ARTICLES

RUSSIAN LAW ON DISCRIMINATION IN EMPLOYMENT: CAN IT BE COMPATIBLE WITH INTERNATIONAL LABOR STANDARDS?

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Law concerning discrimination in employment in Russia was expected to undergo a serious transformation after the fall of the Soviet system, when the Iron Curtain was lifted and the country became more open to Western legal concepts and international law. Nevertheless, most existing anti-discrimination norms in Russian law are based on the traditional concept of "uniformity and differentiation in regulation of labor" that is ill-suited to meet the challenges of a market economy and the emergence of employment by privately owned enterprises which may have greater motivation to discriminate than state-owned-enterprises. The aim of the author is not to present an encyclopedic overview of all aspects of the topic of discrimination, but rather to concentrate on the most significant areas in which Russian law and practices diverge from international labor standards. To do so, this article analyzes current Russian legislation and landmark cases concerning gender, disability, age and some other areas of discrimination in employment with respect to their effectiveness and conformity to international labor standards on the matter. The issues of a clear definition of discrimination in employment, of protection from indirect discrimination, and of alleviation from the burden of proof are also examined. The author concludes this work by offering the reader several suggestions about how to harmonize Russian domestic law on employment discrimination with international labor standards while giving due respect to national legal and societal traditions and the current economic environment.

Keywords: employment discrimination law; Russian labor law; international labor standards; European Court of Human Rights; International Labour Organization.

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1. Introduction

Although the early Soviet era is known for grave examples of discrimination, especially in such areas as class origin[1] or nationality,[2] equality of treatment was one

[1] The most notorious form of class discrimination was the existence of so-called '*lishentsy*' (the deprived ones) – a group of persons that were deprived of political rights because of their previous membership in the ruling classes of the clergy. It is difficult not to notice the striking parallel between the prejudicial treatment of these 'lishentsy' and modern lustration processes in some of the Eastern European countries. On this topic see: Саламатова М.С. Лишение избирательных прав как форма социально-политической дискриминации в середине 1920-х – 1936 гг.: на материалах Западной Сибири: автореф. дис. ... канд. ист. наук (Новосибирск 2002) [Salamatova M.S. Lishenie izbiratel'nykh prav kak forma sotsial'no politicheskoi diskriminatsii v seredine 1920-kh – 1936 gg.: na materialakh Zapadnoi Sibiri: avtoref. dis. ... kand. ist. nauk (Novosibirsk 2002) [Salamatova M.S. Disenfranchisement as a form of socio-political discrimination in the mid-1920s – 1936: On materials of Western Siberia: Summary of a Ph.D. thesis in history (Novosibirsk 2002)]]; Валуев Д.В. Лишенцы в системе социальных отношений (1918–1936 гг.) (на материалах Западного региона РСФСР): автореф. дис. ... канд. ист. наук (Брянск 2003) [Valuev D.V. Lishentsy v sisteme sotsial'nykh otnoshenii (1918–1936) (na materialakh Zapadnogo regiona RSFSR): avtoref. dis. ... kand. ist. nauk*: (*Briansk 2003) [Valuev D.V. The disenfranchised in the system of social relations (1918–1936) (on materials of the Western region of the RSFSR): Summary of a Ph.D. thesis in history (Briansk 2003)]]; Мавлютова З.Ш. *Лишение избирательных прав православного духовенства (на материалах Тюменского и тобольского округов уральской области 1920-х годов)*, 23 Вестник ЧелГУ 52–57 (2009) [Mavliutova Z. Sh. *Lishenie izbiratel'nykh prav pravoslavnogo dukhovenstva (na materialakh Tiumenskogo i Tobol'skogo okrugov Ural'skoi oblasti 1920-kh godov)*, 23 Vestnik ChelGU 52–57 (2009) [Zul'fiya Sh. Mavliutova, *Deprivation of electoral rights of the Orthodox clergy (on materials of Tyumen and Tobolsk districts of the Ural region in 1920-ies)*, 23 Bulletin of CSU 52–57 (2009)]].

[2] See, for example, Гартвиг Б.В. Классовая дискриминация в системе образования АССР НП и ее последствия in Материалы 8-й международной научной конференции «Немцы России: социально-экономическое и духовное развитие (1871–1941)», Москва (13–16 октября 2001) 329–338 (Москва, ЗАО «МДЦ Холдинг» 2002) [Gartvig B.V. Klassovaia diskriminatsiia v sisteme obrazovaniia ASSR NP

of the mainstays of Soviet propaganda. Although this is disputed,[3] there is evidence for suggesting that 'equality' played an important role.[4] The very nature of a socialist economy favored equality in employment. When there was total state ownership of the employing enterprises and no practical freedom to negotiate the conditions of employment contracts, there was no economic motivation for employers to discriminate.[5] Political and societal motives for discrimination were in place in the Soviet era, especially on grounds such as political or religious convictions or for sexual orientation. Although discrimination based on gender[6] and race[7] was prohibited by

i ee posledstvii in Materialy 8-j mezhdunarodnoj nauchnoj konferencii Nemcy Rossii: social'no-ehkonomicheskoe i duhovnoe razvitie (1871–1941), Moskva (13–16 oktyabrya 2001) 329–338 (Moskva, ZAO "MDC Kholding" 2002) [Bella V. Gartvig, Class discrimination in education of ASSR NP and its consequences in Materials for the 8th International Conference The Germans of Russia: socio-economic and spiritual development (1871–1941), Moscow (13–16 October 2001) 329–338 (Moscow, MDC Holding 2002), P. 329–338]]. This paper deals with discrimination against people of German origin in the Soviet educational system. There were also examples of anti-Semitism affecting access to education. See the discussion on this matter: Губайловский В. Костинский А. *Дискриминации при поступлении в высшие учебные заведения Советского Союза, Радио Свобода* [Gubailovkii V. Kostinkii A. *Diskriminatsiia pri postuplenii v vysshie uchebnie zavedeniia Sovetskogo Soiuza*, Radio Svoboda [Vladimir Gubailovkii, Aleksandr Kostinkii *Discrimination in admission to higher educational institutions of the Soviet Union*, Radio Liberty)]] <http://archive.svoboda.org/programs/edu/2005/edu.010505.asp> (accessed July 8, 2016).

3 See *supra* notes 1 and 2.

4 For such arguments see Vera N. Tolkunova, Women in the USSR in On the UN Decade for Women (Moscow, Progress Publishers 1985).

5 This was the case during the 'classical' period of the socialist era from roughly 1930s to the beginning of 1980s. Later on, in the second half of the 1980s but still prior to the collapse of the Soviet Union, there was a brief period of transformation to a market economy while socialist ideology was still in place. This period was accompanied by so much legal and economic chaos that it is impossible to find any reliable information on discrimination in employment for those years.

6 See more about gender and family policy in the USSR: Айвазова С.Г. Свобода и равенство советских женщин in Айвазова С.Г. Русские женщины в лабиринте равноправия (Очерки политической теории и истории. Документальные материалы) [Ajvazova S.G. Svoboda i ravenstvo sovetskih zhenshchin in Aivazova S.G. Russkie zhenshchiny v labirinte ravnopraviya (Ocherki politicheskoj teorii i istorii. Dokumental'nye materialy) [Svetlana G. Aivazova, Freedom and equality of Soviet women in Aivazova S.G. Russian women in the labyrinth of equality (studies in political theory and history. Documentary materials)]] 66–99 (Moscow 1998); Айвазова С.Г. Гендерное равенство в контексте прав человека: пособие [Aivazova S.G. Gendernoie raavenstvo v kontekste prav cheloveka: posobie [Svetlana G. Aivazova, Gender equality in the context of human rights: textbook]], available at <http://www.owl.ru/win/books/gender/11.htm> (accessed July 8, 2016); Шаповалова Я.А. *Политика большевиков в отношении семьи в первые годы советской власти*, 1 Общество: политика, экономика, право 105–107 (2010) [Shapovalova Ia.A. *Politika bol'shevikov v otnoshenii sem'i v pervye gody sovetskoi vlasti,* 1 Obshchestvo: politika, ekonomika, pravo 105–107 (2010) [Ianina A. Shapovalova, *Policy of the Bolsheviks towards the family in the first years of Soviet power*, 1 Soc'y: Pol., Econ., L. 105–107 (2010)]]. Probably the brightest illustration of the early Soviet gender policy may be the biography of Aleksandra Kollontai, the famous Bolshevik diplomat who became the first woman ambassador in the world. See her works on the Soviet gender policy: Коллонтай А.М. Труд женщины в эволюции народного хозяйства [Kollontai A.M. Trud zhenshchiny v evolutsii narodnogo khoziaistva [Aleksandra M. Kollontai, Woman work in the evolution of the national economy]] (Gosizdat 1923); Коллонтай А.М. Любовь трудовых пчел [Kollontai A.M. Liubov' trudovykh pchel [Aleksandra M. Kollontai, Love of labor bees]] (Gosizdat 1924).

7 For more information about race and national policy of the Soviet state see: Сяньчжун Л. *Плюсы и минусы политики «коренизации» СССР в 1920-е годы*, 1 Ойкумена. Регионоведческие исследования

state policy, there were some instances of it in reality. For example, gender pay gaps in the USSR were comparable to those in most capitalist economies.[8]

During its socialist period, the country was isolated from the Western legal tradition by the Iron Curtain. Therefore, some legal concepts were used differently to the way they functioned in countries with market economies. Instead of anti-discrimination regulation, there was a principle of "uniformity and differentiation in labor law," which meant that labor legislation was applied equally to everyone, but some specific categories of employees (youth, women, people with family responsibilities, disabled individuals, etc.) were given preferential consideration by the legislators, and special norms were provided for them.[9] For some workers belonging to the protected categories these special norms were themselves discriminatory.[10] The way these norms operate at present will be discussed in more detail later in this article. In fact, such a system functioned as the equivalent of a prohibition against discrimination including elements of affirmative action. After the collapse of the socialist system and the introduction of a market economy with new privately owned enterprises, this old approach to equality turned out to be insufficient because employers found economic motivations to discriminate against workers that were reinforced by the traditional stereotypes that favor discrimination.

41–49 (2014) [Xianzhong L. *Pliusy i minusy politiki 'korenizatsii' v SSSR v 1920-e gody*, 1 Oikumena. Regionovedcheskie Issledovania 41–49 (2014) [Liu Xianzhong, *The pros and cons of the policy of 'indigenization' of the USSR in the 1920-ies*, 1 Ojkumena. Regional Res. 41–49 (2014)]], available at <http://ojkum.ru/arc/lib/2014_01_05.pdf> (accessed July 8, 2016); Ракачева Я.В. *Национальная политика СССР на Северо-Западном Кавказе в 1920–1930-е гг.*, 9 Теория и практика общественного развития 193–195 (2013) [Rakacheva Ia.V. *Natsional'naia politika SSSR na Severo-Zapadnom Kavkaze v 1920–1930-e gg.*, 9 Teoriia i praktika obshchestvennogo razvitiia 193–195 (2013) [Iaroslava V. Rakacheva, *The national policy of the USSR in the North-Western Caucasus in the 1920–1930s*, 9 Theory and practice of social development 193–195 (2013)]]; Синицын Ф.Л. Национальная политика СССР в Великой отечественной войне: 1941–1945: автореф. дис. ... канд. ист. наук [Sinitsyn F.L. Natsional'naia politika SSSR v Velikoi otechestvennoi voine: 1941–1945: avtoref. dis. ... kand. ist. nauk [Fedor L. Sinitsyn, The national policy of the USSR in the great Patriotic war: 1941–1945: Summary of a PhD. Thesis in history]] 1 ff. (Moscow 2009).

[8] See, for example: Paul R. Gregory, Janet E. Kohlhase, *The Earnings of Soviet Workers: Evidence from The Soviet Interview Project*, 70(1) Rev. of Econ. & Stat. 23–35 (1988); Katarina Katz, *Gender, Wages and Discrimination in the USSR: A Study of a Russian Industrial Town*, 21(4) Cambridge J. of Econ. 431–452 (1997).

[9] See: Бочарникова М.А., Коршунова, Т.Ю. *Дифференциация правового регулирования трудовых отношений: теоретические аспекты*, 2 Российский ежегодник трудового права 239 (2007) [Bocharnikova M.A., Korshunova T.Iu. *Differentsiatsiia pravovogo regulirovaniia trudovykh otnoshenii: teoreticheskie aspekty*, 2 Rossiiskii ezhegodnik trudovogo prava 239 (2007) [Marina A. Bocharnikova, Tatiana Iu. Korshunova, *Differentiation of legal regulation of labor relations: theoretical aspects*, 2 Russian Yearbook of Lab. L. 239 (2007); Куренной А.М. (ред.) Трудовое право России [Kurennoi A.M. (red.) Trudovoe pravo Rossii [Aleksandr M. Kurennoi (ed.), Labor law of Russia]] 27-28 (Moscow, Pravovedenie 2008); Лушников А.М., Лушникова М.В. Курс трудового права: учебник в 2-х томах. Том 1 [Lushnikov A.M., Lushnikova M.V. Kurs trudovogo prava: uchebnik v 2-kh tomakh, Tom 1 [Andrei M. Lushnikov, Marina V. Lushnikova, The course of labour law: textbook in 2 volumes, Vol. 1]] 526 ff. (Moscow, Statut 2009).

[10] These categories include women, people with family responsibilities and certain other categories. The examples of such norms in modern context are provided in sections 7 and 8 further.

There are some studies that deal with the Russian Federation's compliance with international anti-discrimination norms, but in most cases[11] they either deal with certain specific types of discrimination (without elucidating the consequences for employment),[12] or they examine discrimination without paying special attention to the interaction between national and international law,[13] or touch upon some actual cases rather than examining the legal provisions.[14] This article seeks to fill the gap in research about Russian law on employment discrimination in general. It analyses how modern Russian employment law addresses the problem of discrimination as well as the major discrepancies that exist between Russian law and international

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[11] The exceptions are: Лютов Н.Л. Российское трудовое законодательство и международные трудовые стандарты: соответствие и перспективы совершенствования: научно-практическое пособие [Lyutov N.L. Rossiiskoe trudovoe zakonodatel'stvo i mezhdunarodnye trudovye standarty: sootvetstvie i perspektivy sovershenstvovaniia: nauchno-prakticheskoe posobie [Nikita L. Lyutov, Russian labour legislation and international labour standards: compliance and prospects for improvement: scientific and practical textbook]] 13–15, 48–59, 94–97 (Moscow, Tsentr sotsial'no-trudovykh prav 2012); Elena Sychenko, Contradictions in the Anti-Discrimination Protection of Employees in Russia and the Influence of the European Court of Human Rights, in Vladimir Lebedev, Elena Radevich (eds.), Labour Law in Russia: Recent Developments and New Challenges 289–310 (Newcastle upon Tyne, Cambridge Scholars Publishing 2014).

[12] For example: Козлова М.С. Дискриминация женщин на российском рынке труда: региональный аспект: автореф. дис. ... канд. соц. наук [Kozlova M.S. Diskriminatsiia zhenshchin na rossiiskom rynke truda: regional'nii aspekt: avtoref. dis. ... kand. soc. nauk [Margarita S. Kozlova, Discrimination against women in the Russian labor market: regional dimension: Summary of a Ph.D. thesis in sociology]] 1ff. (Saratov 2006); Осипов А.Г. Антидискриминационное законодательство и практика в России и зарубежных странах (расовая и этническая дискриминация) [Osipov A.G. Antidiskriminatsionnoie zakonodatel'stvo i praktika v Rossii i zarubezhnykh stranakh (rasovaia i etnicheskaia diskriminatsiia) [Alexander G. Osipov, Anti-discrimination legislation and practice in Russia and foreign countries (racial and ethnic discrimination]] 5–93 (Moscow 2009); Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination: Russian NGOs' Alternative Report (2008), available at <http://www.sova-center.ru/en/xenophobia/conference-papers/2008/08/d13901/> (accessed July 8, 2016); Лушников А.М., Лушникова М.В., Тарусина Н.Н. Гендер в законе [Lushnikov A.M., Lushnikova M.V., Tarusina N.N. Gender v zakone [Andrei M. Lushnikov, Marina V. Lushnikova, Nadezhda N. Tarusina Gender in the law]] 1 ff. (Moscow, Prospekt 2015).

[13] For example: Митина Н.М. Запрещение дискриминации в сфере труда как один из основных принципов трудового права: автореф. дис. ... канд. юрид. наук [Mitina N.M. Zapreshchenie diskriminatsii v sfere truda kak odin iz printsipov trudovogo prava: avtoref. dis. ... kand. iurid. nauk [Nadezhda M. Mitina, The prohibition of discrimination in employment as one of the main principles of labour law: Summary of a Ph.D. thesis in law]] 1–32 (Moscow 2006); *Командиров А.А.* Конституционный принцип запрета дискриминации в сфере труда в Российской Федерации: автореф. дис. ... канд. юрид. наук [Komandirov A.A. Konstitutsionnii printsip zapreta diskriminatsii v sfere truda v Rossiiskoi Federatsii: avtoref. dis. ... kand. yurid. nauk [Aleksei A. Komandirov, The constitutional principle of discrimination prohibition in labor sphere in the Russian Federation: Summary of a Ph.D. thesis in law]] 1ff. (Saratov 2011).

