic in the future.

The Committee on the Revision of the Constitution in 1996, in its proposal at the Plenary Session about the revisable provisions, proposed the following, as regards article 31: «It is proposed by the Committee unanimously, revision of par. 1 of article 31, so that Greek citizenship on the side of one's mother would be a qualification to be elected as President of the Republic». After 23 years since the Constitution was voted upon, we hope that equality of the sexes would be restored in article 31; it is worth noticing that this equality has been consolidated for the first time, by the 1975 Constitution.

8. See *Minutes of Parliamentary Sessions on debates about the 1975 Constitution*, p. 940 and 389.

9. That theory was adopted by professors G. Kassimatis, See *Remarks on Decree No 118/1978 by the Athens Court of Appeal*, p. 347 and the decisions of the Federal Constitutional Court of Germany of 23 October 1951 and 18 December 1953, *The Constitution*, p. 376-377; and G. Mitropoulos, *Problems about the Validity of the Law*, *Nomiko Vima* 24, p. 7.

10. See A. Raikos, *Traditions of Constitutional Law*, Vol. B. Issue A, p. 737-38.