

## EQUALIZATION OF LEGAL STATUS WITH RESPECT TO GENDER

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*This article discusses the current trends in Russian legal doctrine and legislation on aligning the legal status of women and men, taking into account the legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights. It analyzes and critically reflects upon the gender aspects and content of those branches of Russian law in which such aspects are most clearly represented, either objectively or by tradition – techniques for gender neutralization of legal norms, the establishment of gender privileges and gender restrictions in legal status.*

*Constitutional law: the basic premise of gender equality, preferential treatment for certain categories of citizens, gender limitations; problems of quotas for women's representation in government, administration and other structures, provisions for women's representation in party electoral lists, etc.*

*Criminal Law: trends in the gender neutralization of crimes of a sexual nature while maintaining criminal responsibility for offenses against pregnant women, etc.; gender neutralization of preferential treatment in the punishment of persons with children.*

*Family Law: Russia's traditional view of marriage and parenthood; privileges for women in the divorce process, disputes about children, maintenance obligations; gender restrictions on adoption, assisted reproductive technologies; variants of gender neutralization of some family law norms.*

*Labor law: the preservation of absolute protection of the rights and interests of pregnant women and mothers of young children; the trend for gender neutralization of the legal*

*status of parents of young children; continued restrictions on women's access to certain areas of work.*

*Analysis of the legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights shows that on a number of gender equality aspects in Russian legislation and law enforcement practice, the views of these courts differ greatly. At the same time, there is a convergence of views on certain issues (for example, on the implementation of the legal status of persons with family responsibilities).*

*Keywords: gender; equality; status; legal positions of the courts.*

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## 1. Introduction

Legislative and legal enforcement 'games in the field of gender' have a long history in Russia. In connection with the patriarchal nature of social relations (exclusion of women from the electoral process, recognition of husbands' and fathers' power in the domestic sphere, limitations on women's right to work, etc.), the 'game' was mostly one-sided until 1917. However, in some public institutions, elements of equalization could be seen. For example, the traditional features of women's status in the Russian family include rather broad rights to ownership of movable and immovable property; inheritance of ancestral estates in the presence of heirs in the male line (which was not observed in Europe); custody, especially in widowhood; dowry ownership; the right of women from the privileged class to receive a fixed part of an inheritance. A number of historians and legal scholars explain this as the influence of the Russian empresses who took the status of women to heart. Elizabeth and Catherine the Great, "sympathizing with the interests of their gender," as D.I. Meyer wrote, "wanted to protect wives' property from husbands' power and,

taking advantage of the uncertainty of our ancient law with respect to property relations between spouses, initiated the separation of spouses' property rights.<sup>1</sup>

In Russia, the idea of women's equality originated in the first half of the 19th century, but its implementation started in social practice only in the 1960s with a focus on women's education and labor, and later on political rights. However, formal legal equalization of the status of women and men took place only at the beginning of the Soviet period (RSFSR Constitution of 1918). In the West, as O.A. Khazova notes, women fought for equality over a long period of time, and 'bit by bit' – in the 'quiet women's revolution'. In Russia, the liberation of women from the power of men, as well as from class and political inequality, was revolutionary, top-down, almost by force<sup>2</sup>, in a society not quite ready for it. This led to distortions – especially in the family institution (the idea of the sexual liberation of women and unlimited sexual freedom in general; the idea of giving up the path of marriage and family; the transfer of childcare concerns to society and the state).<sup>3</sup>

The legal contexts of gender are integrated, especially since the end of the 20th century, into the space of systemic and diverse gender studies. For example, 'women's history' (not only with a focus on the study of phenomena of male dominance in society, but all forms of interaction between male and female; therefore 'women's history' will inevitably meet with 'men's'); psychology of gender expression, sociology of the gender construct, gender linguistics, gender-based policy management, etc.

Status alignment in jurisprudence was accompanied by the granting of a variety of privileges, and 'positive discrimination' expressed either in providing privileges to women (prohibition of pregnant women's dismissal; paid leave for child care; alimony during pregnancy and three years after the birth of a child; temporary denial of a husband's right to initiate termination of marriage during his wife's pregnancy and for a year after giving birth, etc.), or capacity restrictions (bans on employment in heavy physical labor, work in harmful conditions, etc.). At the same time, there have been cases of retreat from established positions. For example, the Decree of the Supreme Soviet of the USSR from 8 July 1944 banned the voluntary recognition and legal establishment of illegitimate paternity – thereby leaving the woman solely responsible for the fate of the child. In addition, the legislator refused to protect the interests of de facto spouses (which was established by the Code of Laws on Marriage, Family and Guardianship, 1926), that is, the vitally important interests of women leading a household, caring for children and other family members and, as

<sup>1</sup> Мейер Д.И. Русское гражданское право [Meyer D.I. Russkoe gragdanskoe pravo [Meyer D.I. Russian civil law]] 364–365 (2d Ed., Moscow 1997).

<sup>2</sup> Гендерная экспертиза российского законодательства [Gendenaya expertiza rossiikogo zakonodatelstva [Gender expertise of Russian legislation]] 92–93 (Zavadskaya ed., Moscow 2001).

<sup>3</sup> Лушников А.М., Лушникова М.В., Тарусина Н.Н. Гендер в законе [Lushnikov A.M. Lushnikova M.V., Tarusina N.N. Gender v zakone [Lushnikov A.M. Lushnikova M.V., Tarusina N.N. Gender in law]] 105–111 (Moscow, Prospekt 2015).

a rule, not participating in public labor or not participating full-time. According to M.V. Antokolskaya, the decree was a page out of George Orwell's book, setting our legislation back by a century.<sup>4</sup>

In recent years, the gender context of Russian legislation has returned to the realm of scientific research's current issues, draft legislative works, and judicial practice, including legal debate on specific aspects of gender equality of the Constitutional Court of the Russian Federation and the European Court of Human Rights. Scientists', legislators' and legal practitioners' attention has turned to the problems of optimizing the benefits and limitations relating to gender, and the gender neutralization of legal institutions – to the extent that this allows for differences between the sexes.

