

2nd LSE PhD Symposium on Modern Greece: Current Social Science
Research on Greece

“Gender Equality and Positive Measures for Women in Greece”

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I. Introduction.

In the framework of international political and economic developments during the 1980's and 1990's Greece attempted to restructure its social infrastructures and implement an economic and social policy able to confront the contemporary problems of citizens. In this context gender equality was prioritised in the political agenda and became a core concern for the legislators. Positive measures, hotly disputed when first introduced fifteen years ago, have gradually but steadily gained support in both the political scene and the judiciary and are now regarded as a necessary means to achieve full and effective gender equality.

This paper purports to examine the developments on gender equality and positive action in a dialectical relation to the equality discourse and the current legal landscape in Europe and internationally. The aim is to assess the Greek legal system from the point of view of gender equality and to identify the problems that have yet to be addressed.

The first part of the paper will provide the theoretical background of positive action within the conceptual framework of discrimination and through its relation to different conceptions of equality. A general outline of the major themes and strands in feminist jurisprudence will offer the female perspective on the relevant issues.

The second part will focus on Greece and present the major legal provisions and judicial decisions that have marked the route from a formal towards a more substantive notion of gender equality. In this respect, the brief overview of our not so distant legal past does not only have historical interest, but may also serve as a useful instrument to analyse the current state of affairs and identify existing problems that put in jeopardy the achievements of the last few years. The recent legislation that introduced quotas in favour of women in critical areas of the public sphere, coupled with the Constitutional reform of 2001, will be thoroughly examined, as they now constitute the pillars of gender equality in the Greek legal order.

Finally, the third part of the paper will return to an abstract level of analysis and discuss the issue of under-representation of women in the higher end of the socio-political spectrum. The principal arguments involve the legitimacy and efficiency of quotas as a mechanism to tackle under-representation of women as a social group. The

question, then, is whether representation should be defined in terms of group membership or actual opinions that reflect the interests of the under-represented group. In the latter case, however, disadvantage should be given conceptual priority over under-representation as a criterion for entitlement to positive measures. In this regard, it will be argued that positive measures, though compatible with the general principles of justice and representative democracy, may nevertheless be inadequate – at least in their current form – to provide effective solutions.

II. Theoretical underpinnings of positive action.

Positive action is arguably one of the most controversial current legal issues. The theoretical debate, established in the 1960's in the United States, has been enriched with arguments coming not only from legal theorists, but also from all those involved in the whole enterprise: Lawyers, judges, trade-unionists, economists, politicians and members of the disadvantaged and benefiting communities. However broad the field may be, the fundamental question always remains related to equality and justice: Acknowledging that the latter cannot exist in the absence of the former, evaluative judgments of positive action as to its fairness is premised upon its relation to equality and its compatibility with the principle of equal treatment.

In this respect and for the purposes of the present paper we can distinguish three main approaches to positive action:¹ The 'symmetrical' approach, the 'equal-opportunities' approach and the 'substantive equality' approach. The first rejects positive action in principle; the second allows it within strict limits but seems generally uncomfortable with the idea of using gender as a criterion of distinctions, while the third largely supports positive measures in favour of disadvantaged or under-represented social groups.

¹ S. Fredman, "*Reversing Discrimination*", 113 L.Q.R. 575 (1997). Fredman's distinction is adopted here with certain reservations: not every contribution to the relevant discourse falls comfortably within the specified limits of the above stated categories. Moreover, the critical assessment of the relevant theories should be made on a comprehensive basis, if it is to provide us with sound and meaningful conclusions, since it is possible to endorse the 'substantive equality' approach (that largely supports positive action) and, at the same time, reject positive action for reasons of inefficiency (R. Dworkin accepts this possibility in *Taking Rights Seriously*, 1977). These remarks, however, do not cancel the merits of the distinction, especially in terms of its capability to reflect the basic theoretical differences among the conceptions of equality in their dialectic relation to positive action.

Before mapping the theoretical underpinnings of positive action it is essential to provide a working definition of the concept:² Positive action denotes the deliberate use of gender-conscious criteria³ for the specific purpose of benefiting women⁴ as a group that has been previously disadvantaged or excluded on grounds of gender.⁵ Its aims may range from providing a specific remedy for gender discrimination to increasing the participation of women in important public spheres – such as education, employment and politics – where they are visibly under-represented.⁶ In its strongest version positive action⁷ takes the form of quotas, requiring that individual members of the disadvantaged group be actively preferred over other - equally or better qualified – candidates in the allocation of jobs, places in higher education or other benefits.⁸

1. Equality and positive action.

'Symmetrical' approach.

The 'symmetrical' approach relies conceptually on two limbs: First, the Aristotelian notion of formal equality, which requires to 'treat the likes alike',⁹ and, second, a strong individualistic background that endorses the principle of state neutrality. The

² It should be born in mind that positive action is an extremely broad term that may include practically any (primarily) state action towards achieving an equal state of affairs in all areas of the social field by all available means. Its use in the present paper, however, will consistently abide by the definition given here.

³ Or race-conscious criteria etc., according to the type of discrimination it purports to tackle.

⁴ Or any other social group (*mutatis mutandis*, supra n. 3).

⁵ *Mutatis mutandis*, supra n. 3.

⁶ S. Fredman, *Discrimination Law*, Clarendon Law Series (OUP), 2002, p. 126. Fredman's definition, apart from being concise and clear, possesses the additional advantage of being relatively uncontroversial. As the focus of the present paper is positive measures in favour of women, the definition has been modified accordingly.

⁷ Often in the literature this form of positive action is termed "reverse discrimination". This term, however, will not be used in the paper, not only because it does not exist in either EU or international law (S. Koukoulis-Spiliotopoulos, *From Formal to Substantive Equality*, A. N. Sakkoulas / Bruylant, 2001, p. 59), but also because it creates unnecessary confusion by deliberately appealing to the negative public instincts towards discrimination (and quite unsurprisingly so, since it was introduced as part of the conservative agenda against positive action in the United States).

⁸ Fredman, *Discrimination Law*, op. cit. (supra n. 6).

⁹ It is important to underline that the maxim 'treating likes alike' comes, indeed, from Aristotle's *Nicomachean Ethics* (book E), but the relevant passage has often been misunderstood and misinterpreted. Aristotle never said (nor implied) what the supporters of the 'symmetrical' approach usually advocate, namely that everyone is entitled to the *same* treatment. Justice for Aristotle ought to be "blind" only in respect to those differences that are irrelevant in the context of the specific case at hand. To argue, then, that a man and a woman are in essentially similar situations simply on account of their common humanity, constitutes a logical leap, because it disregards a history of discrimination and inequality that has unfairly and irrationally placed women at an inferior social position in relation to men. Aristotle cannot be held responsible for this mistake, which is clearly a product of modernity.

‘symmetrical’ approach invokes an absolute moral prohibition against discrimination on the grounds of race or sex. If discrimination on those grounds is unfair, then it is unfair as such and it is irrelevant whether those benefiting from the discriminatory practices are members of a so-called ‘disadvantaged’ group.¹⁰ Discrimination would amount in any case to the distortion of the principle of equality and, consequently, to a violation of justice.¹¹ In this respect, discrimination cannot be justified by appealing to the idea of equality, since the latter is dependent upon the notion of justice, which in turn suffers a breach due to discrimination. Moreover, in this view justice is an a priori concept, formulated independently of its historical or political contexts. It applies, therefore, in the same way under all circumstances, without reference to any prior distribution of goods or benefits, which may have already established an unequal status for individual or groups.

The ‘symmetrical’ model asserts the primacy of the individual in two dimensions: Merit and responsibility.¹² The merit principle requires that every individual be treated according to his or her own personal characteristics that are relevant to the situation under consideration. Thus, merit emerges as an objective criterion of distribution and is – at least prima facie – incompatible with any reference to gender whatsoever.

Responsibility is conceived solely on the basis of individual fault. A direct causal link must exist between the mistake and the agent so as the latter to be held responsible for it. In this way, an individual cannot bear any obligation to compensate for social ills that are not directly attributed to him or her. According to this argument, collective responsibility should be regarded as nothing more than an arithmetical addition of the responsibility of every individual that took part in the collective decision. So, positive action would only be fair, if the individuals excluded from a benefit in favour of black people, women or members of a minority played some part in the history of discrimination against these

¹⁰ As Justice Powell of the U.S. Supreme Court declared in the famous Bakke case: ‘The guarantee of equal protection [under the U.S. Constitution] cannot mean one thing when applied to one individual and something else when applied to an individual of a different colour’.

