



Preventing gender discrimination in labor market

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Abstract

Gender discrimination in labor relations is a primary issue in Republic of Armenia, and it is expressed in our real life practice. This kind of discrimination takes place both during the process of applying for a job and working period. Some NGOs in Armenia have mission to prevent gender discrimination by suggesting implementing mechanisms or legislative solutions and presenting it to the Government. The Armenian State Labor Inspectorate, as a state body, is authorized to oversee and audit the procedures related to employer-employee relationship. However violations of rights of the parties take place in these relations. Despite the efforts of those NGOs and Armenian State Labor Inspectorate the problem remains one of the main issues in labor market of our country.

Introduction

Equality of men and women in labor relations is a universal concept and it has taken its unique place both in international legal framework and in many countries' constitutions and other laws. Gender equality is a fundamental human right. At the same time it is a reasonable requirement in terms of economics: Equality allows using the country's human capital more efficiently, and it benefits not just women or men, but also the whole society. The International Labor Organization (ILO) has recognized the importance of equality in labor relations and it mentions that gender equality is not only an end in itself but also a key means of achieving wider development goals that include:

- poverty reduction;
- increased productivity and aggregate output;
- reduced fertility, infant mortality, and child labor; and
- greater decision making and bargaining power for women within households.¹

When speaking about gender discrimination it is better first to define gender equality which can be found in the European Commission's glossary on equality between women and men. Gender equality defines that all human beings are free to develop their personal abilities and make choices without limitations set by strict gender roles; that the different behavior, aspirations and needs of women and men are equally considered, valued and favored. Gender equality includes also equal treatment and opportunities for the representatives of both genders, which means absence of barriers to economic, political and social participation on grounds of sex and absence of discrimination on grounds of sex, either directly or indirectly.²

But it does not mean that all women and men employees should be treated the same. It is logical that men and women of different ages, backgrounds, areas of specialization, etc. should be treated

¹ Guidelines on gender in employment policies, information resource book, International Labor Office, Geneva, 2009

² European Commission, DG EMPL, One hundred words for equality: A glossary of terms on equality between women and men, 1998

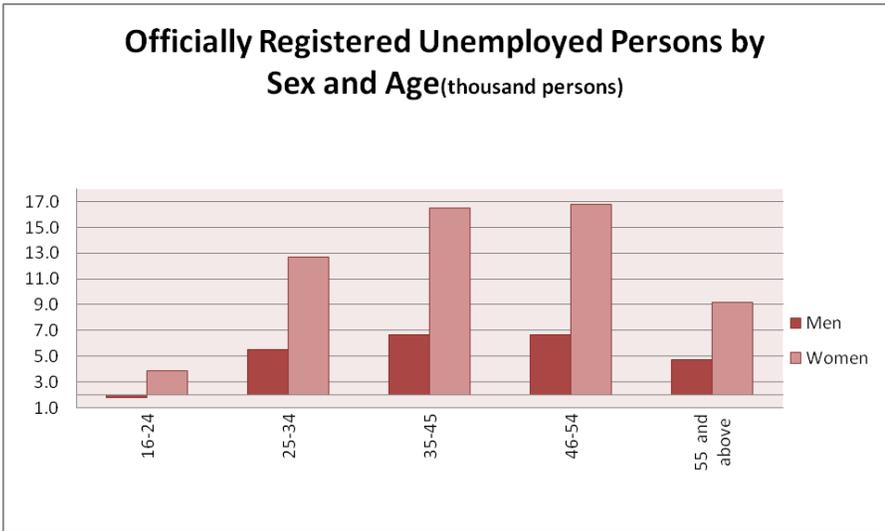
differently. The issue is about the same level participants (having same specialization, background, etc.) of one of the above mentioned fields.