In this regard, the Russian legal space has objectively differentiated groups of social relations according to branch affiliation. Thus, civil law (without the family law unit), civil litigation, land and environmental law, and most of the specialized sub-sectors of administrative law, as a rule, are not the focus of gender expansion. On the contrary, labor, social security, family, criminal, and criminal-executive law traditionally sway on the gender issues of benefits and/or limitations. At the same time, of course, constitutional and conventional laws are a fundamental prerequisite for gender differentiation and gender neutralization. On the one hand, the supporting principle is the idea of citizens' equality before the law, including equality regardless of sex (Art. 19 of the Constitution of the Russian Federation). On the other, priority is assigned by the state for special protection of the family and motherhood (Art. 38), the ability to set restrictions on the rights and freedoms of individuals in order to protect the constitutional order, morality, health, rights and interests of others, national defense and state security (Item 3 of Art. 55), which gives a basis for legal differentiation.

## **2. The Political and Administrative 'Fields of the Gender Game'**

The idea of gender quotas in the political sphere is not yet exhausted, including and especially because the proclamation (and partial incarnation) of the gender equality idea has not yet led to its final and irrevocable success. This is confirmed by statistics and data of sociological research. In general, the level of electoral activity of women (4 to 10%) is even slightly higher than that of men. At the same time, women are more likely support the party in power, both in parliamentary and presidential elections. However, the intensity of their interest in the political process is significantly lower than that of men. In terms of European standards and practices, the quantity and quality of women's participation in the 'corridors of power', is insufficient. In the State Duma their share is less than 14% (18% in United Russia, and 4.3% in the

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<sup>4</sup> Антокольская М.В. Семейное право [Antokolskaia M.V. Semeinoe pravo [Antokolskaia M.V. Family law]] 77 (Moscow 1997).

Communist Party, for example; the latter figure eloquently illustrates the real, rather than mythological, approaches of the parties to gender equality in politics<sup>5</sup>; three women are heads of regions, and four head State Duma steering committees. At the same time, in regional public chambers, the activity of which, among other things, shows the activity of Russian civil society, the membership of women varies from 20% to 52% (not without irony we can state that where the work does not involve power and is not paid, women's representation increases).

This, apparently, not completely favorable picture of the Russian gender world (it is assumed that it becomes favorable when women's representation in government structures reaches 20–40%<sup>6</sup>) periodically inspires renewal of the idea of the need for a federal law that guarantees equal rights and freedoms for women and men and equal possibilities for their implementation. A draft was presented to the relevant committee of the State Duma in 2003 and swept under the carpet, from where it is periodically brought out for discussion, political testing and editing. The bill provides measures to ensure equal opportunities in the implementation of passive suffrage; priority for vacant civil service positions to persons of the gender that is in the minority in the relevant position or in civil service; gender equality in the formation of the Constitutional Court, Supreme Court, and Accounts Chamber.<sup>7</sup> Its fate is unclear, despite the adoption of a model CIS law based upon it.<sup>8</sup> At the same time, the State Duma has repeatedly turned down proposals from non-profit women's organizations for the introduction of gender quotas in ballots, such as at least 30% female candidates. (By the way, Russian Prime Minister Dmitry Medvedev told a press conference that he is not a supporter of gender quotas – women and men have to prove their ability to work in senior positions by real merits. The authors of this work, being self-made themselves, are sympathetic to this position; however, considering themselves realists, they understand that additional measures to support women's political activity, even if of a temporary nature, may be useful.)

There are foreign examples of the introduction of gender quotas, not only in the political but also in the economic sphere. The legislation of the European Union and member countries is oriented as much as possible on gender equality; one of

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<sup>5</sup> Isaeva E., Sokolov A., Tarusina N. *Gender and Civic Engagement in Modern Russia*, 25(3) *Annals for Istran and Mediterranean Stud. Series Historia et Soc.* 457–458 (2015).

<sup>6</sup> Nadezhda N. Tarusina, Elena A. Isaeva, *Gender Tendency of Russian Political Activity from the Perspective of Jurisprudence*, 11(12) *Am. J. of Applied Sci.* 1976–1979 (2014). DOI: 10.3844/ajassp.2014.1976.1979.

<sup>7</sup> Tarusina N.N., Isaeva E.A. 'Gender Game' on the Field of Russian Jurisprudence, 5(1) *Eur. J. of Soc. Sci. Educ. & Res.* 381 (2015).

<sup>8</sup> For more detailed information about this social movement, please see: Поленина С.В. *Правовой механизм решения гендерных проблем в современной России*, 10 *Государство и право* 7 (2012) [Polenina S.V. *Pravovoy mehanizm reshenya gendernih problem v sovremennoy Rossii*, 10 *Gosudarstvo i pravo* 7 (2012) [Polenina S.V. *The legal mechanism for addressing gender issues in modern Russia*, 10 *St. & L.* 7 (2012)]].

its focus areas is the percentage of female members on large companies' boards of directors. It includes a requirement for the mandatory introduction of gender quotas (Belgium, Finland, France, Germany, Iceland, Netherlands, Norway and Spain).<sup>9</sup> The experience of Norway is usually mentioned in the literature as an example of successful implementation of such a rule. Norway's law on gender equality, adopted in 1978, prohibits discrimination based on gender in all spheres of public life. A 2003 law that came into force in 2006 specifies that each gender must have at least 40% representation in the composition of large companies' boards of directors.<sup>10</sup>

Policy implementation of gender quotas and the promotion of women to boards of directors has spawned the term 'golden skirts', denoting women who have succeeded with the help of quotas to break into business' top management structures.<sup>11</sup>

