Analysis of Georgian labour legislation

Gender-based discrimination in the workplace and its legal implications

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ANALYSIS OF GEORGIAN LABOUR LEGISLATION – GENDER-BASED DISCRIMINATION IN THE WORKPLACE AND ITS LEGAL IMPLICATIONS

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CONTENT

I. Introduction

Human rights are the basis of modern democratic society. Freedom of individuals as limited by the human rights cannot be violated. They have universal character and apply to all individuals equally in equal conditions.[1] Emanating principle of equality is echoed in many international and national legal acts. Legal recognition creates only formal basis for equality. Establishment of mechanisms for its real implementation and realization in life is more essential. For the purposes of this process it is important to identify persons who are discriminated in society and create guarantees of equal treatment for them. Women clearly fall under this category.

Taking into account the situation in Georgia, promoting gender equality becomes more and more essential. According to Gender Inequality Index developed by the UNDP, Georgia is 71st out of 137 countries[2]. Adoption of the Law of Georgia on Gender Equality in 2010 raised a need to develop a new strategy on gender equality.

On January 24, 2014 the Parliament of Georgia adopted a resolution on Approval of 2014-2016 Action Plan of Measures of Gender Equality Policy (Gender Equality NAP 2014-2016); the document clearly identifies the objective of the State to develop legislation based on gender equality, strengthen institutional mechanisms for equality, harmonize national legislation with international standards on gender equality and ensure equal participation of women and men in the economic field, including in labour relations. Later, on April 30, 2014 the Parliament adopted National Human Rights Strategy (2014-2020) (NHRS); this document manifestly states that guaranteeing gender equality in all aspects of social life and alignment of national labour legislation with international standards is one of the priorities for the State.

Georgia faces many gender-related challenges as clearly stated in the Report on Implementation of the European Neighbourhood Policy in Georgia Progress in 2013[3]. Taking into account the cultural peculiarity, involvement of women in labour relations is problematic that is manifestly proved by the statistics on unemployed women – the number is quite high (75%)[4]. The Euro-integration aspirations of Georgia is directly related to the issue of gender equality. Georgia-EU Association Agreement (AA), Title 6 specifies that "the Parties shall strengthen their dialogue and cooperation on promoting the Decent Work Agenda, employment policy, … gender equality and anti-discrimination…"[5].

Even though Georgia has adopted a number of international and national binding instruments that contain antidiscrimination guarantees for ensuring equal treatment for men

[1] *Schrittwieser, B.*, Gleichbehandlung im Arbeitsrecht, AR 7, 2011, S. 5.

[2] http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf, see, Public Perceptions on Gender Equality in Politics and Business, research developed by the The UNDP Project Enhancing Gender Equality in Georgia; http://www.ge.undp.org/content/dam/georgia/docs/publications/GE_UNDP_Gender_Research_GEO.pdf

[3] *„Georgia is progressing towards gender equality, although more needs to be achieved."* See JOINT STAFF WORKING DOCUMENT Implementation of the European Neighbourhood Policy in Georgia Progress in 2013 and recommendations for action, Brussels, 2013, p. 13
http://eeas.europa.eu/delegations/georgia/documents/eu_georgia/progress_report_2013/memo-14-georgia_ka.pdf

[4] Public Perceptions on Gender Equality in Politics and Business, 2013, p.9.

[5] „Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part" Title VI, Chapter 14 http://www.mfa.gov.ge/

and women, protection of rights is still problematic. The number of court applications on this issue is low that has direct bearing with nihilism and low awareness on legal mechanisms of protection.

The objective of this research is to analyze issues related to discrimination on the basis of gender in the workplace and legal implications of such discrimination, as well as to identify specific mechanisms of protection. The research uses systematic, comparative and analytical methods.

Firstly, the research deals with the legal basis of prohibition of discrimination, both constitutional and labour law aspects, as well as EU, ILO and UN standards. The third chapter of the research discusses legal basis of gender equality in the workplace. The research also deals the issues essential for elimination of discrimination in pre-contractual and contractual relations, namely: neutral advertisement of vacancy , regulation of interview process and the scope of allowed questions, principle of equal remuneration of women and men for the equal work or work of the equal value, challenges to maternity leave regulations, prohibition of harassment in the workplace, basis for positive discrimination for the purposes of elimination of factual inequality. Next chapter of the Research will discuss legal implications of gender-based discrimination in the workplace under Georgian legal system. And the last chapter presents major findings and recommendations.

II. Prohibition of Discrimination – main principle of modern legal order

Despite differences of legal systems there are still common values. These are universally recognized fundamental human rights and freedoms of persons. Modern democratic state should recognize basic human rights and create mechanisms for their protection. As for the fundamental human rights they are based on individual freedom and dignity as manifestly stated in article 1 of the Universal Declaration of Human Rights 1948: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[6].

The principle of equality was built on the idea of freedom. Nowadays freedom and equality are interrelated. Unless equal rights for all are guaranteed it is impossible to safeguard individual freedom and vice versa. It is essential to ensure protection of personal freedom – to be different and at the same time have equal opportunities to exercise his/her freedom. Individual differences steam from personal perceptions, characteristic, biological and physical signs, status dominating societies, membership of marginalized groups, etc. Accordingly, there is a threat that universal idea of equality could be applied partially or on discriminatory basis. Therefore elaboration of antidiscrimination legislation on international and national levels and creation of mechanisms for its implementation is vital for elimination of cases of unequal treatment of persons in equal circumstances, equal treatment of persons in substantially unequal circumstances and arbitrary differentiation.[7]

Principles of freedom and equality are recognized in the main legal document of a state

[6] http://ungeorgia.ge/uploads/UDHR-60Geo.pdf

[7] *Schmidt/Bleibtreu/Hoffmann/Hopfauf*, Grundgesetz Kommentar, 11.Auflage, 2008, S. 196.

