

# Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts  
on Combating Sexual Orientation Discrimination*<sup>1</sup>

about the implementation up to April 2004 of  
*Directive 2000/78/EC establishing a general framework  
for equal treatment in employment and occupation*

## 9 Greece

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## 9.1 General legal situation

Sexual orientation as a concept is so far *not* recognised by Greek law. Following Greek society's traditional Judaeo-Christian morality, Greek law (legislation, jurisprudence, doctrine) implicitly but systematically recognises, accepts, protects and institutionalises human sexuality that is confined within the limits of the traditional married heterosexual couple. Other forms of sexuality are either:

- totally ignored by the law (female homosexuality, group sex, fetishism) or
- not approved but tolerated (adultery) or
- disapproved but punished only under specific circumstances (male homosexuality,<sup>3</sup> sexual relations among close relatives) or
- disapproved and generally punished (paedophilia, sexual relations without consent).

As far as sexual orientation is concerned, the law merely reflects the general position of the Greek society towards anything different from the 'norm': mistrust, marginalisation, intolerance, hostility. Greek homosexuals and in particular lesbians have been fighting for visibility, equal rights and respect with limited success. The absence of any anti-discrimination law (with the exception of gender, race or origin, see 9.1.7 below) and the general negative climate have obliged Greek citizens to deny and/or hide their true sexual identity since nothing positive could be gained by asserting it.

### 9.1.1 Constitutional protection against discrimination

Constitutional provisions against discrimination are found in the following articles<sup>4</sup>:

Art. 5(1): *All persons have the right to develop freely their personality and take part in the social, economic and political life of this Country insofar as they do not infringe upon others' rights and do not violate the Constitution or moral values.*<sup>5</sup>

Art. 5(2): *All persons found on Greek Territory enjoy absolute (total) protection of their life, honour and freedom irrespective of nationality, race, language and religious or political beliefs. Exceptions are permitted in cases provided by international law.*<sup>6</sup>

Article 5 is considered as the constitutional basis of all Greek anti-discrimination law. Unfortunately and despite the efforts of gay activists<sup>7</sup> 'sexual orientation' was not included in Art. 5(2), during the recent constitutional amendment of

<sup>3</sup> The now infamous (and unconstitutional) Art. 347 of the Penal Code (Law 1492/ 17 August 1950, in effect as of 1 January 1951) which punishes sexual relations between males (*contra natura* as they are called) when acted a) with abuse of any dependence, b) by an adult with a person younger than 17 years, c) for profit or as a profession.

<sup>4</sup> The 1975 Constitution (the first democratic constitution after the fall of the military dictatorship 1967-1974), was amended in 1986 and in 2001.

<sup>5</sup> Art. 5 par. 1 of the Constitution: *Καθένας έχει δικαίωμα να αναπτύσσει ελεύθερα την προσωπικότητά του και να συμμετέχει στην κοινωνική, οικονομική και πολιτική ζωή της Χώρας, εφόσον δεν προσβάλλει τα δικαιώματα των άλλων και δεν παραβιάζει το Σύνταγμα και τα χρηστά ήθη.*

<sup>6</sup> Art. 5 par 2. *Όσοι βρίσκονται στην Ελληνική Επικράτεια απολαμβάνουν την απόλυτη προστασία της ζωής, της τιμής και της ελευθερίας τους, χωρίς διάκριση εθνικότητας, φυλής, γλώσσας και θρησκευτικών ή πολιτικών πεποιθήσεων. Εξαιρέσεις επιτρέπονται στις περιπτώσεις που προβλέπει το διεθνές δίκαιο.*

<sup>7</sup> According to *amphi* magazine, spring 1996 issue.

2001 when Art. 5(2) remained unchanged.<sup>8</sup> Nevertheless, it has been argued that these general provisions (the combination of paragraphs 1 and 2) may be used in cases of sexual orientation discrimination.<sup>9</sup>

Particular provisions of equality in the field of employment are found in article 22 of the Constitution:

Art. 22 par. 1b *All employees, irrespective of gender or other distinctions, are entitled to equal remuneration for equally valued labour.*<sup>10</sup>

It is interesting to note that in this article the Constitution does not provide a list of prohibited grounds of discrimination in the way of art. 5 (2) with the exception of gender. This is probably due to the increased protection the Constitution grants to the field of employment.