In Russia, an attempt to lobby for the introduction of similar legal norms was carried out as early as the end of 2003. It concerned state enterprises and large private companies, which serve as role models for behavior in the business environment, and act as models for medium and small companies. The bill was rejected. We believe that we should agree with B. Choudhury, that in order to address the issue of gender representation in the governing bodies of large companies, we should approach it from rational positions and sensibly evaluate, from the perspective of strategic management, what that is progressive and useful can women bring to the decision-making process of boards of directors. The first thing to bear in mind is that the main task of the company management body is not the solution of gender problems in the country, but the adoption of cost-effective solutions that are profitable for the company. The board should work as an integrated team, not a group of individuals, selected by quotas. As part of their studies, specialists in strategic management do not confirm a direct relationship between the efficiency of a company and the gender composition of its management body.<sup>12</sup>

In addition to the problem of quotas to ensure equal opportunities for women and men in the political, administrative and management process, the administrative-legal sphere in recent years has seen confrontation between government agencies and the LGBT community with respect to the latter's rights to hold public events: every year they submit the relevant requests, and in most cases they are refused, including failure to get approval for the place and time of the event.

On this issue, there have been several judgments of the European Court of Human Rights (hereinafter – ECHR). In particular, in its judgment of 21 November

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<sup>9</sup> De Vos Mark, Culliford Philippe, *Gender quotas for company boards* Cambridge – Antwerp – Portland 3 (2014).

<sup>10</sup> Lister R. *A Nordic nirvana? Gender, citizenship, and social justice in the Nordic welfare states*, 16(2) *Soc. Pol.: Int'l Stud. in Gender, St. and Soc'y* 257 (2009). DOI: 10.1093/sp/jxp007.

<sup>11</sup> De Vos Mark, Culliford, Philippe, *Gender quotas for company boards* Cambridge, at 182.

<sup>12</sup> Choudhury Barnali, *New rationales for women on boards*, 34(3) *Oxford J. of Legal Stud.* 511, 523 (2014).

2010 on the appeal "Alekseev v. the Russian Federation", the Court stated that the government's decision violated the provisions of Articles 10, 11 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to freedom of expression, assembly and association; the prohibition of discrimination on the grounds of sex). The reasons for the ban, specified by the Government of Moscow, mainly boiled down to security reasons (the Moscow authorities received numerous complaints from various associations opposing gay parades), as well as the incompatibility of homosexual propaganda with the religious and moral values of Russian society. The Court considered these arguments unacceptable and beyond reasonable discretion: the first should be overcome by the adoption of effective measures to ensure public safety, and the second shows a lack of tolerance towards minorities.

We believe that legislators and enforcers, at least, must act more correctly: legislatively specify the limitations, and look for compromise solutions at the level of legal enforcement. In connection with the adoption of special laws and regulations in the majority of Russian regions prohibiting public actions aimed at the propaganda of homosexuality among minors and administrative sanctions for violating the ban, the Court is served complaints on this issue too. Compatibility between Russian and European positions in this special area of life is not to be expected. Understanding and a positive decision in the case of an appeal against gay activists' administrative sanctions is possible only in cases where the court has established facts of gross procedural irregularities on the part of law enforcement agencies, as confirmed by judicial practice. The remaining steps in the direction of tolerance are clearly in the distant future.

## **2. Sectoral Aspects of Gender Equality**

### ***2.1. Criminal Policy Field***

Russian criminal and penal legislation is traditionally characterized by a certain gender asymmetry. There is additional criminal law protection of the life and health of women, their social and economic rights related to the implementation of reproductive function (liability for illegal abortion, rape, unjustified refusal to hire or unjustified dismissal of pregnant women or women with children of up to three years of age, increased liability for the murder of a pregnant woman, etc.); bans on sentencing women to life imprisonment or the death penalty, lenient modes of serving prison sentences, delayed punishment for pregnant women and mothers, etc. It should be noted that there is no complete unanimity in the doctrine on this issue. On the one hand, it has been suggested that providing women with less severe conditions for serving sentences is not only due to reproductive factors, but also because they pose a lower level of social danger (a controversial thesis, especially in the context of serious crimes). On the other hand, there are considerations about

the need for criminal law to move toward relative gender neutralization (e.g., with respect to the qualification of sexual assault); the latter trend was confirmed by the decision to extend the rules on the stay of execution of punishment to men who have children.<sup>13</sup>

## 2.2. Gender and Family

The main forces of gender asymmetry are concentrated in the areas of family and labor – the production and reproduction of human life. Gender plays its most active and vibrant role as an ‘agent of influence’ in the institutions of marriage, parenthood and child custody.

It is known that the European trend is not only for the legalization of same-sex partnerships, but also for gender neutralization of the institution of marriage. Following Britain, France and other countries that gave up the ‘last bastions’ of the traditional family, the most striking new approaches have been seen in Ireland. In May 2015, Irish citizens voted in a national referendum in which a majority of voters (62.07%) were in favor of amending the Constitution to allow marriage as a union of two people regardless of their sex. This fact has become a phenomenon, since 84% of the population consider themselves to be Catholics.<sup>14</sup> Previously European countries’ legalization of same-sex marriage was based not on the will of the people, but on legislators’ decision, while receiving serious challenges from civilian opponents of the measure. (The Irish referendum is not the only case when this method has been applied to determine public opinion, but with a different result: for example, in a referendum in December 2013, two-thirds of Croatian citizens voted for preserving the traditional definition of marriage.)

The Russian social-legal reality is based on a completely different ‘picture of marriage’. Despite the lack of a definition of marriage in the Family Code (FC), the fixed male-and-female composition is fairly obvious, since Item 1 of Art. 12 of the FC specifies the “mutual and voluntary consent of the man and woman who marry ...” However, the idea of heterosexual conjugal union, although traditional and legally fixed, does not settle questions on its nature and various types: the universal construction of human rights, according to a number of Russian scientists and public figures, leads to the right to marry anyone, regardless of his or her sexual orientation.<sup>15</sup>

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<sup>13</sup> Кругликов Л.Л., Чернышкова Л.Ю. Уравнивающий и распределяющий аспекты справедливости в сфере уголовно-правовой охраны и ответственности женщин [Kruglikov L.L., Chernyshkova L.Y. Urvnivaushii i raspredelyaushii aspekti spravedlivosti v sfere ugovolno-pravovoy ohrany i otvetstvennosti genshin [Kruglikov L.L., Chernyshkova L.Y. Equalized and dispensing aspects of justice in criminal and legal spheres of women's responsibility protection]] 88–91 (Yurlitinform Moscow 2013).