– the Constitution. Accordingly constitutional guarantees create safeguards for equality of individuals in all areas of life, including socio-economic. The equality guaranteed by the constitution creates a framework for all legislative acts, actions of government and decisions of private persons. Protection of this principle in private law relations is essential, especially in those relations where one side enjoys economical and informational superiority and the threat of abuse of rights is greater. Being on the margin of social and economic factors relations in the field of employment may contain a number of threats related to discrimination.

1. **Constitutional basis for prohibition of discrimination**

In the 1995 Constitution of Georgia enshrines the willingness of Georgian citizens to establish democratic social order, a rule of law based social state and to secure universally recognised human rights and freedoms. These values create framework for Georgian legal system and every provision and regulation should comply. The first stage is to reflect values in the constitution and later they [values] are specified in different statutes and by-laws.

Rule of law state is based on the idea of fairness and the latter cannot exist without freedom and right to equality[8]. Articles 6 and 7 of the Constitution of Georgia provide that Georgian legal system shall correspond to internationally recognized principles and norms and a State recognizes that human rights and freedoms are ethereal and supreme human values. The people and the state shall be bound by these rights and freedoms as directly acting law.

Article 14 of the constitution sets a basis of values specified in the supreme legal document and provides that "everyone is free by birth and is equal before law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence". This article manifestly recognizes that individual freedom and equality are interlinked and inseparable. Freedom is a legal opportunity and every individual should enjoy it equally.

It is noteworthy the decision # N2/7/219 of 2003 of the Constitutional Court of Georgia that defined the principle of equality: "equality before the law means recognition and protection of all rights and freedoms of individuals who are in the equal conditions and have adequate perceptions towards issues identified by the law. The mentioned principle also deals with the lawmaking activities of a state to ensure that individuals who are in the equal conditions are granted equal privileges and imposed equal obligations. It is obvious that different legal regulation should not be *per se* considered to be a violation of principle of equality before the law. A lawmaker is entitled to prescribe differentiated conditions that should be justified, rational and reasonable. At the same time, persons in equal conditions should enjoy the same level of differentiation." Three elements of prohibition of discrimination mentioned in the definition should be identified: a) granting equal privileges (imposing equal responsibilities) to persons who are in equal conditions; b) admissibility of differentiated regulations; c) justification, rationality and reasonability are the basis of legitimacy of differentiated approach.

[8] *Kublashvili K.*, Basic Rights, 2003, p.9. See also: Izoria, Korkelia, Kublashvili, Khubia (*ed*) Commentaries to the Constitution of Georgia, 2005, p. 23.

Accordingly if individuals are in unequal conditions based on social and economic factors or due to health or other conditions, lawmaker allows their unequal treatment through granting them privileges based on principle of equity.

2. Labour law perspective of prohibition of gender discrimination

Historically labour law, a specific area of civil law, was developed due to lack of private law regulations safeguarding proper protection of legitimate interests of an employee[9]. Accordingly, developed social regulations introduced framework of contractual freedoms that ensured protection of interests of less protected party – employee and elimination of inequality of parties.

In labour relations an employer is economically stronger party, he/she owns more information and power; as for the employ, he/she is personally and economically dependent upon employer. Accordingly, the threat of unequal treatment and arbitrary decisions is great in labour relations. Observation of requirements on gender equality and implementation of antidiscrimination requirements in the workplace are especially problematic.

UNDP Georgia research "Perceptions on Gender Equality in Politics and Business" of 2013 revealed the problem related to segregation and less involvement of women in labour relations. Throughout Georgia about 1800 face-to-face interviews and 16 focus groups were conducted during the research that showed traditional views on gender role are yet strong and work and career for women are considered to be less important[10].

Participation of women in socio-economic field, promotion of higher degree of accessibility to work and creation of relevant employment conditions are extremely important. Such stimulating factors are, on the one hand, relevant legal framework and on the other side, awareness raising campaign that will promote implementation of the legal regulations in life and increase applications to court for violations. This active process will positively influence development of court case law on prohibition of discrimination against women in labour relations and be a step forward for inclusion of women in labour market.

In 2006 the parliament of Georgia adopted State Concept on Gender Equality. The document defined gender, gender equality and discrimination on the basis of gender. Gender equality was recognized to be a priority of a state policy that aimed at creation of beneficial conditions for gender equality in political economic and social fields and protection of these conditions. It was recognized that in the process of implementation of economic security policy equal participation of women and men is an important tool for further development of market economy. If the gender equality principle is respected in employment policy the gender balance at labour market will be improved.

a) Gender equality safeguards under national legislation

Safeguards of equality and prohibition of discrimination in labour relations are enshrined in various legal acts of Georgia.

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[9] *Zöllner/Loritz*, Arbeitsrecht, 5. Auflage, 1998, S. 2.

[10] „Perceptions on Gender Equality in Politics and Business", 2013, p. 20.

Labour law is a special field of private law. Accordingly general provisions of private law are applicable, in a limited manner, to labour relations. Therefore it is noteworthy that article 1 of the Civil Code of Georgia (CCG) of Georgia clearly states that private law relations are regulated based on the equality of persons. The mentioned article does not specify inequality based on different grounds that is justifiable for the purposes of the CCG; however the fact that equality is referred to in the very first article of the code is very important as a general rule is created- rights, powers and responsibilities of subjects of private law are regulated based on principle of equality. In addition paragraph 1 of article 2 of the CCG states that acts of private law, and interpretations thereof, shall conform to the Constitution of Georgia; accordingly civil law relations are limited by the framework of values enshrined in the Constitution of Georgia.