Of great importance is also art. 25: *The State guarantees everyone's rights as an individual as well as a member of the society and the principle of justice and welfare. All public agencies have to ensure the unhindered and effective exercise of these rights. These rights are also valid in the private sector where applicable.*<sup>11</sup>

This last phrase of art. 25 is very important as it clearly states that private employers also must respect the constitutional rights of their employees (e.g. the rights of equality and non discrimination). It was added during the last constitutional amendment of 2001 and it should be used against the previously predominant doctrine that constitutional provisions protect citizens against unequal treatment or discrimination by state entities *only* and not by employers of the private sector.

### 9.1.2 General principles and concepts of equality

Constitutional provisions of equality are found in the following articles:

Art. 4 par. 1 *All Greeks are equal before the Law.*<sup>12</sup>

Art. 4 par. 2 *Greek men and women have equal rights and obligations.*<sup>13</sup>

In Greek constitutional law, especially the last thirty years the discussion of equality has been mainly political. The reason for this has been the period of political instability and severe oppression that followed the civil war of 1945-49 which resulted to a seven year long military dictatorship from 1967 till 1974. After the new Constitution of 1975, Greeks felt substantially equal to one another. Women in particular, oppressed and denied basic rights over a long period, had to wait till 1982-83 for the revision of family law to enjoy real equality in the eyes of the law.<sup>14</sup>

<sup>8</sup> Constitutional amendments require a space of at least ten years between each other and a strong majority in the Parliament.

<sup>9</sup> Dokoumetzidis, 1988, 359.

<sup>10</sup> Art. 22 par. 1b of the Constitution: *'Όλοι οι εργαζόμενοι, ανεξάρτητα από το φύλο ή άλλη διάκριση, έχουν δικαίωμα ίσης αμοιβής για παρεχόμενη εργασία ίσης αξίας'.*

<sup>11</sup> Art. 25 par. 1 of the Constitution: *'Τα δικαιώματα του ανθρώπου ως ατόμου και ως μέλους του κοινωνικού συνόλου και η αρχή του κοινωνικού κράτους δικαίου τελούν υπό την εγγύηση του Κράτους. Όλα τα κρατικά όργανα υποχρεούνται να διασφαλίζουν την ανεμπόδιστη και αποτελεσματική άσκηση τους. Τα δικαιώματα αυτά ισχύουν και στις σχέσεις μεταξύ ιδιωτών στις οποίες προσιδιάζουν'.*

<sup>12</sup> Art. 4 par. 1 of the Constitution: *'Οι Έλληνες είναι ίσοι ενώπιον του νόμου'.*

<sup>13</sup> Art. 4 par. 2 of the Constitution: *'Οι Έλληνες και οι Ελληνίδες έχουν ίσα δικαιώματα και υποχρεώσεις'.*

<sup>14</sup> Avdi Kalkani, 1988, 24.

Traditionally, the application of the principle of equality has been: equal rights in similar situations. Equality has been considered a political necessity, a rule of law which obliges the state to ensure equality of opportunities in the enjoyment of constitutional rights.<sup>15</sup> There has therefore traditionally existed a close link between equality and democracy. The more recent tendency however is the justification of cases of inequality which must not only be accepted from the legal point of view but from the social one as well (e.g. positive action, favourable provisions for disabled persons etc.).

### 9.1.3 Division of legislative powers relating to discrimination in employment

Greece is a parliamentary republic. Statutes enacted by Parliament, Presidential Decrees or any other acts of government apply nationally and may cover all fields of State action, because there is no division of competencies with regional or local bodies. According to the relevant constitutional provisions, the main law making bodies in the Greek legal order are: the Parliament, the President of the Republic acting on a governmental proposal, the Government, the Social Partners (in employment matters), and the so called '*Independent Authorities*' (in specific matters).

The right to introduce Bills belongs to the Parliament and the Government.<sup>16</sup>

Every Bill<sup>17</sup> accompanied by an *explanatory report*,<sup>18</sup> is introduced for debate and if accepted, the President of the Republic shall *promulgate* and *publish* it as a Statute (Law)<sup>19</sup> and, subsequently, issue the Decrees necessary for its execution.<sup>20</sup> When specially delegated by a Statute and upon the motion of the competent Minister,<sup>21</sup> the President can issue *General Regulatory Decrees*.<sup>22</sup> These decrees (*Presidential Decrees*,<sup>23</sup> as they are termed in practice) have the power of a Statute.<sup>24</sup> The Government uses this *delegated presidential competence* quite often, as it is a speedier and simpler way to introduce legislation compared to parliamentary procedure which involves complex procedures and debates.<sup>25</sup>

All Ministers have the right to issue regulatory acts (usually termed 'Ministerial Decisions'<sup>26</sup>) by virtue of a statutory delegation in cases concerning the regulation of specific matters or matters of local interest or of a technical and detailed nature.<sup>27</sup> Ministers (including the Employment and Social Affairs Minister) make wide use of this right.