<sup>14</sup> Tobin Brian, *Marriage Equality in Ireland: The Politico-Legal Context*, 30(2) *Int'l J. of L., Pol'y & The Fam.* 115–130 (2016). DOI: 10.1093/lawfam/ebw002.

<sup>15</sup> For example: M.V. Antokolskaia. *Harmonisation of Family Law in Europe: A Historical Perspective* 237–312 (Antwerpen-Oxford 2006).



The validity of the traditional version has been criticized on repeated occasions, although to no avail. For example, the RF Constitutional Court, in its decision № 496-O of 16 December 2006, about the refusal to accept for consideration E. Murzin's complaints about the unconstitutionality of Item 1 of Art. 12 of the FC, explained: 1) one of the purposes of the family is birth and child-raising; 2) the concept of marriage as a biological union of man and woman is a national tradition of Russia; 3) the lack of a legal possibility to register a same-sex partnership does not affect the level of recognition and guarantees of the rights and freedoms of an applicant as a person and a citizen; 4) Provision of Art. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly provides the opportunity for creating a family in accordance with national legislation.

It should be noted that Art. 12 of the Convention uses the terms 'men' and 'women', so a literal interpretation of the provision does not exclude different combinations in the composition of the subject of marriage. At the same time the combination of the second and fourth arguments in the legal position of the Court, in fact, gives grounds to refuse the complaint, but does not explain the essence of the problem. However, some social scientists, representing LGBT community interests, believe that the institution of marriage, which was historically built on a husband's 'ownership' of his wife, must change dramatically; be 'desexualized'; open up marriage's legal benefits to all who are legally capable. In addition, it should focus on cohabitation – property, budget, housing and parenting<sup>16</sup> – that is, in fact, to modify the institution of marriage into a partnership of family type. Of course, Russian legislators are unlikely to show favor to such a proposal in the coming years. The possibility of parallel existence of two types of union – marriage and partnership – in Russian civil law is discussed, but the supporters of this idea, born of European doctrine and legislation<sup>17</sup>, remain a small minority.<sup>18</sup>

The ECHR, based on an interpretation of Art. 12 of the European Convention, does not consider as a violation the consolidation of heterosexual marriage at the level of national law.<sup>19</sup> The Court implicitly and explicitly recognizes that same-sex couples in registered civil partnerships have similar rights as married opposite-sex couples,

<sup>16</sup> Кондаков А. *Однополый брак в России: «Темное прошлое», серые будни и «светлое» послезавтра*, 21(22) *Гендерные исследования* 51–57 (2010). [Kondakov A. *Odnopoliy brak v Rossii 'Temnoe proshloe', serie budni i 'svetloe' poslezavtra*, 21(22) *Gendernie issledovania* 51–57 (2010) [Kondakov A. *Same-sex marriage in Russia: 'The dark past', gray days and the 'light' day after tomorrow*, 21(22) *Gender Stud.* 51–57 (2010)].

<sup>17</sup> See for ex.: Danish Registered Partnership Act №372 of June 7, 1989; Pact civil solidarite (PACS), Mode d'emploi №99–944. 15/11/1999; etc.

<sup>18</sup> Тарусина Н.Н. Семейное право: в «оркестровке» суверенности и судебного усмотрения [Tarusina N.N. *Semeinoe pravo v «orkestrovke» suverenosti i sudebnogo usmotrenia* [Tarusina N.N. *Family Law: in the «orchestration» of sovereignty and judicial discretion*]] 130–131 (Prospekt, Moscow 2014).

<sup>19</sup> *Schalk and Kopf v Austria*, No. 30141/04, 24 June 2010; *Hämäläinen v Finland* [GC], No. 37359/09, 16 July 2014. § 63.

when domestic legislation gives them similar rights and benefits.<sup>20</sup> Paul Johnson also drew attention to another aspect – the alignment of the actual status of de facto same-sex partnerships and traditional de facto marriage. The author demonstrates this with two cases from the ECHR: *Karner v. Austria* and *Kozak v. Poland*.<sup>21-22</sup>

Among the ECHR tipping points on the issue was the decision of 21 July 2015 on “*Oliari and Others v. Italy*”<sup>23</sup>. The Court noted that the legal protection of same-sex couples does not guarantee their basic needs, including mutual financial support as well as their right to alimony and inheritance. The Italian Constitutional Court has expressed solidarity with this position, pointing to the need for positive changes in the legislation, which was carried out in May 2016.

The principle of monogamy in marriage is also in the gender discursive field (Art. 14 of the Russian Federation Family Code).<sup>24</sup> Thus, the Constitutional Court of the Russian Federation, in the definition №851-O of 18 December 2007, refused to accept for consideration N.G. Ryazapov’s complaints of violation of his constitutional rights by Item 1 of Art. 12 and Art. 14 of the RF FC. He claimed that these regulations limited his constitutional rights (the registrar authority refused him marriage to two women). The legal position of the Court was limited to ascertaining the secular nature of the Russian state, which excludes direct influence of all religious establishments on state policy in the field of family relations, including those allowing polygamy. In our opinion, it is a somewhat redundant statement: the leading religious confessions, of course, have indirect influence on political decisions: their positions form the trends for substantial restriction of abortion, surrogacy programs, and the use of other modern technologies in the reproductive sphere, etc.