A party to labour relations is also a subject of private law; however parties of labour relations are in unequal conditions and therefore imperative norms are introduced that alter principles of private law and equality of parties.

Prohibition of discrimination in labour relations is also provided in the main law on labour issues. Article 2 of the Labour Code of Georgia (LCG) defines, for the purposes of labour relations, discrimination and sets imperative for prohibition of discrimination in specific circumstances and sets admissibility and legitimacy framework for differentiated treatment of individuals. Paragraph 3 of article 2 of the LCG provides prohibition of discrimination based on different grounds, including gender. Direct or indirect harassment of a person based on gender, aimed at or causing creation of harassing, hostile, humiliating, dignity harming or insulting environment, or creation of such conditions which directly or indirectly impair his/her state compared with other persons being in the analogous conditions is prohibited.

It is noteworthy that the lawmaker considers that harassment is a form of discrimination. German analogy of the aforementioned provision article 3 of 2008 Law on Equal treatment[11]defines direct and indirect discrimination, harassment and sexual harassment separately; definition of discrimination refers to the group of individuals (unequal treatment compared to persons who are in the same conditions); as for the definition of harassment it does not include comparison with other persons. The relevant provision goes in line with paragraph 4 of article 2 of the LCG and states that direct harassment is aimed at or causing creation of harassing, hostile, humiliating, dignity harming or insulting environment of employ.

The Law of Georgia on Gender Equality (LGGE) also defined gender, gender equality and prohibition of discrimination and establishes the fundamental guarantees of equal rights, freedoms and opportunities of women and men granted by the Constitution, defines legal mechanisms and conditions for their implementation in relevant spheres of social life. For the purposes of the LGGE, gender equality is part of the human rights pertaining to equal rights and obligations, responsibilities and equal participation of women and men in all spheres of private and social life. Gender-based direct discrimination is defined as treatment of a person or creation of conditions under which a person enjoys unequal treatment based on sex in the same conditions or creates equal conditions for persons who are in substantially unequal conditions except those cases when unequal treatment is legitimate.

[11] Allgemeine Gleichbehandlungsgesetz, http://dejure.org/gesetze/AGG

Article 4 of the LGGE provides gender equality guarantees that support and ensure equal rights of women and men in political, economic, social and cultural life. In order to ensure gender equality the principles of free choice of occupation or profession, career promotion, vocational training, as well as equal treatment during performance appraisal and equal access to employment for men and women shall be adhered to without discrimination.

Article 6 of the LGGE deals with gender equality in labour relations; however the provision focuses more on harassment and sexual harassment rather than discrimination. Paragraph 1 of article 6 states that any kind of persecution and/or forcing measure, unwanted verbal, nonverbal or physical act of sexual nature that is based on sex which is aimed at or induces conditions that are intimidating, hostile, humiliating, impairing dignity or abusive to a person is prohibited. It is straightforward that this wording has essential similarity with the first sentence of paragraph 3 of article 2 of the LCG.

Both the LCG and the LGGE identify admissibility and legitimacy of unequal treatment in specific circumstances; however the LGGE is more specific concerning unequal treatment or granting privileges on the ground of sex. Paragraph 5 of article 2 of the LCG recognizes differences between individuals based on the essence and specifics of the work or the conditions of its performance. The LCG provides that differentiation is legitimate if it serves for achieving a legitimate objective and is a proportionate and necessary means of achievement of that objective.

Practical example #1: A person employed at airport whose main function is to check persons or objects at border cross points may be chosen based on sex. Taking into account the fact that checking procedures include physical contact with the checked person it is mandatory that the procedure is conducted by a person of the same sex.

Practical example #2: The law provides quotas of participation of women in public service; therefore it is legitimate to recruit only women within the set quotas.

The regulations provide different treatment based on gender taking into account specifics of the work. F.e. article 18 of the LCG prohibits employing pregnant women for a night job as the latter means working during night that is harmful for a women and a foetus who need special care and protection; therefore pregnant women are not allowed to work at night. However it is impossible to specify every situation and abstract provisions are included in legislation that create a broad margin for interpretation. In every case legality of unequal treatment of a man and a woman should be evaluated individually.

In 2014, after a long process of discussions the Parliament of Georgia adopted a Law on Elimination of All Forms of Discrimination (Antidiscrimination Law) that prohibited any form of discrimination in Georgia. Article 3 of the Law defines the scope of its application and provides that the requirements of the Law shall apply to the actions of public institutions, organisations, and to the actions of natural and legal persons in all spheres, only if the actions are not regulated by other legal acts, which are in conformity with the provisions on prohibition of discrimination. In the context of labour relations, the LCG regulating prohibition of discrimination in labour relations is a special law and prevails over the Antidiscrimination Law in the hierarchy of legal acts. Therefore, the LCG is applicable for evaluation and discussion of cases of unequal treatment in labour relations.

In the process of evaluating legal acts concerning gender issues in labour relations it was identified that there are a number of definitions, concepts that are interlinked; however none of the legal acts provide for specific remedies for those who were subject to discrimination on the grounds of sex that would have enabled them to apply to a relevant body with a proper legal basis.

b) European Strategy for equality between women and men and A Women's Charter of 2010

Taking into account euro- integration aspirations of Georgia review of the EU newest documents concerning EU policy and approaches on gender equality is of a paramount importance. Equality between women and men is one of the common values on which the European Union is founded.[12]. EU member states have adopted a number of measures to ensure gender equality and greater participation of women in public, political, economic and social spheres. One of main documents on gender equality was a Women's Charter adopted in 2010 and European Strategy for equality between women and men for 2010-2015 developed on the basis of the Charter[13].