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<sup>15</sup> Kassimatis, 1980, 125.

<sup>16</sup> Article 73.1 of the Constitution. Individual Members of the Parliament have the right to introduce a Bill, but this only rarely occurs.

<sup>17</sup> *Νομοσχέδιο*.

<sup>18</sup> Article 74 of the Constitution: '*Εισηγητική Έκθεση*'.

<sup>19</sup> Statutes (*Νόμοι*) are then published in the Official Gazette.

<sup>20</sup> Article 42 of the Constitution.

<sup>21</sup> Article 35 of the Constitution: 'No Act of the President shall be valid nor be executed unless countersigned by the competent Minister'.

<sup>22</sup> Article 43.2 of the Constitution: '*Κανονιστικά Διατάγματα*'.

<sup>23</sup> *Προεδρικά Διατάγματα*.

<sup>24</sup> All decrees of a regulatory nature must be, prior to their entry into force, elaborated by the Council of the State, the Supreme Administrative Court (Constitution, article 95.1.d).

<sup>25</sup> International Conventions, require ratification by a statutory act of Parliament, as foreseen in Article 28.1 of the Constitution.

<sup>26</sup> *Υπουργικές Αποφάσεις*.

<sup>27</sup> Article 43.2 of the Constitution.

A Presidential Decree is indeed currently being prepared by the Government to implement the Directive.<sup>28</sup>

#### 9.1.4 *Basic structure of employment law*

##### *i. General distinctions*

Modern employment law in Greece fundamentally protects employees' personality and dignity<sup>29</sup> creating an ever increasing social balance among the various social partners. In recent years it is being brought in accordance with the developments of the international realm and in particular with European Community law.

A distinction exists between employees of the public and the private sectors. Employment relations of civil servants, employees of local authorities (municipalities) and state-owned enterprises are regulated by the public servants' law.<sup>30</sup> Labour law to the contrary regulates employment relations in the private sector. Further exceptions to the application of labour law traditionally include agriculture and shipping which follow special employment regulations.

##### *ii. Sources*

There are three categories of sources in employment law.

To the first category belong: constitutional provisions, international agreements, statutes (parts of the Civil Code, special labour laws) and custom.

To the second category belong all independent sources: trade union charters, collective agreements, arbitration court decisions, workplace regulations.

To the third category: jurisprudence and doctrine.

#### 9.1.5 *Provisions on sexual orientation discrimination in employment or occupation*

No such provisions exist in current legislation.

#### 9.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

Since there is no specific sexual orientation anti-discrimination legislation (or case law) in the Greek legal system there are no such precedents to analyse. I have not found any relevant case law even under other general rules. I would like though to add two cases which came to my knowledge recently and which can shed some light on the situation.<sup>31</sup>

In 1997 V. N. was working as a chef at a restaurant on Santorini island. When asked by his boss whether he was a homosexual, he admitted to being so and was dismissed on the spot. He applied to the local Labour Inspectorate asking whether his dismissal had been legal and was told that as a homosexual he was a health risk so his boss had the right to fire him.

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<sup>28</sup> In application (mainly) of Statutes 1338/1983 on the application of Community Law, 1558/1985 on Government etc., the Ministerial Decision 97506/23.10.2002 for the implementation of the Directive.

<sup>29</sup> Karakatsanis, 1984, 27.

<sup>30</sup> *Δημοσιονομικό Δίκαιο*.

<sup>31</sup> Published in the online edition of 'amphi' magazine, spring 2003.

More recently, M. K. was working at a public school as a music teacher. He was arrested in a gay bar and charged (without any proof) with prostitution! He was illegally detained for five days and his name was published in (almost all) Athens newspapers. Due to the prosecution he was asked by the school to resign and under psychological pressure he accepted to do so. Now he is trying to find different employment.

#### 9.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*

Apart from the above mentioned (9.1.1) constitutional provisions of Art. 22(1b), there are also certain clauses that could be invoked by employees seeking equal treatment and non-discrimination in their employment life<sup>32</sup> in the General Principles Chapters of the Civil Code.<sup>33</sup> Thus, articles 281 and 288 refer to the good faith and to business practices from which derives the principle of Equal Treatment of employees.<sup>34</sup> This principle has helped the courts to construct a wide protection network against discriminating practises by the employer, especially where voluntary benefits are concerned.