Divorce is built primarily on a gender-neutral basis, but not without deviations from it. Thus, Art. 17 of the RF FC is a norm of gender dissonance. It limits the rights of the husband without the wife's consent (in a state of pregnancy and for a year after giving birth) to initiate a legal divorce. The prohibition is absolute: it applies to cases of stillbirth, death of a child under one year, as well as legal establishment of paternity of another man. The latter circumstance is an inhibiting legal fact only in Russian family law. Neighboring countries’ legislators (e.g., in the Republic of Belarus), in one form or another have ‘disavowed’ this fact while retaining restrictions on the right to initiate a divorce.

<sup>20</sup> *Burden v the United Kingdom* [GC], No. 13378/05, 29 April 2008, § 65. For a broader discussion, see: Gross (2013).

<sup>21</sup> Details: *Karner v Austria*, No. 40016/98, 24 July 2003. <[http://www.pravosudie.biz/base1/data\\_vy/sudaswbbj.htm](http://www.pravosudie.biz/base1/data_vy/sudaswbbj.htm)> (accessed May 1, 2016); *Kozak v Poland*, No. 13102/02, 2 March 2010. available at <<http://www.refworld.org/docid/4ba207962.html>> (accessed May 1, 2016).

<sup>22</sup> Details: Johnson Paul, *Marriage, Heteronormativity, and the European Court of Human Rights: a Reappraisal*, 29(1) *Int'l J. of L., Pol'y and The Fam.* 58 (2015).

<sup>23</sup> *Oliari and Others v. Italy*. <http://subscribe.ru/archive/law.europeancourt/201511/12104846.html/>

<sup>24</sup> Tarusina Nadezhda, *European Experience and National Traditions in Russian Family Law*, 2(3) *Russian L. J.* 101 (2015). DOI: 10.17589/2309-8678-2015-3-2-97-108.

It is known that a divorce can be integrated with a procedural claim for alimony to the spouse in need and a claim for determining the child's place of residence. At the same time, provision of Item 1 of Art. 90 of the RF FC is in need of partial gender neutralization: only the ex-wife has the right to alimony in the current version (in cases where there is a mutual child of up to three years), while, even if as an exception, a young child may be left with the father. Regarding trends in dispute resolution about which parent will be the primary caretaker, the situation has not changed: despite the equality of parents' rights, children are most often passed to the mother. In this sense, we can talk about the so-called *de facto* presumption of the preemptive rights of the mother to keep her infant child. On the one hand, every presumption is refutable; on the other hand, in recent years this has been supported by the court referring to the principle embodied in the Declaration of Rights of the Child, 1959: "a child of tender years shall not, save in exceptional circumstances, be separated from his mother" (Art. 6). At the same time, there is a trend for a gender-neutralization approach to solving this problem, based on a more sensitive and professional understanding of the interests of the child as a subject of family law.<sup>25</sup> (It should be noted that in the civil context this integration is a striking example of judicial activism, confirming the mixed nature of Russian judicial procedures for resolving civil cases.<sup>26</sup> This is because a court within the meaning of the rules of Art. 23–24 of the RF FC is required to resolve the issue of a child's residence, including on its own initiative, if the concerned persons have not already set a similar issue before it. Thus, the goal of gender equalization of the mother's and the father's statuses is indirectly achieved, along with other goals.)

The institutions of parenthood and other childcare do not contain a single prerequisite for construction of a same-sex union for raising and caring for a child. In this sense, they are oriented toward continuation of the construction of traditional marriage and traditional family. Moreover, in connection with the European legal trend to allow same-sex parenting,<sup>27</sup> new rules establishing the requirements for guardians and adoptive parents were implemented in 2013 (Art. 127 and Art. 146 of the RF FC). Persons who are in same-sex unions, as well as persons who are not married (if they are citizens of states where such a union is permitted) are not permitted adoption or guardianship. Such a prohibition, unlike several others, cannot be overcome by judicial discretion, even if in the interest of the child.

However, indirectly and by default, same-sex parenthood can arise when one of the parent-spouses changes sex. Russian family legislation, despite constructive

<sup>25</sup> Natalya Kravchuk, *The Child's Right to Express His/Her Views in the Context of Russian Culture and Democracy*, 2(3) Russian L. J. 31–35 (2014), available at <<http://www.russianlawjournal.org/index.php/jour/article/download/22/18>> (accessed May, 2015).

<sup>26</sup> Dmitry Mareshin, *The Russian Style of Civil Procedure*, 21(2) Emory Int'l L. Rev. 545–548 (2007), available at <[http://papers.ssrn.com/abstract\\_id=2208488](http://papers.ssrn.com/abstract_id=2208488)> (accessed May 17, 2015).

<sup>27</sup> Details: Hyden A., Allman M. *Children and Same Sex Families 2* (Jordan publishing LTD 2012).

proposals in civil law doctrine,<sup>28</sup> does not provide for legal consequences of this medical operation in terms of validity (termination) of the marriage. Legislators and law enforcers (including higher courts) exhibit inexplicable indifference towards the situation: same-sex marriage, parenthood and guardianship are declared inadmissible – and they are the same time, with the connivance of the authors and interpreters of prohibitions, in fact possible ... However, in judicial practice decisions on deprivation of parental rights of those who changed their sex have begun to appear. The basis of such decisions is parents' inappropriate public behavior in the presence of the child, causing damage to the interests of the latter, and not the fact of sex change and the emergence of two fathers or two mothers for the child.

Gender constraints are also present in the field of assisted reproductive technologies. Family and medical legislation governing the relationships of surrogate motherhood permits participation in the program by spouses, male and female, and unmarried women (infertile), but excludes unmarried men and same-sex couples (Art. 55 of the "Fundamentals of the legislation on protection of the health of citizens in the Russian Federation"). That is why some Russian citizens (especially single men) are forced to resort to foreign surrogacy, further facing the problem of the child's citizenship and registration of his paternity in Russia.