[14] For example: Варламова Н.В., Васильева Т.А., Осипов А.Г., Тимофеев М.Т. Защита личности от дискриминации. В 3-х томах [Varlamova N.V., Vasilieva T.A., Osipov A.G., Timofeev M.T. Zashchita lichnosti ot diskriminatsii. V 3 tomakh [Nataliia.V. Varlamova, Tatiana A. Vasilieva, Aleksandr G. Osipov, Maksim T. Timofeev Protect individual from discrimination. In 3 volumes]] 1–424 (Moscow 2009); Anna Sevortian, *Xenophobia in Post-Soviet Russia*, 3 The Equal Rts Rev. 19–27 (2009).

labor standards[15] on the matter, and what could be done to make these two sets of standards more compatible with each other. However, this article does not claim to cover all the problems related to the issue of employment discrimination.

The text is further structured in a way that would best represent the topic within the scope of single article. Sections 2 to 5 deal with general issues that are applicable to all types of employment discrimination. Those include the general overview of legal framework for existing employment discrimination law in Russia including the applicable international law norms (Section 2 "The Law on the Books" and Section 3 "The International Law Framework"), the analysis of the definition of discrimination according to Russian domestic law compared to international norms (Section 4), the issues of enforcement of employment discrimination law in Russia (Section 5).

Sections 6 to 10 cover the most resonant grounds of discrimination: trade union membership (Section 6), sex (Section 7), family responsibilities (Section 8), disability (Section 9) and age (Section 10). The first of this group of sections (Section 6) also deals with a more general issue of the protection of the employee from retaliation of the employer. So long as such retaliation is addressed to the trade union activists, we found it possible to include the analysis of this problem into the section that is dedicated to trade unions.

Many serious issues are beyond the scope of the article because they require separate discussion. Among them are the problems of discrimination in the labor market against atypical workers,[16] against migrant workers,[17] against sexual

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[15] Although the term 'international labor standards' is sometimes understood in different ways, the author prefers to use its most frequently accepted sense, which includes both binding international treaties and soft law. See examples of such usage: Jean-Claude Javillier, Droit du Travail 108 (Paris, L.G.D.J., 1999); Keith D. Ewing, International Labour Standards, in Michael J. Morley, Patrick Guningle, David G. Collins (eds.), Global Industrial Relations 239–253 (London, Routledge and New York, NY 2006); Lee Swepston, International Labour Law in Roger Blanpain (ed.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies 139 ff. (IX ed., Boston, Chicago, Wolters Kluwer, Austin, IL 2007).

[16] See the information about what is termed 'atypical' employment contracts as means to discriminate at: Ляпин А., Нойнхеффер Г., Шершукова Л., Бизюков П. Неустойчивая занятость и ее последствия для работников [Liapin A., Noinkhoffer G., Shershukova L., Biziukov P. Neustoichivaia zaniatost'i ee posledstivia dlia rabotnikov [Anton Liapin, Gizela Noinkhofer, Lika Shershukova, Petr Biziukov, Unstable employment and its consequences for workers 1ff (Moscow, Tsentr Sotsial'no-Trudovykh Prav 2007); Бизюков П.В., Герасимова Е.С., Саурин С.А. Заемный труд: последствия для работников [Biziukov P.V., Gerasimova E.S., Saurin S.A. Zaemnyi trud: posledstviia dlia rabotnikov [Petr V. Biziukov, Elena S. Gerasimova, Sergei A. Saurin, Outsourced labor: implications for workers]] 1ff (Moscow, Tsentr Sotsial'no-Trudovykh Prav, 2012), available at <http://trudprava.ru/expert/research/employsurv/570> (accessed July 8, 2016).

[17] See the research on discrimination against migrant workers in the Russian labor market: Тюрюканова Е. *Трудовая миграция в России* [Tiuriukanova E. *Trudovaia migratsiia v Rossiiu*] [Elena Tiuriukanova, *Labor migration in Russia*]], Demosop Weekly, Jan. 21, 2008, available at <http://polit.ru/article/2008/01/21/demoscope315/#_ftn1> (accessed July 8, 2016); Анализ практик трудовых отношений иностранных граждан (трудовых мигрантов) и их влияние на трансформацию трудовых отношений российских граждан [Analiz praktik trudovykh otnoshenii inostrannykh grazdan (trudovykh migrantov) i ikh vliianiia na transformatiiu trudovykh otnoshenii rossiskikh grazhdan [Analysis of practices of foreign citizens (migrants) labor relations and their influence on the transformation of Russian citizens labor relations]] 1 ff. (Moscow, Tsentr Sotsial'no-Trudovykh Prav 2013), available at <http://trudprava.ru/expert/research/migrationsurv/771> (accessed July 8, 2016).

minorities,[18] discrimination based upon the political views of the employee,[19] and several others.[20] The topics discussed in this article are limited to those that are amenable to legal analysis with emphasis on specific legal measures that may be taken in order to ameliorate the situation, such as changes in legislation and in the way it is interpreted through case law. The issues that remain beyond the scope of this article demand mostly practical and political solutions, such as allocation of funds, administrative action plans, mass media campaigns, etc. It may be said that all types of employment discrimination that are listed above and are not dealt with in the text of article, are generally prohibited by the Constitution and Labor code,[21] as long as both acts do not limit the list of grounds of discrimination. Obviously, this general prohibition does not mean that those categories of workers are effectively protected from employment discrimination (see Section 5 about the enforcement

[18] There is nearly no academic literature about employment discrimination in Russia based upon a worker's sexual orientation. In private discussions NGO activists indicate that LGBT people are afraid to defend their rights in court or to draw broad attention to their problems because public opinion in Russia favours homophobia, and this tendency is reinforced by mass media campaigns and some steps taken by the government, such as the recently passed law prohibiting advocacy of non-traditional sexual behaviours to children (Федеральный закон РФ «О внесении изменении в статью 5 Федерального закона «О защите детей от информации, причиняющей вред их здоровью и развитию» и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей [Federal'nyi Zakon RF "O vnesenii izmenenii v stat'iu 5 Federal'nogo zakona 'O zashchite detei ot informatsii, prichiniaiushchei vred ikh zdorov'iu i razvitiiu' i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v tseliakh zashchity detei ot informatsii, propagandiruiushchei otritsanie traditsionnykh semeinykh tsennostei" [Federal law of the Russian Federation On amendments to article 5 of the Federal law "On protection of children from information harmful to their health and development» and certain legislative acts of the Russian Federation to protect children from information promoting denial of traditional family values"]], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2013, No. 26, Item 3208. Some information about anti-gay discrimination may be found in the materials from an international conference that took place in Saint Petersburg in October 2012: Antidiskriminatsionnye strategii: opyt i perspektivy. Materialy Mezdunarodoi konferentsii: Rossiia, Sankt-Peterburg, 26–27 oktiabria 2012 g. (Saint-Petersburg, Rossiiskaia LGBT set 2013), available at <http://lgbtnet.ru/sites/default/files/2012.10.27_materials_conference.pdf> (accessed July 8, 2016). There is a well-known case of LGBT activist who has successfully proved the discriminative attitude of the state towards the sexual minorities in the European Court of Human Rights (ECtHR): Alekseyev v. Russia, ECtHR Judgment (20 October 2010). (Applications nos. 4916/07, 25924/08 and 14599/09). However, this case is related to freedom of assembly, but not to employment matters, therefore it falls out of the subject matter of this article.

[19] For example, in 2014 there was a vociferous mass media discussion about the dismissal of a university professor who had publicly criticized the Russian annexation of Crimea (Prof. A. Zubov). While his university (MGIMO – the university affiliated with the Ministry of Foreign Affairs) claimed that its particular status obliges its professors to refrain from criticizing Russian foreign policy, many people believed that this employer's reaction was contrary to the concept of academic freedom. After public pressure gathered force, Prof. Zubov was reinstated in his position. See: Смирнов С. Профессор Зубов восстановлен в МГИМО [Smirnov S. Professor Zubov vosstanovlen v MGIMO [Sergei Smirnov, Professor Zubov reinstated in MGIMO]],Vedomosti.ru, Apr. 11, 2014), available at <http://www.vedomosti.ru/politics/news/25245321/professor-zubov-vosstanovlen-v-mgimo> (accessed July 8, 2016).

[20] For example, there are debates on the possible discrimination against workers with a criminal record. See: Уголовникам разрешили работать с детьми [Ugolovnikam razreshili rabotat' s det'mi [Center for Social and labor rights, Criminals were allowed to work with children]], available at <http://trudprava.ru/news/discriminnews/1344> (accessed July 8, 2016).

[21] See further notes 24 and 25.

of law). However, there is currently no case law that is known to the author which could be used for academic legal analysis.

The same may be said about the choice of case law in different parts of this article. The case law analysis is provided only where it is relevant and exists. For example, in Section 2 ("The Law in the Books") case law is irrelevant, because it deals with general provisions of law, and as Russia is not a common law country it does not have such concepts included in the court decisions. Another example is Section 9, which deals with the employment discrimination of people with disabilities. In this Section, only case laws of international organizations are used because there are no decisions within domestic courts, known by the author at the moment of writing, that reference discrimination.

Although any legal analysis must be responsive to the practical situation and employ a 'law plus' perspective, the primary aim here is to offer some ways to correct the legal gaps in protection from employment discrimination in Russia.

2. "The Law on the Books"

Russia is a party to both of the International Labour Organization (ILO) fundamental Conventions on discrimination[22] and has ratified other major international treaties on the matter.[23] The principle of equality is included in the Russian Constitution,[24] and there is a specific article concerning the prohibition of discrimination in employment

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[22] The ILO Equal Remuneration Convention, 1951 (No. 100), International Labour Organization (hereinafter 'ILO') (accessed July 8, 2016) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (hereinafter "ILO Convention No. 111") (accessed July 8, 2016).

[23] Art. 2, para. 1, International Covenant on Civil and Political Rights, 1966, available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed July 8, 2016); Art. 2, para. 2, International Covenant on Economic, Social and Cultural Rights, 1966, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed July 8, 2016); International Convention on the Elimination of All Forms of Racial Discrimination, 1965, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> (accessed July 8, 2016); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (accessed July 8, 2016); Convention on the Rights of Persons with Disabilities, 2006, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed July 8, 2016); Art. 1 of the European Social Charter, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm> (accessed July 8, 2016) covering the right to work, which is interpreted by the European Committee on Social Rights as including the prohibition of discrimination (see further), and several others.

[24] Art. 19 of the Constitution of Russia contains the provisions that: "1. All people shall be equal before the law and the courts. 2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership in public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned. 3. Men and women shall enjoy equal rights and freedoms and have equal opportunities to exercise them." (translation by the author). Konstitutsiia Rossiiskoi Federatsii with subsequent amendments (12 December 1993) [Konst. RF] [Constitution] SZ RF 2014, No. 31, Item 4398.

in the Labor Code.[25] Separate articles of the Labor Code contain provisions on equality in the process of concluding employment contracts and in the payment of wages.[26] Since 2011, discrimination has been considered an administrative (non-criminal) offence, punishable by a fine with a maximum limit of 100,000 rubles (about 1600 euros).[27] There is even an article in the Penal Code named "The infringement of the principle of equality of rights and freedoms of human beings and citizens" stipulating a serious sanction, a maximum of five years of imprisonment, for the most serious cases of discrimination.[28]

Special norms on what is called 'affirmative action' or 'positive action' in Western labor law and 'differentiation norms' (*normy differentsiatsii*) in Russian legal doctrine[29] also exist.

For example, chapter 41 of the Labor Code contains special norms on the protection of women and persons with family responsibilities, and such norms are numerous. Beside the norms on maternity leave,[30] special breaks for feeding children,[31] and additional holidays,[32] there are norms that are aimed at protecting pregnant women, parents, and people responsible for taking care of children, although it is debatable whether these measures protect the employees in question from discrimination or actually discriminate against them.[33] These 'protection or discrimination' provisions are discussed in more detail below.

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[25] Трудовой кодекс Российской Федерации [Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labor Code]] with subsequent amendments, Art. 3, SZ RF 2002, No.1 (part 1), Item 3.

[26] TK RF Arts 64 and 132.

[27] Кодекс Российской Федерации об Административных правонарушениях [Kodeks Rossiiskoi Federatsii ob Administrativnykh Pravonarusheniiakh [KOAP RF] [Code of Administrative Violations]] Art. 5.62, SZ RF 2002, No. 1, Part 1, Item 1.

[28] Уголовный кодекс Российской Федерации [Ugolovnyi Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code]] Art.136, SZ RF 1996, No. 25, Item 2954.

[29] See more on the balance between 'differentiation' and discrimination: Лушников А.М. Проблемы дифференциации в правовом регулировании отношений в сфере труда [Lushnikov A.M. Problemy diskriminatsii v pravovom regulirovanii otnoshenii v sfere truda i sotsial'nogo obespecheniia [Andrei M. Lushnikov, Problems of differentiation in the legal regulation of relations in the labor sphere]], in Kantemir N. Gusov (ed.), Problemy differentsiatsii v pravovom regulirovanii truda i sotsial'nogo obespecheniia 14–15 (Moscow, Prospect 2009)); Гусов К.Н. Единство и дифференциация трудового права: некоторые вопросы [Gusov K.N. Edinstvo i differentsiatsiia trudovogo prava: nekotorie voprosy [Kantemir N. Gusov, Unity and differentiation of labour law: some questions]], *Id.*, at 31–36; Куренной А.М. Дифференциация или дискриминация? [Kurennoi A.M. Differentsiatsiia ili diskriminatsiia? [Alexander M. Kurennoi, Differentiation or discrimination?]], *Id.*, at 47–50.

[30] TK RF Arts 256, 257 and 263.

[31] TK RF Art. 258.

[32] TK RF Art. 262.

[33] For arguments see: Герасимова Е.С. Особенности регулирования труда женщин, лиц с семейными обязанностями [Gerasimova E.S. Osobennosti regulirovaniia truda zhenshchin, lits s semeinymi obiazannostiami [Elena S. Gerasimova, Features of regulation work of women, persons with family

Another chapter of the Labor Code provides special protections for young workers.[34] These include the reduction of working hours (in contrast with other protected categories of employees, reduced hours for young workers are accompanied by a proportionate reduction in wages meant to avoid discouraging employment of workers under the age of eighteen), limitations on types of work permitted, longer annual leave, a prohibition against posting young workers[35] and additional limitations on their dismissal (a requirement that the state commission responsible for the rights of minors approve the dismissal).[36]

Special norms for the protection of representatives of workers (trade unionists and other worker representatives are considered separately under these norms)[37] are the subject of serious debates and litigation in Russia and are also discussed further in more detail.

There is a provision on quotas for employing disabled persons in accordance with a 1995 Russian Federal Law,[38] which contains the requirement that employers with more than 100 workers establish such quotas ranging from 2 to 4 percent of the total number of workers in the company, the exact percentage within that range to be set by regional governments of the Russian Federation. An additional quota of up to 3 percent of the total number of workers has been introduced for employers with a number of workers ranging from 35 to 100 by a new Federal Law adopted in 2013.[39] Another article of this law may be interpreted as providing a kind of 'reasonable accommodation' requirement for disabled persons similar to the requirements

responsibilities]] in Iuri P. Orlovskii (ed.), Osobennosti pravovogo regulirovaniia truda otdel'nykh kategorii rabotnikov 14–42 (Moscow, Kontrakt 2014); Герасимова Е.С., Саурин С.А., Лютов Н.Л. Решение проблемы защиты от дискриминации в трудовых отношениях по признаку пола [Gerasimova E.S. Saurin S.A., Lyutov N.L. Reshenie problem zashchity ot diskriminatsii v trudovykh otnosheniiakh po priznaku pola [Elena S. Gerasimova, Sergei A. Saurin, Nikita L. Lyutov, The solution to the problem of protection against discrimination in labour relations on grounds of sex] 11–14 (Moscow, Variant 2015)..

34 TK RF Chapter 42.

35 *E.g.*, TK RF Arts 265–268, 271.

36 TK RF Art. 269.

37 TK RF Arts 39, 373, 374, 405, 414. Федеральный закон РФ о профессиональных союзах, их правах и гарантиях деятельности [Federal'nyi Zakon RF o professional'nykh soiuzakh, ikh pravakh i garantiiakh deiatel'nosti [Federal Law On trade unions, their rights and guarantees of their activity]] Art. 25, [SZ RF] 1996, No. 3, Item 148 (hereinafter: 'the Trade Unions Act').