Gender discrimination in employment was first dealt with by Law 1414/84, which aimed to satisfy the constitutional provisions of equality between Greek men and women [Art. 4(2) and Art. 22(1b)], and to implement Directive 76/207EEC on equal treatment of men and women in employment and professional training. This law has been only partially effective (its interpretation by the Greek Courts has not been uniform) and was often attacked by feminist writers<sup>35</sup> for the difficulties in its application. Its main shortcoming was that it covered only private law workers and self-employed workers. Workers who offer independent services were included later (Law 1835/89 Art. 7).

Several other laws that followed have supplemented the need for equal treatment of the sexes<sup>36</sup>:

- Law 1483/84 introduced facilities and benefits to parents of both sexes but was equally attacked for the multitude of conditions it set (far too demanding on the parents).
- Law 2434/96 facilitated the access of women to employment and professional training.
- Law 2470/1997 promoted equal pay in the public sector.
- Presidential decree 176/1997 which enacted additional measures for the protection of maternity.
- Law 2639/1998 corrected injustices occurring in the 'habitual' employment of women and amended above mentioned Law 1483/1984.
- Article 116, paragraph 20 of the Constitutional Amendment of 18 April 2001, prohibits any discrimination between the sexes and introduces the concept of positive action.

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<sup>32</sup> *Areios Pagos* (Supreme Court) 446/1958, 25/1962, 572/1965, 455/1989, 488/1988.

<sup>33</sup> Despite the abundance of specific labour laws, the Civil Code is very often invoked, particularly in General Principles questions.

<sup>34</sup> Lanaras, 2003, 151.

<sup>35</sup> Avdi-Kalkani, 1988, 35-41; Agallopoulou, 1992, 37.

<sup>36</sup> National Report, 2000, 25.

- Presidential decree 87/2002 ensures equal treatment between men and women in social security systems.
- Presidential decree 105/2003 introduced the shift in the burden of proof in cases of gender discrimination.

#### 9.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

No such provisions exist in current legislation.

#### 9.1.9 *Other aspects of the legal background*

There are criminal law provisions outlawing discrimination on grounds of racial or ethnic origin or religious beliefs.<sup>37</sup> Even though this law exists since 1979, it has very rarely been used. Just recently, the Helsinki Monitor<sup>38</sup> has sought its application in cases of property owners refusing to rent housing to foreigners.

## 9.2 **The prohibition of discrimination required by the Directive**

### 9.2.1 *Instrument(s) used to implement the Directive*

Greece has already made two efforts to implement Directive 2000/78/EC. In the summer of 2003, the Directive was studied by the Law Preparatory Committee of the – then called – Labour Ministry. This Committee had prepared a Draft of a proposed *Presidential Decree* which would have implemented the Directive<sup>39</sup>. Its contents were almost a word by word translation of the Directive in most articles so the implementation should have been satisfactory if not complete. That Draft has been abandoned and a new one was prepared in the form of a proposed *Statute* which was presented to the public on 6 November 2003 by the – then – Ministers of Labour and Justice jointly. That new draft would have implemented both Directives 2000/43 and 2000/78. Unfortunately, it was also ill-fated since it was presented to the Parliament in January 2004, just a few weeks before the national elections. The Parliament was dissolved before the proposed Statute was discussed. The new government which emerged after the elections was formed by the centrist-right 'New Democracy' party. The Ministry of Employment and Social Solidarity (as it has been renamed by the new government) is reconsidering the whole implementation issue without any official announcement to this date (June 2004).

However, on 13 May 2004, PASOK, the former governing party, introduced a draft of a statute to the Greek Parliament, concerning the 'Application of the Principle of equal treatment, regardless of racial or ethnic descent, religious or other beliefs, disability, age or sexual orientation'. This draft is a revival of the one presented last November, by the then PASOK government in order to implement Directives 2000/43/EC and 2000/78/EC. *The commentary which follows is based on the draft Statute of November 2003 and the May 2004 parliamentary proposal (hereafter called 'draft' since the two documents have*

<sup>37</sup> Law 927/1979 as revised by Law 1419/1984.

<sup>38</sup> An independent Human Rights watchdog.

<sup>39</sup> See 9.1.3. and footnote 22.

very few differences) with a few comments on the earlier draft of the proposed Presidential Decree of July 2003 (hereafter called 'earlier draft').

### 9.2.2 Concept of sexual orientation (art. 1 Directive)

The draft follows the wording of the Directive closely. In art. 1 it is stated: '*The purpose of this Statute is the establishment of a framework to fight discrimination on the grounds of racial or ethnic descent but also to fight discrimination based on religious or other beliefs, disability, age or sexual orientation in the fields of occupation and employment, in order to effectively achieve the principle of equal treatment.*' Actually the purpose of the draft is not 'to establish a framework', that is the purpose of the Directive, but to implement the Directives.