¹¹ ‘All discrimination is wrong prima facie because it violates justice; and that goes for reverse discrimination too’ (ibid). Also see L. H. Newton, *Reverse Discrimination as unjustified*, in S. M. Cahn (ed.), *The Affirmative Action Debate* (1995). This assumption, however, is conceptually flawed, if for no other reason, because it implicitly equates “discrimination” with any kind of “distinction”. Obviously, not every distinction is discriminatory, as the European Court of Human Rights was compelled to point out in its *“Belgian Linguistics”* case. If this is true, however, the question must be whether “reverse discrimination” is, in fact, discrimination in the first place.

¹² Fredman, *Discrimination Law*, op. cit., pp. 126-128.

groups. But even in that, rather improbable, case positive action would not satisfy the condition of judging people according to merit and would again be regarded as unfair.

Finally, the ‘symmetrical’ approach deals with positive action under the light of the state-neutrality principle, which requires that a state has the same ‘attitude’ towards its citizens, without favouring or disfavouring some among them, and that it intervenes the least possible in the ‘free market’ economy. Positive action clearly contravenes this principle – the term in itself makes it obvious for that matter – since the state takes a stance in favour of specific groups of the populace and, in many cases, seeks to expand this favourable status to the private sector by exerting its economic powers in the field of the free market.¹³

‘Equal opportunities’ approach.

The ‘equal opportunities’ approach could be described as the ‘middle way’ between the proponents and the opponents of positive action and, for this reason, it is not distinctly delineated.¹⁴ It rejects the non-proportional notion of formal equality and relies heavily on the metaphor of a ‘race’, where athletes begin from the same starting point. It asserts that equality cannot be achieved in a society, if some privileged individuals have a ‘head start’ while others begin from a disadvantageous position, because this handicap prevents the objective application of the merit criterion.¹⁵ In this connection, this model

¹³ A state can pursue compliance with positive action schemes in the private sector mainly by state-funding policies or tax allowances to the participating employers. However, the nature of the intervention depends on the nature of the intended preferential measure. In France, for instance, the state subsidises political parties according to the percentage of women they include in their electoral lists, without imposing a positive obligation in the form of a strict quota. See As to the application of positive measures in the private sector, it is now generally accepted across the EU Member States that preferential treatment to women employees (or minority members) is compatible with the principle of equal treatment. See also *infra*, concerning the scope of application of Law 2839/2000.

¹⁴ By and large, the equal opportunities approach has been consistently followed by the European Commission and the ECJ, at least until quite recently. See the pivotal ECJ decision *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93 [1995], ECR, I-3051, IRLR 660. The extent to which the attitude of the Commission and the ECJ has changed towards a more substantial notion of equality is open to question. For an excellent account of this movement in the EU (and the UK) see C. Barnard and B. Hepple, “*Substantive Equality*”, *Cambridge Law Journal*, 59(3), November 2000, pp. 562-585 (esp. pp. 576-583 concerning positive action). In any case, it must be emphasised that under the new article 141 para 4 of the Treaty of Amsterdam positive action is understood as a means for achieving “effective equality”. See S. Koukoulis-Spiliotopoulos, *From Formal to Substantive Equality*, op. cit., p. 59.

¹⁵ In the literature this approach to equality is usually referred to as “fair equality of opportunities”, attributed to John Rawls, who discusses it as one of his two principles of justice. See J. Rawls, *A Theory of Justice*, Oxford University Press, 1999 (revised edition), esp. pp. 73-78.

dissociates from the narrow individualism of the ‘symmetrical’ approach, recognising that the individual’s opportunities in life are determined, to some extent, by his or her initial social position and can be distorted by structural discrimination stemming from group membership. The ‘equal opportunities’ approach, therefore, is committed to levelling the playing field by putting all individuals at the same starting point and partially accepts positive action as a means towards this end.¹⁶

At the point, however, that equality of opportunities has been achieved, the principle of state neutrality and the individualistic principle of equal treatment based on merit regain dominance. Having overcome the problem of institutional discrimination by establishing equal opportunities, formal equality and justice require that individuals be, henceforth, treated on a meritocratic basis, without any further reference to race, gender or any other irrelevant personal characteristic. Positive measures, then, are conceived of as “temporary” by their very nature designed to continue in each particular area only until their objective is fully achieved.¹⁷

It should be noted, still, that there is a lack of consensus among the proponents of the ‘equal opportunities’ model concerning the extent of the necessary state intervention. In other words, it is unclear whether equality of opportunities is merely a procedural requirement, satisfied against a formalistic standard similar to the one used by the ‘symmetrical’ approach, or if it entails a more substantive demand of social justice, in order for every member of the society to have a truly equal chance of meeting the criteria for access to a social good.

‘Substantive equality’ approach.

The ‘substantive’ model challenges the propositions that constitute the ‘pillars’ of the ‘symmetrical’ approach, namely the formal justice argument, the notion of individualism and the neutral state principle.¹⁸ First of all, the proponents of ‘substantive’ equality stress out the incoherence between an ideal theoretical model and the real-life situations. The discriminatory practices against certain social or racial groups are undeniable and

¹⁶ See for instance B. Williams, “*The idea of equality*”, in P. Laslett and W. G. Runciman, *Philosophy, Politics and Society* (1965), pp. 125-126.

¹⁷ Koukoulis-Spiliotopoulos, *op. cit.*, p. 60.

¹⁸ Fredman, *Discrimination Law* (*op. cit.*), pp. 126-127.

have continuing effects, because they have created a status quo that still exists. Justice, therefore, needs an asymmetric vision that will take into account the existing inequalities in the allocation of resources and will aim to change them. In simple terms, a non-interventionist symmetrical approach will lead to the perpetuation of this status quo, which is based on an unfair distribution of wealth, and will legitimise this unfairness by securing the existing stratification of society. The ‘substantive’ approach calls for an openly distributive notion of justice, as the only efficient way of actually making a difference and pursuing true equality.

The criticism to the individualistic notion follows on the same lines. It is false to disregard the influence of social and historical background on the opportunities of the individual. Even if we adopt a perfect meritocratic system that allows us to choose the most ‘qualified’ individual in every case of allocation of social goods, the very definition of ‘meritocracy’ will entrap us in a vicious circle. It is absolutely expectable and understandable to have more qualified men than women, since the social position and the objective life conditions of the latter prohibited them for many long years from pursuing a better education. A rigid merit-based selection process takes into no consideration the past and does not count in institutional discrimination as an important factor that limits a person’s opportunities by shaping significant angles of her plan of life.

The same line of argument applies to the fault principle, in the sense that discrimination is not a result of personal mistakes and, therefore, it cannot amount to individual responsibility. According to this non-individualistic view the responsibility for correcting institutional discrimination, which is merged into the social structures, should not be attributed to specific individuals through a causal link, following the paradigm of criminal law, because there is no individual fault. On the contrary, discrimination is a matter of collective responsibility and should be treated as such. The privileged class or classes of society, therefore, are rightfully expected to bear the cost of remedy, at least to some extent.

Finally, the ‘substantial’ approach underlines the paradoxical nature of the principle of neutral state. Neutrality does not entail merely abstinence from action, but also a policy of non-participation in social conflicts and treating all parties indifferently, in order not to affect the result of the conflict either way. A policy of non-intervention in a society built

upon centuries of discrimination will, inevitably, favour the dominant groups by supporting the status quo and facilitate the continuity of the existing ‘balance’ of power. The ‘substantive’ approach maintains that the state has a positive obligation to intervene and take suitable measures to correct the results of discrimination, with a view to achieving a truly fair balance of power.

2. The women’s point of view: Feminist jurisprudence and positive action.

Feminist Jurisprudence emerged less than thirty years ago¹⁹, originally within the movement of Critical Legal Studies (CLS) in the late 1970s. Many feminist legal theorists subscribed to the early principles of CLS, including the ‘basic critique of the inherent logic of the law, the indeterminacy and manipulability of doctrine, the role of law in legitimating particular social relations, the illegitimate hierarchies created by law and legal institutions’²⁰. In a nutshell, feminist jurisprudence seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated²¹. However it would not be an overstatement to argue that there are different feminist jurisprudences, stemming basically from different conceptions of equality. Patricia Cain²² proposes a categorisation into four schools of thought: liberal, radical, cultural and post-modern. One of the fundamental differences among them is the way these models perceive and tackle the problem of equality, which was early theme and

¹⁹ The origins of this school of thought can be traced back in some path-breaking classics that long anti-date modern literature. See for instance M. Woolstonecraft, *A Vindication of the Rights of Women* (1772) and J.S. Mill & H. Taylor, *The Subjection of Women* (1839). Nicola Lacey argues, furthermore, that Bentham was a ‘proto feminist’ (See her relevant article in CLP S1, 441, 1998).