38 Федеральный закон о социальной защите инвалидов в Российской Федерации [Federal'nyi Zakon o sotsial'noi zashchite invalidov v Rossiiskoi Federatsii [Federal Law On social protection of invalids in the Russian Federation]] Art. 21, para. 1, [SZ RF] 1995, No. 48, Item 4563.

39 Федеральный закон о внесении изменений в статью 21 Федерального закона «О социальной защите инвалидов в Российской Федерации [Federal'nyi Zakon o vnesenii izmeneniia v statiu 21 Federal'nogo zakona 'O sotsial'noy zashchite invalidov v Rossiiskoy Federatsi'i [Federal Law On amendments to article 21 of the Federal Law "On social protection of invalids in the Russian Federation"]], [SZ RF] 2013, No. 27, Item 3475.

that are common in industrialized economies. Until quite recently the norms on reasonable accommodation were almost entirely restricted to the status of 'law on the books' in Russia. Nevertheless, the situation has begun to change in the last few years.[40]

However, some of the 'differentiation norms' may arguably be qualified as discriminatory themselves. Among these are the changes to the Labor Code and the special Federal law that were adopted in June 2013 in the course of preparing Russia for the FIFA Football Championships of 2017 and 2018.[41] Although terms of payment for work on weekends and on national holidays are copied from the standard regulations and the additional payment schedule established by the Labor Code,[42] overtime work is not to be paid at the usual higher rate.[43] All these norms are clearly motivated not by the 'inherent requirements of the job' (see section 3 below) but only by the state's interest in economizing on labor expenses in the process of preparing for these championships, and therefore they must be considered discriminatory. Despite the fact that these regulations are of an *ad hoc* character and apply only to two specific sports events, they may become a dangerous precedent for the future.

Any disputes concerning discrimination in employment, as well as labor disputes on other quite serious grounds, may be resolved only through direct appeal to the courts and without any recourse to the internal procedures of a company that are applied to less important grievances.[44] This underlines the importance of disputes about discrimination in employment from the legislative point of view. Another reason for such a system can be seen in how labor inspectorates have the authority to examine complaints of clear violations of labor law, while the courts resolve labor disputes that require broader legal expertise to reach a judgment. Discrimination cases are regarded as sensitive, debatable and matters for judgment, therefore they are not entrusted to the inspectorates. At the same time this results in problems for victims of discrimination as they try to defend themselves. They have no right to file a complaint about discrimination to the State Labor Inspectorate as they could in the case of other infringements of other labor rights.

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40 See section 9 further.

41 I.e. FIFA World Football Championship of 2018 and the FIFA Confederations Cup of 2017. According to Federal Law No. 108. (Федеральный закон о подготовке и проведении в Российской Федерации чемпионата мир по футболу ФИФА 2018 года, Кубка конфедерации ФИФА 2018 года, Кубка конфедерации ФИФА 2017 года [Federal'nyi Zakon o podgotovke i provedenii v Rossiiskoi Federatsii chempionata mira po futbolu FIFA 2018 goda, Kubka konfederatsii FIFA 2017 goda [Federal Law About preparation and carrying out in the Russian Federation the FIFA World Cup 2018, The Confederations Cup FIFA 2017 and amendments to certain legislative acts of the Russian Federation]], [SZ RF] 2013, No. 23, Item 2866.

42 TK RF Arts 113 and 153.

43 TK RF Art. 152.

44 TK RF Art. 391, para. 3.

There is then a quite developed set of legal norms in Russia that are intended to protect against discrimination. Nevertheless, such a purely normative description of the situation can provide information only about the 'law on the books' rather than about the actual ways that discrimination is approached in practice.

3. The International Law Framework

Any comparative analysis of national and international law supposes, first of all, that some basis for comparison must be defined. The plain text of binding international legal norms on prohibition of discrimination does not contain many rules that a national law could theoretically contradict. It is very difficult to imagine any national legal norm in the modern world that would contain a statement such as 'discrimination is allowed'. More specific and important international requirements on prohibition of discrimination are contained either in the soft law norms or in the decisions concerning member states by international monitoring bodies. The legal status of these acts of interpretation is not very clear. The Russian Constitution contains the statement that "international treaties of the Russian Federation and core principles and norms of international law shall form a part of the Russian legal system."[45] This means that Russian domestic courts have the right to use in their practice only ratified international treaties and those 'core principles and normes' which are not identical with, but very close to, the 'peremptory norms of general international law (*jus cogens*)' as established by the Vienna Convention on the Law of Treaties, 1969.[46] There is no legal definition of the 'core principles and norms of international law' that are mentioned in the Constitution. However, the Supreme Court gives such definition[47] in a way that clearly quotes the definition of the Vienna Convention.

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[45] Konst. RF Art. 15, para.4.

[46] Art. 53, Vienna Convention on the Law of Treaties (23 May 1969) (hereinafter 'The Vienna Convention'), United Nations Treaty Series, Vol. 1155, No. 18232.

[47] Постановление Пленума Верховного Суда Российской Федерации «О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации» от 10 октября 2003 г., статья 1 [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O primenenii sudami obshchei iurisdiktsii obshchepriznannykh printsipov i norm mezhdunarodnogo prava i mezhdunarodnykh dogovorov Rossiiskoi Federatsii" ot 10 oktyabrya 2003 g., para. 1. [Para. 1 of the Russian Federation Supreme Court Plenary Ruling on the application by courts of general jurisdiction generally recognized principles and norms of international law and international treaties of the Russian Federation]] Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2003, No. 12. The Supreme Court provides two separate definitions: 'the core principles of international law' and 'the core norm of the international law'. Nevertheless, one definition is linked to another. The core principles are defined as "the basic peremtory *norms* (italisyzed by the author – N.L.) of international law accepted and recognized by the international community of states as a whole from which no derogation is permitted." In its turn, the core norm of international law is defined as "the rule of behavior that is accepted by the international community of states as binding" (translation is made by the author). The definition of 'principles' is made through the definition of norms and both of them textually rely on the wording of the article 53

The most detailed requirements of international law are contained in the observations of the ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) and in the case law of the European Committee of Social Rights (ECSR) that is authorized to interpret the provisions of the European Social Charter (ESC). As is clear from the above quotation from the Russian Constitution, these acts of case law cannot be directly applied by the Russian domestic courts,[48] and this situation is the same in nearly any country.[49] The status of decisions by these international institutions has not been clarified in any international treaty. Nevertheless, such acts may be considered as sources of international law, if they are treated as international custom. Two conditions for this should be satisfied: the existence of the repetitive practice and the co-called *opinio juris sive necessitatis*,[50]

of the Vienna Convention (*Id.*, note 46) where the peremtory norm of general international law is defined as: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Concerning the possible existence of jus cogens norms in labor law see: Nikita Lyutov, *Do 'Jus Cogens' Norms Exist in the International Labor Law?* Studia z zakresu prawa pracy i polityki społecznej (Krakow, Jagellonian University 2013).

48 The Constitutional Court of Russia quoted the practice of CEACR once (see Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционности Федерального закона «О внесении изменений в Кодекс Российской Федерации об административных правонарушениях и Федеральный закон «О собраниях, митингах, демонстрациях, шествиях и пикетированиях» в связи с запросом группы депутатов Государственной Думы и жалобой гражданина Е.В. Савенко» от 14 февраля 2013 г., статья 3.2 [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti Federal'nogo zakona "O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniiakh i Federal'nyi zakon 'O sobraniiakh, mitingakh, demonstratsiiakh, shestviiakh i piketirovaniiakh' v sviazi s zaprosom gruppy deputatov Gosudarstvennoi Dumy i zhaloboi grazhdanina E.V. Savenko" ot 14 fevralya 2013 g., Para. 3.2, [Para 3.2 of Ruling of the Russian Federation Constitutional Court 'In the case about the verification of constitutionality of the Federal law "On amendments to the Russian Code of administrative offences and the Federal law "On assemblies, rallies, demonstrations, processions and picketing" in connection with inquiry of group of representatives of the State Duma and the complaint of the citizen E.V. Savenko' of Feb. 14, 2013]], [SZ RF] 2013, No. 8, Item 868. However, it doesn't follow from the text of this act that the Constitutional Court treats it as binding source.

49 The only one exception that is known to us is the Ukrainian law which expressly names the practice of the ECtHR among the sources of domestic law. (Zakon Ukrainy "Pro vykonannia rishen' ta zastosuvannia praktyky Evropeis'kogo sudu z prav liudyny" (23 February 2006) No. 3477–IV, Vidomosti Verkhovnoi Rady Ukrainy 2006, No. 30, Item 260). See more about monistic and dualistic approaches to the international law at: Eileen Denza, The Relationship between International and National Law 411–438 in Malcolm D. Evans (ed.), International Law (Oxford, Oxford University Press 2010); Colin Warbrick, Dominic McGoldrick, *International Law in English Courts: Recent Cases,* 52(3) Int'l and Comp. L. Q. 815–824 (2003); Roger O'Keefe, *Customary International Crimes in English Courts,* 72 Brit. Yearbook of Int'l L. 293 (2001); Fiona De Londras, Dualism, Domestic Courts, and the Rule of International Law in Mortimer Sellers in Tadeusz Tomaszewski (eds), Ius Gentium: The Rule of Law in Comparative Perspective 217 ff. (Wien, Springer 2009); Pierre-Hugues Verdier, Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 Am. J. of Int'l L. 514–533 (2015).

50 See more about the *opinio juris* requirement: Alina Kaczorowska, Public International Law 39–41 (4th ed. Routledge, London and New York, NY, 2010); Sean D. Murphy, Principles of International Law 80–81 (Thomson-West 2006); Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 Am. J. of Int'l L. 146 (1987); Hugh Thirlway, The Sources of International Law 1–272 (Oxford, Oxford University Press 2014).

i.e. the state's treatment of such acts as binding instruments must be proven.[51] Further analysis deals with domestic provisions on discrimination in employment as compared to both ratified treaties and the case law of international monitoring bodies on the matter.

This article does not attempt an analysis of the different sources of international law from the point of view of their specific legal content and interaction with municipal law. There is abundant literature on these issues covering both international law in general[52] and, more specifically, international labor law.[53] As stated above, Russian legislation and practice are to be compared with international labor standards, which are understood as instruments that include both binding norms and soft law.

4. The Definition of Discrimination in International Labour Organization Convention No. 111 and the Russian Labor Code

As follows from the title of this article, its subject is not so much about whether Russian anti-discrimination laws are of good or bad quality, which may be quite a debatable issue, but rather whether Russian law complies with international labor standards. The very definition of discrimination is understood differently in the ILO Discrimination Convention No.111 (Employment and Occupation) than in the Russian

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[51] See: Лютов Н.Л. Эффективность норм международного трудового права: монография [Lyutov N.L Effektivnost' norm mezhdunarodnogo trudovogo prava: monografiia] [Nikita L. Lyutov, The effectiveness of norms of international labour law: monograph] 50–62 (Moscow, Prospect 2014).

[52] Reino A. Müllerson, Monitoring Compliance with International Human Rights Standards in William E. Butler (ed.), Control over Compliance with International Law 125–138 (The Netherlands, Martinus Nijhoff Publishers, Dordrecht 1991); Bruno Simma, Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 17 Australian Yearbook of Int'l L. 82–108 (1992); Reino A. Müllerson, Ordering Anarchy: International Law in International Society 1–387 (The Hague, Martinus Nijhoff Publishers 2000); Rebecca M.M. Wallace, International Law 25–38 (London, Sweet & Maxwell ltd. 2006); Mary E. O'Connel, The Power and Purpose of International Law 9 (Oxford, Oxford University Press 2008).

[53] Constance Thomas, Martin Oelz and Xavier Beaudonnet, The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications in Jean-Claude Javillier and Bernard Gernigon (eds.), Les normes internationales du travail: un patrimoine pour l'avenir Mélanges en l'honneur de Nicolas Valticos 249–286 (Geneva, International Labour Office 2004); Bob Hepple, Does Law Matter? The Future of Binding Norms in George P. Politakis (ed.), Protecting Labour Rights as Human Rights: Present and Future of International Supervision. Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations (Geneva: 24–25 Nov., 2006) 221–231 (Geneva, International Labour Office 2007); Tony Royle, *The ILO's Shift to Promotional Principles and the 'Privatization' of Labour Rights: An Analysis of Labour Standards, Voluntary Self-Regulation and Social Clauses*, 26(3) The Int'l J. of Comp. Lab. L. and Indus. Rel. 249–271 (2010); Antonio García-Muñoz Alhambra, Beryl ter Haar, Attila Kun, *Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law*, 27(4) The Int'l J. of Comp. Lab. L. & Indus. Rel. 337–363 (2011); Manfred Weiss, *International Labour Standards: A Complex Public-Private Policy Mix*, 29(1) The Int'l J. of Comp. Lab. L. and Ind'l Rel. 7–20 (2013).

Labor Code. According to ILO Convention No.111,[54] "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". It seems natural, at least in a Russian context,[55] to expect that it is up to the employer to determine what the requirements of a particular job are. If one were to interpret this provision in such a way, the Convention as a whole would become meaningless: in each particular situation the employer would be able to justify discrimination by citing the 'inherent requirements' of a job. Thus in each case it would be left to the courts to determine whether these requirements are in fact inherent or discriminatory. This leaves considerable scope for arbitrary decisions. The Russian Labor Code uses another approach to the concept of discrimination, which at first glance looks more concrete from the legal point of view. According to Article 3, para.2 of the Code,

> "No one's rights and freedoms shall be limited and no one shall have any privilege based on [here the full list of discriminatory criteria appears] as well as on other circumstances that are not associated with the occupational qualities of a worker."

Exceptions to this stipulation by reference to the demands of a particular job or to the need for special care in handling particular categories of workers are also provided for in the Labor Code,[56] but these exceptions may be imposed only through specific legislation. There are no such provisions granting exceptions for professions that obviously require them, e.g. actors or fashion models, or employees of religious organizations, or many others. This means that in certain situations judges have no practical way to follow the direct requirement of the Labor Code because it contradicts common sense. Another problem is that in certain situations different treatment (e.g. of actors) must be considered as discrimination according to the Labor Code, but it is nevertheless justifiable according to Convention No.111. The Supreme Court of the Russian Federation seems to see the contradiction between the two definitions of discrimination according to Convention No.111 and Article 3 of the Labor Code. In its Ruling on the application of the Labor Code by the courts, the Supreme Court diplomatically states that both requirements should be applied: the 'inherent

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54 Art.1, para 2 of the ILO Convention No. 111.

55 This interpretation may be a matter of a linguistic difference that affects the translation of the official text of the Convention into Russian. The word 'requirements' is translated in the Russian text of the Convention as 'trebovaniia', which is formally correct. However, in English 'requirements' suggests something that exists independently, while in Russian '*trebovaniia*' suggests that a request has been made by someone. In the author's personal experience as an instructor students that are asked how to understand this passage of Convention No.111, *always* answer that it is up to employer to set up the '*trebovaniia*' for a job that he pays for.

56 TK RF Art. 3, para. 3.

requirements of the job' without any mention of the legislative stipulation of any such requirement that is required by the Labor Code; and also 'occupational qualities'.[57] Legislative provisions granting exceptions in applying the non-discrimination principle for some specific categories of workers could probably resolve this issue.

Another issue that is associated with the definition of discrimination is the necessity of prohibiting *indirect discrimination*. According to the position of the ECSR, legislation should prohibit both direct and indirect discrimination.[58] As the ECSR explains in its case law digest, indirect discrimination arises when a measure or practice that is identical for everyone disproportionately and without a legitimate aim affects persons having a particular religion or belief, a particular disability, a particular age, a particular sexual orientation, particular political opinion, particular ethnic origin, etc.[59] The ILO supervisory bodies have asked the Russian Government to ensure that indirect discrimination is also prohibited in Russian law.[60] Russian domestic law contains only a statement that "…direct and indirect limitation of rights or provision for direct or indirect preferences in the process of concluding employment contracts is prohibited".[61] This norm covers only the process of concluding an employment contract and does not establish any rules concerning the process of work, dismissals and other issues linked to the employment relationship. More importantly, there is no legal explanation of the meaning of 'indirect discrimination'. In practice the courts have a poor understanding of the very meaning of discrimination[62] and such

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57 Постановление Пленума Верховного Суда Российской Федерации «О применении судами Российской Федерации Трудового кодекса Российской Федерации» от 17 марта 2004 г., статья 9 [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O primemenii sudami Rossiiskoi Federatsii Trudovogo kodeksa Rossiiskoi Federatsii" ot 17 marta 2004, para. 9 [of the Russian Federation Supreme Court Plenary Ruling on the application by courts of the Russian Federation Labor code of the Russian Federation, Para. 9]], [BVS] 2006, No. 6.