Sexual orientation would have been mentioned for the very first time in a Greek legal text, but, alas, it was not defined. The words used in the draft were 'γενετήσιος προσανατολισμός', which was an exact translation of the English words, but included no legal definition.

A crucial issue is the terminology used in the Greek translation of the Directive, in particular the word used to translate the term 'sexual' which is also used in the draft as well. The official Greek text of the Directive uses the word γενετήσιος which is scholarly and is used in legal texts almost uniformly, but in my opinion not appropriate, certainly not in this particular case.<sup>40</sup> This word is widely associated with *reproduction* and thus restricts the much more general aspect of the word 'sexual' of the Directive in an anachronistic manner. No one could seriously claim today that human sexual relations are restricted to those relating to reproduction. This is certainly not the aim of the Directive. The term γενετήσιος simply follows the hypocritical stance of the Greek law makers applied in the penal code.<sup>41</sup> A definitely more suitable term would be the word σεξουαλικός which has been established by the modern social movement (and doctrine) and despite its foreign (Latin) origin, it is widely used today to convey both the sensual character of human contact and its sentimental meaning.

At this stage, it appears unclear how 'sexual orientation' will be interpreted by Greek courts, since there is no case law or even much doctrine on the matter.

### 9.2.3 Direct discrimination (art. 2(2)(a) Directive)

The draft, in art. 7(1)(a), following the text of the Directive, states that '*direct discrimination occurs when, on any of these grounds, a person is in an unlawful or unjustified manner, according to the present, treated less favourably than another person is, has been or would be treated in a comparable situation*'.

The words 'in an unlawful or unjustified manner' are not only superfluous but potentially dangerous, and in direct disagreement with the Directive. Direct discrimination is *always* prohibited and *cannot* be lawful or justified. These words should be deleted.

### 9.2.4 Indirect discrimination (art. 2(2)(b) Directive)

The draft, in art. 7(1)(b), following the text of the Directive, states that '*indirect discrimination occurs when an apparently neutral provision, criterion or practice*

<sup>40</sup> See also similar opinion in Dokoumetzidis, 1988, 354.

<sup>41</sup> Chapter 19, 'Crimes against sexual liberty etc.' as they were named after the 1984 amendment.



*would cause unfavourable treatment of persons having particular religious or other beliefs, a particular disability, a particular age or a particular sexual orientation compared with other persons. Such a provision, criterion or practice does not constitute illegitimate indirect discrimination when it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...’.*

#### 9.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*

The draft, in art. 2(2), following the text of the Directive, states that: *‘Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to one of the grounds of art. 1 with as its purpose or effect the violation of the dignity of a person and the creation of an intimidating, hostile, degrading, humiliating or offensive environment.’* Unfortunately, as explained in 9.3.8 below, there is no other Greek legal text referring to the concept of harassment and no doctrine on the matter. The draft adds: In defining the harassment, the ‘usual business practices’ must be considered. This phrase is also dangerous and contradictory to the spirit of the Directive, and should be deleted.

#### 9.2.6 *Instruction to discriminate (art. 2(4) Directive)*

The draft, in art. 2(3), following the text of the Directive, states that *‘an instruction to discriminate against any person related to any of the grounds of article 1 is deemed to be a form of discrimination within the meaning of paragraph 1.’*

#### 9.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

The draft, in art. 8(1)(a), (b), (c) and (d) and following the text of the Directive, states that: *‘..this statute is applied to all persons of the public and private sector in relation to:*

- (a) conditions for access to employment, to self employment and occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions;*
- (b) access to all types and all levels of vocational guidance, vocational training, retraining including practical work experience;*
- (c) working and employment conditions, including dismissals and remuneration;*
- (d) membership of and involvement in an organisation of workers or employers or any professional organisation, including the benefits deriving from participating in them’.*

Article 8 adds some exceptions in its paragraph 3, which reads: *‘3. The principle of equal treatment regardless of religious or other beliefs, disability, age or sexual orientation does not apply to public systems (or those assimilated to them) including public systems of social security and welfare.’* While the exclusion of the grounds of disability and age is understandable and justified, the exclusion of religious or other beliefs, and sexual orientation is not understandable and should be omitted.

9.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

The draft, in art. 8(1), following the text of the Directive, states that: *'..this statute is applied to all persons of the public and private sector..'* clearly including every natural or legal person involved in employment or occupation in Greece.

The draft seems to incorporate the exceptions allowed by art. 3(2) of the Directive, i.e. differences of treatment based on nationality, provisions and conditions relating to the entry and residence of third country nationals and stateless persons etc.