²⁰ C. Menkel-Meadow, “*Feminist Legal Theory, Critical Legal Studies and Legal Education or ‘The Fem Crits Go to Law School’*”, 38 *Journal of Legal Education* 61 (1988).

²¹ Although feminist jurisprudence has various aspects and many feminist legal theorists have contradictory claims, what unites feminist legal theorists is an underlying belief that society, and necessarily legal order, is patriarchal. See L. Bender, “*Lawyer’s Primer on Feminist Theory and Tort*”, 38 *Journal of Legal Education*, 3, 1988

²² P. Cain, “*Feminism and the Limits of Equality*”, 24, *Georgia Law Review*, 803 (1989-1990). See Also P. Cain, “*Feminist Legal Scholarship*”, 77, *Iowa Law Review*, 19 (1991-1992). There are, of course, other categorisations as the one suggested by Rosemarie Tong (*Liberal Feminism in Feminist Thought: A Comprehensive Introduction*, 1989) into seven different schools, namely: liberal Marxist, radical, psychoanalytic, socialist, existentialist and post-modern)

pursuit for the feminist legal thinkers²³. Let us briefly examine their position on the subject of positive action with regard to their conception of equality.

For liberal feminists equality amounts to equal opportunity and, in this respect, they share the theoretical background of liberal political theory that endorses, in general, the ‘equal opportunities’ approach to positive action: they believe that women, as well as men, are rights-bearing, autonomous human beings and, accordingly, they should have an equal chance with men to exercise their right to make rational, self-interested choices²⁴. In this regard they are happy to accept positive action programs as long as the latter are merely means of ‘levelling the playing field’, with a view to fair competition²⁵. Consequently, they reject the idea of positive action as an apparatus of redistributing social wealth on an equal basis, taking essentially the ‘equal opportunities’ approach discussed earlier.

Whereas liberal feminists put emphasis to the individual, radical feminists focus on women as a distinct social class, dominated by the hierarchically superior class, namely men²⁶. Their equality arguments tend to undermine differences between men and women, which have been constructed in such a way as to contribute to women’s inequality²⁷. Therefore, they advocate for the special protection rule, which provides the legal basis for positive action. Since the formal equality principle requires ‘treating likes alike’ and women are not ‘like’ men, women should enjoy differentiated treatment. In this view positive action is regarded as a means of realising the existing differences between the sexes and a mechanism of ensuring equal treatment with respect to these differences.

Cultural feminists also emphasise difference but they have a more positive view on it, because they use the rhetoric of equality to advocate changes that support the values of this difference, such as caring and relational connectedness²⁸. Woman’s moral vision,

²³ H.H. Kay, *Text, Cases and Materials on Sex-Based Discrimination*, 1988 (St. Paul Minn. West. Pub. Co.).

²⁴ Cain, “*Liberalism and the Limits of Equality*”, supra n. 22.

²⁵ As explained earlier, from the liberal standpoint positive action is considered to be not a barrier but a necessary condition for selecting the best-qualified candidate. See T.W. Allen, “*In Defence of Affirmative Action in Employing Policy*”, *Cultural Logic*, Volume 1, n.2.

²⁶ See P. Cain, “*Liberalism and the Limits of Equality*”, supra n.22.

²⁷ Ibid.

²⁸ C. Gilligan, *In a Different Voice* (1982) and R. West, “*Jurisprudence and Gender*”, 55 U. Chi. L. Rev. 1 (1985).

according to cultural feminists, encompasses a ‘different voice’²⁹ and their primary interest is, therefore, changing institutions to give equal weight to women’s moral voice. The position on positive action, however, does not seem to be clear and unanimous, since there are disagreements on the effectiveness of such schemes in producing institutional changes³⁰. Finally post-modern feminism views equality as a social construct that reflects patriarchal ideas and needs reconstruction. However, postmodernism eschews the idea of unitary truth or objective reality and, in this respect, feminist theorists of this school of thought argue that there is no single theory of equality that will work for the benefit of all women³¹. As it can be easily understood, positive action does not constitute a core interest for post-modern feminists.

The conclusion deriving from a brief examination of the feminist jurisprudence is essentially that there is no consensus among feminist theorists neither on the conception of equality nor on the specific issue of positive. Although the latter is obviously not rejected in principle, liberal feminism – which is currently the dominant school of feminist thought - gives priority to the individualistic claims of political liberalism and accepts positive action programs only as far as they do not contradict the merit principle and they are restricted in ensuring equal opportunity. In this respect, it adopts almost in full the ‘equal opportunities’ approach. However, it should be stressed that feminist legal theorists, in general, do not resort to compensatory arguments and favour in general the idea of positive action as a means towards achieving equality between the sexes.

²⁹ Ibid.

³⁰ Cain, “*Liberalism and the Limits of Equality*”, supra n. 22.

³¹ For a stimulating example of post-modern feminist thought see D. Cornell, “*The Doubly-Prised World: Myth, Allegory and the Feminine*”, 75 Cornell L.R. 644 (1990).

III. Gender equality and positive action for women in Greece.

1. Gender equality and non-discrimination in Greece: Brief historical overview until 1998.

Greece can take pride in the fact that its “Revolutionary Constitution” of 1822³² contained a general equality clause. Nevertheless, gender equality was explicitly recognised by the 1975 Constitution for the first time in the Greek constitutional history.³³ Although one might assume that, in theory, gender equality can automatically derive from a general equality clause, the legislation of the period and the relevant case-law of the Supreme Administrative Court (hereinafter SAC) prove that there is a long way from theory to practice.³⁴ Female jurists were prohibited from sitting the entry examinations for the judiciary, becoming members of the Legal State Council or associates of the Criminology service or even notaries; female archaeologists and chemists could not sit the entry examinations for the Archaeological Service and the General Chemical Laboratory of the State respectively; women were not legally competent to become members of a jury or to witness a notarial document.³⁵ Moreover, in judgements of 1949 and 1961 the SAC confirmed that *men are better equipped for the profession of court ushers, whereas the tasks performed by cleaners suit female employees best.*

These irrational and discriminatory prohibitions were started being abolished gradually after 1952, when the Convention on the Political Rights of Women was adopted by the United Nations and ratified by Greece.³⁶ Characteristically, Law 959/1949 and Law 2159/1952 empowered women with full electoral rights and may be regarded as the first legislative step towards gender equality in the modern Greek state. These

³² The Revolutionary Constitution of Epidaurus preceded the independence of the modern Greek state by six years, being “revolutionary” in the literal sense that it was created and enacted a few months into the Greek Revolution of 1821.

³³ Article 4 para 2, 1975 Constitution.

³⁴ The same is true for most national jurisdictions throughout Europe and, for this reason, separate provisions on gender equality in domestic legislation and international instruments are thought to be anything but redundant.

³⁵ A. Yotopoulos-Marangopoulos, *Affirmative Action: Towards Effective Gender Equality*, Sakkoulas / Bruylant, 1998, pp. 80-81.

³⁶ The said Convention was adopted by the UN General Assembly in December 1952, was ratified by Greece a year later (Legislative Decree 2620/1953) and entered into force in 1954.

developments entailed a relative improvement in the social position of women, without, however, elevating gender equality to the status of a general legal principle or a strategic social policy goal. What is more, the unstable political situation and the military coup of 1967 left little room for further progress at the time.

The 1975 Constitution reinstated democratic order and marked the beginning of a new era in the relation between the sexes. Article 4 para 2 stipulated that Greek men and women were equal before the law and had equal rights and obligations, while article 116 para 1 provided for the abolition – by the end of 1982 – of all regulatory provisions allowing for unequal treatment. The process of democratisation and modernisation of the Greek state was slow and difficult – understandably so, given the historical circumstances. After a transitional period, during which Greece became full Member State of the European Communities and saw the socialists entering into power in 1981, a number of significant legal changes brought gender equality to the political and legal.

The first major step to this direction was the ratification of the UN Convention for the Elimination of all forms of Discrimination Against Women (hereinafter CEDAW),³⁷ coupled with the complete reform of Family Law,³⁸ which revoked the patriarchal family model and recognised the role of women within the family as equal to that of men in almost every respect. Shortly after, Law 1414/1984 applied the principle of gender equality to the employment field, decisively reshaping labour relations and improving the professional prospects of women. In the period 1983 – 1998 a series of other legal provisions (concerning social security, education etc.), which were enacted as part of a dynamic process of adapting the Greek legislation to international conventions and EU Directives, contributed to the creation of an integrated legal framework³⁹ that progressively established a plateau of equal opportunities for the sexes in the political, social and economic domains.