A Women's Charter states that economic and social cohesion, sustainable growth and competitiveness, and tackling the demographic challenge depend on real equality between women and men. Despite the achieved remarkable progress obstacles to real equality remain. The Strategy states that equality of women and men is more than just a slogan and it is social and economic responsibility of every EU member State[14].

Both Charter and Strategy for 2010-2015 specify five main directions, namely: a) equal economic independence, b) equal pay for equal work and work of equal value, so called pay gap, c) equality in decision-making, d) dignity, integrity and an end to gender-based violence and e) promoting gender equality beyond the union.

These five principles are aimed at prevention of discrimination, gender-based labour market segregation, elimination of educational stereotypes and use of women's potential. The documents also underline that EU Member States commit to a forceful mobilisation of all instruments, both legislative and non-legislative, to close the gender pay gap. In addition, gender balance in decision-making, in political and economic life and in the public and private sectors, will help Europe shape more effective policies, develop a gender-aware knowledge-based society, and create a stronger and more prosperous democracy.

It is noteworthy that Section 5 of the Charter states that gender equality will be fully incorporated into EU external policies and EU Member States commit to promote and strengthen cooperation with all stakeholders, including CSOs.

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[12] EU Commission Women's Charter, 2010, preamble;
http://ec.europa.eu/commission_2010-2014/president/news/documents/pdf/20100305_1_de.pdf

[13] http://ec.europa.eu/justice/gender-equality/files/gender_strategy_de.pdfor file:///C:/R.T/personal%20files/translations/gender/Strategy_Equality_Women_Men_EN.pdf

[14] *Ibid*.

c) Prohibition of discrimination in the workplace – prerequisite of decent work (ILO approaches)

International Labour Organization (ILO) has greatly contributed to development of regulations on protection in labour relations and their implementation. "[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" – states the ILO Philadelphia Declaration[15].

Social and economic aspects are taken into account in regulations developed by the ILO. Accordingly gender equality evaluation is based on the same method. It is interesting to review ILO perspective of prohibition of discrimination as it is based on social protection standards and economic efficiency. This approach is not used in Georgia as the process of development of labour regulations does not include discussions on economic efficiency.

The principle of prohibition of discrimination in labour relations is beneficial both for employer as employee. If equal treatment of employees is based on protection of fundamental rights and equity, it is beneficial for employer[16]. Antidiscrimination approaches on national level contribute to economic growth and reduction of poverty. The purpose of prohibition of gender-based discrimination in labour relations is to impose equal responsibility and grant equal privileges to men and women.

For both adult men and women, pursuing decent work is essential as it gives possibility to ensure material well-being for her/him and family members. Socially constructed gender roles, the biological differences between men and women, and how these interact in the world of work are at the core of decent work concept. In 2009 ILO recognized that "gender equality is at the heart of decent work"[17]. Accordingly gender issue is the central issue of ILO labour policy.

ILO gender equality regulations are specified in various conventions, *inter alia*, 1958 Discrimination (Employment and Occupation) Convention, 1951 Equal Remuneration Convention and 2000 Maternity Protection Convention.

d) United Nations instruments

The United Nations (UN) developed provisions on equality of persons as early as in 1948 in the Universal Declaration of Human Rights. Article 1 of the Declaration states, all human beings are born free and equal in dignity and rights. Article 2 of the Declaration further specifies equality approach and provides that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind. The grounds for distinction are listed therein, including sex.

Specific regulations on prohibition of gender based discrimination were developed later in 1979 Convention on Elimination of All Forms of Discrimination against Women

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[15] http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-berlin/documents/genericdocument/wcms_193725.pdfhttp://www.ilocarib.org.tt/cariblex/conventions_23.shtml

[16] "Gleichstellung der Geschlechter als Kernstück menschenwürdiger Arbeit", Bericht IV, 2009, Zusammenfassung; http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_106177.pdf

[17] *Ibid*, p.. 3.

(CEDAW)[18]. State Parties to the CEDAW recognize that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries and are convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women.

Even though the Georgian translation of the Convention includes some gaps related to stylistics it is interesting to identify the main accents of the definition of discrimination against women. According to the CEDAW discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms.

The CEDAW safeguards guarantees of equal treatment for women in different fields. However the research will deal only article 11 concerning the prohibition of discrimination in labour relations.

States Parties of the CEDAW, including Georgia, committed to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular, the right to work , the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment, the right to free choice of profession and employment, the right to equal remuneration, the right to social security, and the right to protection of health and to safety in working conditions.

Recognition of gender equality in the field of employment is not sufficient unless the CEDAW defines the purposes of efficient antidiscrimination measures that should be applied for interpretation of national general provisions on labour relations. The mentioned purposes include: prohibition, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; introduction of maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; promoting relevant mechanisms for life-work balance; providing special protection to women during pregnancy in types of work proved to be harmful to them.

III. Legal mechanisms for gender equality in the workplace

Having reviewed national and international policy and legal regulations concerning gender equality, for the purposes of efficient implementation of prohibition of discrimination it is important to discuss legal mechanisms (remedies) that safeguard practical implementation of the right to work of women and men.

Implementation of the right to work means that men and women have equal access to pre-contractual labour relations – prohibition of gender based discrimination, as well as equal conditions for men and women in contractual relations. It is noteworthy that some mechanisms are not regulated that hinders protection of rights based on gender.

[18] Ratified by the Parliament of Georgia by the Resolution #561 on September 22 1994.

It is apparent that Germany is a leading European country in terms of social and legal state effectiveness, introduction of innovations and sustainable economic growth or financial stability. In addition, German legal system and court practice on antidiscrimination has recognized gender equality principle and specific mechanisms for its implementation. In 2008 Law on Equal Treatment was adopted that introduced various safeguards for equality of women and men at all stages of employment. Taking into account influence of German law on Georgian civil law, comparative approach will better reveal the gaps of Georgian legislation. Recommendations will be developed to address identified gaps in legislation.