This paper is devoted to exploring gender discrimination in labor relations. In Armenia both men and women can be victims of gender discrimination in labor market. It comes from the mentality of our society. Most of men employers give priority to women applicants, and want to take them under their subordination, after which they sometimes become victims of sexual harassment. Here are examples which we can learn from our real life practice: sometimes we hear that a company announces vacancies for either women (i.e. waitress) or men (i.e. as a taxi driver). Therefore a reasonable question comes out - why can not a woman drive a taxi cab if there are so many women-drivers in Armenia? Or whether a girl will serve the clients of a café better than a man?

During recent years gender discrimination cases in labor market have reduced. We can see from above mentioned example that a lot of men waiters have been employed in cafes, but this is only the general scenery, as taking into account particular employers we can again see signs of discrimination, e.g. famous “Jazzve” café chain where all the waiters are men.

In accordance with this issue here is a statistical review showing officially registered unemployed persons in RA. According to the National Statistical Service of the Republic of Armenia, the number of officially registered unemployed persons as of January-March 2010 reached 84,3 thousands, where 59,1 thousand persons were women, and only 25, 4 thousands were men³.

³ National Statistical Service of the Republic of Armenia (n.d.). Socio-Economic Situation of the Republic of Armenia in January-March 2010. Retrieved May 10, 2010, from <http://www.armstat.am/am/?nid=82>



National Statistical Service of the Republic of Armenia

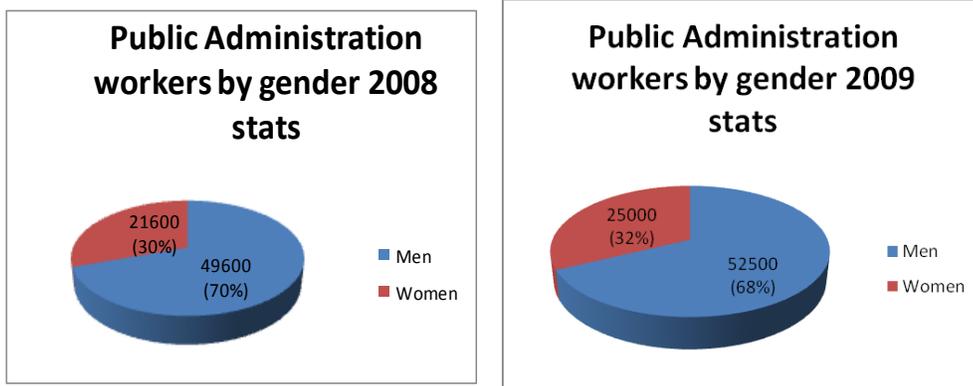
Here we can see that from the unemployment mostly suffer the female population of our society. They make up 70% of unemployed.⁴ And this is not because of the fact that the number of women in the society is less than men. It is vice-versa: from 2006-2010 the percentage of men and women population in Armenia remains the same 48.5% vs. 51.5%.⁵

The above mentioned examples speak about gender discrimination only in the process of entering into labor relations. De facto, there is also expressed gender discrimination in the existing labor relations. The example of the latter can be the employees of the Public Administration who become discriminated on the ground of gender when they are to be appointed for higher positions. We can see

⁴ Association of Women with University Education NGO (AAWUE); survey and recommendation on gender equality, Jemma Hasratyan

⁵ <http://armstat.am/file/doc/99461548.pdf>

that in Armenia women working in Public Administration are more than twice as less than men employees. Here are 2008 and 2009 statistics of Public Administration workers by gender⁶:



As we can see from the statistics there is a little increase of female employees in 1 year by 4% against men in this field. However this is not satisfactory rate of equal employment and women workers are more than 2 times less than men workers in public administration field.

The situation in the government of Armenia if looking whether there is gender equality of employees seems to be on a normal level, but when we consider how many women high officials we have in this branch, especially taking into account Ministries and National Assembly of Republic of Armenia, it becomes obvious that number of women working force there is too much less than men. There are 17 ministers in RA and only 2 of them are women. Also it is worth mentioning that in the National Assembly of Armenia women account for 9.2% of members and in 7 commissions out of 12 no woman is included.⁷

Comment [b1]: Can you speak about Parliament, where the members are elected, and the party lists according to the recent law have to have only 15% women candidates? You may touch upon this.

