



Speech delivered by the Greek Ombudsman, Ms Calliope Spanou, in the Third International Symposium on Ombudsman Institutions (Ankara, 16-17 September 2015)

## **Ombudsman and Women's Rights**

### **The contribution of the Ombudsman to combating gender discrimination**

Discrimination on all grounds (gender, nationality, belief, disability, age, sexual orientation) is an area where both the legal culture and the overall civilization of a society are particularly tested. Modern principles of the legal order consider discrimination to be a form of violation of legal interests and rights on the basis of specific characteristics, countering the universally acknowledged validity of the principle of equality. Combating discrimination involves harmonizing national legislation with the international *acquis* on the level of human rights' protection and ensuring its implementation.

However, given the fact that discrimination is constantly fed by stereotypes and prejudices, deeply rooted in the historical and social tradition, their limitation, much less their elimination, appears to be particularly difficult. For many years, these stereotypes have been so dominant and compact that they are easily believed to be perfectly justified and natural. A typical case here is gender discrimination, which is connected with the long history of stereotypes that have shaped and forged gender inequality as a 'natural difference'. In view of this, any legislative framework against discrimination of this kind will certainly remain inactive or inadequate if, at the same time, it does not seek to eliminate the prime reasons of inequality and does not encourage resistance against discrimination practices.

It is then obvious that the realization of the principle of gender equality is an objective hard to achieve. Combating discrimination includes but is not restricted to the regulatory field. However, the existence and effective implementation of an adequate legal framework, along with the activation of sanctions and ideological mechanisms promoting the principle of equal treatment and its importance, remains critical to the effective fight against gender discrimination.

### **The Competences of the Ombudsman**

Investigating cases of violation of gender equality by public services, whose actions fall within the legal competence of the Authority of the Greek Ombudsman (G.O.), occupies a substantial

part of the activity of the Greek Ombudsman and cuts across many policy fields: from taxation to recruitment, social security and labour relations.

Since 2006, the European and the Greek legislation have enhanced the relevant role of the Greek Ombudsman. Thus, beyond Constitutional provisions for gender equality, a series of pieces of legislation at national level following the developments of EU legislation have broadened the field of the Ombudsman's competence on gender equality issues. According to the relevant EU directive, every member state should appoint an independent body to provide assistance to victims of discrimination, investigate whether the principle of equal treatment is applied and publish reports recommending measures to eradicate gender discrimination. On top of its general mandate, the Greek Ombudsman, already a National Human Rights institution, is officially an Equality Body, promoting the principle of equal treatment in the public sector. Regarding the private sector, the G.O. has also the monitoring of the implementation of the principle of equal treatment for men and women in labour issues (Law 3896/2010) and in the access to, and supply of goods, and services in the public sector (Law 3769/2009).

The Ombudsman's mandate for promoting gender equality broadened its scope of intervention in more than one ways. It is now possible to investigate from this angle complaints pertaining to the civil service internal relations -initially excluded from its competence; it further extended the Ombudsman's field of intervention to include the private sector for gender equality in employment, in collaboration with the Labour Inspectorate. Moreover, when it comes to complaints related to gender-based discrimination, the Ombudsman is not obliged to end its investigation in case the complainant files a lawsuit; instead, it is entitled to continue its mediating efforts till the first actual hearing in court of the lawsuit or the relevant petition for the issue of a temporary injunction (Law 3896/2010). And last, the Ombudsman can take up preventive actions in order to promote equal opportunities and equal treatment of men and women in matters of employment and occupation, in cooperation with public administration, social partners, enterprises, NGOs, etc., ensuring the active promotion of change in gender perceptions especially in the labour market (Law 3896/2010).

This broader regulatory framework aims at implementing in the most effective way the principle of equal treatment of men and women in employment through a system (a) of expanded legal protection and (b) of innovative legal tools.