58 Conclusions of the European Committee of Social Rights, XVIII-I, 29, available at <http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> (accessed July 9, 2016).

59 Digest of the Case Law of the European Committee of Social Rights 21 (Council of Europe, Strasbourg, 2008), available at <http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> (accessed July 9, 2016).

60 Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A) in International Labour Conference, 100th Session 496 (2011).

61 TK RF Art. 64, para. 2.

62 The most frequent mistake in qualification of discrimination by the courts is ignoring the fact of different treatment, when any type of abuse of labor rights is examined. Such ignoring may occur despite the fact that court decides in favor of the claimant. This approach may be found in quite different issues that are linked to discrimination: payment of wages and benefits

(see: Апелляционное определение Судебной коллегии по гражданским делам Ямало-Ненецкого Округа от 19 октября 2015 г. [Apelliatsionnoe opredelenie Sudebnoi kollegii po grazhdanskim delam Iamalo-Nenetskogo Okruga ot 19 oktyabrya 2015 [The appeal determination of Judicial board on civil cases of the Yamalo-Nenets Autonomous district of 19 october 2015]]; material allowances to employee, such as apartment (see: Определение Ленинградского областного суда от 13 ноября 2014 г. [Opredelenie Leningradskogo oblastnogo suda ot 13 noyabrya 2014 [Determination of the

an 'exotic' issue as indirect discrimination is beyond the judges' comprehension. Therefore, in Russia there are currently no known cases of a successful defense of the employees' right not to suffer from indirect discrimination.

It may also be argued that although the lists of grounds of discrimination provided in the Constitution and the Labor Code[63] are not exhaustive and should be subject to different types of treatment even if they are not directly mentioned in the legal text, some additional grounds, such as disability, sexual orientation, and political views could be specified directly in the text of the law. This would not change the formal status of these types of discrimination, but may be a reminder to the employers that these grounds are also treated as grounds for discrimination.

5. The Enforcement of Anti-Discrimination Norms

One of the biggest problems in Russian law on discrimination in employment is the issue of *burden of proof*. Unlike the majority of labor law proceedings that are won by employees in most[64] of the cases, the discrimination cases are very rarely won

Leningrad regional court of 13 November, 2014]]; conclusion of employment contract on additional work (see: Решение Сыктывкарского городского суда Республики Коми от 19 декабря 2011 г. [Reshenie Syktyvkarskogo gorodskogo suda Respubliki Komi ot 19 dekabrya 2011 [The decision of Syktyvkar city court of the Komi Republic of 19 December 2011]]; redundancy dismissal (see: Решение Химкинского городского сдуа Московской области от 2 августа 2010 г. [Reshenie Khimkinskogo gorodskogo suda Moskovskoi oblasti ot 2 avgusta 2010 [The decision of the Khimki city court of Moscow region of 2 August 2010]]; dismissal of the company director (see: Апелляционное определение Судебной коллегии по гражданским делам Верховного Суда Республики Дагестан от 13 октября 2015 г. [Apelliatsionnoe opredelenie Sudebnoi kollegii po grazhdanskim delam Verkhovnogo suda Respubliki Dagestan ot 13 oktyabrya 2015 [The appeal determination of Judicial Board on civil cases of the Supreme court of the Republic of Dagestan of 13 October 2015]]. Although in most cases such wrongful qualification of discrimination is made by the lower courts, misunderstanding of the notion of discrimination sometimes is shown even by the Supreme Court of Russia. See: Решение Верховного Суда Российской Федерации об отказе в удовлетворении заявления о признании недействующими в части пункта 374 раздела XXX Перечня тяжелых работ и работ с вредными и опасными условиями труда, при выполнении которых запрещается применение труда женщин, утв. Постановлением Правительства РФ от 25.02.2000 № 162 от 2 марта 2009 г. [Reshenie Verkhovnogo Suda Rossiiskoi Federatsii ob otkaze v udovletvorenii zaiavleniia o priznanii nedeistvuiushchimi v chasti punkta 374 pazdela XXX Perechnia tiazhelykh rabot i rabot s vrednymi i opasnymi usloviiami truda, pri vypolenii kotorykh zapreshchaetshia primemeniie truda zhenshchin, utv. Postanovleniem Pravitel'stva RF ot 25.02.2000 No. 162 ot 2 marta 2009 [The decision of the Supreme Court of the Russian Federation about refusal in satisfaction of the statement for recognition invalid the paragraph of section 374 of XXX List of heavy works and works with harmful or dangerous working conditions, under which prohibits the employment of women, approved by the Resolution of the RF Government dated 25.02.2000 No. 162 of Mar. 2, 2009]] (hereinafter 'Reshenie 162'). This case is discussed in more detail in section 7 further.

63 See *supra* notes 24 and 25.

64 No statistical summary of the outcomes in these cases exists. The author has examined what research is available and has managed to find only one case, when the court has acknowledged the fact of discrimination in employment: Михайличенко К.А. Вопросы квалификации понятия «дискриминация в сфере труда» в судебной практике [Mikhailichenko K.A. Voprosy kvalifikatsii poniatiia 'diskriminatsiia v sfere truda' v sudebnoi praktike [Kseniia A. Mikhailichenko, Issues of qualification of the term 'discrimination in employment' in judicial practice]] 2 (paper presented

by employees.[65] The main reason for this is that there is no *alleviation of the burden of proof* in discrimination cases.[66] Each party in a civil proceeding in Russia has to prove the circumstances to which that party refers.[67] In such a situation, it is always very difficult for the employee to prove the case of discrimination – regardless of whether or not it happens in the Russian legal system.[68] Russian law contradicts the approach of the ECSR on the issue,[69] although the plain text of the ESC does not contain clear norms about the burden of proof. In some cases the ECSR states that the burden of proof in discrimination cases must be alleviated for the plaintiff,[70] while in others it goes even further to claim that it must be shifted.[71]

at Lomonosov 2013 Conference, Moscow, 8–13 April 2013). Although it cannot be ruled out that there are some more cases where discrimination is confirmed, the vast majority of case law presented in the legal databases, shows that claimants almost never succeed in proving the fact of discrimination in employment. See, for example at Tsentr sotsial'no-trudovykh prav employment cases database, available at <http://llpa.ru/?id=86&expmids={30}{1}> (accessed July 10, 2016) or the 'Consultant plus' case law database, available at <http://www.consultant.ru/> (accessed July 10, 2016).

65 See, for more details, Лукьянова И.Н. Доказывание в делах о дискриминации в сфере труда в Российской Федерации [Lukianova I.N. Dokazyvanie v delakh o diskriminatsii v sfere truda v Rossiiskoi Federatsii [I.N. Lukianova, Proof in cases of discrimination in labor sphere in the Russian Federation] in Diskriminatsiia v sfere truda: teoriia i praktika: nauchno-prakticheskii sbornik 192–267 (Moscow, Tsentr sotsial'no-trudovykh prav 2008).

66 There is a claim in the legal literature (see Elena Sychenko, *Id.* note 11 at 298) that the burden of proof in cases of wrongful dismissal, including dismissal due to discrimination, is shifted to the employer according to the statement of the Supreme Court (she quotes Supreme Court Resolution No. 2 of 2004, Postanovlenie, *Id.* note 57, para 23). However, this is a misunderstanding of the Supreme Court's statement. The Supreme Court is merely calling attention to the rule on proving legitimate grounds for dismissal contained in the Civil Procedural Code (see note 156). If wrongful dismissal is claimed by an employee, then the employer is obliged to prove that a formal ground for dismissal (absence at work, wrongful behavior or other grounds directly mentioned in law) was applicable. If such proof is in place, then an employee may try to prove that, although legally acknowledged grounds for dismissal were applicable, the employer was in fact discriminating against him or her. Therefore the burden of proof of discrimination has *not* shifted to the employer.

67 Гражданский процессуальный кодекс Российской Федерации [Grazhdanskii Protsessual'nyi Kodeks Rossiiskoi Federatsii [GPK RF] [Civil Procedural Code]] Art. 56, [SZ RF] 2002, No. 46, Item 4532. See, for further details, Гончарова Е.Ю. Соблюдение принципа равенства трудовых прав в практике Верховного суда РФ и Конституционного суда РФ [Goncharova E. Iu. Sobliudenie printsipa ravenstva trudovykh prav v praktike Verkhovnogo Suda RF i Konstitutsionnogo Suda RF [Elena Iu. Goncharova, The principle of equality of labour rights in the practice of the Supreme court and the constitutional court of the Russian Federation]] 122–191 (Moscow 2008); Гвоздицких А.В. Дискриминация в трудовых отношениях: рекомендации по процессуальной работе представителя [Gvozditskikh A.V. Rekomendatsii po protsessual'noi rabote predstavitelia v delakh o diskriminatsii v trudovykh otnosheniiakh] [Anna V. Gvozditskikh, Discrimination in labour relations: guidelines for procedural representative]] 35–42 (Moscow, Tsentr sotsial'no-trudovykh prav 2008).

68 For more details see Fiona Palmer, *Re-dressing the Balance of Power in Discrimination Cases: the Shift in the Burden of Proof,* 4 Eur. Anti-Discrimination L. Rev. 24 (2006).

69 Art. 4, para. 3, Art. 15, Art. 19, para. 5, and Art 20 and 27, European Social Charter.

70 Conclusions of the European Committee of Social Rights, 2002, 24; and Syndicat Sud Travail et Affaires Sociales v. France, Decision on the merits (16 November 2005) Complaint No. 24/200, § 33.

71 Conclusions of the European Committee of Social Rights, 2004, 495; Conclusions of the European Committee of Social Rights, xiii-5, 272–276.

There is not much legal discussion regarding shifting the burden of proof in discrimination cases in Russia. This idea is either discussed as an alternative to the alleviation of burden,[72] or as a possible "second best" solution after the alleviation.[73] This may be explained by the fact that a total shift of the burden of proof in discrimination cases may have controversial effects, and in certain situations it may be used as a means to abuse rights[74] by employees who in reality have not been discriminated against.[75] Another very serious consideration is that the principle of presumption of innocence may suffer in such cases. The claimant in the discrimination case is currently under an obligation to prove the disparate treatment based on a certain discriminative ground and the lack of legally prescribed reasons that would justify the employer's behavior. A total shift of the burden of proof would in some situations mean that an employer is obliged to prove the lack of evidence of his or her behavior, which is not always possible even if there was no illegal act actually occurring. For example, an employer may be obliged to prove that his representative did *not* tell the potential employee about some discriminative requirements concerning the vacancy. Even if the job interview would be fully recorded and the court would agree to take the audio recording as proof in the proceeding, which is highly unlikely in Russian court practice, the claimant would always have the possibility to say that such illegal requirements were announced to him or her before or after an interview. This would make it impossible to prove the innocence of the employer.

Nevertheless, some alleviation of the burden of proof in discrimination cases, such as a broader range of instruments of evidence that must be accepted by the court and certain other measures are necessary. Among those may be the possibility of using

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[72] Герасимова Е.С., Саурин С.А., Лютов Н.Л. Эффективность защиты от дискриминации в трудовых отношениях по признаку пола в законодательстве и на практике в России. Аналитический доклад [Gerasimova E.S., Saurin S.A., Lyutov N.L. Effektivnost' zashchity ot diskriminatsii v trudovykh otnosheniiakh po priznaku pola v zakonodatel'stve i na praktike v Rossii. Analiticheskii doklad [Elena S. Gerasimova, Sergei A. Saurin, Nikita L. Lyutov, The effectiveness of the protection against discrimination in labour relations on grounds of sex in law and in practice in Russia. Analytical report]] 110 (Moscow, Tsentr sotsial'no-trudovykh prav 2015), available at <http://trudprava.ru/images/files/research/Discrimination%20on%20grounds%20of%20sex%20in%20labour%20relations%202015.pdf> (accessed July 10, 2016).

[73] I.N. Lukianova, *Id.* note 65, 266.

[74] According to Russian legal doctrine (see, for example Малиновский А.А. Злоупотребление субъективным правом [Malinovskii A.A. Zloupotreblenie subiektivnym pravom [Aleksei A. Malinovskii, Abuse of a subjective right]] 49–182 (Moscow, Iurlitinform 2007), the abuse of a right (*zloupotreblenie pravom*) is the malicious usage of a human right for a purpose other than the original goal intended by the legislator.

[75] It could be tempting to use the US concept of *prima facie* evidence in discrimination cases, which means that there is enough evidence before the trial to prove the case, unless contradictory evidence is presented at trial. However, it is not very clear at what stage of litigation *prima facie* case may be applied (see George Rutheglen, Employment Discrimination Law: Visions of Equality in Theory and Doctrine 67–68 (Foundation Press, Thomson West 2007). Therefore this doctrine also doesn't give precise and well-grounded guidance about the alleviation of burden of proof.

statistical data as proof or liberalization of the usage of video and audio evidence which is currently allowed by courts only in a rather restrictive manner. Other measures of alleviation that could make discrimination regarding proof of employment easier, may include the legalization of situational tests organized to prove discriminative behavior,[76] the implementation of the courts' authority to investigate the circumstances of the case,[77] liberalization of use of statistical data, and the permission to use other employers' situation as a comparator (e.g. in cases of equal pay). The CEACR has already made recommendations to Russia concerning the alleviation of the burden of proof, but the Russian Government has not reacted to these recommendations.[78]

The issue of burden of proof in discrimination cases is aggravated by the way the traditional documentary administrative approach of the courts toward employment relations leads to a misunderstanding of the very concept of non-discrimination. For example, in one such case the court understood that the employee was selectively dismissed because of his trade union activities. However, the employer had followed the procedures for dismissal established in the legislation,[79], and that—without any consideration of the justification of the dismissal – was sufficient for the court to find that the employer was entitled to discipline the worker and, at the same time, was free to decide whether to discipline others or not.

Another serious obstacle to the effective enforcement of norms protecting against discrimination in employment in Russia is the inadequacy of the *remedies available to victims of discrimination*. According to the position of the ECSR, such remedies must be adequate, proportionate and dissuasive.[80] The employees that are wrongfully dismissed or that have suffered other forms of discrimination in employment are entitled, in addition to the right to be reinstated, to compensation for moral damages.[81] But the amounts of these moral damages, according to the existing case

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[76] Situation testing is a technique aimed at getting the evidence of discrimination by organizing the meeting with fake job candidates of certain type (e.g. the immigrants) with parallel candidates of different reference group. The differential treatment in such situations is used as an evidence of real cases of discrimination by the employer. See Isabelle Rorive, Proving Discrimination Cases – the Role of Situation Testing 1–91 (MPG, Centre for Equal Rights Scientific conception 2009).

[77] Such an approach is used for example in the EU. See Preamble, para. 22, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Union 22–26 (2000) L. 180; Preamble, para. 32 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union 16–22 (2000) L. 303.

[78] Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A) in International Labour Conference, 100th Session 496 (2011).

[79] He was dismissed for his second late appearance at work, although all of the employer's other workers habitually came to work in the first 30 minutes after the official start of the workday; however, only the trade union activist was punished.

[80] Conclusions of the European Committee of Social Rights (2006). Albania, 29.

[81] TK RF Art. 3, para. 4, arts 21, 22, 237.

law,[82] are so small that they do not serve to dissuade employers from discriminatory behavior in the future. Among the measures to correct this problem, there has been a discussion within the Civic Chamber of the Russian Federation[83] about adapting the mechanism of so-called "punitive damages" applied in US law for such situations.[84] But this discussion did not result in any practical measures.

The issue of effective methods of protection from discrimination has been under discussion between the ILO and the Russian Government. The CEACR has expressed its concern[85] about the limitation of the right of *labor inspections* to examine discrimination cases. Prior to the amendment of the Labor Code in 2006,[86] labor inspectors had such powers, but now disputes concerning discrimination in employment may be addressed only to the courts.

Nevertheless some positive, albeit peripheral, changes with enforcement of anti-discrimination law have already been made. In the summer of 2013, federal legislation was amended[87] in order to prohibit job announcements containing discriminatory requirements. According to data collected by NGOs, before the adoption of this law more than 80 per cent of advertisements of vacancies contained such requirements (limitations on age, gender, etc., without any connection to the nature of the job).[88] After the adoption of this Law the situation changed markedly: currently 'only' about 20 to 25 per cent of adverts contain such requirements.[89] Although this measure

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82 Further details in Nikita L. Lyutov, *Id.* note 51, 225–227.

83 Рекомендации Общественной палаты РФ по итогам общественных слушаний на тему «Реальность и эффективность защиты трудовых прав в России» [Rekomendatsii Obshchestvennoi palati RF po itogam obshchestvennykh slushanii na temu: "Real'nost' i effectivnost' zashchity trudovykh prav v Rossii" [Recommendations of the Civic chamber of the Russian Federation on the results of public hearings on the theme "The reality and effectiveness of labour rights protection in Russia"]] (Paper presented by the Civic Chamber of Russia at public hearings, Moscow, 29 July 2010), available at <http://trudprava.ru/expert/analytics/miscanalyt/549> (accessed July 10, 2016).