Equal opportunities, however, do not guarantee the attainment of “effective equality”, according to the phrasing of new article 141 para 4 of the Treaty of Amsterdam. The well-known dichotomy between formal and substantive equality, which

³⁷ Ratified by Law 1342/1983.

³⁸ Law 1329/1983.

³⁹ See the first three National Reports of Greece to the Commission for CEDAW (period 1983 – 1993), as published by the General Secretariat for Equality.

permeates the relevant discourse on an international level, was acutely present in the case of Greece. Until 1998 all legal documents designed to promote gender equality were premised upon a formal conception of equality, which, by and large, was tantamount to the absence of direct discrimination. The constitutional provision of article 116 para 2, which allowed for derogations from the principle of equal treatment in cases expressly provided for by law and for serious reasons, became in practice the instrument for the promulgation of laws introducing new inequalities, especially in the form of *restrictive quotas*.⁴⁰ In parallel, the possibility of positive measures in favour of women with a view to establishing a state of true equality between the sexes⁴¹ was not only ignored, but also found to be unconstitutional in respect of the general equal treatment guarantee.⁴²

Until the end of 1990's, therefore, and despite the adoption of a set of rules that improved considerably the position of women, there was still a long way to go until the accomplishment of substantive gender equality.

2. Exceptions to equal treatment and positive measures: the attitude of the Greek courts.

Typically, positive measures have been regarded as a deviation from the principle of equal treatment, since they reserve a special benefit or they afford preference to members of an under-privileged or under-represented social group. In Greece, however, article 116 para 2 of the 1975 Constitution permitted exceptions to equal treatment without any further specification as to the purposes of the derogations. In the way, the scope was broad enough to cover both differential treatment for the protection of pregnancy and restrictive quotas against women in the entry examinations to the police academy or the military schools.⁴³

Until 1998 the Greek courts were, indeed, quite comfortable with upholding the constitutionality of differential treatment towards women on account of their biological

⁴⁰ Restrictive quotas designate the maximum number or percentage (out of the total number of applicants) of members of a specific group that are allowed to benefit from the allocation of social goods, especially in employment. They are often referred to as *maximum quotas* in order to distinguish them from positive measures (also known as *minimum quotas*). It goes without saying that restrictive quotas are the exact opposite of positive action, since their "mandate" is irrelevant to equality.

⁴¹ Recognised explicitly by article 4 para 1, Law 1342/1983 that ratified CEDAW.

⁴² See the case-law of the SAC discussed in the following section.

⁴³ Yotopoulos-Marangopoulos, op. cit., p.87.

differences to the male sex. As early as in 1977 the SAC held that “derogations from this principle [of equal treatment], [are] lawful [...], provided that they are stipulated by a formal law and justified by *sufficient reasons concerning either the necessity to accord increased protection to women*, especially in the fields of maternity, marriage and family [...] *or the purely biological differences that require the adoption of particular measures of differential treatment* according to the subject matter or the relation to be regulated” [emphasis added].⁴⁴

This line of reasoning, reproduced consistently and with identical phrasing in a number of other judicial decisions of the period,⁴⁵ is premised upon a core assumption of the discourse on discrimination: Biological characteristics may justify a state of exception from equal treatment insofar as they reflect “morally relevant” qualifications for the subject matter in question.⁴⁶ To give but a textbook example, the colour of an actor’s skin (or her sex) may serve as a justified criterion of preference when auditioning for the role of Othello.⁴⁷ It is obvious that this case does not fall within the ambit of positive action as it does not serve the *aim* of benefiting a disadvantaged social group.⁴⁸

According to the interpretation of the Greek courts as presented above, however, the “sufficient” or “substantial” reasons of article 116 para 2 may be either biological or of a *functional* nature.⁴⁹ This distinction between “purely biological reasons” and “functional” ones, also supported in the literature,⁵⁰ created unnecessary confusion. Functional reasons are understood as “relating to needs emanating from adherence to a specific social group (family, public or private service etc.)”.⁵¹ From a terminological point of view it is difficult to see why “the necessity to accord increased protection to women” in certain social fields has a functional element. To the extent that the protection of maternity and family life is a strategic constitutional choice, one may understand

⁴⁴ SAC 3217/1977.

⁴⁵ SAC (3rd chamber) 2857/1993, 2861/1993 and 5645/1996; Athens Admin. Court of Appeals 2509/1995.

⁴⁶ For the discourse on morally relevant characteristics, instead of many see J. Nickel, “*Discrimination and Morally Relevant Characteristics*”, in S. Cahn (ed), *The Affirmative Action Debate*, Routledge, 1995.

⁴⁷ It goes without saying that preference in such a case is justified insofar as the black male actor gets the part.

⁴⁸ Even if the person at the receiving end of the benefit (preference) belongs, in fact, to a disadvantaged or under-represented group.

⁴⁹ Yotopoulos-Marangopoulos, *op. cit.*, p. 80.

⁵⁰ A. Manassis, “*Η συνταγματική κατοχύρωση της ισότητας μεταξύ ανδρών και γυναικών ενώπιον του νόμου*”, Δίκαιο και Πολιτική, ειδικό τεύχος *Ισότητα των φύλων ενώπιον του νόμου*, 1983, p. 21 [in Greek].

⁵¹ *Supra*, n. 49.

functionality in terms of promoting a specific model of social arrangements over another. Still, biological differences between the sexes seem to be of an even greater functional importance when they relate to the performance in a certain employment area. If being a police officer requires a level of physical strength that women are not capable by nature of attaining, the selection of male candidates for the job is evidently connected to considerations of *performance*; hence, the reasons justifying preference to one sex rather than the other are *functionally* linked to the subject matter in question.

A more plausible analysis ought to recognise that biological differences play a role in relation to pregnancy and maternity.⁵² What should be emphasised here is that the measures designed for the protection of pregnancy and maternity are by default applicable only to women. In this regard, they cannot be subject to the standard comparative tests employed in the framework of non-discrimination law, simply because no appropriate comparator exists.⁵³ When article 4 para 2 of CEDAW stipulates that the protection of maternity does not constitute sex discrimination, it merely states the obvious. Provisions protecting maternity are neither positive measures *stricto sensu* nor exceptions to equal treatment, because the factual circumstances they regulate are unique to women. This has been acknowledged by the ECJ⁵⁴ and national courts in many European jurisdictions, as well as by the Canadian Supreme Court⁵⁵ and the U.S. Supreme Court.⁵⁶ As the ECJ emphatically put it in *Dekker*, pregnancy discrimination can only occur *against* women because only women may be subject to bad treatment for this reason.

Nevertheless, the Greek case-law of the period insisted that in professions requiring certain skills, such as physical force and flexibility, the provisions restricting the number of successful female candidates to a fixed maximum were non-

⁵² Yotopoulos-Marangopoulos, *op. cit.*, p. 88.

⁵³ See Fredman, *Discrimination Law* (*op. cit.*), esp. pp. 99-101, where an excellent discussion of the ECJ's case-law on the issue.

⁵⁴ Case C-177/88, *Dekker* [1990], ECR I-394; Case C-32/93, *Webb* [1994], ECR I-3567.

⁵⁵ *Brookes v. Canada Safeway Ltd* [1989], I, SCR, 1219.

⁵⁶ *Californian Federal Savings and Loan Association v. Guerra* [1987], 479, US 272, 107, SCt, 683.

discriminatory,⁵⁷ simply because men were thought to be physically stronger and more agile by nature (and, consequently, better qualified for the job).

Needless to say, of course, that the argument is *prima facie* theoretically sound, drawing upon the discourse on morally relevant characteristics. It is generally accepted in the international literature on equality and discrimination, as well as in the case-law of international instruments,⁵⁸ that the use of *any* human characteristic – including race and gender - as a criterion of selection does not amount to discrimination when justified *in concreto* due to the circumstances of the case. The problem, however, in the rationale of the Greek case-law discussed here (and of the relevant pieces of legislation) lies in the use of gender as a proxy for physical abilities, *without allowing for an actual comparison between individual candidates*. Restrictive quotas cannot be justified – even if we accept that physical strength is an absolute precondition for the specific jobs – because they disregard the possibility of more than 10% of the female applicants being, in fact, stronger, faster or more agile than their male counterparts. To the extent, then, that restrictive quotas serve the purpose of selecting the best candidates in employment areas of crucial public interest, they are not only discriminatory but also inefficient and self-defeating, in view of the fact that they pose an (unnecessary) additional obstacle to potentially better qualified candidates.