⁶ Armenian Statistical data centre - <http://www.armstat.am/file/doc/99461553.pdf>

⁷ See, footnote 4

Taking into consideration the above mentioned facts this paper will examine gender discrimination in both cases – when applying for a job and in already existing labor relations.

To explore and address the issue of gender discrimination I will answer to the questions:

1. Whether making changes in the RA Labor law or creating separate law on gender discrimination can help to prevent gender discrimination in labor market?
2. What enforcement mechanism(s) would be able to prevent gender discrimination in labor market?

In the first part the paper will cover the Armenian legal framework and practice, which kind of enforcement mechanisms we have, and the second part of the paper will introduce the analysis of European and International legal framework and best practice including both when applying for a job and in existing labor relations.

The objective of the paper is to find out gaps in Armenian legal system concerning gender discrimination in employment relations and by creating or amending the legislation to have a precisely defined law on gender discrimination in labor field. Also it will include suggestion of some kind of enforcement mechanism for easily recovering violated rights on the ground of gender discrimination in labor market.

PART I. Armenian legal framework and current enforcement mechanisms

Armenia has ratified a number of international conventions which consider gender discrimination issue or include chapters, protocols concerning gender discrimination.. Among ratified conventions, Armenia is a member to the Convention on the Elimination of Discrimination Against Women (CEDAW), Article 14 and Protocol 12 of the European Convention on Human Rights (ECHR) which defines and regulates discriminatory relationships, etc.

In Armenian legislation discrimination is generally emphasized in RA Constitution. Article 14.1 of the Constitution stipulates that *everyone is equal before the law. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited.* The Constitution mentions the equality of people *only* before the law. Hence, if we do not have law explicitly regulating gender discrimination, or at least provisions in the legal codes, we cannot be protected from it on constitutional level.

Article 3 of RA Labor law sets out the principles of labor law, part “c” of paragraph 1 of which emphasizes the *equality of the parties in labor relationships regardless of their sex, race, nationality, language, origin, residency, social status, religion, marital status and family status, age, beliefs or viewpoints, engagement in political parties, trade unions or non-membership organizations, and other conditions not connected with the practical features of the employee.* Firstly, in this provision it is mentioned the term “parties” which considers from one side the employer and the employee from other side.⁸ The term “parties” in this case is not correct as it is too hard to imagine that the employer and the employee can be equal in labor relationships. Thus, the word “parties” makes this provision vague.

⁸ According to Article 13 of RA Labor law

According to paragraph 3 of Article 180 (Organization of work remuneration) of RA labor law *"In case of applying the working qualification system, the same standards should apply both to men and women, and that system must be designed in such a way in order to exclude any discrimination of gender characteristics"*⁹. This provision is clearer than the one mentioned above; this provision makes it clear that both men and women, with same professional qualification should be treated equally while applying for job, therefore receiving the same remuneration.

These are the main provisions from the Armenian legal system concerning discrimination in labor market. These few provisions are not always applicable as they express only some general principles that men and women shall be equal and in concrete situation these provisions cannot be considered applicable. There are some specific cases when concrete provisions regulating concrete situations are necessary to give clear solution to the dispute.

Quite often people are not able to get employment due to gender discrimination, or after applying he/she discovers that that the employer needs representative of the opposing gender for given job announcement without any reason.

Example: An announcement is made where the employer invites specialists for working on a position in his/her firm. A woman who has previously worked in the same field applies for the job and gets rejection. After several months she finds out that in that position is working a man who has less experience in that field than this woman. So, she wants to apply to court to recover her violated right (right not to be discriminated), but under which provision can she bring a suit to the court? Armenia even does not have case law concerning gender discrimination in labor market, also it is worth to mention that even having a case law on some fields it has very low applicability and mainly laws are

⁹ Self translation from Armenian. See the Armenian version of the text at

<http://parliament.am/legislation.php?sel=show&ID=2131&lang=arm>

applied for solving the dispute. Thereby, as there is lack of legal regulation of this kind of relationships no one will bring suit involving gender discrimination complaint, because people think that it will be waste of time and as there is no law regulating such issue they will probably lose the suit and it will also cost them money¹⁰.