84 See, for example, Douglas Laycock, Modern American Remedies 732–736 (Wolters Kluwer, Aspen Co, 2002).

85 International Labour Conference, 99th Session, 2009. Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR); and Observation adopted 2009, published 99th ILC session, 2010. Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Russian Federation (Ratification: 1961).

86 According to the Federal Law of 30 June 2006, No. 90-FZ, SZ RF 2006, No. 27, Item 2878.

87 According to the Federal Law of 2 July 2013 No. 162 (Федеральный Закон о внесении изменений в Закон Российской Федерации «О занятости населения в Российской Федерации» и отдельные законодательные акты Российской Федерации [Federal'nyi Zakon o vnesenii izmenenii v Zakon Rossiiskoi Federatsii "O zaniatosti naseleniia v Rossiiskoi Federatsii' i otdel'nie zakonodatel'nie akty Rossiiskoi Federatsii" [Federal law on amendments to the Law of the Russian Federation "On employment in the Russian Federation" and certain legislative acts of the Russian Federation]], [SZ RF] 2013, No. 27, Item 3454).

88 Elena S. Gerasimova, Presentation at "Kutafinskie chteniia" [Kutafin's readings] International Conference (Moscow, 27–28 November 2013, unpublished).

89 *Id.*

cannot prevent discrimination, there are reasons to believe that employers in many cases have started to consider their own behavior as discriminatory and in some cases are beginning to act in a less discriminatory manner.

6. Protection of Workers from Retaliation by Employers and Anti-Union Discrimination

Another serious issue for anti-discrimination law and practice in Russia is the problem of protection for employees filing complaints about discrimination.

The state's obligation to effectively protect the right of the worker to 'earn his living in an occupation freely entered upon,' established by the ESC,[90] is interpreted by the ECSR in such a way that, in order to make the prohibition of discrimination effective, domestic law must provide, among other things, for protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action.[91] Some protective measures of this kind do exist in Russian law. For a better understanding of these measures one must distinguish between protection in cases of individual grievances and collective conflicts. The issue of protection of workers from employer retaliation in individual cases is inseparable from the prohibition of anti-union discrimination, because the motivation of employer to discriminate is both situations seems to be the same in most cases.

Protection in individual cases does not entail a special system of immunities and is associated with the general system for regulating dismissals.[92] Russian legislation permits dismissal only on the grounds specifically mentioned in the law[93] and obviously does not regard an employer's retaliation against an employee as a valid reason for dismissal. But in practice an employer may use one of the grounds envisaged by the Labor Code, and it will be the employee's obligation to prove in the court that the *reason* for dismissal was different from the officially stated legal *ground*. This issue is therefore very closely connected with the problem of burden of proof in discrimination cases.

The situation with protection of workers in collective labor law issues is different from the total absence of such protection in cases of individual grievances. There are special protective measures for those who take part in collective bargaining, mediation, conciliation and arbitration in collective labor disputes, strikes, and also for trade

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90 Art. 1, para. 2 of the European Social Charter.

91 Conclusions of the European Committee of Social Rights, XVI-1, 313.

92 Except for the employer's obligation to take into account the opinion of the enterprise's internal Commission on Labor Disputes 'on the dismissal of any of that Commission's members as established by Art.171 of the TK RF.

93 Unlike that in many other countries, Russian labor legislation does not contain merely the requirement that grounds for dismissal be reasonable but instead provides a limited list of legitimate grounds for dismissal.

unionists.[94] In the course of the neo-liberal reforms of the economy after the collapse of the Soviet system, this scheme of immunities has gradually been eroding.

Currently the dismissal of the heads or deputy heads of a plant-level trade union who are not released from their ordinary work duties is possible, once the general procedures for dismissal have been met, only with the prior written consent of a higher trade union organization.[95] This protection is applied only in the case of certain specific grounds for dismissal:[96] redundancy, lack of qualification and (until 2009, see further) systematic non-fulfillment of the worker's obligations. The guarantees previously contained in the Trade Unions Act,[97] were significantly stronger. First, they were applicable to any grounds for dismissal; second, they concerned any worker elected to an office in the trade union body; third, the protection applied not only to dismissal, but also to transfer of an employee to another position and to any disciplinary sanction affecting him or her. The Constitutional Court of Russia found in 2002 that the 'overly rigid' provisions of the Trade Unions Act in these matters inhibit the constitutional principles of equality and freedom of economic activity, and the Court declared some of them unconstitutional.[98] In 2003 the Constitutional Court analyzed the provisions of Article 374 of the Labor Code on practically the same grounds and came to the conclusion that this article in the Labor Code does not contradict the Constitution regarding an employer's right to exercise his economic freedom.[99] The second ruling of the Constitutional Court, in fact, means

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94 According to the art. 405, para. 2 of the TK RF. The employees' representatives in the collective labor dispute cannot be disciplined or dismissed by the employer without the prior written consent of the employees' representative body that has authorized them to take part in the dispute.

95 TK RF Art. 374, para.1.

96 TK RF Art. 81, para 1 (2), (3) and (5).

97 Art. 25, the Trade Unions Act.

98 Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционности положений части второй статьи 170 и части второй статьи 235 Кодекса законов о труде Российской Федерации и пункта 3 статьи 25 Федерального закона «О профессиональных союзах, их правах и гарантиях деятельности в связи с запросами Зерноградского районного суда Ростовской области и Центрального районного суда города Кемерово» от 24 января 2002 г. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti polozhenii chasti vtoroi stat'i 170 i chasti vtoroi stat'i 235 Kodeksa zakonov o trude Rossiiskoi Federatsii i punkta 3 stat'i 25 Federal'nogo zakona "O professional'nykh soiuzakh, ikh pravakh i garantiiakh deiatel'nosti' v sviazi s zaprosami Zernogradkogo raionnogo suda Rostovskoi oblasti i Tsentral'nogo raionnogo suda goroda Kemerovo" ot 24 ianvaria 2002 [Ruling of the Russian Federation Constitutional Court In the case of check of constitutionality of provisions of part two of article 170 and part two of article 235 of the Code of laws on labour of the Russian Federation and paragraph 3 of article 25 of the Federal law "On trade unions, their rights and guarantees of their activity" in connection with requests Zernogradskiy district court of the Rostov region and the Central district court of the city of Kemerovo of Jan. 24, 2002]], [SZ RF] 2002, No. 7, Item 745.

99 Определение Конституционного Суда Российской Федерации «По запросу Первомайского районного суда города Пензы о проверке конституционности части первой статьи 374 Трудового кодекса Российской Федерации» от 4 декабря 2013 г. [Opredelenie Konstitutsionnogo Suda Rossi-

that the requirement that the employer must obtain approval in the case of a trade union official's dismissal does not contradict the economic freedoms enshrined in the Constitution, although if a such restriction were excessive (as it was in the Constitutional Court's view in the case of the Trade Unions Act), then that restriction would be unconstitutional. Nevertheless, even this limited immunity was further diluted by the Constitutional Court in 2009[100] in relation to disciplinary dismissals. Once again, the Constitutional Court was motivated in its decision by the argument that this immunity limits the constitutional freedom of an employer to conduct business. As a result of this ruling, the only reasons for dismissals that require the approval of a higher trade union are redundancy and lack of qualification.[101]

It may also be noted that the requirement that higher level trade union authorities approve the dismissal of trade union officials implies a centralized trade union hierarchy, which is usually applicable only to those unions affiliated to some sort of centralized federation. This provision in practice may be considered a discriminatory withdrawal of protection from independent trade unions that are not included in such a hierarchy.[102]

Ordinary trade unionists may be dismissed after a procedure that 'takes into account the opinion of the trade union body.'[103] This procedure presupposes that the employer is obliged to notify the plant-level union about the planned dismissal. The trade union has the right to state its opinion on it within the next seven days. Another three days are given for additional consultations, in which the trade union has the right to discuss the matter with the employer.[104] As long as there are no requirements for real

iskoi Federatsii "Po zaprosu Pervomaiskogo raionnogo suda goroda Penzy o proverke konstitutsionnosti chasti pervoi stat'i 374 Trudovogo kodeksa Rossiiskoi Federatsii" ot 4 dekabria 2003 [The determination of the Russian Federation Constitutional Court on request of the Pervomaisky district court of Penza about the verification of constitutionality of part one of article 374 of the Labour code of the Russian Federation]], [SZ RF] 2004, No. 5, Item 404.

100 Определение Конституционного Суда Российской Федерации «По жалобе открытого акционерного общество «Судостроительный завод «Лотос» на нарушение конституционных прав и свобод положением части первой статьи 374 Трудового кодекса Российской Федерации от 3 ноября 2009 г. [Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po zhalobe otkrytogo aktsionernogo obshchestva 'Sudostroitel'nii zavod 'Lotos' na narushenie konstitutsionnykh prav i svobod polozheniem chasti pervoi stat'i 374 Trudovogo kodeksa Rossiskoi Federatsii" ot 3 noiabria 2009 [The determination of the Russian Federation Constitutional Court on the complaint of the open joint stock company "Shipbuilding plant 'LOTOS' for violation of constitutional rights and freedoms by the provision of part one of article 374 of the Labour code of the Russian Federation]].

101 TK RF Art. 81, para. 1 (2) and (3).

102 Коршунова Т.Ю. Комментарий к Федеральному закону «О профессиональных союзах, их правах и гарантиях деятельности» [Korshunova T. Iu. Kommentarii k Federal'nomu zakonu "O professlional'nykh soiuzakh, ikh pravakh i garantiiakh deiatel'nosti" [Tatiana Iu. Korshunova, The commentary to the Federal law "On trade unions, their rights and guarantees of their activity"]] 7 ff. (Moscow, Iustitsinform 2002).

103 The procedure for such 'taking into account' is established in Art. 373 of the TK RF.

104 The entire procedure is established by the art. 373 of the TK RF.

bona fide negotiation in such cases, this procedure means that a trade union's power in such cases is limited to postponing the dismissal of its member for 10 days.

In other situations of protection of worker representatives (collective bargaining representatives,[105] participants in mediation, conciliation and arbitration procedures in collective labor disputes,[106] and strikers[107]) there is a ban on dismissal,[108] but this ban is in force only for the duration of the procedure in question. As soon as the procedure of bargaining or dispute is over, there is no special protection from an employer's retaliatory actions. Another problem of this kind is the lack of any protection for workers who have taken part in a strike, but who were not appointed officially as worker representatives.

The issue of the balance between labor rights and economic freedoms that may in certain situations contradict each other is one of the most crucial issues in modern European labor law. It came to the center of legal discussion after the very high profile *Laval* and *Viking* cases[109] in the European Court of Justice (ECJ) that were triggered by the EU expansion in 2004 and later. It seems that after the demise of the socialist system and the introduction of neo-liberal political and economic reforms, Central and Eastern European countries set the balance very much in favor of employers' economic rights while sacrificing workers' rights if that balance is compared to the practices in Western Europe countries.[110] This situation has left employees with diminished means to protect their rights. In Russia this trend has led to serious practical problems. For example, trade unionists from the Kaliningrad seaport have been struggling against anti-union discrimination and repression by their employer for many years and finally had to refer their dispute to the European Court of Human Rights (ECtHR).[111] Even more notorious was the case of the leader of the independent

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105 TK RF Art. 38, para. 3.

106 TK RF Art. 405, para. 2.

107 TK RF Art. 414, para. 2.

108 In the case of collective bargaining representatives the ban is applied to non-disciplinary dismissals only.

109 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, ECJ Judgment (18 December 2007) Case No. C-341/05; International Transport Workers Federation v. Viking Line ABP, ECJ Judgment (11 December 2007), Case No. C-438/05.

110 See, for example, Roger Blanpain and Andrzej M. Świątkowski (eds), The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflicts in the European Union 1 ff (Wolters Kluwer, Austin, Boston et al., 2009); Ulrike Wendeling-Schröder, Fundamental Freedoms of the EC Treaty Versus the Fundamental Social Right to Take Collective Action – a Critical Comment on the New Jurisdiction of the European Court of Justice in E. Ales, T. Jaspers, and P. Lorber et al. (eds.), Fundamental Social Rights in Europe: Challenges and Opportunities 25–36 (Antwerp, Intersentia 2009); Andreas Bücker and Wiebke Warneck (eds.), Viking – Laval – Rüffert: Consequences and Policy Perspectives 7–127 (Brussels, European Trade Union Institute 2010).

111 Danilenkov and others v. Russia, ECtHR Judgment (30 July 2009). (Application no. 67336/01).

trade union at the Alrosa diamond mining company – Valentin Urusov, who became the victim of a frame-up, was charged with trading drugs, and was sentenced to eight years in prison. Only after a trade union protest campaign and pressure on the state authorities by the ILO[112] was he finally released.

More technical non-conformities of Russian law with the requirements of the ECSR with respect to the ESC may be noted as well. For example, according to the ESCR's statement, employees attempting to exercise their right to equality must be legally protected against any form of reprisals from their employers, including not only dismissal, but also downgrading, changes in work conditions, and so on.[113] Russian law on this issue goes no further than a general prohibition of different treatment.[114] The same may be said about the requirement of the ECSR that national legislation or case law must contain express safeguards against retaliatory dismissal.[115]

The inadequacy of the protection of workers against employer retaliation is especially worrying inasmuch as these infringements by employers are currently the second most frequent (after discrimination on the criteria of age) kind of discrimination in employment according to data from independent sociological polls.[116]

7. Controversial Norms on the Protection of Women

One of the major targets of international criticism of Russian law as it concerns discrimination in employment is the *prohibition of certain professions* (with hard, dangerous, or harmful conditions of work) for women. The existence of a large list of professions prohibited for women by Russian law[117] has been criticized by the supervisory bodies of the ILO,[118] of the UN Committee on Economic, Social and Cultural Rights that is responsible for monitoring the International Covenant on Economic,

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112 ILO Governing Body. 316th Session, Geneva (1–16 November 2012). ILO Doc. No. GB.316/INS/9/1. 365th Report of the Committee on Freedom of Association. Para. 1306–1352, at 352–368.

113 Council of Europe. Conclusions of the European Committee of Social Rights. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol, 272–276.

114 TK RF Art. 3.

115 Council of Europe. Conclusions of the European Committee of Social Rights, Conclusions 2005, Estonia, 205–210.

116 Бизюков В.А. Социологическое исследование «Дискриминация в сфере труда: распространенность, формы и причины существования» [Biziukov V.A. Sotsiologicheskoie issledovaniie "Diskriminatsiia v sfere truda: rasprostranennost', formy i prichiny sushchestvovaniia [Viacheslav A. Biziukov, Sociological study "Discrimination in employment: prevalence, forms and causes of existence"]] (Moscow, Tsentr sotsial'no-trudovykh prav 2008), available at <http://trudprava.ru/expert/research/discriminsurv/565> (accessed July 10, 2016).

117 The list was approved by Government Resolution (25 February 2000) No. 162.

118 Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A) in International Labour Conference, 100th Session 464 (Geneva, ILO 2011).

Social and Cultural Rights, 1966,[119] and more recently, by the UN Committee on the Elimination of Discrimination against Women responsible for the application of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.[120] The argument of those critics is that this protective legislation goes beyond its merely protective purpose and becomes a form of discrimination against women who consequently have poorer opportunities in the labor market. Within the ILO there has been discussion at the highest level of oversight—the International Labor Conference Committee on the Application of Conventions and Recommendations—that reached the conclusion that the Labor Code and the list of professions prohibited for women "went beyond protecting women's reproductive health and broadly restricted their access to occupations and sectors that involve equal health and safety risks to men and women."[121] The Committee urged the Russian Government "...to ensure that any limitations on the work that can be undertaken by women are not based on stereotyped perceptions regarding their capacity and role in society and are strictly limited to measures to protect maternity".[122]

Some NGO activists have supported these accusations. In 2009 there was a prominent Supreme Court case[123] when a woman attempted to contest the rejection of her application to enroll in the courses of study for subway train drivers in Saint Petersburg. It should be noted that this woman, A. Klevets, had just finished studies with the Faculty of Law of Saint Petersburg University and had begun work at an NGO specializing in protection from gender discrimination. She lost the case, and the Government Resolution prohibiting hiring women as subway train drivers remains in force. The Court based its decision on medical expertise which confirmed that this line of work was in fact harmful to human health. The important issue that was ignored by the Court in this case was the lack of proof that this professional risk was more threatening to women than to men. In the absence of such proof the logic of this decision appears discriminatory, as it seems that women's health is considered by the legislature and the Court to be more valuable than the health of men. The same may be said about the lists of 'prohibited professions'. This list should not have been abandoned as such, but there should have been a revision of it that would indicate

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119 Report on the forty-sixth and forty-seventh sessions (2–20 May 2011, 14 November – 2 December 2011). Economic and Social Council Official Records, 2012. Supplement No. 2. UN Doc. No. E/2012/22, E/C.12/2011/3 37 (United Nations, New York, NY, and Geneva, 2012).