It is interesting to note that the SAC, in its relevant judgements, addresses directly the question of constitutionality of Law 1911/1990, which conferred the normative power to the Minister of National Defence to determine the numbers of candidates admitted to the higher military schools. The Court found that article 1 para 3 of the said law violated the constitutional provisions of art 4 para 2 and 116 para 2 because it did not specify any “criteria, related to the existence of substantial reasons that render constitutionally acceptable the different treatment of men and women”.⁵⁹ In this way, however, the constitutionality of restrictive quotas *per se* was not put under scrutiny. All the Court said

⁵⁷ Athens Admin. Court of Appeals 2509/1995 (concerning restrictive quotas for women in the entry examinations to the police academy); SAC report 243/1996 (concerning restrictive quotas for the entry of women to the fire department).

⁵⁸ Instead of many see the European Court of Human Rights reasoning in *Belgian Linguistics Case (No 2)*, Series A, No 6, 1968, I, EHRR, 252.

⁵⁹ SAC 2861/1993, thought 5.

was that the ministerial decision to impose restrictive quotas did not make use of any objective criteria that would justify deviation from equal treatment.⁶⁰

Incidentally, in its judgement 2861/1993 the SAC was called upon to decide on genuine positive measures in favour of (allegedly) disadvantaged social groups. The compatibility of positive action with the equal treatment principle is self-evident according to the Court's reasoning. And when striking down the quota in favour of citizens coming originally from areas of the Greek frontier zone, it does so in view of "the currently existing conditions in the country" that render such a distinction unjustified in concreto.⁶¹

To return to positive action for women, the first provision introducing quotas in favour of women was Law 2085/1992. The latter, in its article 29, guaranteed the participation of at least one fully qualified woman in departmental boards. The SAC held, in its decision 6275/1995, that the said provision was unconstitutional on account of the lack of any clear evidence suggesting that the under-representation of women in service councils was due to discrimination.⁶² It should be underlined that, once again, the Court does not go so far as to doubt the constitutionality of positive measures in principle, contrary to the concerns voiced then by feminist jurists and organisations.⁶³ Indeed that would have been an unforgivable mistake in the light of Law 1342/1983 and Law 1414/1984, both of which expressly acknowledged the compatibility of positive measures with the equal treatment principle.

An interesting conclusion must be drawn from the afore-mentioned decision: The dominant position in the Greek case-law, which was largely not disputed by theorists, accepted positive measures as lawful, insofar as the social group benefiting from them could *prove* the occurrence of precise instances of discrimination against it. Furthermore, under-representation was not deemed to be enough evidence of discrimination *ipso facto*.

⁶⁰ It has to be said at any rate that the SAC received much unfair criticism, especially from women's organisations, which focused solely on the (condemnable) judicial hesitance to take the opportunity and settle the real issue once and for all. This line of criticism ignores that neither the reasoning nor the outcome of the decisions was legally flawed and that the responsibility for changing the law should primarily rest with the legislator and not the courts.

⁶¹ SAC 2861/1993, thought 8.

⁶² The said provision had already been abolished by Law 2190/1994 but the 6th chamber of the SAC went on to examine the case as it involved an issue of constitutionality and, for the same reason, referred it to the Grand Chamber.

⁶³ Yotopoulos-Marangopoulos, op. cit., pp. 84-85.

The absurdity of this approach, which effectively renders any legal protection against discrimination dead letter, becomes obvious, if one contemplates that the only way of providing the evidence required would be to exhaust and rule out every other possible factor (that is, other than discrimination) that might have affected the selection process under scrutiny. Clearly, such reasoning fails to come to grips with the reality of indirect discrimination, the most pertinent and tenacious of its forms.

Not all the decisions of the Greek courts, however, were equally dismissive of women's entitlement to special treatment in areas other than pregnancy and maternity. Thus, the SAC did not hold unconstitutional the maintenance of pension for unmarried daughters in view of the equal treatment principle.⁶⁴ Similarly, the Court accorded, albeit with restrictions, a pension from the Social Security Fund for Health Professions to divorced women.⁶⁵ Let us bear in mind, however, that the rationale of these decisions does not involve protection from discrimination – and quite rightly so, since the *ratio* of the legislation was unrelated to discrimination. The measures under scrutiny were understood as reflecting factual differences in the situation of men and women that, irrespective of their causes, call for different treatment. Therefore, these cases are not justified exceptions to equal treatment – as positive measures are thought to be – but the application of the rule “treating likes alike” turned on its head (namely treating different cases differently).⁶⁶

3. The current legal landscape: From formal to substantive equality.

In May 1998 two major legal developments were hailed by women's organisations as the hallmark to true and effective gender equality.⁶⁷ With its decision

⁶⁴ SAC 828/1989 (grand chamber). It should be noted that the Court does not examine the issue of constitutionality as it could have done *ex proprio motu*; hence, it tacitly concedes the compatibility of the provisions in question with the equal treatment principle.

⁶⁵ SAC 4378/1995 (1st chamber). See supra n. 64 (*mutatis mutandis*).

⁶⁶ It is the opinion of the author that positive measures should also be conceived as an integral element of the equal treatment principle and not as a deviation from it. This point of view seems to be gaining support within the EU, especially after the entry into force of the Treaty of Amsterdam. See Koukoulis-Spiliotopoulos, *op. cit.*, esp. pp. 24-27 and 58-59.

⁶⁷ See A. Yotopoulos-Marangopoulos, “Διπλή νίκη: Βουλή και Συμβούλιο της Επικρατείας αποδέχονται ουσιαστική ισότητα και θετικά μέτρα υπέρ των γυναικών”, *Αγώνας της Γυναίκας* [Struggle for Women], 65, pp. 1-3 [in Greek].

1933/1998 of May 8th the SAC⁶⁸ held that “the adoption of positive measures between men and women is not contrary to the Constitution”.⁶⁹ A few days later, on May 20th, the Greek Parliament voted article 116 para 2 of the Constitution among the provisions to be amended by the following, Constituent Parliamentary Assembly, with a view to introducing the notion of positive action as a means to achieve effective equality.

The historical change in the jurisprudence of the SAC was confirmed in the cluster of decisions 1917-1929/1998 (grand chamber) that struck down restrictive quotas against women in admissions to the higher military schools and the police academy. In these latter decisions, however, the Court accepts the possibility of restrictive quotas *in principle*, when the nature of the subject matter may justify an exception to equal treatment.⁷⁰

On the other hand, the afore-mentioned decision 1933/1998 went further than merely recognising in abstracto the constitutionality of positive measures in favour of women that correct de facto inequalities against them. The Court found that the provision of article 29 of Law 2085/1992, which stipulated compulsory participation of at least one fully qualified woman in the departmental boards of public agencies, was in compliance with the equal treatment principle. In this way it effectively recognised that *under-representation of women* in the higher strata of the professional spectrum *constitutes unjustifiable inequality caused by gender discrimination*. This is the first time that a Greek court expressly acknowledges the necessity to afford special treatment to women *for reasons unrelated to biological differences*.⁷¹ Moreover, under-representation appears to be of particular importance in proving the existence of *indirect institutional discrimination* and, in this respect, becomes a factor to be taken into consideration in every relevant case in the future.

All doubts regarding the constitutionality of restrictive quotas and (genuine) positive measures in Greece have definitively ended since April 2001, when the revised

⁶⁸ SAC 1933/1998 (grand chamber), which reverses the previous decision 6275/1995 of the 6th chamber.

⁶⁹ Ibid (thought 3).

⁷⁰ And, in this respect, the change in the case-law seems immaterial. In practice, however, it is difficult to imagine another area of the public sphere where restrictive quotas can be justified, since they were found to be discriminatory in a case where physical abilities do matter to a certain extent. In any case, after the constitutional reform of 2001 the issue has already been settled and no such concerns remain.

⁷¹ For an interesting comment on the decisions discussed here and the issue of positive measures in Greece see K. Kaftani, “Οι Θετικές Δράσεις”, Κριτική Επιθεώρηση [Critical Review], 1999, 247.

Constitution entered into force. Its new article 116 para 2 settles the issues by providing that: a) The adoption of positive measures for the promotion of equality between men and women does not constitute gender discrimination and b) the State undertakes the obligation to abolish all de facto existing inequalities, especially against women.