These were situations when gender discrimination takes place while applying for a job. But there are situations when this procedure takes place in existing labor relations.

Firstly, it is important to see when labor relations begin according to RA Labor Law. Pursuant to Article 14 of RA Labor Code *labor relations between the employer and employee arise on the basis of employment contract in accordance with labor law and other normative legal acts containing labor law regulations.*¹¹ This provision clearly defines that labor relations between the employer and employee start after signing the contract. Hence, discrimination in labor relations can be conducted only in the case the employer and employee have signed employment contract. Gender Discrimination in existing labor relations mainly can be met in public administration bodies, medical institutions, and in some private companies. Here we can see that victim of gender discrimination are women. Basically, in public administration there is obvious lack of women in leading positions, and the same scene is in medical institutions, where leading doctors and professors are men. In high ranking public service positions women account for 11%, among 65 deputy ministers only 5 are women, also there was a fact that the governor of Shirak Marz was removed from her position without any motivation.¹² This does not mean that gender discrimination is always conducted against woman, it takes place also against man, and in Armenia it generally occurs in private sector. Also as a classical discrimination of gender in labor relations is unequal pay to persons having same specializations and working on similar

¹⁰ Interview with AUA Law Department student Gevorg Mkrtchyan.

¹¹ Self translation from Armenian. See the Armenian version of the text at <http://parliament.am/legislation.php?sel=show&ID=2131&lang=arm>

¹² See footnote 4

positions. Article 180 of RA Labor Code prohibits such discrimination, but the situation remains unchanged. The example for this kind of discrimination can be the following: man and woman having no experience but same specialization, are accepted to work in a law firm as paralegals. Firstly, they are set to pass probation period for 2 months after the contract will be signed. They both do their jobs even the man does his best obviously more than the woman to gratify the employer, but after 15-20 days the woman signs the employment contract and by contract she gets higher salary, whereas the man remains in probation period till the end of the term and then is either rejected or employed by lower salary.

These are common types of discrimination at workplaces.

EU-Armenia European Neighborhood Policy Action Plan called for a draft of Law on Ensuring Equal Rights and Equal Opportunities for Men and Women. Also for increasing women's participation in the National Assembly of RA new reforms are planning to be made in the Electoral Law of RA, according to which every 10th candidate on party list should be woman, which will give the number of woman participants in National Assembly increase from 15 to 20%. Even steps are being made to eliminate gender discrimination though the number is not satisfactory enough.

For eliminating gender discrimination in public administration the UN Committee on the Elimination of Discrimination Against Women made a recommendation on "ensuring over 20% quotas for women representation in the Parliament". It is notable to mention that the number of women of world's parliament members is only 18.2%. Also 23 organizations made recommendations on gender quotas stating that 1 out of 3 members should be woman.¹³

Concerning the enforcement mechanisms it is worth mentioning that enforcing the employer not to make discriminatory actions first of all we need precisely emphasized law regulating gender

¹³ See, footnote 4

discrimination in labor market. There even is Armenian Trade Union Confederation with its 24 Republican branches which are engaged in the issues of violated rights of employees, but they cannot make a decision binding for the employer. Trade Unions on this kind of issues are representing the interest of the employee in the court. State Labor Inspectorate (SLI) of the Republic of Armenia is also dealing with the employment relationships. The general function of SLI is the implementation of state control and supervision over the adherence to the labor legislation and other normative legal acts containing norms of labor law on the part of employers in conformity with the rules established by the legislation of RA. Main features of the SLI are:

- Providing a state control and supervision over the implementation of labor legislation and other normative legal acts containing norms of labor law,
- Organizing preventive arrangements of industrial accidents and occupational diseases at workplace,
- Ensuring the reservation and protection of working conditions, labor rights and freedoms of employees (including the right of safe working conditions at workplace),
- Providing of information to employees, employers, trade unions on more effective implementation of Labor Code and other normative legal acts containing norms of Labor Law.¹⁴