120 United Nations. Committee on the Elimination of Discrimination against Women (15 February – 4 March 2016) 1 ff. (United Nations, New York, NY, and Geneva 2016), available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F63%2FD%2F60%2F2013&Lang=en> (accessed July 10, 2016).

121 Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A) in International Labour Conference, 100th Session 464 (2011).

122 *Id.*

123 Reshenie No. 162, Id. note 62.

which professions have a negative impact on women's and mothers' health that is greater than the negative impact on men's health.

Nevertheless at the end of 2013 the legislature chose another path. A new Federal Law "On special evaluation of the conditions of labor"[124] and the amendments to the Labor Code and some acts that are associated with it,[125] were adopted on 28 December 2013. Instead of the previously existing system of state classification of workplaces according to the conditions of work and their harmful character with a view to reducing time spent in such workplaces and providing other preferences for workers, a new system of 'special evaluation' was introduced. Starting in 2014 employers will be obliged to hire special private companies and work jointly with them to make such evaluations. There is a risk that it will become easier for employers to declare that a given workplace is not dangerous or harmful.[126] It seems that a reduction in the risk of discrimination against women's right to work in this case has been exchanged for greater risks of exploitation of workers as employers may place them in dangerous and harmful conditions of work without due compensation. The allegedly discriminative norms on the protection of women will then soon be replaced by discretionary standards local to individual enterprises and are likely to result in a general deterioration in occupational safety and health for all workers. Also, as it seems from a recent statement of the Supreme Court,[127] the courts are obliged to accept a refusal to conclude an employment contract with women if the conditions of work are not safe – again without mention of any special harm to women's health as such.

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[124] Федеральный Закон «О специальной оценке условий труда» от 28 декабря 2013 г. [Federal'nyi Zakon "O spetsial'noi otsenke uslovii truda" ot 28 dekabria 2013 [Federal Law on special assessment of working conditions of Dec. 28, 2013]], [SZ RF] 2013, No. 52, Part 1, Item 6991.

[125] Федеральный Закон «О внесении изменений в отдельные законодательные акты Российской Федерации в связи с принятием Федерального закона «О специальной оценке условий труда» от 28 декабря 2013 г. [Federal'nyi Zakon "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s priniatiem Federal'nogo zakona 'O spetsialnoi otsenke uslovii truda" ot 28 dekabria 2013 [Federal Law on amendments to certain legislative acts of the Russian Federation in connection with adoption of the Federal law 'On special assessment of working conditions' of Dec. 28, 2013]], [SZ RF] 2013, No. 52, part 1, Item 6986.

[126] See the arguments in Бабич О. Как отбирают гарантии у работников, занятых во вредных условиях труда [Babich O. Kak otbiraiut garantii u rabotnikov, zaniatykh vo vrednykh usloviiakh truda [Oleg Babich, How selected guarantees of workers employed in harmful labor conditions]] in Konfederatsiia truda Rossii (Moscow 2014), available at <http://ktr.su/content/news/detail.php?ID=1692> (accessed July 10, 2016).

[127] Постановление Пленума Верховного Суда Российской Федерации «О применении законодательства, регулирующего труда женщин, лиц с семейными обязанностями и несовершеннолетних» от 28 января 2014 г. Статья 7 [Postanovleniie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "O primemenii zakonodatel'stva, reguliruiushchego trud zhenshchin, lits s semeinymi obiazannostiami i nesovershennoletnikh" ot 28 ianvaria 2014, para. 7 [Para. 7 of the Russian Federation Supreme Court Plenary Ruling on the application of legislation regulating the labor of women, persons with family responsibilities and minors of Jan. 28, 2014]], Rossiiskaia Gazeta (Ros. Gaz.) 2014, No. 27.

Although it is justifiable that this list of professions should be modified in order to avoid discrimination, the very prominent discussion of this issue seems to distract the public and international organizations from much more important issues of discrimination in Russia.

It should also be noted that the restrictions on dangerous and harmful kinds of employment for women is compensated *by additional guarantees of employment at ordinary work for pregnant women and mothers*.[128] The most well-known provision of this kind is the prohibition against dismissing a pregnant woman on the employer's initiative. According to the Labor Code, a woman may be dismissed on the initiative of the employer during her pregnancy only if the employer is liquidated.[129] If a pregnant worker is guilty of a grave lapse that would ordinarily incur disciplinary measures, the employer nevertheless has no right to dismiss her. Even for a company director who normally may be dismissed in a much more flexible way because of the special character of her job,[130] this guarantee remains in force. This protective measure was introduced in the Soviet era and has been carried over from that previously existing legislation. As long as all Soviet employers belonged to the state, this measure was appropriate because employers were not risking their own money in such situations. In a market economy this measure may paradoxically work directly against its primary goal. Any employer will be aware of this guarantee and will see the risk in hiring women of child-bearing age. The employer will therefore be averse to hiring such women. There is a direct prohibition against refusing to hire a pregnant woman "for reasons associated with her pregnancy and motherhood"[131] and there is even a penal sanction for illegal refusal to conclude an employment contract with a pregnant

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[128] These guaratees are mainly gathered in the special chapter of the Labor Code "The Specifics of Regulation of Labor of Women and Persons with Family Responisilities" (Ch. 41 of the TK RF). They include the employer's obligation to lower the norms of work for pregnant women without reduction of their average wages (Art. 254, para. 1 of the TK RF); the continuation of payment of average wages in cases of release from work which is harmful for pregnant women (Art. 254, para. 2 of the TK RF) and for the days of obligatory medical examination (Art. 254, para. 3 of the TK RF); the right of women having children younger than 1.5 years to be transferred to other work without reduction of the average wages in cases of impossibility to perform the previous work (Art. 254, para. 4 of the TK RF); the pregnancy leaves of at least 70 days before the act of delivery and 70 after it (with longer periods in special cases of childbirth) with payment of special social security benefit (Art. 255 of the TK RF); the parental leaves (Art. 256 and 257 of the TK RF); the breastfeeding breaks (Art. 258 of the TK RF); the prohibition to assign pregnant women and limitation to assign women with children below 3 years old to overtime work and to travel work (Art. 259 of the TK RF); the right to have the annual leave immediately before or after the pregnancy leave (Art. 260 of the TK RF); the additional days-off for persons taking care of children with disabilities and to women working in the country-side (Art. 262 of the TK RF); additional unpaid leaves for people taking care of children (Art. 263 of the TK RF), and certain others.

[129] TK RF Art. 261, para. 1.

[130] Additional grounds for dismissal of the company directors are mentioned in Art. 278 of the TK RF and include "the decision of the owner of the company" which means that the usual restricted list of grounds for dismissal (Art. 81 of the TK RF) in this case is almost irrelevant.

[131] TK RF Art. 64, para. 3.

woman or mother of a child younger than three years with a maximum penalty of 360 hours of correctional labor or a fine in an amount up to that worker's average wage for 18 months.[132] But this prohibition and the associated sanctions are ineffective in practice because, as long as the burden of proof about the real reason for refusing falls on the victim of discrimination (see above), no employer would confess that his refusal to conclude an employment contract was motivated by such a consideration. One should not draw the conclusion that protective measures for pregnant women and mothers should be abolished. The issue is very sensitive and requires broad public discussion to arrive at some alternative ways for protecting them.

8. The Constitutional Court and European Court of Human Rights Case Law Prohibiting Discrimination against Workers with Family Responsibilities

The most prominent case by far on employment discrimination in Russia was initiated by military officer Konstantin Markin and was linked to the rights of male workers with family obligations. This case has triggered much legal discussion and finally resulted in a direct confrontation between the Constitutional Court of Russia and the ECtHR.[133] Therefore this case merits closer consideration in this article. In January 2009 the Constitutional Court of Russia refused to accede to the claim of Konstantin Markin,[134] an army officer and a single father of three children who was denied parental leave to take care of his children until they reach 3 years of age, a benefit to which single

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[132] UK RF Art. 145.

[133] See more in English about this case in Svetlana Huntley, *Konstantin Markin threw a military court into a dilemma: to side with the ECHR or to support the Constitutional Court of the Russian Federation*, ECHR and Promotion of the Rule of Law in Russia, available at <http://echrrussia.blogspot.ru/2012/08/konstantin-markin-threw-military-court.html> (accessed July 10, 2016); Elena Sychenko, *Id*., note 11 at 292–294.

[134] Определение Конституционного Суда Российской Федерации «Об отказе в принятии к рассмотрению жалоб гражданина Маркина Константина Александровича на нарушение его конституционных прав положениями статей 13 и 15 Федерального закона «О государственных пособиях гражданам, имеющим детей», статей 10 и 11 Федерального закона «О статусе военнослужащих», статьи 32 Положения о порядке прохождения военной службы и пунктов 35 и 44 Положения о назначении и выплате государственных пособий гражданам, имеющим детей» от 15 января 2009 г. [Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Ob otkaze v priniatii k rassmotreniiu zhalob grazhdanina Markina Konstantina Aleksandrovicha na narushenie ego konstitutsionnykh prav polozheniiami statei 13 i 15 Federal'nogo zakona 'O gosudarstvennykh posobiiakh grazhdanam, imeiushchim detei', statei 10 i 11 Federal'nogo zakona 'O statuse voennosluzhashchikh', stat'i 32 Polozheniia o poriadke prokhozhdeniia voennoi sluzhby i punktov 35 i 44 Polozheniia o naznachenii i vyplate gosudarstvennykh posobii grazhdanam, imeiushchim detei" ot 15 ianvaria 2009 [The determination of the Russian Federation Constitutional Court about refusal in acceptance to consideration of complaints of citizen Markin Konstantin Aleksandrovich on violation of his constitutional rights provisions of articles 13 and 15 of the Federal law "On state benefits to citizens with children", articles 10 and 11 of the Federal law "On status of servicemen", article 32 of the Regulations on military service and paragraphs 35 and 44 of Regulations on the appointment and payment of state allowances to citizens having children of Jan. 15, 2009]].

mothers are entitled according to the Federal Law "On the status of those in military service"[135] and the Federal Law "On state assistance to citizens with children".[136]

In refusing to consider these legislative provisions as gender discrimination against fathers, the Constitutional Court referred to the provision of ILO Convention No.111[137] quoted above which mentions the inherent requirements of a job as a permissible ground for different treatment. The Court justified this position by stating that "Inasmuch as the inherent requirements of military service preclude any possibility of mass non-fulfillment of their obligations by those in the military services, such as would impair important public interests protected by law, the prohibition against parental leave for male military servants working on a contract basis cannot be regarded as a breach of their constitutional rights and freedoms".[138] Soon after the *Markin* case the Constitutional Court examined the analogous provision of the Labor Code concerning parental leave for mothers working under employment contracts (referred to as the *Ostaiev* case).[139] In this situation the Court found that there was discrimination on grounds of gender, and the provisions of the Labor Code[140] were amended to allow fathers to have parental leave equivalent to the leave for mothers. In this decision the Constitutional Court directly referred to ILO Convention No.111 and ECtHR case law.[141] The same approach was taken with respect to state civil servants (the *Borovik* case).[142] The latter case was not decided unanimously, and

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135 Федеральный Закон оо статусе военнослужащих от 27 мая 1998 г., [Federal'nyi Zakon o statuse voennosluzhashchikh ot 27 maia 1998 st. 11, para. 13 (9) i (10) [Art. 11, para. 13 (9) and (10) of the Federal Law on status of servicemen of May 27, 1998], SZ RF 1998, No. 22, item 2331.

136 Федеральный Закон о государственных пособиях гражданам, имеющим детей, от 19 мая 1995 г. [Federal'nyi Zakon o gosudarstvennykh posobiiakh grazhdanam, imeiushchim detei ot 19 maia 1995, st. 13, para. 1 (2) i (7), st. 15, par. 1 (2) i (3) [Art. 13, para. 1 (2) and (7), Art. 15, para. 1 (2) and (3) of the Federal Law on state benefits to citizens with children]], [SZ RF] 1995, No. 21, Item 1929.

137 Art. 1, para. 2 of the ILO Convention No. 111

138 Para. 2.2 of the Constitutional Court Ruling No. 187-O-O, *Id.,* note 134.

139 Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционной части 4 статьи 261 Трудового кодекса Российской Федерации в связи с жалобой гражданина А.Е. Остаева» от 15 декабря 2011 г. [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti chasti 4 stat'i 261 Trudovogo Kodeksa Rossiiskoi Federatsii v sviazi s zhaloboi grazhdanina A.E. Ostaieva" ot 15 dekabria 2011 [Ruling of the Russian Federation Constitutional Court in the case about the verification of constitutionality of the fourth paragraph of article 261 of the Labour code of the Russian Federation in connection with the complaint of citizen A.E. Ostaev of Dec. 15, 2011]], [SZ RF] 2011, No. 52, Item 7639.

140 TK RF Art. 261.

141 *Weller v. Hungary*, ECtHR Judgment (31 March 2009) Application No. 44399/05.

142 Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционности положений части 4 статьи 31, пункта 6 части 1 статьи 33 и статьи 37 Федерального закона «О государственной гражданской службе Российской Федерации в связи с жалобой гражданки И.Ю. Боровик» от 22 ноября 2011 г. [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti polozhenii chasti 4 stat'i 31, punkta 6 chasti 1

two judges lodged their dissenting opinions with a statement that the character of the state civil service justifies different treatment in such a case.[143]

Not content with the Constitutional Court decision, Konstantin Markin applied to the ECtHR. In March 2012 the ECtHR Grand Chamber decided in his favor.[144] The Russian Government in its objections to the ECtHR made the statement that this legal situation is "positive discrimination" in favor of women that is justified by special attention to the welfare of female servicepersons by the state. The ECtHR noted that "…the Government's reference to positive discrimination is misconceived. The different treatment of servicemen and servicewomen as regards entitlement to parental leave is clearly not intended to correct the disadvantaged position of women in society or 'factual inequalities' between men and women".[145] The Court agreed with the applicant "[...] that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life".[146] Regarding the reference to ILO Convention No.111, the ECtHR noted that "[…] the applicant, who served as a radio intelligence operator, was capable of being replaced by either servicemen or servicewomen. It is significant that equivalent posts in the applicant's unit were often held by servicewomen and that he himself was frequently replaced in his duties by servicewomen. [...] Those servicewomen had an unconditional entitlement to three years' parental leave. The applicant, by contrast, did not have such entitlement, and that was only because he was a man. He was therefore subjected to discrimination on grounds of sex".[147]

The different approaches of the ECtHR and of the Constitutional Court have gone far beyond the purely legal issue and have become the subject of a major political dispute. The Constitutional Court Chairman, Valerii Zor'kin, published a polemical article in the official newspaper *Russian Gazette* with the provocative title "The Limits of Acquiescence"[148] in which he defends the position of the Constitutional Court and

stat'i 33 i stat'i 37 Federal'nogo zakona 'O gosudarstvennoi grazhdanskoi sluzhbe Rossiskoi Federatsii' v sviazi s zhaloboi grazhdanki V.Iu. Borovik" ot 22 noiabria 2011 [Ruling of the Russian Federation Constitutional Court in the case of check of constitutionality of provisions of part 4 of article 31, paragraph 6 of part 1 of article 33 and article 37 of the Federal law "On state civil service of the Russian Federation" in connection with the complaint of the citizen V.Yu. Borovik of Nov. 22, 2011]], [SZ RF] 2011, No. 79, Part 5, Item 7333.

143 See special opinions of judges K.V. Aranovskii and S.D. Kniazev, *Id.*

144 *Konstantin Markin v. Russia*, ECtHR Grand Chamber Judgment (22 March 2012), Application No. 30078/06.

145 *Id.*, § 141.

146 *Id.*

147 *Id.*, §149.

148 Зорькин В.Д. *Предел уступчивости* [Zor'kin V.D. *Predel ustupchivosti* [Valerii D. Zor'kin, *The limit of concessions*]], Rossiiskaia Gazeta [Ros. Gaz.], 29 October 2010, available at <http://www.rg.ru/2010/10/29/zorkin.html> (accessed July 10, 2016).

sharply criticizes the approach of the ECtHR in the Markin case. He was supported by the authoritative specialist in labor law and Vice-Chairman of the Constitutional Court, Prof. S. P. Mavrin,[149] two former Constitutional Court Chairmen,[150] and several other well-known academic lawyers representing labor law and international law.[151] Valerii Zor'kin has even brought up the possibility of having Russia denounce the ECHR at an international forum on constitutional justice.[152] The logic of the Constitutional Court arguments was based on the contradiction between the ECtHR decision on Markin and the basic constitutional principles of Russia. Draft laws were proposed with the purpose of changing the Penal Procedure Code and the Arbitration Procedure Code, as well as the manner of applying to the Constitutional Court, as a means of future 'defense' from ECtHR decisions contradicting Russia's basic constitutional principles.[153]

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149 Маврин С.П. Решение Европейского суда и Российская правовая система [Mavrin S.P. Resheniia Evropeiskogo suda i Rossiiskaia pravovaia sistema [Sergei P. Mavrin The decisions of the European Court and the Russian legal system]], available at <http://rapsinews.ru/judicial_analyst/20101118/251057007.html> (accessed July 10, 2016).