The phrasing of the revised article 116 para 2 leaves no room for misinterpretations: Deviations from equal treatment are permissible *only* insofar as they consist in positive measures, designed to redress discrimination and its effects and to promote *substantive equality*. Restrictive quotas are by the same token in violation of the equal treatment principle, *irrespective* of the nature of the subject matter or the circumstances of the case. In this way, the Greek Constitution stands now in complete harmony with EU Law, declaring positive measures a means to “ensure full equality in practice”.⁷²

Alongside the constitutional reform, two new pieces of legislation introducing quotas in favour of women entered into force in 2000 and 2001. The first, Law 2839/2000,⁷³ aimed to ensure the balanced participation of men and women in decision-making procedures in the public administration, as well as in the entities of the private sector and in the local administration agencies of 1st and 2nd degree (municipalities). Its article 6⁷⁴ stipulates that the departmental boards throughout the public sector will be comprised to a minimum of 1/3 by members of each sex.⁷⁵ Moreover, Law 2910/2001 in its article 75 para 2 provides that the number of candidates of each sex in the local and

⁷² Article 141 para 4, Treaty of Amsterdam. As to the indubitable impermissibility of restrictive quotas under EU Law, Declaration No 28 on article 119(4) of the Treaty establishing the EC (annexed to the Treaty of Amsterdam), which authentically interprets article 141(4) [former 119(4)], reads as follows: “When adopting measures referred to in Article 119(4) [now 141(4)] of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life”.

⁷³ Law 2839/2000 was enacted by the Greek Parliament following a proposal of the General Secretariat for Equality, the competent government agency responsible for the implementation of programmes promoting gender equality (established by Law 1558/1985).

⁷⁴ Article 6 reads as follows: “a. In every departmental board of state organisations, of entities of the public sector and of local administration agencies, the number of members of each sex nominated by the Administration shall be equal to at least 1/3 of those nominated [...]. b. In cases of appointment or recommendation by the public Administration to entities of the public sector or local administration agencies of members of the board or of other collective managing bodies of entities of the public sector or of local administration agencies, the number of appointed or recommended persons of each sex shall correspond to at least 1/3 of those appointed or recommended [...]” Law 2839/2000 entered into force before the finalisation of the Constitutional reform.

⁷⁵ The scope of the provision also covers entities of the private sector, but only as far as appointments (or recommendations) made by the Administration are concerned.

regional elections (for the 1st and 2nd degrees of local administration) must be equal to at least 1/3 of the total number of candidates in each party list.

These developments have added significant weapons in the anti-discrimination and equality arsenal of the Greek legal system. They also confirmed the transformation of the socio-political climate and the commitment to a more substantial notion of gender equality that accepts the need for positive measures as means to this end. In this context, it is important to engage in a more detailed analysis of the afore-mentioned provisions and identify their position within the conceptual framework of positive action.

The aim of both pieces of legislation appears, *prima facie*, to be identical, namely to tackle the problem of under-representation of women in decision-making processes in the public sphere. A more thorough analysis, however, indicates that Law 2839/2000 is based on a straightforward rationale: The complete absence of women from decision-making bodies cannot be justified on account of their lesser merit in comparison with their male colleagues; hence, it must be attributed to gender discrimination. Introducing, then, a quota in favour of *fully qualified women*⁷⁶ seems a fair and modest way to cure an unjustified inequality in the relative situation of men and women in the employment field. In fact, this is a clear case of “soft positive action”, operating largely as a tie-break rule among equally qualified candidates.

The Legal State Council has recently confirmed this interpretation of the said provision, ruling that all-male boards are lawful, insofar as there are not any fully qualified women employees in the relevant department.⁷⁷ Obviously, the quota’s scope of application is narrower, in view of its proviso, than one might have hoped for. Nevertheless, it is crucial to note that positive measures of this type, apart from their undeniable practical significance, have the added advantage of being relatively uncontroversial. In this regard, they can play a cardinal role in the ideological transformation process towards a better understanding of the causal connection between

⁷⁶ Article 6 para 1 of Law 2839/2000 includes a proviso that restricts the application of the quota only to departments employing an adequate number of fully qualified women.

⁷⁷ Legal State Council opinion 259/2004. It is logical to assume that in a department where fully qualified women are less than 1/3 of the members of the departmental board the quota will still apply, although the set minimum percentage would not be observed. In other words, if in a department serve three fully qualified women and the board is comprised by nine (or more) members, then all three women will have to be appointed to the board in compliance with the quota.

gender discrimination and under-representation of women in the higher strata of the employment pyramid.

Article 75 para 2 of Law 2910/2001, on the other hand, regulates an issue that features among the hottest topics of political and legal debate throughout Europe, as well as in the United States. In the justification report of article 75 the Greek legislator invokes the notion of substantial equality and proclaims the necessity of positive measures for its accomplishment. Moreover, it is made clear once again that positive measures do not constitute derogations from substantial equal treatment but a necessary means for its effective application. The quota in favour of female candidates in the regional and municipal elections is also in compliance with the obligations of the State arising from international conventions and from EU Law.

The quota in question is much more rigid than the one introduced by Law 2839/2000, because in this case there is not (and cannot be) a proviso limiting the scope of application. In other words, the political parties are under an *absolute obligation* to abide by the quota, on pain of nullity of their electoral lists. The issue of individual qualifications is here irrelevant, since the quota, on the one hand, does not correspond to a tie-break type of rule and the concept of merit, on the other, cannot resonate with political participation in the same way as in the context of employment.

Since the late 1990's most Greek political parties had already incorporated some form of quota in favour of women in their internal selection procedures,⁷⁸ following the trend in most EU Member States.⁷⁹ As a result, the implementation of the new provision did not meet with considerable resistance within the parties. The use of quotas, however, as a mechanism to remedy the problem of under-representation in the political field brings forth unresolved tensions with the fundamental democratic principles in representative democracy. What follows is an attempt for a brief analysis of the most controversial theoretical issues.

⁷⁸ See M. Stratigaki, "Ποσοτώσεις: Ένα αναγκαίο κακό", Κυριακάτικη Αυγή [newspaper], 16 July 2000.

⁷⁹ In the year 2000, fifty three political parties in the EU had specific policies in order to ensure stronger participation of women in their decision-making bodies and thirty one among them implemented specific quotas ranging from 20% to 50% (source: www.db-decision.de).

IV. Political under-representation of women and their status as a disadvantaged social group: Are quotas the remedy?

Throughout the literature on positive action the terms disadvantaged (or under-privileged) groups and under-represented groups are used interchangeably, in accordance with what seems to fit best in each particular case. This is understandable considering the diversity of the aims that positive action entertains, which range from providing a specific remedy for invidious race or sex discrimination to the more general purpose of increasing participation of excluded or visibly under-represented groups in important public spheres⁸⁰. Disadvantage and under-representation, then, are understood as variations of the consequences than may befall upon social groups, which have been victims of direct or indirect discrimination. This interpretation, convenient though it may sound, fails to go past a superficial level of analysis and underestimates the complexity of the issues involved.

When positive measures taken in a specific area of law are unclear as to their rationale in targeting disadvantaged instead of simply under-represented groups or vice versa, the two obviously non-tautological terms seem to collapse into one another. The problems arising in this connection are not confined to academic concerns about theoretical clarity and consistency or linguistic accuracy. Apart from the obvious issue of accommodating competing claims from groups equally entitled in principle to special protection or preferential treatment, the lack of legal integrity in selecting beneficiaries imperils the legitimacy of positive action due to potential conflict with the underlying principle of equal treatment. What is more, when dealing with under-representation the theoretical validity of many traditional defence lines for positive action⁸¹ becomes questionable, since they appear to presuppose some sort of tangible social disadvantage resulting from past discrimination.

⁸⁰ See Fredman, *supra* n. 1, p.126.

⁸¹ Especially in relation to arguments invoking compensation as a legitimate aim of positive action.

By and large, social disadvantage denotes a state of affairs in which the group is unjustifiably⁸² deprived of rights or opportunities. To the extent that positive action is restricted within the normative framework of discrimination law, there should exist a causal link between the lower social position of the group and the discriminatory practices against it. In other words, entitlement to benefits is justified on the legal basis not only of disadvantage but also of its causes and, in fact, the latter consideration should be taken into account first in adjudication.⁸³ When it comes to under-representation, however, things become significantly more complex.

Tackling under-representation of women in the political sphere has been a primary concern in Europe for many years and is hailed nowadays as positive action's main goal.⁸⁴ The moral justification of such measures seems relatively straightforward, since social exclusion contradicts the fundamental precepts of the democratic polity. From a more pragmatic point of view, it is reasonable to assume that, statistically, talents and natural abilities are evenly spread across the populace⁸⁵, which renders the absence of certain social groups from employment areas irrational and counter-productive.