**9.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?**

At this stage the information in the following sub-paragraphs will have to remain very general.

9.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

These forms of discrimination seem to be falling within the scope of art. 1 and 2 of the draft.

9.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

These forms of discrimination seem to be falling within the scope of art. 1 and 2 of the draft.

9.3.3 *Discrimination between same-sex partners and different-sex partners*

It is unclear whether discrimination between unmarried different-sex partners and unmarried same-sex partners in employment would be considered unlawful.

There is no official recognition of same-sex partners in the Greek law. Yet, discrimination of same-sex partners legally established in a country where such partnerships are recognised could fall within the scope of art. 1 and 2 of the draft.

9.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual individuals, events or organisations*

These forms of discrimination seem to be falling within the scope of art. 1 and 2 of the draft.

9.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

If these groups etc. are legitimately related to the workplace, discrimination against them would seem to fall within the scope of art. 1 and 2 of the draft.

9.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation*

This form of discrimination would have been unlawful even before the Directive. Such personal information is considered as 'sensitive personal data' under art. 2(b) of the Data Protection law.<sup>42</sup> The practical meaning of this is that it is unlawful to ask such a question so a refusal to answer or an inaccurate answer should have no consequences.

9.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

Such information as a criminal record is considered as 'sensitive personal data' under art. 2(b) of the Data Protection law<sup>43</sup> so it would be very difficult to be known. Furthermore, the only 'homosexual' offence without a heterosexual equivalent would be art. 347 of the Penal Code mentioned in footnote 2 above which by now has very limited use. Still, no such discrimination would be justified after the implementation of the Directive.

9.3.8 *Harassment*

The concept of harassment at the workplace is still new for the Greek legal order. There is no specific law to deal with harassment so victims usually seek protection through an applicable provision of the Penal Code, usually indecent exposure, sexual assault or something similar. The defendants invariably reply by a libel suit and/or criminal charges. Even though harassment has been an issue forwarded by the feminist movement for quite some time, the macho representatives of labour unions do nothing to promote the urgent need for legislation. The idea of 'mobbing' as an illegitimate practice is almost entirely unknown. Most people believe that minorities, whether political, religious, sexual or other, are righteously 'mobbed'!

## 9.4 **Exceptions to the prohibition of discrimination**

9.4.1 *Objectively justified indirect distinctions (art. 2(2)(b)(I) Directive)*

The draft, in art. 9(1)(b), following the text of the Directive, states that '*[s]uch a provision, criterion or practice does not constitute an illegitimate indirect discrimination when it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*'. And goes further by adding: '*or when it regards persons with disability and measures taken in their favour according to art. 10 of the present and art. 21(6) of the Constitution*'.<sup>44</sup>

9.4.2 *Measures necessary for public security, for the protections of rights of others, etc. (art. 2(5) Directive)*

The draft, in art. 9(2), following the text of the Directive, states that: '*the present statute does not affect the measures necessary in a democratic society for*

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<sup>42</sup> Law 2472/1997.

<sup>43</sup> Law 2472/1997.

<sup>44</sup> Positive action measures for disabled persons.

*public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the rights and freedoms of others.'*

#### 9.4.3 Social security and similar payments (art. 3(3) Directive)

The exception allowed by the Directive [art. 3(3)], regarding payments made by state schemes is also included in the Draft in art. 8(3).

#### 9.4.4 Occupational requirements (art. 4(1) Directive)

Following the art. 4 of the Directive, the Draft, in art. 9 states that: *'a difference in treatment based on a characteristic related to one of the grounds referred to in art. 1 does not constitute discrimination where mutatis mutandis and by reason of the nature of the particular professional activities or of the context in which they are carried out, this ground is connected to a characteristic constituting a genuine and determining occupational requirement.'*

#### 9.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

Following the art. 4(2) of the Directive, the Draft, in art. 9(2) states that: *'professional activities within churches and other public or private organisations the ethos of which is based on religion or other beliefs of a person, the present Presidential Decree does not affect legislation in as well as practices due to which, a difference in treatment based on religious or other beliefs of a person, does not constitute discrimination where, by reason of the nature of these activities or the context in which they are carried out, these beliefs constitute a genuine, legitimate and justified occupational requirement, having regard to the mentioned ethos. The right of churches or other public or private organisations, the ethos of which is based on religion or other beliefs, to require individuals working for them to act in good faith and with loyalty to their ethos, acting in conformity to the Constitution and the present or other laws, is not prejudiced.'*

#### 9.4.6 Positive action (art. 7(1) Directive)

Following art. 7(1) of the Directive, the Draft, in art. 12(1) titled 'Positive action and special measures, states that: *'the adoption or maintenance of special measures to prevent or compensate for disadvantages because of religious or other beliefs, disability, age or sexual orientation does not constitute discrimination.'*

## 9.5 Remedies and enforcement

### 9.5.1 Basic structure of enforcement of employment law

According to the Constitution the law is enforced by the Courts<sup>45</sup> and no person against his will shall be deprived of the judge assigned to one.<sup>46</sup> As a matter of

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<sup>45</sup> Article 87.1 of the Constitution: 'Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence'.