150 *Стенограмма круглого стола, посвященного 20-летию учреждения Конституционного Суда Российской Федерации, 15 декабря 2010 года*, 1 Журнал конституционного правосудия 15–23 (2011) [*Stenogramma kruglogo stola, posviashchennogo 20-letiiu uchrezhdeniia Konstitutsionnogo Suda Rossiiskoi Federatsii, 15 dekabrya 2010 goda*, 1 Zhurnal Konstitutsionnogo Pravosudiia 15–23 (2011) [*Transcript of the round table, dedicated to the 20th anniversary of the establishment of the Russian Federation Constitutional Court, 15 December 2010*, 1 J. of Constitutional Just. 15–23 (2011)]]

151 Тузмухамедов Б.Р. *Европейский суд защитил многодетного отца-офицера. Поможет ли это развитию российского законодательства и судебной практики?* [Tuzmukhamedov B.R. *Evropeiskii sud zashchitil mnogodetnogo otsa-ofitsera. Pomozhet li eto razvitiiu rossiiskogo zakonodatel'stva i sudebnoi praktiki?* [Bakhtiiar R. Tuzmukhamedov, *The European court has protected the officer and father with many chindren. Will it help the development of the Russian legislation and judicial practice?*]], Nezavisimaia gazeta, Oct. 13, 4–7; Нуртдинова А.Ф. *Право на уважение семейной жизни и его защита Европейским судом по правам человека*, 2 Журнал конституционного правосудия 1–8 (2011) [Nurtdinova A.F. *Pravo na uvazheniie semeinoi zhizni i ego zashchita Evropeiskim sudom po pravam cheloveka*, 2 Zhurnal Konstitutsionnogo Pravosudiia 1–8 (2011)] [Aliia F. Nurtdinova, *The right to respect for family life and its protection by the European court of human rights*, 2 J. of Const. Just. 1–8 (2011)]].

152 Пушкарская А. *Валерий Зорькин готов к обороне национального правового суверенитета* [Pushkarskaia A. *Valerii Zor'kin gotov k oborone natsional'nogo pravovogo suvereniteta* [Anna Pushkarskaia, *Valery Zorkin is ready to defend national legal sovereignty*]] (Kommersant, Nov. 22, 2010, No. 215 (4515), available at <http://www.kommersant.ru/doc/1544077?stamp=634751173002796190> (accessed July 10, 2016).

153 Проект Закона «О внесении изменений в статью 415 Уголовно-процессуального кодекса Российской Федерации и статью 312 Арбитражно-процессуального кодекса Российской Федерации» от 16 июня 2011 [Proekt Zakona "O vnesenii izmenenii v stat'iu 415 Ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii i stat'iu 312 Arbitrazhnogo-protsessual'nogo kodeksa Rossiiskoi Federatsii" ot 16 iiunia 2011 [Draft Law on amendments to article 415 of the Criminal procedure code of the Russian Federation and article 312 of the Arbitration procedural code of the Russian Federation of Jun. 16, 2011]]. Проект Закона «О внесении изменений в отдельные законодательные акты Российской Федерации от 16 июня 2011 г. [Proekt Zakona "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii" ot 16 iiunia 2011 [Draft Law on amendments to certain legislative acts of the Russian Federation]].

Other legal experts have sharply criticized the position of the Constitutional Court and of its Chairman personally, and they have written about the priority of international law over the Constitution.[154] There are also more balanced publications on the matter that are not aimed at finding the 'party in the right' in this 'inter-court conflict'.[155] The case of Konstantin Markin is not closed even now: after the ECtHR Grand Chamber decision, Markin applied to the Leningrad District Military Court for a revocation of the previous military court's decisions concerning his parental leave. The Leningrad District Military Court referred the issue to the Constitutional Court again accompanied by a query about whether article 392 of the Civil Procedural Code[156] is constitutional with mention of the ECtHR decisions as a new circumstance

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[154] Лукьянова Е.А. *Валерий Зорькин между конституцией и севрюжиной с хреном. Эволюция председателя Конституционного Суда по Салтыкову-Щедрину* [Lukianova E.A. *Valerii Zor'kin mezhdu konstitutsiei i sevriuzhinoi s khrenom. Evoliutsiia predsedatelia Konstitutsionnogo Suda po Saltykovu-Shchedrinu* [Elena A. Lukianova, *Valery Zorkin between Constitution and sturgeon with horseradish. The evolution of the Chairman of the Constitutional court by Saltykov-Shchedrin*]], Forbes Russia, Oct. 9, 2010), available at <http://www.forbes.ru/ekonomika-column/vlast/60777-predely-ustupchivosti-valeriya-zorkina> (accessed July 10, 2016). The title of the article paraphrases the well-known short story by M. E. Saltykov-Shchedrin in a very sarcastic, not to say rude, way towards V. Zor'kin. See also Лукьянова Е., *Крушение конституционных основ?* 1 Право и политика 106–113 (2011) [Lukianova E. *Krusheniie konstitutsionnykh osnov?* 1 Pravo i politika 106–113 (2011) [Elena Lukianova, *The collapse of the constitutional foundations?* 1 L. and Pol. 106–113 (2011)]]; Исаева Н.В. *Реализация конституционных прав человека и гражданина в России в дискурсе правовой идентичности (обсуждая некоторые судебные решения)*, 4 Конституционное и муниципальное право 32–36 (2011) [Isaieva N.V. *Realizatsiia konstitutsionnykh prav cheloveka i grazhdanina v Rossii v discurse pravovoi identichnosti (obsuzhdaia nekotoriie sudebnye resheniia)*, 4 Konstitutsionnoie i munitsipal'noe pravo 32–36 (2011) [Nina V. Isaieva, *The implementation of the constitutional rights of man and citizen in Russia in the discourse of legal identity (discussing some judicial decisions)*, 4 Const. and Municipal L. 32–36 (2011)]].

[155] See, for example, Пузанов И. *Между конвенцией и национальным законодательством*, 6 ЭЖ Юрист 103 (2011) [Puzanov I. *Mezhdu konventsiei i natsional'nym zakonodatel'stvom*, 6 EJ Iurist 103 (2011) [Igor' Puzanov, *Between the Convention and National Legislation*, 6 EJ Lawyer 103 (2011)]]; Очередько В.П. *Применение национальными и наднациональными судами международного трудового права*, 4 Российское правосудие 39–43 (2011) [Ochered'ko V.P. *Primeneniie natsionalnymi i nadnatsionalnymi sudami mezhdunarodnogo trudovogo prava*, 4 Rossiiskoie pravosudiie 39–43 (2011) [Viktor P. Ochered'ko, *Application international labour law by national and supranational courts*, 4 Russian Justice 39–43 (2011)]].

[156] This provision was included in the Civil Procedural Code in 2010 (according to Federal Law of 9 December 2010 No. 353-FZ) after another Constitutional Court case examining the constitutionality of the previous version of this article. See: Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционности части второй статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с жалобами граждан А.А. Дорошка, А.Е. Кота и Е.Ю. Федотовой» от 26 февраля 2010 г. [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti chasti vtoroi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zhalobami grazhdan A.A. Doroshka, A.E. Kota i E.Iu. Fedotovoi" ot 26 fevralia 2010 [Ruling of the Russian Federation Constitutional Court in the case of verification of constitutionality of part two of article 392 of the Civil procedure code of the Russian Federation in connection with complaints of citizens A.A. Doroshka, A.E. Kot and E.Yu. Fedotov of Feb. 26, 2010]] [SZ RF] 2010, No. 11, Item 1255.

that would justify a revision of the case. In December 2013 the Constitutional Court left the Civil Procedural Code unchanged but clearly underlined the priority of the Constitution over any other norms (including international treaties) that are applied within the territory of Russia.[157]

This legal thunderstorm seems to have gone far beyond questions of law to become a political issue. From a formal point of view there is no contradiction between the approaches of the Constitutional Court and the ECtHR. The Russian Constitutional Court has supreme authority in matters of interpretation of the Russian Constitution, while the ECtHR has the same power for the ECHR. Thus one court has found no contradiction with the constitutional norm prohibiting discrimination, while the other court has found a contradiction with the quite similar norm of the ECHR. However, because the ECtHR has acted as a kind of supranational, rather than international, body without any mandate for such a status, and has taken the liberty of criticizing the approach of the Constitutional Court with respect to its interpretation of the Constitution, the discussion has become emotional and politicized.

Nevertheless, the approach of the ECtHR to the issue of discrimination in the *Markin* case seems to be more convincing because women were employed at the same job that Markin held, and the employer was obliged to grant parental leave to female officers in this situation.

9. Discrimination against Persons with Disabilities

The ESC contains a requirement for member states to take adequate measures for placing disabled persons in employment.[158] Russia has ratified this provision, which is interpreted by the ECSR as the obligation for national legislators to directly prohibit discrimination in employment on the basis of disability as well as to prohibit dismissal on the basis of disability.[159] Although the ILO has failed to adopt the protocol to Convention No.111 that would specify that differential treatment based

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157 Постановление Конституционного Суда Российской Федерации «По делу о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с запросом президиума Ленинградского окружного военного суда» от 6 декабря 2013 г. [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Po delu o proverke konstitutsionnosti polozhenii stat'i 11 i punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zaprosom presidiuma Leningradskogo okruzhnogo voennogo suda" ot 6 dekabria 2013 [Ruling of the Russian Federation Constitutional Court in the case of check of constitutionality of provisions of article 11 and of paragraphs 3 and 4 of part four of article 392 of the Civil procedure code of the Russian Federation in connection with inquiry of Presidium of Leningrad district military court of Dec. 6, 2013]] [SZ RF] 2013, No. 50, Item 6670.

158 Art. 15, para. 2 of the ESC.

159 Conclusions of the European Committee of Social Rights 503 (Slovenia 2003).

on disability is discriminatory,[160] there is a special 1983 ILO Convention containing such a direct prohibition[161] to which Russia is a party.

Russian legislation does not directly mention the use of disability as a justification for differential treatment as discriminatory.[162] Nevertheless, the list of discriminatory justifications is open-ended and includes any differences not based on the "occupational qualities" of a worker (see above). Therefore, from a formal point of view discrimination against disabled persons is also prohibited. A direct statement in law that such practices are discriminatory would have practical impact by informing employers and employees about their already existing rights and obligations in this respect.

Much more important for Russian law and practice is another requirement of international law prohibiting discrimination against people with disabilities. The provision of the ESC quoted above requires employers to arrange "[…] specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment." According to the approach of the ECSR,[163] this means that employers are under an obligation to provide what is called *reasonable accommodation* for disabled persons at workplaces. This reasonable accommodation is usually understood as the employer's obligation to introduce certain technical facilities that enable a disabled person to work, study, and use the features of the social infrastructure along with other people.[164] An employer's failure to apply measures that amount to reasonable accommodation is usually treated in economically and socially developed countries as indirect discrimination against the disabled.[165] The CEACR also holds that reasonable accommodation is an integral part

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160 See the discussion from the International Labour Conference, 83rd Session 1996. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution). Special Survey on Equality in Employment and Occupation in respect of Convention No.111 120–122 (Geneva, ILO 1996).

161 Art. 4, ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (1983) (No. 159). Convention No. 159. See also the CEACR opinion about its requirements from the International Labour Conference, 86th Session 1998. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution). General Survey on the reports on the Vocational Rehabilitation and Employment (Disabled Persons) Convention (No.159) and Recommendation (No. 168), 1983 28 (Geneva, ILO 1998).

162 See TK RF Art. 3

163 Council of Europe. Conclusions of the European Committee of Social Rights, 2007, Statement of Interpretation on Article 15 § 2, § 10, 12.

164 See more about the reasonable accommodation concept at: Lisa Waddington, Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, 18(3) Int'l J. of Comp. Lab. L. and Indust. Rel. 403–428 (2002); Lisa Waddington, Reasonable accommodation in Dagmar Schiek, Lisa Waddington and Mark Bell (eds.), Cases, Materials and Text on National, Supranational and International Non-discrimination Law 740–745 (Oxford, Hart Publishing 2007); Mark Bell, *Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive*, 3 The Equal Rts Rev. 7–18, 10 (2009).

165 Lisa Waddington, Aart Hendriks, *Id*. n.164 at 405.

of disabled persons' right to work.[166] The list of criteria and requirements for measures that amount to reasonable accommodation are listed in the special ILO Code of Practice adopted in 2002.[167] Russia is also a party to the UN Convention on the Rights of Persons with Disabilities of 2006 that is based on the reasonable accommodation principle and directly mentions the denial to provide reasonable accommodation as discrimination in employment.[168] "Reasonable accommodation" means, according to the Convention, "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[169]

The federal legislation contains the concept that "disabled persons employed at any company irrespective of their legal form of organization and form of ownership shall be afforded with the necessary working conditions according to their individual program of rehabilitation."[170] Theoretically, this provision is supposed to establish an obligation to apply the reasonable accommodation principle. But neither this nor any other norm of Russian domestic legislation gives an explanation of who (the employer or the state) is under this obligation and who is required to pay for fulfilling it. The 'individual program of rehabilitation' of a disabled person is specified in a form approved by the Government[171] and is designed in such a way that an officer of the medical rehabilitation authority is free to choose among different forms of rehabilitation for disabled persons. These forms include: adaptation at the previous workplace; adaptation at the previous workplace with changes in working conditions; search for an appropriate workplace; creation of a special workplace; and others. There are no provisions in law concerning the priority of inclusive measures that would promote the integration of the disabled people into normal work and social activity.[172]

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166 Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A) in International Labour Conference, 100th Session 624 (2011).

167 ILO Code of Practice. Managing disability in the workplace 1ff (Geneva, ILO 2002).

168 Art. 2, UN Convention on the Rights of Persons with Disabilities, 2006.

169 *Id.*

170 Art. 23, para. 1, Федеральный Закон «О социальной защите инвалидов в Российской Федерации» [Federal'nyi Zakon "O sotsial'noi zashchite invalidov v Rossiiskoi Federatsii" [Federal Law on Social Protection of People with Disabilities]].

171 Приказ Минэкономразвития от 4 августа 2008 г. № 379н [Prikaz Minzdravsotsrazvitiia (4 August 2008) No.379n]], RG, 2008, No. 4747.

172 See Воронкова Е.Р. *Отказ работодателя от исполнения обязанности по обеспечению разумного приспособления как форма косвенной дискриминации по признаку инвалидности*, 4 Трудовое право в России и за рубежом 45–48 (2013) [Voronkova E.R. *Otkaz rabotodatelia ot ispolneniia obiazannosti po obespecheniiu razumnogo prisposobleniia kak forma kosvennoi diskriminatsii po priznaku invalidnosti*, 4 Trudovoie pravo v Rossii i za rubezhom 45–48 (2013) [Ekaterina R. Voronkova, *The refusal of the employer from the obligation to ensure reasonable accommodation as a form of indirect discrimination on grounds of disability*, 4 Lab. L. in Russia & Abroad 45–48 (2013)]].