Confusion begins, however, when under-representation is used as a proxy to locate social disadvantage. Although the two are not mutually exclusive and, in practice, they often coincide or even causally relate to one another⁸⁶, under-representation does not necessarily entail disadvantage and vice versa. To mention but a simple example, the fact that there are more female than male nurses is neither a necessary nor a sufficient condition to characterise men as a disadvantaged group in this specific employment area.

⁸² Prisoners, for instance, constitute the paradigm case of justified disadvantaged or social exclusion. On the contrary, discrimination against former convicts may be a legal basis for entitlement to positive action, depending on whether they qualify as a social group.

⁸³ The analytical process, then, comprises three stages, answering to corresponding questions: Which clusters of individuals constitute social groups? Which social groups are or have been discriminated against? Which of the latter groups are disadvantaged suffer from detrimental effects of discrimination)?

⁸⁴ For a comparative review of the situation in a number of European jurisdictions see M Russell and C. O'Conneide, "Positive Action to Promote Women in Politics: Some European Comparisons", ICLQ, 52, 2003, pp. 587-614. Also see N. Lenoir, "The Representation of Women in Politics: From Quotas to Parity in Elections", ICLQ, 2001, 50, pp. 217-247, which focuses on the case of France.

⁸⁵ H. Hernes, *Welfare state and women power: Essays in state feminism*, Norwegian University Press, 1987; S. Helgesen, *The female advantage: Women's ways of leadership*, Doubleday, 1990.

⁸⁶ Groups that are excluded from decision-making processes or from certain areas of employment, either horizontally (total absence from certain areas) or vertically (absence from the higher ranks within a certain area), are inevitably more likely to suffer from relative disadvantages compared to the rest of the population, even if their exclusion per se is not regarded as such (which, of course, seems rather implausible).

The issue, then, is whether under-representation requires positive measures irrespective of its actual negative consequences for the affected group.

To come back to the view of under-representation as undemocratic and counter-productive, a further remark has to be made. The classical conception of positive action, contrary to the conclusion drawn above, seems to implicitly adopt an understanding of under-representation as amounting per se to social disadvantage. If the latter consists in the deprivation of rights and opportunities, under-representation falls comfortably within the scope of the definition. The argument, then, that rules out the absurd result of “disadvantaged male nurses” invokes that under-representation matters only insofar as it is not the outcome of free and genuine choice in a state of equal opportunities. In this respect, women’s under-representation in Parliament constitutes disadvantage if and only if there are not enough female candidates in party shortlists, in which case the voters are presented with an unlawfully limited set of options that restrains their freedom of choice⁸⁷.

Individual choice is apparently instrumental to the liberal notion of equal opportunities, which dominates the discourse in the European legal order, and the emphasis on it is far from surprising. What is quite surprising, on the contrary, is the self-defeating nature of the relevant arguments in the context of positive action. If our primary legal (and political) concern is to provide citizens with the widest possible set of options⁸⁸, result-oriented quotas that secure a number of Parliamentary seats – or any other elected public offices in decision making bodies – for a specific group inhibit one’s freedom to select one’s representatives. Favouring members of under-represented groups may be to some extent a “legitimate sacrifice” of freedom of choice and, for this reason, the latter cannot be plausibly used as a justification for positive measures.

⁸⁷ In the opposite case, when equal opportunities are ensured for all candidates and the widest possible set of options is provided to voters, a potentially unbalanced representation of social groups in Parliament reflects the democratically expressed choice of the electorate body and cannot be subject to further legal scrutiny.

⁸⁸ This is, by and large, the principle claim of liberal egalitarianism that appears to inspire much of the literature in defence of positive action. On the question how far does equality of opportunity require that the cultural values and commitments of different groups be taken into account when public policy on access to jobs, educational places and so forth is being decided see the debate between Brian Barry (*Culture and Equality: An Egalitarian Critique of Multiculturalism*, Polity Press, 2001) and his critics (Paul Kelly ed., *Multiculturalism Reconsidered: ‘Culture and Equality’ and its Critics*, Polity Press/Blackwell Publishers, 2002).

The matter is quite different, though, when quotas apply to the selection of candidates for elected offices. Clearly, all-male shortlists affect substantially the outcome of the process and predetermine an uneven landscape in terms of representation.⁸⁹ Especially in an electoral system as in Greece, where MPs are elected throughout the country at large in proportion to the total electoral strength of their party and not by their particular constituency,⁹⁰ the legitimacy of quotas in the party electoral lists cannot be questioned from a perspective of democracy, except in extreme circumstances.⁹¹

The classical conception of positive action assumes that a group's under-representation entails its lower position in the social hierarchy. But whether preferential treatment to any one member of the group is the answer depends on the underlying understanding of representation and its functioning. The distinction between social representation and opinion representation⁹² sets the tone of the discourse. The terms are self-explanatory and they have been omnipresent in the positive action debate, either explicitly or implicitly. Early feminists and civil rights activists dismissed the dilemma relatively easily by firmly supporting social representation as the only available way to end years of discrimination and oppression against women. Social exclusion was an apparent as well as appalling reality and positive action presented an excellent opportunity to deal with the situation effectively and immediately.

Historical experience, however, has been disillusionary, proving that the actual difference made by positive action programmes was nowhere near the initial ultra-optimistic predictions. More women (and minority members) were accepted in previously excluded areas and, if anything, this was a sign of progress. But the extent to which this change reflected to the group as a whole was significantly less than intended. The mere presence of women in positions of power does neither mean that they are on the same footing as men⁹³ nor that the former are willing and able to contribute towards enhancing

⁸⁹ N. Kaltsoya-Tournaviti, *Υποαντιπροσώπηση γυναικών και δημοκρατία* [*Under-representation of women and Democracy*], A. N. Sakkoulas, 1997, p. 73 [in Greek].

⁹⁰ Yotopoulos-Marangopoulos, *op. cit.*, p. 71.

⁹¹ One may wonder what would happen in the case of an all-male political party campaigning for the rights of divorced fathers.

⁹² J. Perkins and D. L. Fowlkes, "*Opinion Representation versus Social Representation; or Why Women Can't Run as Women and Win*", *The American Political Science Review*, vol. 74, no. 1, Mar. 1980.

⁹³ B. Bergmann, *In Defence of Affirmative Action*, Basic Books, 1996, pp. 42-43.

the overall social status of their group⁹⁴. By far the most eloquent example of the latter is the U.S. National Security Advisor, Condoleeza Rice, who recently backed the Bush administration in its campaign against preferential treatment for minorities in University admission policies⁹⁵, although she acknowledged that, in her opinion, race should be taken into account as a morally relevant factor⁹⁶. Her reluctance to voice a strong dissenting opinion is rather ironic, considering that she publicly admits being herself a beneficiary of positive action when admitted to Stanford University⁹⁷.

This is not to argue that one's rejection of positive action as ineffective or even unfair signifies automatically the betrayal of one's allegiance to the disadvantaged group one comes from. The concept of representation in itself, however, requires a minimum degree of solidarity between the individual "representative" and the rest of the group. A reflection of this should be the existence of shared fundamental beliefs and interests; otherwise positive measures against under-representation would be pointless. To put it differently, commitment to the conception of social representation is inadequate to account for quotas in candidate selection for public offices, because it allows only for a superficial diversity of gender, race or ethnicity and not for a substantial and meaningful diversity in opinions, interests and ideas.

Many opponents of positive action falsely suggest that under-representation is not an issue as long as democratic institutions ensure in principle that all voices are heard. The very fact that specific social or ethnic groups have always been disproportionately represented in or completely absent from the higher ranks of the socio-political hierarchy, far from being coincidental, echoes the fundamental institutional deficit that reproduces a subtle pattern of discrimination, defying equal opportunities and equal treatment. The legal enquiry undertaken here is whether quotas insensitive to the beneficiaries'

⁹⁴ Fredman (supra n. 1) contends that the position of many women in Britain declined during the premiership of Margaret Thatcher. The U.S. Secretary of State, Collin Powell, who incidentally has voiced publicly his disagreement with the White House's negative stance on positive action in University admission policies (see G. Younge, "Powell opposes Bush line on race" in *The Guardian*, 21/01/03), has been the target of similar criticism for his lack of support to the black community (see G. Younge, "*Different class*" in *The Guardian*, 23/11/02, where the singer and one-time civil rights activist Harry Belafonte is quoted to compare the Secretary of State to a "house slave, permitted to come into the house of the master").

⁹⁵ See G. Younge, "*America is a class act*" in *The Guardian*, 27/01/03.

⁹⁶ See G. Younge, "*A supreme showdown*" in *The Guardian*, 21/06/03.