<sup>46</sup> Article 8.1 of the Constitution.

principle therefore, adjudication bodies other than Courts, may not be established.

#### 9.5.2 *Specific and/or general enforcement bodies*

In respect of employment issues, apart from the Courts, four Public (administrative) Authorities play a considerable role in the law enforcement environment.

The Labour Inspectorate<sup>47</sup> (a central monitoring service of the Ministry of Employment) performs inspection and checks at workplaces to ensure the proper implementation of legislation, with powers to seek criminal proceedings or impose fines against employers. However, its resources are very limited and its staff insufficient.

The Secretariat of Equality of the sexes,<sup>48</sup> operating under the direct control of the Prime Minister, deals with gender discrimination issues.

The Ombudsperson,<sup>49</sup> which is an Independent Authority, operating under Article 103 of the Constitution and Law 2477/1997. This recent service has proved very efficient in dealing with public authorities and could be a valuable tool in cases of discrimination.

The Independent Authority for the Protection of Personal Data (*Αρχή Προστασίας Δεδομένων Προσωπικού Χαρακτήρα*) has considerable powers regarding revision and implementation of the legal regulations concerning protection of individuals against revealing or illegally processing personal data.<sup>50</sup>

#### 9.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

The previous draft, in its art. 9(1) stated:

*'(a) Non compliance with the principle of equal treatment constitutes an offence against one's personality. The wronged party has the right to demand the removal of the offence, its omission in the future, the restitution of any financial damage and the compensation of any moral damage according to the relative general and procedural provisions.'*

The protection given through the above mentioned procedure may be thorough but can be notoriously time consuming. It can take several years (and a considerable amount of legal fees and expenses) to reach any definite result, which will certainly discourage several victims from seeking protection. In my opinion, the special procedure for labour litigation<sup>51</sup> should have been chosen in this case.

This clause is totally absent in the draft of 6 November 2003, which in its art. 13(1) foresees only

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<sup>47</sup> *Επιθεώρηση Εργασίας.*

<sup>48</sup> *Γραμματεία Ισότητας* established by Law. 1558/85.

<sup>49</sup> *Συνήγορος του Πολίτη.*

<sup>50</sup> Article 19 of Law 2472/1997.

<sup>51</sup> Articles 663-676 of Civil Procedure Code.

*'...when an offence occurs within the realm of an administrative action, the wronged party may seek protection according to art. 24-27 of the Administrative Procedure Code.'*<sup>52</sup>

This procedure is faster and more effective but I would like to believe that the administration will not violate the Directive often enough to require the application of this protection.

*'(2) The termination of the relationship in which the discrimination has occurred does not prevent the above mentioned protection.'*

This clause is in accordance with the requirement of the Directive.

#### 9.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

Following art. 17 of the Directive, the previous draft, in art. 12 titled 'Penal Sanctions' set a penalty of up to one year's imprisonment plus a fine (without any indication of the sum) for any person acting as *employer* who refuses employment or in any other way violates the principle of equal treatment in violation of the Presidential Decree during the function, evolution or termination of an employment relation.

However the draft of 6 November 2003 foresees only administrative sanctions in art. 17 which cannot be considered dissuasive in accordance with art. 17 of the Directive.

#### 9.5.5 *Natural and legal persons to whom sanctions may be applied*

As discussed in 9.5.4 above, the Draft sets sanctions for employers only. In the case of legal persons, their representatives will be liable for prosecution.

#### 9.5.6 *Awareness among law enforcers of sexual orientation issues*

As explained in the introduction (9.1) the notion of sexual orientation is still a new idea for the Greek legal order. It will require considerable time and effort till one can claim that the awareness of sexual orientation issues among law enforcers is of a satisfactory level.