Therefore, even at a formal level the principle of reasonable accommodation is unfortunately not applied in Russia at this time. Therefore there is no known case law on the employment discrimination of disabled persons from the point of view of reasonable accommodation.[173] Nevertheless, large-budget programs that are aimed at including disabled people in normal life are currently in progress in Russia.[174] Until quite recently most of the public infrastructure (buildings, public transport etc.) was almost completely lacking in any special facilities for people with disabilities. After the start of the governmental Accessible Environment project[175] special facilities including accommodations at the entrances to buildings and on public transport as well as special parking places have become available in large numbers. Although the situation of people with disabilities still seems far from ideal, it is apparently changing for the better.[176]

The UN Committee on Economic, Social and Cultural Rights (which is responsible for application of the UN Covenant on Economic, Social and Cultural Rights of 1966) has made proposals concerning the need to strengthen the integration of disabled persons into the labor market.[177] But these proposals were aimed at a more

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[173] However, there is some case law associated with the employer's obligation to create the special workplaces for disabled people (without reference to discrimination). See Определение Верховного Суда Российской Федерации «Об отмене решения Верховного Суда Республики Тыва от 03.03.2011 и признании недействующими пунктов 1, 5–14, 16–21 Приложения к постановлению Правительства Республики Тыва от 01.11.2010 № 464 «Об установлении организациям Республики Тыва минимального количества специальных рабочих мест для трудоустройства инвалидов» от 11 мая 2011 г. [Opredelenie Verkhovnogo Suda Rossiiskoi Federatsii "Ob otmene resheniia Verkhovnogo Suda Respubliki Tyva ot 03.03.2011 i priznanii nedeistvuiushchimi punktov 1, 5–14, 16–21 Prilozheniia k postanovleniiu Pravitel'stva Respubliki Tyva ot 01.11.2010 No. 464 "Ob ustanovlenii organizatsiiam Respubliki Tyva mimimal'nogo kolichestva spetsial'nykh rabochikh mest dlia trudoustroistva invalidov"' ot 11 maia 2011 [The determination of the Russian Federation Supreme Court about cancellation of the decision of the Supreme court of Republic Tyva from 03.03.2011 and the invalidation of paragraphs (1), 5–14, 16–21 of the Annex to the decree of the Government of the Republic of Tyva of 01.11.2010 No. 464 "On the establishment of organizations of the Republic of Tyva of the minimum quantity of special workplaces for employment of disabled people" of 11 May 2011]]; Определение Верховного Суда Российской Федерации от 25 ноября 2011 г. [Opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 25 noiabria 2011 [The determination of the Russian Federation Supreme Court of Nov. 25, 2011]]; Определение Высшего Арбитражного Суда Российской Федерации от 19 марта 2013 г. [Opredelenie Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 19 marta 2013 [The determination of the Russian Federation Supreme arbitration court of 19 Mar. 2013]].

[174] See the information about the "Dostupnaia sreda" Project website, available at <http://zhit-vmeste.ru/> (accessed July 10, 2016).

[175] See *supra* note.

[176] See more details about protection of disabled persons in employment and social security in: Жаворонков Р.Н. Правовое регулирование труда и социального обеспечения инвалидов в Российской Федерации [Zhavoronkov R.N. Pravovoe regulirovanie truda i sotsial'nogo obespecheniia invalidov v Rossiiskoi Federatsii [Roman N. Zhavoronkov, Legal regulation of labor and social security of invalids in the Russian Federation]] 1–318 (Moscow, Fond NIPI 2014).

[177] United Nations. Committee on Economic, Social and Cultural Rights. Report on the thirtieth and thirty-first sessions (5–23 May 2003, 10–28 November 2003), Economic and Social Council Official Records, 2004. Supplement No.2. UN Doc. No. E/2004/22, E/C.12/2003/14. Para. 486, 69.

stringent application of the older system of setting aside a quota of workplaces for disabled persons and at punishment of employers who refuse to employ people with disabilities. This system is indeed very important, but currently it is less comprehensive than the reasonable accommodation principle because the Covenant of 1966 tends to segregate disabled persons in a "special labor market for the disabled" rather than include them in normal life. At the international level, Russia has not yet been criticized for failure to apply reasonable accommodation measures.

10. Age Discrimination

In addition to the gaps in regulation that are described above and that lead to practical flaws in the application of anti-discrimination employment law, some legislative norms in Russia (at least arguably) contain discriminatory provisions.

One such example is *age discrimination*. The Labor Code contains a provision that employer and employee may conclude a fixed-term employment contract only in cases directly listed in the law.[178] This limited list of grounds is aimed at protecting employees from an employer's abuse of its right to conclude fixed-term contracts. Without such a list of permissible grounds, it is probable that the great majority of employment contracts would be fixed-term ones, and protection from unfair dismissal would be inapplicable in practice. Therefore, inclusion of a particular category of workers in this list puts those workers in an inferior position compared to all other workers, and this disadvantageous status may be justified only by the 'inherent requirements of the job' (according to ILO Convention No. 111, see above), as is the case with chief executive officers, their deputies, and chief financial officers.[179] Those who are entitled to an old-age pension are listed,[180] among other groups of workers, with whom fixed-term employment contracts are permissible upon the agreement of both parties. Taking into account that ageing workers have a weaker position in the labor market[181] and that age seems to be the most 'popular' justification

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178 The list of grounds is given in art.59 of the TK RF.

179 TK RF Art. 59, para. 2.

180 The applicable age is 60 years for men and 55 for women, according to Art. 7, Федеральный Закон «О трудовых пенсиях» от 17 декабря 2001 г. [Federal'nyi Zakon "O trudovykh pensiiakh" ot 17 dekabria 2001 [Federal Law on labor pensions of Dec. 17, 2001]], SZ RF 2001, No. 52 (part 1), Item 4920.

181 See more on the topic: 5th Annual Legal Seminar of the European Labour Law Network (ELLN) "Labour Law in a Greying Labour Market: Challenges of Active Ageing". Seminar Report (The Hague, 11–12 October 2012), available at <http://www.labourlawnetwork.eu/frontend/file.php?id=317&dl=1> (accessed July 10, 2016). For the Russian situation see: Васильева Т.А. Специфика дискриминации по признаку возраста и правовых механизмов ее предоставления [Vasilieva T.A. Spetsifika diskriminatsii po priznaku vozrasta i pravovykh mekhanizmov ee predotvrashcheniia [Tatiana A. Vasilieva, The Specifics of Age Discrimination and of the Legal Mechanisms Aimed at its Prevention]] in Tatiana A. Vasilieva (ed.) Zashchita lichnosti ot diskriminatsii po priznaku vozrasta: sbornik dokumentov [Protection of persons from the age discrimination: a collection of documents] 7–12 (Moscow, Iuriks 2010).

for discrimination,[182] it is not difficult to understand that in the majority of cases such workers have no other choice than to agree to employment on a temporary basis. In 1992 the Constitutional Court found that the norm of the previous Code of Laws on Labor of Russia[183] mentioning the retirement age as grounds for dismissal on the employer's initiative[184] was discriminatory and incompatible with ILO Convention No.111.

Although special grounds for dismissal and the permissibility of concluding a fixed-term employment contract are not strictly identical, there is a clear parallel between these two provisions. The provision of the current Labor Code concerning fixed-term contracts was criticized in some academic publications[185] and was also challenged in the Constitutional Court. But contrary to its own position from 1992, the Constitutional Court in this case refused to consider the current norm discriminatory.[186] The main reasoning of the Constitutional Court on this matter was that this exclusion from permanent employment is made not for all workers, but only for those who receive pensions; therefore, the ground of 'differentiation' is not age but an additional source of income. It is difficult to agree with these arguments not only because the old-age pension level is very low in Russia, but mainly because any other sources of income that a person may have are not considered as legitimate grounds for differentiation in law. Therefore it is not surprising that the Constitutional Court judge specializing in labor law (Olga S. Khokhriakova) has expressed her separate opinion, which is contrary to this decision.[187]

Problems of this kind are not confined to Russia. For example, the ECJ has found the German law waiving the requirement that employers justify concluding fixed-term employment contracts with employees older than 52 years as contradicting

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182 See Biziukov, *Id*. n.116.

183 Art.33, para.1.1, Kodeks zakonov o trude Rossiiskoi Federatsii. Vedomosti Verkhovnogo Soveta RSFSR (1971) No. 50 item 1007.This paragraph was rescinded by the Federal Law (12 March 1992) No. 2502-1 adopted after this Constitutional Court Ruling (see the next footnote).

184 Постановление Кoституционного Суда РСФР «По делу о проверке конституционности правоприменительной практики расторжения трудового договора по основанию, предусмотренному пунктом 1.1 статьи 22 КЗоТ РСФСР» от 4 февраля 1992 г. [Postanovlenie Konstitutsionnogo Suda RSFSR "Po delu o proverke konstitutsionnosti pravoprimenitel'noi praktiki rastorzheniia trudovogo dogovora po osnovaniiu, predusmotrennomu punktom 1.1 stat'i 33 KZoT RSFSR" ot 4 fevralia 1992 [Ruling of the Russian Federation Constitutional Court on the case about the verification of constitutionality of the law enforcement practice of terminating an employment contract on grounds envisaged by item 1.1 of article 33 of the Labor code of the RSFSR" of Feb. 4, 1992]], Vedomosti Soveta Narodnykh Deputatov I Verkhovnogo Soveta RSFSR (1992), No. 13, Item 669.

185 Kantemir N. Gusov, *Id.* at 31–36 n.25.

186 Определение Конституционного Суда Российской Федерации «Об отказе в принятии к рассмотрению запроса Амурского городского суда Хабаровского края о проверке конституционности положения статьи 59 Трудового кодекса Российской Федерации от 15 мая 2007 г. [Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii "Ob otkaze v priniatii k rassmotreniiu zaprosa Amurskogo gorodskogo suda Khabarovskogo kraia o proverke konstitutsionnosti polozheniia stat'i 59 Trudovogo Kodeksa Rossiiskoi Federatsii" ot 15 maia 2007 [The determination of the Russian Federation Constitutional Court about refusal in acceptance to consideration of inquiry of the Amur city court of the Khabarovsk region about check of constitutionality of provisions of article 59 of the Labour code of the Russian Federation of May 15, 2007]], Vestnik Verkhovnogo Suda RF, 2007, No. 6.

187 *Id.*

the fundamental principle of non-discrimination established in the EU Directives.[188] It seems that a similar conclusion could be reached concerning this provision of the Russian Labor Code as being in contradiction with the Constitution, ILO Convention No.111, the ESC and other basic international treaties on the matter.

11. Conclusion

Two types of issues connected with employment discrimination in Russia were addressed in this article. The first one dealt with general conceptual approaches that are relevant to all types of discrimination (sections 2 to 5). The other field of analysis dealt with the most resonant inconsistencies of Russian law on specific areas of discrimination compared to the relevant international law (sections 6 to 10). The main conclusion that may be made after this analysis of the law and practice concerning discrimination in employment in Russia compared to the international labor standards is that gaps and flaws in the legislation are numerous and that they may be considered as fundamental and systemic in nature. Some of them are associated with the transformation from a planned to a market economy and to a lack of clear understanding of the very notion of discrimination by judges, employers, employees, and trade unions. Others are grounded in weak mechanisms of protection from discrimination. Still others, such as the special football championship norms, may be attributed to ignorance of the problem on the part of the state. A separate series of problems may arise from a lack of societal agreement about what types of behavior are acceptable. Those include the discrimination on the basis of sexual orientation and political views.

What is obvious is that a 'copy-and-paste' adoption of the anti-discrimination legislation of 'Western' industrial economies in the Russian system would not eliminate the problem. This is so both because of the general problem of transposing foreign law into any country's national legal system[189] and also because this Western system of protection against discrimination is itself not perfect.[190]

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188 *Werner Mangold v. Rüdiger Helm*, ECJ (Grand Chamber) Judgment (22 November 2005) Application No. I-9981. (Case-144/04). For more details see: Catherine Barnard, EC Employment Law 320 (3d ed., Oxford, Oxford University Press 2006).

189 See, on this issue, Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 The Mod. L. Rev. 1–27 (1974). The limits of adaptation of international and foreign labor law in the Russian context are more specifically discussed by professors Lushnikov and Lushnikova. See Лушников А.М., Лушникова М.В. *Пределы заимствования международного и зарубежного опыта правового регулирования трудовых отношений в Российской Федерации: теоретические и прикладные проблемы*, 11 Евразийский юридический журнал 123–126 (2013) [Lushnikov A.M., Lushnikova M.V. *Predely zaimstvovaniia mezhdunarodnogo i zarubezhnogo opyta pravovogo regulirovaniia trudovykh otnoshenii v Rossiiskoi Federatsii: teoreticheskie i prikladnye problem*, 11 Evraziiskii Iuridicheskii Zhurnal. 123–126 (2013) [Andrei M. Lushnikov, Marina V. Lushnikova *The limits of borrowing of international and foreign experience of labor ralations legal regulation in the Russian Federation: theoretical and applied issues*, 11 Eur. L. J. 123–126 (2013)].

190 For some criticism of the US antidiscrimination law see, for example: Terry Smith, *Everyday Indignities: Race, Retaliation and the Promise of Title VII,* 34(3) Colum. Hum. Rts. L. Rev. 531–574 (2003); D. Wendy Greene, *Categorically Black, White, or Wrong: Misperception Discrimination and the State of Title VII*

One measure that might improve the situation with employment discrimination would be the adoption of the complex of anti-discrimination law that has been discussed among human rights activists for several years.[191] The UN Committee on Economic, Social and Cultural Rights advised adopting such laws[192] and there is a draft law of this kind submitted to the State Duma for consideration,[193] although without any indication of practical steps towards its adoption.

The radical approach of totally shifting the burden of proof in cases of discrimination in employment is also dangerous because this may lead to serious abuses by encouraging false claims of such discrimination; in some cases this may even turn the victims into the guilty parties and vice versa.

Among the legal norms that could be changed in order to make Russian labor law meet international anti-discrimination standards, one could suggest a substantial alleviation of standards of proof of discrimination, including the option to use statistical data, situational testing, and less stringent requirements for the sources of evidence. A shift of the burden of proof may be an improvement only in certain specific areas, such as the protection of employees from retaliation by employers. In cases in which an employee has filed a complaint against his or her employer, it seems logical that any disciplinary sanction that has been imposed on this employee after the complaint should be treated as retaliation, unless the employer could prove the opposite. The same approach may be applied to any disciplinary actions that target trade union activists.

Protection, 47(1) U. of Michigan J. of L. Reform 87–166 (2013); Trina Jones, *Family-Friendly for Whom? Low-Wage Workers and Workplace Benefits in the U.S.*, presentation at XIV Marco Biagi Conference 2016 (Modena, 17–18 March, 2016, unpublished). For Russian perspective on the Western concepts of discrimination see: Andrei M. Lushnikov, Marina V. Lushnikova, Nadezhda N. Tarusina, *Id.*, note 12, 23–35; Лютов Н.Л. *Дискриминация в сфере труда и занятий: проблемы определения*, 4 Трудовое право в России и за рубежом 20–24 (2011) [Lyutov N.L. *Diskriminatsiia v sfere truda i zaniatii: problemy opredeleniia*, 4 Trudovoe pravo v Rossii i za rubezhom 20–24 (2011) [Nikita L. Lyutov, *Discrimination in employment and occupation: problems of definition*, 4 Lab. L. in Russia and Abroad 20–24 (2011).

191 Alexander G. Osipov, *Id.,* note 12, at 87.

192 Report on the forty-sixth and forty-seventh sessions (2–20 May 2011, 14 November – 2 December 2011), Economic and Social Council Official Records, 2012. Supplement No.2. UN Doc. No.E/2012/22, E/C.12/2011/3, 35.

193 Проект Закона «О внесении изменений в Закон Российской Федерации «О занятости населения в Российской Федерации» и отдельные законодательные акты Российской Федерации (о дополнительных мерах по содействию занятости лиц, находящихся в социально уязвимом положении, и запрете на распространение дискриминационной информации о вакансиях» (2013) [Proekt Zakona "O vnesenii izmenenii v Zakon Rossiiskoi Federatsii 'O zaniatosti naseleniia v Rossiiskoi Federatsii' i otdel'nie zakonodatel'nie akty Rossiiskoi Federatsii (o dopolnitel'nykh merakh po sodeistviu zaniatosti lits, nakhodiashchikhsia v sotsial'no uiazvimom polozhenii, i zaprete na rasprostraneniie diskiminatsionnoi informatsii o vakansiiakh)" (2013) [Draft law On amendments to the Law of the Russian Federation "On employment in the Russian Federation" and certain legislative acts of the Russian Federation (on additional measures for promotion of employment of persons in a socially vulnerable position, and prohibition on the dissemination of discriminatory information about the job) (2013)]], available at <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=236214-6&02> (accessed July 10, 2016).

The alleviation of burden of proof is very closely linked with the necessity to change the state attitude towards the implementation of the antidiscrimination law including the already existing administrative and penal sanctions for its infringement. Anti-discrimination law enforcement may also become much more effective if labor inspections would acquire the right to interfere in situations of discrimination. However, this change of approach may work only if the competence and resources allocated to the inspections themselves would be harmonized with the international labor standards on the matter.

Other necessary legislative amendments include clarification in the definition of discrimination in order to harmonize it with international labor standards, and special attention to the regulation of indirect discrimination.

There are discriminatory provisions in Russian law that should be abrogated. Those include the permissibility of concluding the temporary employment contract with workers who have reached the pension age, the exceptional status applied to workers involved with football championships, and several others. In addition, serious discussion is needed on those measures that nominally protect women but that actually restrict their right to work.

Nevertheless, because discrimination in employment is a very sensitive and delicate issue, any legislator or judge must approach reforms with caution and a concern not to make the situation worse.

Needless to say, purely legal measures will always be insufficient to overcome the problem of discrimination in employment. Gradual changes in the culture of employment relations including the activity of trade unions, NGOs, state institutions, and the behavior of the parties directly involved in employment relations are needed to achieve social justice in these matters.

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