Here we can see that SLI can deal with every violation in labor relations, but whether it is under its power to deal with violations in job during the application period? The answer is no, because it only defines that the power range of SLI is only within the scope of relationships which are regulated by Labor Code of RA and normative acts regulating labor relations. As we do not have law or normative act regulating gender discrimination when applying for job and also as the applying period does not fit

¹⁴ Charter of State Labor Inspectorate of Republic of Armenia, adopted by Government of RA in 2004

within the scope of labor relations according to RA Labor Code¹⁵, therefore this body cannot be a body which can fully deal with gender discrimination issues in labor market.

The next stage and the main bodies are the courts which deal with variety of issues which include violation of gender equality. As the RA courts are mainly guided by law when hearing the cases therefore they cannot be effective in gender discrimination related disputes until an explicit law on gender equality is not adopted.

¹⁵ See Article 14 of Labor Code of RA

PART 2: European and International best practice

This part of the paper will explore practices from European and other countries.

EU by its structure is a democratic Union and the fundamental rights of humanity and their protection in democratic society are of primary importance. European countries have developed gender discrimination laws, as the discriminatory actions mainly against women were conducted and they were deprived of enjoying their equal rights with men. The legislatures of the countries started to focus on the issue and create gender equality laws which were called to decrease discrimination rates inside the Europe. Now European Union as an entity of countries is seriously considering gender based discrimination issues, and to this respect in 2010 the EU opened a new European Institute for Gender Equality (EIGE) in Vilnius, Lithuania to strengthen the work on Gender Equality. The tasks of the institute are to collect and analyze comparable data on gender issues, to develop methodological tools, in particular for the integration of the gender dimension in all policy areas, to facilitate the exchange of best practices and dialogue among stakeholders, and to raise awareness among EU citizens.¹⁶

The process of integration of the countries which are aimed to join the European Union, the EU has required significant changes in national legislation according to the EU strategy on Gender Equality, which states that a gender equality perspective must be integrated into all areas of legislation, according to the principles of gender mainstreaming¹⁷.

The European Employment Strategy (EES) has adopted a dual approach of gender mainstreaming and specific measures. Since the beginning of the Strategy, Member States have made considerable efforts to strengthen gender equality policy in the employment field. These efforts include actions to

¹⁶ <http://ec.europa.eu/social/main.jsp?catId=732&langId=en>

¹⁷ UNDP Regional Centre for Central and Eastern Europe and CIS (2003). Drafting Gender-Aware Legislation: How to promote and protect Gender Equality in Central and Eastern Europe and in the Commonwealth of Independent States. Bratislava: UNDP Regional Bureau.

increase the employment rate of women, to decrease women's unemployment rate, to tackle the segregation of the labor market and to close the gender pay gap.

“A central role is given to policies of reconciliation between work and family life for both women and men, especially through the provision of services for children and other dependants. Also important is the reintegration of women returning to the labor market after an absence. Moreover, there has been a reinforced commitment to integrate the gender equality objective in all employment policies.”¹⁸ It is important to mention that the guidelines on strengthening equal opportunities policies for women and men did not only address Member States, but also aimed at involving social partners to reduce the gender gaps.

There are Organizations acting within and outside the borders of EU which are seriously involved with helping the EU Member States and Non-EU States by giving recommendations on adopting law on concrete field or making reforms.

The European Employment strategy has adopted a dual approach of gender mainstreaming and specific measures. Among those organizations is OSCE (Organization for Security and Co-operation in Europe), which has developed and made recommendations for a number of States concerning discrimination issues. It has made a recommendation and proposed the law scheme on gender equality in society and suggested for Albania. The law scheme includes a lot of provisions about gender equality, precisely describes the gender equality, what should be prohibited, what exceptions can be made, and also suggests establishing a State body on discrimination issues. Law on gender equality of Albania includes provisions about obligations of the employer in labor relations¹⁹, describes the

¹⁸ <http://ec.europa.eu/social/home.jsp?langId=en>

¹⁹ Albanian Law on GENDER EQUALITY IN SOCIETY Article 16

discriminatory actions of the employer²⁰ and responsibilities of employer for protecting the employee from gender discrimination²¹.