1. **Prohibition of gender discrimination in pre-contractual labour relations**

The right to free choice of employment and access to work are the integral part of the right to work. Employment relations are based on labour contract and there is a need to regulate relations that exist even before the labour contract is concluded. Before the 2013 amendments[19] the LCG did not explicitly refer to prohibition of discrimination on pre-contractual stage. Therefore it was difficult to observe the principle of gender equality and control of different perceptions and treatment of men and women.

Amendments of June 12, 2013 introduced new provision in paragraph 3 of Article 2 concerning antidiscrimination in pre-contractual relations based on different grounds, including sex. This innovation is a step forward for introduction of legal mechanisms on gender equality in the field of employment. Yet the regulations on advertisement of vacancy and interview process need to be developed; otherwise application of the LCG new provision will only depend upon the judicial interpretation. The judicial system of Georgia exists since the independence of the country and judges are reluctant to decide upon individual cases primarily based on general provisions of law.

a) ***Advertisement of Vacancy***

Labour law obligations may arise even before the contract is concluded such as obligation of an employer not to use preference on unjustified ground and ensure equal treatment to candidate women and men[20].

The statistical data on job-fare sites of Georgia is not available; however based on general overview it may be stated that quite often employers set gender as a precondition employment.

Gender equality cannot be safeguarded if employers set gender preconditions for filling in the vacancy without reasonable justification.

German Law on Equal Treatment, aimed at safeguarding equal treatment and prohibition of unjustified preferences in the field of employment, specifically mentions obligations of employer, including pre-contractual ones. Articles 11 and 12 of the Law[21] provide that the employer has a duty to take measures necessary to ensure protection

[19] N729 Law of Georgia on Amending Organic Law of Georgia "Lab our Code" dated 12 June 2013.

[20] *Junker*, A., Grundkurs Arbeitsrecht, 7. Auflage, 2008, S.79.

[21] Allgemeine Gleichbehandlungsgesetz (AGG), Arbeitsgesetze, dtv, 74. Auflage, 2009, S. 69.

against discrimination on any grounds. These measures should also include preventive actions. The Law specifically deals with advertisement on vacancy. The vacancy shall not be advertised in violation of principle of discrimination. Therefore the advertisement of vacancy should use neutral language whether it is drafted by the employer or a designated third person (human resources consultancy firm)[22].

Practical example #1.A Company advertises a vacancy for IT manager. The section of requirements provides that male candidates with high education will prevail.

Practical example # 2: A Company advertises a vacancy for Secretary. The section of requirements provide that female candidates with high education will prevail.

Practical example # 3: A security service advertises a vacancy for lawyer. The advertisement provide that candidates with mandatory military service will prevail..

The first and the second examples contain threat of direct discrimination, while the third case may raise concerns on indirect discrimination as under the Georgian legislation only men are subjected to mandatory military service.

b) ***Interview and admissibility of questions***

Pre-contractual labour relations commence from the moment when the advertisement of vacancy is published and the candidate officially contacts the employer[23]. Official contact means first telephone call or submission of CV. This is the starting moment for commencement of pre-contractual negotiations and obligation may bind each party to act in accordance with extraordinary diligence as to the rights and property of the other party (article 316-317 CCG). In addition to the mentioned obligation, paragraph 3 of article 2 of the LCG introduces further requirement – prohibition of discrimination.

Labour contract like other bilateral agreements is concluded based on free intent of parties. The parties will base their decision on free intent and full-scale information available. Article 5 of the LCG regulates the right of parties to obtain information on the per-contractual stage. Paragraph 1 of this article states, an employer may obtain information about a candidate necessary for deciding to employ him/her. Paragraph 2 thereof provides, a candidate shall be obliged to inform the employer about any circumstance that may impede his/her performance of work or endanger the interests of the employer or the third person. Based on the analysis of both articles it is possible to identify the volume of information that could be required by employer. On the one hand, the required information should be necessary for decision-making on employment of a person, on the other side – it should be relevant for the performance of duties or hiding this information from the employer may endanger (or create threat to) the interests of the employer or the third person. There are various forms of obtaining information, such as submission of documents or interview during which the employer uses the method of questioning.

During interview the candidate is reluctant to provide information to employer that may negatively influence decision on employment. At the same time the employer tries to collect as much information as possible, including information on personal life.

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[22] *Hümmerich/Boecken/Düwell*, Anwaltskommentar, Arbeitsrecht, Band 1, 2008, S. 84.

[23] *Schaub, G.,* Arbeitsrecht, Handbuch, 7. Auflage, 1992, S. 111.

The LCG does not specify the means of obtaining information; thus this stage of labour relations is not regulated and there is a risk of interfering in personal life of a candidate and arbitrary decision-making.

It is important that there are regulations on admissibility of questions, especially those related to sensitive information as there might be a threat to unequal treatment of women and men. According to practice of the Labour Courts of the German Federation, there are admissible, essentially inadmissible and inadmissible questions[24]. The classification of questions is used to decide whether the candidate should answer the question.

Questions related to professional skills, experience and qualification, as well as education are admissible. An employer has a legitimate interest in answers to such questions. Therefore a candidate should respond[25]. Obligation to answer an essentially inadmissible question should be evaluated on individual basis. As for the inadmissible questions, they cannot be asked to candidate at the pre-contractual stage as they interfere in his/her personal life; accordingly answers to such questions go beyond the legitimate interest of an employer. It is inadmissible to ask questions on pregnancy and family status as they have some risks of unequal treatment based on gender.

c) Employment of women during pregnancy

The LCG does not regulate rights of pregnant women during pre-contractual stage; nor does the LCG provide inadmissibility of questions on pregnancy.