(a) Its scope covers not only people already employed but also those seeking employment or vocational training, in all forms of employment in the public or/and the private sector, self employment included. Concepts of "direct", "indirect discrimination" and "harassment" are defined under its protective scope. It is further acknowledged that trade unions and other legal entities as well as associations with similar legitimate interest have the right to exercise, with the approval of the party offended, his or her rights before administrative or independent authorities and to engage on his or her behalf in judicial procedures, while the right to judicial protection is extended to after the employment relation under which the discrimination taken place has ended. Unequal treatment on grounds of gender includes the unfavourable treatment

of a woman due to pregnancy or maternity, as well as of a parent making use of parental leave for the child's upbringing, but also discrimination on the grounds of family status.

For cases concerning the private sector, the G.O. cooperates with the Labour Inspectorate that, contrary to the G.O., has the right to impose administrative sanctions. The local Social Inspectorates have to inform directly the GO on the complaints related to violation of the equal treatment principle and submit the results of their inspections. The G.O. is responsible for formulating the final conclusion of a complaint in all cases on the basis of the Labour Inspectorate report and/or the material collected through its own investigation.

(b) This legislation has also provided the Ombudsman with new methodological tools for the appropriate handling of cases, such as direct and indirect discrimination and particularly the shifting of the burden of proof. According to this, the complainant should bring to the attention of the competent body facts from which it is possible to infer that an instance of discrimination has taken place while the defendant should fully prove that no such discrimination occurred.

However, critical legal concepts and procedures as par excellence the concepts of indirect discrimination and harassment, sexual or other, as well as the mechanism of "shift" of the burden of proof are sometimes vague. It remains a standing responsibility of the G.O. and the Labour Inspectorate and above all of the national courts to clarify and specify these, with the help of a rich case-law constantly developed by the European Court of Justice (ECJ).

When monitoring the implementation of the principle of equal treatment, the Greek Ombudsman also acts as a mediator between the party offended and the person allegedly responsible for discriminatory treatment on grounds of gender. Based on the investigation, recommendations are then formulated not only for individual cases but also at a more general level, involving changes in corresponding rules and regulations.

### **Three main types of complaints**

In fulfilling this task, the G.O. faces three main types of complaints. Its role, the difficulties faced and its action vary according to each and every type of complaints.

1. The first concerns issues of equal treatment as a matter of principle, i.e. discrimination (direct or indirect) that is embedded in laws and regulations. Changing laws and regulations is the issue at stake here. In sum, this first type of issues is placed within the public sphere.
2. The second type involves the implementation of principles of equal treatment on the ground and the respect of corresponding rights by public and private employers or the extension of such rights to wider beneficiary groups. This second type of issues is placed within the social sphere.
3. The third type of complaints concerns equal treatment as a matter of respect of personal integrity particularly at workplace. Sexual harassment is the example par

excellence. The nature of these issues touches upon the private sphere, involving more sensitive and difficult handling.

Examples of gender discrimination cases by type:

### ***1. Rules and Regulations: fighting against gender stereotypes***

One characteristic case was the exclusion of women from participating in vocational training courses, organized by the Greek Manpower Employment Organisation (O.A.E.D.) for certain professions, such as carpenters, oil- painters and welders. O.A.E.D. made no reference to any specific provision of law, pointing out, however, that a high percentage of women had appeared in other courses (e.g. confectionery), and arguing that the introduction of exclusively male courses intended to achieve the organization's national quotas. The Ombudsman considered the justification offered and pointed out that that exclusion not only violated the principle of equality at the expense of women, but further perpetuated in practice existing inequalities and prejudices. O.A.E.D. adopted the recommendations of the Ombudsman.

Another case was that of a woman candidate for recruitment at the Fire Department, who was excluded because of the small proportion of posts reserved for women in a job announcement for vehicle drivers (3/138). To justify the legality of that practice, the Headquarters of the Fire Department pointed to the Service Regulations, which called upon drivers to assist firemen on duty in extinguishing fires. The Ombudsman found that the restriction was incorrectly applied, since it was not only limited to fire fighters' posts as the law prescribed but included all the advertised posts. Moreover, it was not applied with absolute consistency, since women candidates had not been completely excluded from the process, and as a result they took three out of the 138 driver posts. That inconsistent practice was not legitimate and highlighted the need to clarify the restriction and control its consistent implementation.