The Treaty of EU (TEU) also includes provisions concerning discrimination in labor market. Specifically, paragraph 1 of Article 141 of TEU stipulates that *each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*

Pursuant to Section 5 of Netherlands Equal Treatment Law: It is unlawful to discriminate in or with regard to:

- a. advertisements for job vacancies and procedures leading to the filling of vacancies;
- b. job placement;
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permitting staff to receive education or training during or prior to employment;
- g. promotion;
- h. working conditions.²²

Netherlands mentioned law in section 5 includes not only prohibition of discrimination when applying for job, but also in the employment relations it prohibits any kind of discrimination concerning to working conditions and promotion of the employees.

According to the job application discrimination a classic case of US Supreme court is worth presenting.

²⁰ Ibid. Article 17

²¹ Ibid. Article 18

²² www.hsph.harvard.edu/population/womenrights/netherlands.women.94.doc

In *Dothard v. Rawlinson* involved a decision by a state to hire only people of a certain height and weight to be a prison guard. The policy applied to all job applicants and did not mention race, gender, etc., so the state argued it could not be discriminatory. A female who failed to meet the standard and sued, however, produced data showing the effect of the policy was to disqualify nearly 40 percent of female but only about one percent of male applicants. Given this "disparate impact" the court required the state to defend the standard. The state argued that prison guards need strength and its standard was designed to ferret out applicants who were deficient in this regard, but the court replied that while assessing strength is valid there is no necessary correlation between strength and height and weight. If the state wanted to measure strength, it must develop a means of doing so directly.²³

The situation discussed in this case concerns gender discrimination issue, because, first, neither the vacancy announcement nor some kind of internal charter mentioned the proportion of men and women to be employed, and, second, if there were women employed as prison guards, therefore the argument of the state is not correct stating that a person has to have specific physiology in order to apply for job as the numbers show that rejection proportion was 1/40 against women.

This cannot compare to Armenian legislature, because in the US the courts consider cases on the base of case law, or otherwise give interpretation and solution creating a case law.

In contrast with Armenia in Europe there are a lot of cases and courts decisions concerning discrimination issue in already existing labor relations. This is because of the fact that European countries mostly have either separate laws on Discrimination issues, which include prohibition of gender discrimination or an entire law on gender equality.

According to article 157(1) of TFEU *each EU Member State shall ensure and maintain the principle that men and women should receive equal pay for work of equal value.*

²³ Case at http://finduslaw.com/dothard_v_rawlinson_433_u_s_321_1977_97_s_ct_2720

In *Defrenne v. Sabena* the applicant brought an action before the Tribunal in Brussels for compensation for the loss she had incurred in terms of salary, allowance on termination of contract and pension in comparison with male members of the crew performing identical duties. The Belgian appeal court referred the case to the ECJ. The ECJ held that the equal pay provision of Article 119 EC had as its aims both economic and social functions. It ruled that article 119 EC "*forms part for the social objectives of the Community, which is not merely an economic union, but at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions*". The reasoning of the court was that the principle of equal pay for equal work would be binding not only upon member states but also, directly, upon private employers. So an individual can rely on some Treaty articles to enforce rights against another individual in the national courts. Direct and overt discrimination can be identified by the criteria set out under Article 119 of equal pay for equal work, whereas indirect and covert discrimination can be identified by reference to more explicit implementing provisions of a Community or national character. Direct forms of discrimination included discrimination that had their origins in legislative provisions or collective labor agreements that can be detected on the basis of a purely legal analysis of the situation.²⁴

There are also a number of cases including various detections of gender discrimination in employment relations (i.e. women's age of retiring is less than men's, man is fired from the job without any motivation and afterwards a woman with less experience is applied for his position, etc.).