In accordance with the German and ECHR case law, question on pregnancy is inadmissible[26] as this question aims at unequal treatment of candidates on the ground of sex. Whilst only women could be under pregnancy for a limited period of time, an employer is prohibited to reject employment contract on the grounds of pregnancy notwithstanding to the duration (limited or unlimited period) of the contract.

Comparison of the provisions of the LCG and the LGGE is interesting. Both legal acts prohibit employing pregnant women for work involving them to perform hard, harmful, or hazardous work. However LCG and the LGGE could be interpreted differently due to minor differences in wordings. Paragraph 5 of article 4 of the LCG provides that "concluding labour agreements … with pregnant women … involving them to perform hard, harmful, or hazardous work shall be prohibited". Paragraph 4 of article 6 of the LGGE states that favourable work conditions shall be ensured for pregnant women as prescribed by Georgian legislation, which excludes their activity under hard, harmful and hazardous conditions. Unlike the LCG that prohibits conclusion of agreement with pregnant women for hard work, the LGGE provides that the legislation should prohibit performance of hard work by pregnant women and does not deal with conclusion of agreement with a pregnant woman for such a work.

Taking into account provision prohibiting conclusion of labour agreements with pregnant women involving them to perform hard, harmful, or hazardous work, an employer,

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[24] *Thüsing, G.*, Münchner Kommentar zum BGB, 5. Auflage, 2007, Rn. 16.

[25] *Wisskirchen/Bissels*, Das Fragerecht des Arbeitgebers bei Einstellung unter Berücksichtigung des AGG, NZA 4/2007, S. 170.

[26] *Euler, A.*, Zulässigkeit der Frage nach einer Schwerbehinderung nach Einführung des Benachteiligungsverbots des §81 Abs. 2 SGB IX, 2004, S. 70-71.

having legitimate interest, is entitled to ask questions on pregnancy during recruitment for hard work at the pre-contractual stage. This may serve as a basis for discrimination of women. Therefore it is recommended that the LCG is amended to bring it in line with the LGGE and prohibit performance of hard, harmful, or hazardous work by pregnant women.

2. Prohibition of discrimination on the ground of sex in contractual labour relations

In the field of employment gender equality may be safeguarded through legislative regulations on equal and decent work conditions after employment contract is concluded. The remuneration for work is an essential part of labour relations; therefore equal remuneration between men and women for work of equal value is of a paramount importance.

In addition, special guarantees should be provided to protect personal inviolability and respect of dignity of employee in cases of harassment from the part of employer, including sexual harassment, in the workplace.

The LCG does not explicitly refer to right to equal remuneration and prohibition of harassment.

a) Equal Remuneration

As provided in various international documents, equal pay for men and women for work of equal value (pay gap) is one of the main principles of antidiscrimination. The principle on equal treatment was laid down in the original EEC Treaty of 1957, in Article 119[27]. In 2010 European Network of Legal Experts in the Field of Gender Equality developed a research paper on legal perspectives of Pay Gap in EU Member States and 6 other countries[28]. The research underlined once again the importance of the issue and the need to continue work towards better implementation of equality principle.

The LCG covers this issue under the general provision on prohibition of discrimination and the scope of its application is subject of interpretation by those implementing the law.

In 1997 Georgia ratified Equal Remuneration Convention (Convention N100)[29] and since then its provisions are directly applicable on the territory of Georgia.

The national labour legislation does not define the term "remuneration" that is an essential prerequisite for efficient implementation of the principle of equal pay for men and women for work of equal value. However article 1 of the Convention N100 defines remuneration for the purpose of the Convention: the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever

[27] *Schrittwieser, B.*, Gleichbehandlung im Arbeitsrecht, AR 7, 2011, S. 17.

[28] *TheGender Pay Gap in Europe from a Legal Perspective (including 33 country reports)*, 2010.See further details at: http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/genderpaygapfromlegalperspective-nov2010_en.pdf

[29] Ratified by the Resolution #153 of the Parliament of Georgia dated May 29 1996.

payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment. It is defined therein that the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex. Each Member State of the Convention has an obligation to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value by means of, *inter alia*, national laws or regulations.

b) Harassment and sexual harassment

For the purposes of review of harassment and sexual harassment in the workplace it is reasonable to define the terms. The LCG refers to harassment as an element of the definition of discrimination, but does not mention sexual harassment. According to paragraph 4 of article 2 of the LCG discrimination could be: a) direct or indirect harassment of a person aimed at or resulting in creating an intimidating, hostile, humiliating, degrading, or abusive environment for that person; or b) creating the circumstances for a person directly or indirectly causing their condition to deteriorate as compared to other persons in similar circumstances.

Directive 2002/73/EC of the European Parliament and of the Council provides that harassment related to the sex of a person and sexual harassment is contrary to the principle of equal treatment between women and men. It is therefore appropriate to prohibit such forms of discrimination not only in the workplace, but also at the stage of contract preparation[30]. According to article 1 of the Directive, harassment is an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

EC Directive and the LCG do not regulate the issue similarly. The EC Directive separately refers to harassment as the fact/conduct of harassment (without comparing with another person) constitutes discrimination unlike the traditional concept of discrimination that requires comparison with another person who is in the equal conditions[31]. In addition the EC Directive mentions that harassment has the purpose or effect of violating the dignity of a person. While the Georgian legislation provides that creating an intimidating, hostile, humiliating, degrading, or abusive environment for that person is one of the forms of harassment.