There is no unanimity of views on this gender restriction. Several civil lawyers believe that, on the one hand, other people's reproductive choice should be respected, no matter how unconventional it may seem. On the other hand, since this right clashes with the right of the child born as a result of such a choice to know his or her parents, live and grow up in a family (preferably in a two-parent. family), the obligation of the state should be to ensure the best interests of the children. As of today, there is still no clear answer to this clash.<sup>29</sup>

### **2.3. Gender and Labor**

Since labor, as we have previously pointed out, is also relevant to basic social factors that ensure human reproduction, the gender component is thus objectively, inevitably and traditionally represented in labor and social security law. Art. 3 of the Labor Code (hereinafter the RF LC) expressly prohibits discrimination, including on the basis of the sex and marital status of the citizen (worker). At the same time, these characteristics provide the basis for differentiation in the legal regulation of labor and social security relations. Such gender differentiation assumes, despite the legislator's omission, positive 'gender discrimination' in the form of benefits for women, privileges, additional safety and security measures, and negative gender

<sup>28</sup> Тарусина Н.Н. Брак по российскому семейному праву [Tarusina N.N. Brak po rossiskomu semeinomu pravu [Tarusina N.N. Marriage according to the Russian family law]] 95 (Moscow, Prospekt 2010).

<sup>29</sup> Лушников А.М., Лушникова М.В., Тарусина Н.Н. Гендер в законе [Lushnikov A.M. Lushnikova M.V., N.N. Tarusina. Gender v zakone [Lushnikov A.M. Lushnikova M.V., N.N. Tarusina. Gender in law]] 194–195 (Moscow, Prospekt 2015).

differentiation in the form of partial restrictions for women in the application of general rules (for example, through establishing a list of jobs with hazardous working conditions). At the same time, the trend in labor legislation and doctrine, as well as in other areas of law, is to construct ideas and norms which ensure gender neutralization. Special rules governing the work of women and people with family responsibilities, including, consequently, men, are grouped into three blocks: 1) for women – taking into account the physiological characteristics of the body and its reproductive function, requiring protection from adverse occupational factors (gender labor protection for women); 2) for the period of active motherhood – pregnancy, childbirth and care of infants or young children (maternity protection); 3) for combining work with family responsibilities – for both women and men due to the care of children or care for sick family members.<sup>30</sup> Providing benefits to certain categories is designed to make them competitive in the labor market, and to protect the most vulnerable from the arbitrariness of the employer.

At the same time, the rules of the Labor Code of the Russian Federation can justifiably puzzle an employer who chooses to hire a woman. Examples of such rules are as follows: the prohibition of dismissal of pregnant women, except in cases of an organization's liquidation or the termination of individual entrepreneur activity (Art. 261), breaks to feed a child (Art. 258), the prohibition of official business trips, overtime, and work at nighttime, weekends or public holidays for pregnant women (Item 1, Art. 259), and more. This creates a well-founded desire of potential employers to protect themselves from such inconveniences. Arguments against the revision of the current approach, completely prohibiting pregnant women to travel on official business, to work overtime, at night, on weekends and public holidays, are reduced largely to the fact that the employer has the ability to abuse their position and force a woman to carry out such work.

The Labor Code contains an almost absolute ban on termination of an employment contract with a pregnant woman on the initiative of the employer, which is in line with the provisions of the ratified ILO Convention № 103 "On Maternity Protection." However, in 2000 the ILO itself replaced previously adopted standards in the new Convention No. 183, limiting pregnant women's protection from dismissal to aspects directly related to the state of pregnancy or childbirth – probably recognizing their shortcomings from the perspective of gender neutrality and the move towards greater equality for both parents. Decisions of Russian courts lead to the conclusion that judicial protection of pregnant women is 'absolute' at present. In principle, it is not surprising as judges make decisions in accordance with the current legislation, which is focused on this. An impetus for the emergence of the new construction "a pregnant woman is right, even if not pregnant already" was the position set out in par. 2 p. 25 of the Resolution of the Plenum of the Supreme Court of the Russian

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<sup>30</sup> *Id.* at 419.

Federation, dated 28 January 2014 No. 1 “On the application of legislation regulating the work of women, persons with family responsibilities and minors.” Based on the resolution, a pregnant woman's contract of employment, where terminated on the initiative of the employer, must be restored, even if at the time of review in the court of her claim the pregnancy was not preserved. How justified is the new tough stance of the Supreme Court, effectively departing from the principle that the protection of a pregnant woman's rights is based on the existence of a pregnancy, is a moot point. In our view, many Labor Code norms protecting women's rights should be converted from mandatory to discretionary rules. At the level of collective or individual employment contracts, the employer and the employee could together envisage the presence or absence of privileges to women which would be determined by reproductive function and psychophysical characteristics.

Nevertheless, gender stereotypes, which successfully influenced labor law in Russia and other countries throughout the 20th century, are gradually retreating, taking with them the rules for increased protection of motherhood with almost complete disregard for fathers' rights to participate in children's upbringing. The modern practice of having completely different forms of family life show that the 'breadwinner' in the family is often the mother, and fathers do not consider it shameful to take on children's care. This is confirmed by judicial practice. Thanks to flare-ups of precedents in which applicants seek to draw the attention of the legislator and the court to the gender imbalance, changes can be seen in the direction of gender neutrality in labor legislation relating to workers with family responsibilities, albeit not always and not in everything. In 2010 there was the highly significant ECHR judgment of 7 October 2010 in the case of “Konstantin Markin v. Russia.”<sup>31</sup> The applicant was in the military. After his divorce, by court order his three children continued to live with him. The applicant appealed to the head of the military unit with a request for leave to care for a child until the age of three years, but he was denied, because parental leave could be granted only to female military personnel. In August 2008 he applied to the Constitutional Court, challenging the constitutionality of the legal provisions relating to three-year leave to care for a child, but the Constitutional Court ruling of 15 January 2009 refused consideration of the applicant's complaints. Referring to Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Art. 8 of the Convention, the applicant complained to the ECHR about the refusal to grant him leave to care for a child, arguing that the refusal constituted discrimination based on sex.