For promoting members of parliaments to higher positions in parliaments, in most countries as the use of quotas is not sufficient to attain equal gender representation in parliament or other public bodies the so-called "zipper" system is applied. According to this system the political parties of a country are

²⁴ See case at <http://home.aubg.bg/students/BDA100/European%20Law/CASE%20OF%20Defrenne%20vs%20Sabena.pdf>

setting the percentage of their participants. For example, in Austria the Greens party set 50% of quota for men and women under this system.²⁵

Paragraph 5 of Article 4 of Law on gender equality in society of Albania sets that “*equal gender representation*” is the representation of every gender with not less than 30 percent in any institution, management level, appointed organ, political party.²⁶ The parties can decide to set the percentile rank more than 30%.

In European countries as enforcement mechanisms besides the courts of the states and courts in the European level in separate countries there are institutions which deal with discrimination issues and give decisions which can be final, also in contrast with Armenian mechanisms in some countries there are separate labor courts which deal with labor issues including discrimination in labor market, the example is that according to Part 2 of the above mentioned law sets the organs which are responsible for attaining gender equality.

In each European country there is at least one department or state agency which deals with gender discrimination issues, in comparison to this I have to stress that in Armenia we do not have even a department dealing with gender equality.

²⁵ http://www.europarl.europa.eu/workingpapers/femm/w10/4_en.htm

²⁶ OSCE recommendation for Albania on Law on Gender Equality in Society, see at http://www.osce.org/documents/pia/2009/03/37027_en.pdf

Conclusion

To sum up the issue and taking into consideration the European practice it is worth mentioning that Armenia in ensuring gender equality in the society is far from the European countries practice. Armenia has ratified Conventions in this field (CEDAW, ECHR, etc.), the ratified conventions have high legal force and can be highlighted during court proceedings, but in reality, they are rarely applied. Therefore, Armenia needs a new separate law on gender equality or prohibition of discrimination. Also, taking into account the fact, that Armenia is a country which seeks to join the EU on this ground also its legislature shall comply with the European Standards and with the proposal of the Council of Europe, recommendation of which included the “zipper” system.²⁷

For achieving a comparative result with Europe in Armenia the following proposals could be made:

1. A separate anti-discrimination legislation shall be adopted to secure equal opportunities for both gender representatives.
 - The law will stress definition of discrimination, kinds of discriminations,
 - The law should prohibit specifying requirements in job advertisements or education opportunities advertisements, giving priority to one of the sexes, unless the job can be exclusively performed by the person of the certain sex,
 - The law should clearly state even the main actions of the employers that would be deemed discriminatory if taken because of the employees’ sex,
 - Law should clearly state the employer’s duty to provide equal working conditions, opportunities to improve qualification and provide equal benefits; apply equal criteria in assessing the quality of work, etc.

²⁷ See, footnote 4

- The implementation of the law should be supervised by the Equal Opportunities Organ, which should have the authority to investigate complaints relating to gender discrimination, to recommend corrective actions concerning any existing or anticipated shortcomings,
- The law should specify that in the cases of protest to the respective Organ the burden of proof will shift to the employer,
- The Institution dealing with discrimination affairs should have departments which will consider variety of issues, firstly, a department of monitoring will be established in order to monitor and consider the situation in the society-both in private and public institutions,
- The law shall include also some kind of mechanism like “zipper” system that is adopted in many leading countries of Europe,
- The law also should stipulate sanctions for the situations of “revenge” by the employer towards employee.

2. Reconsider Article 3 of RA Labor Code, and by amending or changing the provision make it more explicit, as this provision is one of the core principles of RA Labor Code.

As adopting new law takes a long procedural steps and long time for creating a precise law, hence an alternative way of regulating gender discrimination in labor market can be the amendment of RA Labor Code. Some provisions covering gender discrimination when applying for a job can be amended to the Civil code of RA.

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