In this context paragraph 1 of article 6 of the LGGE is relevant as it prohibits persecution and/or harassment of a person, which is aimed at or results in the creation of intimidating, hostile, humiliating, degrading or offensive atmosphere in labour relations. The wording of this paragraph is analogous to the relevant provision of the LCG; however the former does not specify that the act constitutes harassment in labour relations. The same article prohibits any adverse verbal, non-verbal or physical behaviour of sexual nature aimed at or resulting in personal offence or creating intimidating, hostile or humiliating environment. This provision prohibits sexual harassment in the workplace.

[30] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:269:0015:0020:DE:PDF

[31] *Hümmerich/Boecken/Düwell*, Anwaltskommentar, Arbeitsrecht, Band 1, 2008, S. 63.

According to EC Directive 2002/73/EC, sexual harassment is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

c) Maternity leave

The realization of the right to maternity leave by men is problematic; another issue is the collision between the provisions of the LCG and the Order #231/n (dated 2006) of the Minister of Labour, Health and Social Care on Remuneration of Pregnancy, Birth-giving and Child care, and Newborn Adoption Leaves. Article 27 of the LCG entitles an employee to enjoy maternity and child-care leaves without indicating the sex of the employee. Accordingly the provision should be construed to mean both women and men. However paragraph 6 of article 10 of the Order provides that family members of a pregnant woman cannot enjoy maternity and child care leaves and relevant remuneration save the cases when a woman dies during birth-giving and a child's father or custodian is entitled to the remuneration. This provision provides illegitimate discrimination of men in the workplace and contradicts with the requirements of organic law (the LCG).

It is noteworthy that the LCG is the main legal act regulating labour relations on the territory of Georgia in line with the right to freedom of work guaranteed by the Constitution. The LCG sets the basic standards of employment that are specified in different by-laws. Order #231/n is the compilation of procedural norms and should be considered as instruction. Therefore it is mandatory to bring the Order in compliance with the prevailing legal acts – the Constitution and the LCG.

3. Positive Measures

The principle of formal equality of human beings is guaranteed by various legal acts; however human beings are different and in order to achieve their real equality it is important to consider the difference and legitimize unequal treatment for individuals who are in unequal conditions. The positive discrimination serves this purpose and justifies differentiation of different persons.

Georgian legislation does not recognize positive measures; however paragraph 5 of article 2 of the LCG defines the preconditions which shall not render differentiated treatment to be a discrimination, namely discrimination shall not be the necessity for differentiating between persons arising from the essence or specifics of the work or its performance conditions, serving for achieving a legitimate objective and being a proportionate and necessary means of achievement of that objective. The application of this provision shall depend upon several cumulative preconditions: a) the essence or specifics of the work or its performance conditions; b) necessity to achieve a legitimate objective; and c) it is proportionate and necessary means of achievement of that objective. Differentiation of persons shall be allowed only in cases when all three preconditions exist. The purpose of this provision is prevention of negative discrimination and it does not legitimize use of positive discrimination. It is noteworthy that legislations of European States allow positive measures for creating equal possibilities for different persons; at the same time, preferential treatment does not depend upon the essence or specifics of the work. Ac-

cordingly the legislations of European countries create equal opportunities of persons in unequal conditions.

Article 5 of German Law on Equal Treatment (positive measures) provide that unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages[32].

Practical example: legislation allows giving preferences to women within the established quotas in the process of selection of candidates.

IV. Legal implications of gender discrimination in labour relations

The LCG and the LGGE, as well as conventions binding upon Georgia provide for prohibition of discrimination on the basis of sex in the workplace. The legislation defines the term discrimination, identifies specific grounds that exclude differentiated treatment and preconditions for legitimizing unequal treatment; however the regulations do not specify the sanctions (legal implication) for violation of anti-discrimination provisions in labour relations, neither rights of the employer or candidate for employment are defined. A person, whose right was violated at the pre-contractual stage (could not access job) or she/he was subject to discrimination during employment based on sex, should have the right to submit an application with specific legal requirement to the court. The requirements should be based on legal texts. Paragraph 2 of article 1 of the LCG provides that labour-related questions not governed by the LCG or by other special law shall be regulated by the norms of the CCG. Accordingly violation of antidiscrimination provisions should be evaluated based on this law. The persons whose rights were allegedly violated will find it easier to apply to courts if the schemes of legal basis of requirements are constructed.

1. Violation of antidiscrimination provision – one of the forms of violation of labour obligations

Articles 316 and 317 of the CCG provide, by virtue of an obligation the person is entitled to claim performance of a certain action from the obligor. Refraining from action may constitute performance as well. An obligation may bind each party to act in accordance with extraordinary diligence as to the rights and property of the other party. An obligation shall arise as a rule from the contract between the parties; however an obligation may also arise from the grounds of drawing up the contract.

Relations between employer and employee are based on labour contract that grants rights and imposes obligations to parties. The employer has an obligation not to discriminate the employee and it is noteworthy that non-discrimination obligation binds the employer at pre-contractual stage too under paragraph 2 of article 2 of the LCG.

Paragraphs 3 and 4 of article 7 of the German Law on Equal Treatment provide that provisions of labour contract that are conflicting with antidiscrimination principles will be void; at the same time an employer violates contractual obligations if he/she discriminates an employee, *inter alia,* based on sex. This clear wording in the German law creates a solid basis for an employee to apply to the court.

[32] *Hümmerich/Boecken/Düwell*, Anwaltskommentar, Arbeitsrecht, Band 1, 2008, S. 65.

Discrimination is harassment of a person aimed at or resulting in creating an intimidating, hostile, humiliating, degrading, or abusive environment for that person (paragraph 4 of article 2 of the LCG). Any form of harassment in labour relations violated dignity of a person. In such cases a person may apply to the court based on article 18 of the CCG that regulates remedies for personal non-material rights.