The Court was not convinced by the Russian Federation Constitutional Court's argument that a different attitude to military servicemen and military servicewomen in the provision of childcare leave was justified by the special social role of mothers in

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<sup>31</sup> Case of Konstantin Markin v. Russia, available at <[http://hudoc.echr.coe.int/eng#{"dmdocnumber": \["875216"\],"itemid":\["001-100926"\]}](http://hudoc.echr.coe.int/eng#{)> (accessed May 1, 2016).

the upbringing of children. In contrast to leave for pregnancy and childbirth, leave for childcare is linked to the subsequent period and is intended to provide an opportunity to care for the child at home. With regard to the role, both parents are in a similar position. Arguments that military service requires the continuous discharge of duties and that the mass provision of childcare leave to military servicemen would have a negative impact on the combat readiness of the armed forces were not persuasive. In fact, there are no expert assessments or statistical studies into the number of male soldiers who would qualify for a three years' leave to care for a child and who would like to take it. Thus, the Constitutional Court based its decision on pure assumption. The ECHR found that denying military servicemen the right to childcare leave, while military servicewomen have such right, was not reasonably justified. By six votes to one (the vote against was from A. Kovler, the elected judge from the Russian Federation), the ECHR ruled that there was a violation of Art. 14 in conjunction with Art. 8 of the Convention. The Grand Chamber of the ECHR upheld the 2010 decision when reviewing the case on Russia's request in 2012.<sup>32</sup> The case of *K. Markin v. Russia* was so significant that in April 2016, in a review of gender discrimination cases, the ECHR opened the document with a quote from the Grand Chamber's decision in that case: "... [T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ... In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex." (*Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, § 127.)<sup>33</sup> In this regard, a confrontation unfolded between the legal positions of the ECHR and the Constitutional Court of the Russian Federation, as well as discussions with the active participation of the latter's judges, on the sovereignty of the Russian legal system, based on Russian constitutional provisions.<sup>34</sup>

As a positive judicial precedent, which took into account the father's role in parenting, we want to note the Resolution of the Constitutional Court of the Russian Federation of 15 December 2011 № 28-P on the case on the constitutionality of Part 4 of Art. 261 of the RF LC in connection with the complaint of the citizen A.E. Ostaev. This case indicated a further serious shortcoming of a discriminatory nature, consisting in the exclusion of working fathers with many children from legally protected categories. A.E. Ostaev, a father of three young children, one of which had not reached the age

<sup>32</sup> *Id.*

<sup>33</sup> Gender equality, available at <[http://www.echr.coe.int/Documents/FS\\_Gender\\_Equality\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Gender_Equality_ENG.pdf)> (accessed May 1, 2016).

<sup>34</sup> Grigory Vaypan, *Acquiescence Affirmed, Its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights*, 2(3) Russian L. J. 130–140 (2014).

of three, and another of which is disabled, was laid off from his job. His complaint was designed to verify the constitutionality of Part 4 of Art. 261 of the Labor Code. Ostaev considered his dismissal unjustified and illegal, stating that the prohibition of termination of an employment contract by an employer must apply to fathers with children aged up to three years (especially in a situation where the mother, as in his case, in connection with childcare, does not work). Denying the claims, the courts of the first and second instances pointed out that the plaintiff was not included in the category of persons covered by the guarantees set out in the Part 4 of Art. 261 of the Labor Code. The court recognized that Part 4 Art. 261 was not consistent with the Russian Constitution, and that Art. 7, 19, 37 (p. 1) and 38 (p. 1 and 2), to the extent that the current system of legal regulations prohibits the dismissal by the employer of women with children aged up to three years, and others with children up to that age without a mother, excludes the possibility of a father using this guarantee even if he is the only breadwinner in a family, bringing up young children, including children under the age of three years, where the mother is not in paid employment and is engaged in caring for children.

There is no doubt that in the field of social and labor relations and gender equalization, Russia is still far behind the top-ranking countries in terms of gender-oriented legislation (Norway, Iceland, Sweden). It should be noted that the Nordic gender model is constructed in such a way that a woman should not try to be like a man, and that men should seek to obtain the same rights as women.<sup>35</sup> Among foreign examples of recent years, the UK experience is interesting: in 2014, an Act was passed on joint parental leave for child care (Shared Parental Leave).<sup>36</sup> Parents of children (and civil partners of parents) who were born after 5 April 2015 have the right to joint leave. The leave must be taken within one year of a child's birth. The Act allows parents to take leave at the same time or in succession.<sup>37</sup> The leave days can be divided into blocks and taken in turns. This measure has a very positive effect on scrapping gender stereotypes that only women can take leave for child care, which created serious problems at work.

Obviously, not all the remnants of the Soviet era have been eliminated in Russian law – and this is not only according to Russian citizens' opinion, but also according to international organizations. In particular, the position of the UN Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) is indicative. In its 63rd session in February 2016 it considered a complaint against Russia about the

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<sup>35</sup> Lister Ruth, *A Nordic nirvana? Gender, citizenship, and social justice in the Nordic welfare states*, at 249.

<sup>36</sup> The Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 No. 914 available at <<http://www.legislation.gov.uk/ukdsi/2015/9780111128626/contents>> (accessed May 1, 2016).

<sup>37</sup> Gemma Michel, *Encouraging fathers to care: The Children and Families Act 2014 and Shared Parental Leave*, 44(1) *Indus. L. J.* 123 (2015). DOI: 10.1093/indlaw/dwu034.