Similarly, discrimination was found in the case of different age limits for recruitment of men and women into the body of Border Guards, which were finally abolished as a result of the G.O.'s intervention.

The fulfilment of military service, as a prerequisite for the employment of special guards, and additional credits to those who have served as reserve officers or members of the Special Forces violated the principle of equal treatment, since women do not have the obligation to serve in the military and it is therefore impossible to be accorded these additional credits as qualified examinees. Common performance thresholds for men and women regarding the physical tests, and common height requirements for employment in municipal police are further examples, showing indirect discrimination. These measures in force appear neutral, i.e. regardless of gender, but in essence affect more women than men, as they do not fairly respond to the potential of both genders, as confirmed by experts, but place female candidates at a disadvantage vis-a-vis male candidates.

Stereotypical perceptions and prejudices, even in the exercise of duty of public authority agencies, are behind these issues and have to be solved by changing rules in force.

### ***II. Social sphere: Respecting equality in practice***

Most of these complaints concern the violation of rights related to the protection of maternity. In a period of high unemployment women are more vulnerable, especially during maternity period, despite the special protection they enjoy during this time. Thus women are dismissed during pregnancy or after their return to work; they are sometimes treated in a degrading way, they are moved to further away posts or are assigned harder tasks by employers with the intention of leading them to resign. Employers may also invoke financial difficulties without however enough evidence of it or without any effort to ensure the necessary protection of women during maternity period.

In these cases, the G.O. mediates in order to ensure respect of their rights and aims at the overturn of the dismissal as well as the correct treatment of these women. Cooperation with the Labour Inspectorate and meetings with employers and employees are a major tool in this regard. Otherwise, an administrative fine is imposed on employers who are found to be responsible for gender-based unfair treatment, following a proposal by the Greek Ombudsman.

### ***III. Sexual harassment: defending the integrity of personality at work***

This type of issues is more delicate in many respects. Not only women hesitate to report problems of gender based harassment and especially sexual harassment by employers or co-workers because they feel even more exposed, but difficulties are inherent in the investigation of such complaints, because they touch upon the private sphere. The G.O. is faced with two different narratives and often insufficient evidence.

Investigation of relevant complaints showed that it is most crucial to provide sufficient evidence so that the G.O. and the Labour Inspectorate can exercise their mediating role. In general, there is a grave danger of misinterpreting the relevant provision concerning the burden of proof, as some of the complainants were under the impression that a simple allegation would suffice to justify shifting of the burden of proof to the defendant who would have to disprove the accusation. It is obvious that it is not possible to apply this provision in cases where the accusation is founded on evidence that yields a less than fair probability that the alleged misconduct is sustainable. However, in cases where there is sufficient evidence, the G.O. in collaboration with the Labour Inspectorate, proposes an administrative fine, while later the case often reaches the court. The G.O. consistently reminds the employers and heads of public agencies of their duties to prevent such incidents at work and to treat them correctly as soon as there is such an allegation.

### **Conclusion**

It is clear that combating gender discrimination requires particular attention and systematic monitoring. While our society has significantly evolved with regard to gender equality issues,

there are still individual sectors that present problems. A good legislative framework and its correct implementation are absolutely necessary. As all this has to fight against social prejudice and stereotypes that are slow to change, promotion of gender equality through information campaigns and training are an indispensable part of the G.O.'s mission in this area.

Equally important is the obligation of the state bodies, both judicial and administrative, to give substance to the legislative provisions and to contribute decisively to the effective implementation and shaping of the anti-discrimination culture that must govern court and administrative practice, and also our daily lives concerning the above issues.