2. Right to compensation for damage

If violation of prohibition of discrimination is considered to constitute violation of contractual (or pre-contractual) labour obligation it is possible to claim compensation for damage under the CCG. In such cases the following provisions should be used as legal basis: paragraphs 3 and 4 of article 2 of the LCG and articles 316, 317 and 394 of the CCG. The latter provides that in case of breach of an obligation by the obligor, the obligee may claim damages arising from the breach.

In addition harassment and sexual harassment in labour relations create intimidating, hostile, humiliating, degrading, or abusive environment for a person and therefore the person is entitled to claim compensation under paragraphs 2 and 6 of article 18 of the CCG; the claim covers both material and non-material damage.

In this respect paragraph 2 of article 15[33] of the German Law on Equal Treatment is noteworthy which provides that when an employer violates antidiscrimination provisions on the pre-contractual stage a candidate is entitled to claim damage. This compensation shall not exceed three monthly salaries for the advertised vacancy. Three month limitation will not apply if the person would have been recruited in case non-discrimination provisions would have been observed.

Article 14 of the German Law on Equal Treatment states: in cases of harassment of sexual harassment in the workplace, the affected employees has the right to refuse performance without loss of pay insofar as this is necessary for their protection and until the employed takes all necessary measures to stop of harassment (sexual harassment).

3. Burden of proof

Article 102 of the Civil Procedure Code of Georgia (CPCG) provides both parties have to prove the circumstances that they have used as the basis for application or position. Article 11 of the CPCG provides courts will hear cases on violation or rights or disputed rights, as well as cases on protection of interests protected by law, including labour disputes.

2013 amendments to the LCG introduced an innovation concerning the burden of proof on violation of antidiscrimination provisions in cases when contractual relations are terminated. Article 37.3.b of the LCG provides that terminating labour relations shall be inadmissible on discrimination grounds. Article 40^2 thereof provides that the burden of proof for the claim on termination of contract on discrimination grounds shall lie with employers if employees allege the circumstances providing a reasonable cause to believe that employers acted in breach of the requirements of Article 37(3)(b) of the LCG. This

[33] Allgemeine Gleichbehandlungsgesetz (AGG), Arbeitsgesetze, dtv, 74. Auflage, 2009, S. 70.

provision is very important for loosening the burden of proof of an employee; however it only covers contractual labour relations and does not deal with pre-contractual stage.

V. Conclusion

Modern national and international approaches and policies on prohibition of discrimination on the basis of gender have been identified as a result of review of the basis of gender equality, relevant Georgian regulations, and strategic directions of EU and ILO and UN approaches. The study of basis of gender equality in Georgian legislation focused on risks of discrimination on the basis of gender in contractual and pre-contractual labour relations and specific mechanisms for prevention/management of these risks, as well as on legal implications of unequal treatment and harassment in the workplace.

It is noteworthy that 2013 amendments to the LCG were positive step towards better protection of employees from discrimination; however the Georgian labour legislation still contain risks of unequal treatment on the basis of gender. Based on the conducted analysis and study the following conclusions were developed:

- For the purposes of real implementation of provisions on prohibition of discrimination at the pre-contractual stage of labour relations ***it is essential that vacancy advertisement uses neutral language.*** This is an obligation of an employer that should be regulated by law;
- Interview is most commonly used method of collecting information about candidate. Employment of a person greatly depends on answers to questions during the interview process. Therefore lack of regulations of interview process contains risks of gender discrimination. ***The law should classify admissible questions, regulate the interviewing process and specify inadmissible questions*;**
- International practice recognises the need to create additional mechanisms for protection of pregnant women to ensure equal participation of women and men in labour market and prevent indirect discrimination of pregnant. Paragraph 5 of article 4 of the LCG justifies questioning a women on pregnancy for recruitment on hard, harmful, or hazardous work thus creating conditions for unequal treatment for women and men and arbitrary decisions by the employer. Therefore, ***it is recommended that legislation prohibits that pregnant women do not perform hard, harmful, or hazardous work and not conclusion of an agreement with pregnant women for a job involving hard, harmful, or hazardous work;***
- Even though equal remuneration between men and women for work of equal value is guaranteed by the binding convention of Georgia, ***it is recommended that Pay Gap principle is separated from the general provision on prohibition of discrimination and is drafted separately*;**
- ***In order to ensure equal enjoyment of maternity leave by men and women it is recommended that secondary legislation is brought in compliance with the organic law – the LCG;***
- It is recommended that the Georgian legislation on gender equality ***specifies***

the term "positive discrimination" in order to create safeguards of equal treatment for persons who are in unequal conditions;

- Paragraph 4 of article 2 of the LCG uses terms "discrimination" and "harassment" together. The term "harassment", like discrimination, presupposes the need for comparison with another person thus decreasing the standard of protection of employee. Therefore, ***it is recommended that the terms "harassment" and "discrimination" are separated in the LCG to ensure that evaluation of harassment does not require comparison with hypothetical person who is in the same conditions;***
- Legal implications of unequal treatment should be specified by labour legislation to ensure legal remedies for the victim of violation. Therefore, ***it is reasonable that the relevant amendments - providing that discrimination on any ground by the employer constitutes violation of contractual labour relations- are introduced to the LCG***;
- ***It is recommended that article 40[2] of the LCG on burden of proof in discrimination cases is also applicable to pre-contractual and contractual relations.***

And finally modern tendencies on gender issue should be permanently reviewed, information consistently systematized and issues identified in practice adequately responded. The compilation of these activities will positively affect prohibition of discrimination and equal participation of women and men in socio-economic life.