list of jobs in which women's labor is prohibited. The limitations imposed in Art. 253 RF LC and Government Resolution №162 (a list of 456 jobs in which the employment of women is prohibited) were found to be in violation of the UN Convention on the Elimination of All Forms of Discrimination against Women.<sup>38</sup> Applicant S. Medvedeva considered that the Russian Federation violated her rights according to Art. 1, 2 (c), (d), (e) and (f) and p. 11 (1) (b), (c) and (f) of the Convention. In 2005, the applicant, graduated from Samara River College with the qualification 'technician-navigator'. Her documents qualified her to apply for the position of helmperson-motorist, but when she tried to find a job in 2012, it became clear that a gender restriction was established for the position. On 20 August 2012 the Samara Regional Court dismissed her case, indicating that the denial of employment did not violate her labor rights, as the law protected the reproductive health of the applicant from hazards. When filing a complaint to the UN Committee (CEDAW), S. Medvedeva pointed to the lack of consistency in the normative regulation of issues related to the reproductive function of women in Russia. In particular, according to federal law, a woman with two or more children is entitled to apply for medical sterilization. At the same time, she cannot gain access to work that hypothetically could be harmful to her reproductive function. In considering the complaint, the representative of Russia referred to another landmark case – the case of A. Klevets, which also stated the problem of restrictions on women's right to free choice of employment, which does not protect them but automatically rids them of the right to work. In this case, the Cassation Chamber of the Supreme Court left unchanged the decision of the Russian Armed Forces of 2 March 2009, which deemed that the ban on women's access to the professions of 'train driver' and 'assistant train driver' was legal and did not violate the rights of women to decide how to use their abilities to work and to choose the type of activity and profession. The ILO Experts' Committee issued several conclusions about the conflict between the restricted jobs list and ILO Conventions prohibiting discrimination. The Russian government recommended reviewing these rules, limiting them to protecting the health of pregnant and breast-feeding women.

In the labor law of foreign countries (USA, EU countries and others), the question of special measures aimed at gender equalization has been solved long ago. Such measures are designed to provide a social group or gender with equal access to employment in those positions and in those types of work that are of interest to the relevant citizens. The situation with gender quotas is a measure, for the most part, in our opinion, demonstrating positive discrimination, that is, reverse discrimination, when skilled workers are affected (for example, in the case of the United States – white males). At the same time, Title VII of the Civil Rights Act of 1964 does not allow enterprises to install a rigid policy of gender equalization that would have unambiguous negative

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<sup>38</sup> CEDAW/C/63/D/60/2013, available at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F63%2FD%2F60%2F2013&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2F63%2FD%2F60%2F2013&Lang=en)> (accessed May 1, 2016).

consequences for members of the 'majority', for example, gender quotas.<sup>39</sup> European countries, on the contrary, have used gender quotas in the area of labor relations, which is a cause of conflict, requiring the intervention of the judiciary.

Let us focus, as an example, on a case that is rather controversial in this respect, *Kalanke v. Freire Hansestadt Bremen (City of Bremen)*.<sup>40</sup> The point was that two candidates claimed a vacant post of head of a department at the Bremen Department of Parks – a man and a woman, equally qualified and experienced. The employer hired the woman, later substantiating this with the fact that the burden of the law requires that preference be given to women when choosing between equal candidates of different sexes. The complainant pointed out that the provision of quotas did not coincide with the norms of the Bremen Constitution and the rules of German Basic Law. His argument was not accepted by the first and appellate courts. The Federal Labor Court, considering the case, said that the rule of automatically giving women a quota in areas where they are less represented was discrimination on the grounds of sex. However, it had a right to exist in the domestic legislation of the country, as it provided for equal opportunities for men women and, in some cases, a method for real gender equalization. The ECHR generally supported this position, noting, however, that such rules should be interpreted very strictly, and that unfounded, automatic advantages in relation to women were not legal.<sup>41</sup> Many EU members have criticized the decision of the ECHR because it did not explain what should be the positive measures for them to be lawful. The ECHR's legal position on this issue is not stable. Thus, in the *Marshall v. Land Nordrhein-Westfalen* judgment, the Court supported the preference for women if they are underrepresented in an enterprise, and in *Badeck v. Hessischer Ministerpräsident* it spoke against automatic preference, but for an individual approach to the candidates.<sup>42</sup>

It is noteworthy that the ECHR itself requires mandatory gender representation for judge candidates from participating countries. The Assembly does not consider a list of candidates if it does not include at least one male and one female (Resolution of the Parliamentary Assembly N 1366 (2004)). We agree with S. Hennette Vauchez: according to her research, an increased number of female candidates for the post of judges of the ECHR does not solve the equal gender representation question, much as the election of Barack Obama as US president has not brought racial equality.<sup>43</sup>

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<sup>39</sup> DuBois Cynthia, *The impact of 'Soft' affirmative action policies on minority hiring in executive leadership: the Case of the NFL's Rooney rule*, 18(1) Am. L. & Econ. Rev. 209 (2016). DOI: 10.1093/aler/ahv019.

<sup>40</sup> *Kalanke v. Freire Hansestadt Bremen (City of Bremen)*, 17 October 1995, C-450/93, ECR, 1995, 3051.

<sup>41</sup> R. Blanpain, *European Labour Law* 508 (Wolters Kluwer 2008).

<sup>42</sup> For more detailed information about this social movement, please see: M. Russell. *Women's Representation in UK Politics: What can be done within the Law?* 32 <<http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/60.pdf>>

<sup>43</sup> S. Hennette Vauchez, *More women – but which women? The rule and the politics of gender balance at the European Court of Human Rights*, 26(1) *The Eur. J. of Int'l L.* 221 (2015). DOI: 10.1093/ejil/chv004.

#### 4. Conclusion

Thus, the information we have provided demonstrates that the 'game on the gender field' is regulated by very complex rules and is carried out with varying degrees of success – both in favor of the trend of gender neutralization, and in favor of special methods for gender equalization – in order to achieve real equality through 'positive discrimination'. Not to be ignored are objective gender differences, which gave birth to the benefits and enforcement of decisions that sometimes become excessive restrictions on the freedom choice of women and men. At the same time, the combination of methods for gender neutralization, differentiation, privileges and explicit constraints appear very different in the different branches of jurisprudence. It can be states, for instance, that labor legislation and its practice tend toward gender neutralization, while in political sphere the process is controversial. In the marriage and family sector, the direction of regulation and enforcement is more towards the preservation of traditional approaches.

It is clear that the final round in the fascinating 'gender game' on the Russian jurisprudence field will not be played tomorrow, or even the day after.

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