⁹⁷ See T. Phillips, "*More than skin deep*" in *The Guardian*, 18/08/03.

connectedness with their group are effectively canceling under-representation. And since it seems impractical to seek a metric system of “group loyalty”, the solution might be found in rethinking how quotas resonate with the concept of representation in the democratic polity, with a view to making them more consistent with the theoretical premises of positive action, that encompass both disadvantage and under-representation, as well as more effective in achieving the expected results.

V. Conclusion.

During the last twenty years Greece has managed to improve noticeably its record on gender equality. From the first hesitant legal steps aimed at combating gender discrimination to the implementation of positive measures in favour of women in employment and in political representation, the Greek legal system has come a long way and is now oriented towards true and effective equality. In the general elections of 2004 a record number of 39 women were elected in Parliament, sending, thus, a powerful symbolic message that women are at last claiming their rightful place in the Greek polity of the 21st century.

Unfortunately, the atmosphere of optimism created by these developments is not entirely – if at all – justified. The Gender Gap Report, published by the World Economic Forum in May 2005, provides conclusive evidence that gender equality is a goal not yet attained. Greece has ranked as low as 50th among 58 countries in this study that measures the extent to which women have achieved full equality with men in five critical areas of the public and social life.⁹⁸ Quite unsurprisingly Greece falls far behind every other EU Member State – with the exception of Italy that takes the 45th place – performing particularly poorly on economic participation and on political empowerment.

These unflattering results must give cause for reflection and careful analysis, especially to the extent that they demonstrate that quotas in favour of women in party shortlists are insufficient to solve the problem of under-representation. Instead of congratulating ourselves on the success of having 39 female MPs, amounting to a meagre

⁹⁸ The five areas are: Economic participation, economic opportunity, political empowerment, educational attainment and health and well-being. For the full text of the Report see: www.weforum.org.

13% of the seats, we should rather try and answer why only 39 out of a total 309 female candidates were eventually elected. On an equally alarming note, women represent 65% of the Greek unemployment rate, according to the official data of the Greek Manpower Employment Organisation (OAEΔ) in November 2004, which partly explains the conclusions of the Gender Gap Report as to the low participation of women in the economic life.

Arguably, the most important and difficult issue is that of *equality-awareness* within the Greek society. The phenomenal persistence of institutional discrimination and the magnitude of its effects are often underestimated. It is truly surprising that, after a series of decisions by the SAC and after the Constitutional reform of article 116 para 2, restrictive quotas become once again an issue of debate. A few months ago several municipal authorities in Northern Greece refused to appoint successful female candidates to the municipal police above a maximum of 15% of the total appointees, disregarding the explanatory report of the competent Ministry of Internal Affairs that authentically interpreted the provision as being a *minimum quota*. The inexplicable insistence of the local authorities, which has led the case before the SAC (still pending), may be an exception to the general feeling in the Greek public opinion, but must surely awake us to the fact that the battle for full gender equality is still on.

Bibliographical References

Books:

Bacchi C. L., *The Politics of Affirmative Action: "Women", Equality and Category Politics*, Sage Publications, 1996.

Barker C. R., Kirk E. A. And Sah M. (eds), *Gender Perceptions and the Law*, Ashgate, c1998.

Barry B. *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Polity Press, 2001.

Bell M. et al. [ov.], *Equality, diversity and enlargement: Report on measures to combat discrimination in acceding and candidate countries*, Office for Official Publications of the European Community, 2003.

Bergmann B., *In Defence of Affirmative Action*, Basic Books, 1996.

Cahn S. (ed), *The Affirmative Action Debate*, Routledge, 2002.

Dworkin R., *Taking Rights Seriously*, Duckworth 1994 (c1977).

Dworkin R., *Sovereign Virtue: The Theory and Practice of Equality*, Harvard University Press, 2000.

Fredman S., *Discrimination Law*, Clarendon, 2002.

Gardiner F., *Sex Equality Policy in Western Europe*, Routledge, 1997.

Gilligan C., *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, 1982.

Goldman A. H., *Justice and Reverse Discrimination*, Princeton University Press, 1979.

Helgesen S., *The female advantage: Women's ways of leadership*, Doubleday, 1990.

Hernes H., *Welfare state and women power: Essays in state feminism*, Norwegian University Press, 1987.

Kay H. H., *Text, Cases and Materials on Sex-Based Discrimination*, St. Paul Minn. West. Pub. Co., 1988.

Kelly P. (ed.), *Multiculturalism Reconsidered: 'Culture and Equality' and its Critics*, Polity Press/Blackwell Publishers, 2002.

Koukoulis-Spiliotopoulos S., *From Formal to Substantive Equality*, A. N. Sakkoulas / Bruylant, 2001

Lacey N., *Unspeakable subjects: Feminist essays in legal and social theory*, Hart, 1998.

MacKinnon K., *Feminism Unmodified; Discourses on Life and Law*, Harvard University Press, 1987.

Orlans H. and O'Neil J. (eds), *Affirmative Action Revisited*, Sage, 1992.

Phillips A., *Democracy and Difference*, Pennsylvania State University Press, 1993.

Rawls J., *A Theory of Justice*, Oxford University Press, 1999 (revised edition)

Yotopoulos-Marangopoulos A., *Affirmative Action: Towards Effective Gender Equality*, Sakkoulas / Bruylant, 1998

Young I. M., *Justice and the Politics of Difference*, Princeton University Press, 1990.

Articles:

Abram M., "*Affirmative Action: Fair Shakers and Social Engineers*", 99 Harvard Law Review (1986).

Allen T.W., "*In Defence of Affirmative Action in Employing Policy*", Cultural Logic, Volume 1, n.2.

Barnard C. and Hepple B., "*Substantive Equality*", Cambridge Law Journal, 59(3), November 2000

Bender L., "*Lawyer's Primer on Feminist Theory and Tort*", 38 Journal of Legal Education, 3, 1988

Blackstone W., "*Reverse Discrimination and Compensatory Justice*", Social Theory and Practice, 3 (1975).

Cain P., "*Feminism and the Limits of Equality*", 24 Georgia Law Review 803 (1989-1990).

Cain P., "*Feminist Legal Scholarship*", 77 Iowa Law Review 19 (1991-1992).

Fredman S., "*Reversing Discrimination*", 113 L.Q.R. 575 (1997).

Cornell D., "*The Doubly-Prised World: Myth, Allegory and the Feminine*", 75 Cornell L.R. 644 (1990).

Lenoir N., “*The Representation of Women in Politics: From Quotas to Parity in Elections*”, ICLQ, 2001, 50, pp. 217-247.

Menkel-Meadow C., “*Feminist Legal Theory, Critical Legal Studies and Legal Education*’ or ‘*The Fem Critics Go to Law School*’”, 38 Journal of Legal Education 61 (1988).

Newton L. H., “*Reverse Discrimination as Unjustified*”, Ethics, Vol. 83, No. 4 (July 1973).

Perkins J. and Fowlkes D., “*Opinion Representation versus Social Representation; or Why Women Can’t Run as Women and Win*”, The American Political Science Review, Vol. 74, No. 1 (Mar. 1980).

Russell M. and O’Cinneide C., “*Positive Action to Promote Women in Politics: Some European Comparisons*”, ICLQ, 52, 2003, pp. 587-614.

West R., “*Jurisprudence and Gender*”, 55 U. Chi. L. Rev. 1 (1985).

Williams B., “*The idea of equality*”, in P. Laslett and W. G. Runciman (eds), *Philosophy, Politics and Society* (1965).

Books and articles in Greek:

Manessis, A. “*Η συνταγματική κατοχύρωση της ισότητας μεταξύ ανδρών και γυναικών ενώπιον του νόμου*”, Δίκαιο και Πολιτική, ειδικό τεύχος *Ισότητα των φύλων ενώπιον του νόμου*, 1983.

Yotopoulos-Marangopoulos A., “*Διπλή νίκη: Βουλή και Συμβούλιο της Επικρατείας αποδέχονται ουσιαστική ισότητα και θετικά μέτρα υπέρ των γυναικών*”, Αγώνας της Γυναίκας [Struggle for Women], 65.

Kaftani K., “*Οι Θετικές Δράσεις*”, Κριτική Επιθεώρηση [Critical Review], 1999, 247

Stratigaki M., “*Ποσοτώσεις: Ένα αναγκαίο κακό*”, Κυριακάτικη Αυγή [newspaper], 16 July 2000.

Kaltsoya-Tournaviti N., *Υποαντιπροσώπηση γυναικών και δημοκρατία* [Underrepresentation of women and Democracy], A. N. Sakkoulas, 1997.