#### 9.5.7 *Standing for interest groups (art. 9(2) Directive)*

Following art. 9(2) of the Directive, the Draft, in art. 13(3) states: *'Legal persons which include in their charters the protection of the principle of equal treatment regardless of religious or other beliefs, disability, age or sexual orientation in the domain of occupation and employment, may represent the wronged party before any court or administrative authority provided a prior power of attorney or a written consent with proof of signature is given.'* It remains unclear whether the protection of the principle of equal treatment must be expressly included in the above mentioned Charters or may be deduced from other aims. Interest groups should also have the right to *initiate* a legal procedure, even without the written consent of the wronged party, which the draft fails to provide. In order to achieve this, further amendments of the Code of Civil Procedure, the Code of Administrative Procedure, and the Presidential decree 18/1989 of the Council of State, are in order.

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<sup>52</sup> Law 2690/1999.

### 9.5.8 *Burden of proof of discrimination (art. 10 Directive)*

Following art. 10 of the Directive, the Draft in art. 14 states: *1. When wronged parties claim that the principle of equal treatment has not been applied to them and prove before a court or a competent administrative authority facts from which it may be presumed that there has been a direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle. i. The regulation of the previous paragraph does not apply to criminal procedure. ii The regulation of par. 1 of the present [article] applies also in the case of par. 2 of the previous article*<sup>53</sup>.

In this very important matter the implementation of the Directive is insufficient as the Draft requires wronged parties to *prove* facts where the Directive requires them to *establish* them.<sup>54</sup>

In addition to this, I consider it my duty to refer to a similar recent case of incorrect transposition, highlighted by the Council of the State, Greece's Supreme administrative court, when judging the implementation of Directive 1997/80/EC on the burden of proof in cases of sex discrimination.<sup>55</sup> In that case the court had ruled that the proposed Bill did not implement the Directive correctly but merely repeated the text of the Directive which would not be sufficient for the transposition in the Greek legal order. The court went on to cite which provisions had to be stated in detail and which phrases were ambiguous and how the court believed they should be remedied. Nevertheless, Presidential Decree 105/2003, which implemented Directive 1997/80/EC, merely reproduced the text of the Directive disregarding the Council of the State's suggestions. Since Directive 2000/78/EC will be implemented in the same way as Directive 1997/80, the same criticism could be extended to the draft Presidential Decree.

### 9.5.9 *Burden of proof of sexual orientation*

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### 9.5.10 *Victimisation (art. 11 Directive)*

Art. 15 of the Draft, titled 'Protection against counter measures' states that: *'the protection provided by art. 13 includes dismissal or other adverse treatment against a person when manifested as a counter measure to a complaint or request for legal protection aimed at enforcing compliance with the principle of equal treatment.'* It remains to be seen to what extent the courts will apply the protection established by this article, whether that is they will restrict it to the direct 'victims' of a discriminatory act or will extend it to other persons (for instance witnesses).

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<sup>53</sup> On the ability of legal persons to represent wronged parties.

<sup>54</sup> The Greek text of the Directive uses the verb *προσάγω* (adduce, bring forward) which is certainly different from 'prove'.

<sup>55</sup> Minutes 348/2002, Journal of Labour Law, 2002, 1131.

## 9.6 Reform of existing discriminatory laws and provisions

### 9.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*

Since 'sexual orientation' has not been mentioned in Greek law before, there are no directly discriminatory laws to talk about in the Labour law field. In compliance with art. 16 of Directive 2000/78/EC the draft implementation bill foresaw the abolishment of any law, regulation and administrative provision contrary to the principle of equal treatment and declared null and void any similar provision in contracts or collective agreements, internal rules of any businesses, charters of profit or non profit organisations, independent professional and labour unions of workers and employers.

### 9.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*

See para. 9.6.1.

### 9.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*

In article 26(2), the draft foresees that rules contrary to the principle of equal treatment as it is defined in the present Statute, are abolished and administrative provisions are nullified.

### 9.6.4 *Discriminatory laws and provisions still in force*

This is an ongoing process so one can only hope that the infamous art. 347 of the Penal Code will soon be reformed as well (see supra footnote 2). Several politicians, civil rights and glbt activists and anti-discrimination bodies have been fighting for the abolition of this article for years.

## 9.7 Concluding remarks

The implementation of Directive 2000/78 is currently under revision by the Ministry of Employment and Social Solidarity.

The major shortcomings of the previous two drafts were related to:

- the reversal of the burden of proof (par. 9.5.8);
- the civil procedure selected as a means of protection (par. 9.5.3);
- the terminology used for 'sexual orientation' (par. 9.2.2);
- the absence of really 'dissuasive' sanctions for any infringement of the principle of equal treatment.

Minor shortcomings were:

- the little or no contact with related NGOs during the law making procedure;
- the limited role of NGOs in judicial proceedings.



### List of literature used in footnotes

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