

## "Gender Game" on the Field of Russian Jurisprudence

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### Abstract

*Equality of opportunities is the most important aspect of the general principle of equality, which is currently, received almost universal acclaim. This is one of the most fundamental principles on which democratic society is based. It is enshrined in international instruments, national constitutions and laws. However, despite significant progress in this topic, there is inequality between men and women. The article presents main study areas of the theory and practice of jurisprudence in the context of gender - with an emphasis on gender studies in specific areas of legal science; the importance of gender in the mechanism of legal regulation of social relations in the constitutional, administrative, criminal, labor, and family law, since this factor plays a more active role in these branches of Russian law and legislation. The authors come consider that ideas and solutions concerning the legal regulation of relations with the gender element are contradictory it its basis; complex, not always justified, interaction rules and practices, that include positive discrimination and gender neutralization.*

**Keywords:** gender, equality, discrimination, trends, jurisprudence, branches of Russian law.

### 1. Introduction

Gender as a social construct is located in complex contradictory space being of ideas and social practices; it is the subject of multifaceted research, and, as in the case of jurisprudence, even regulation. While the emphasis and data vectors of these ideas and practices are constantly evolving [1].

They are based on several fundamental assumptions that have become axiomatic. First, equality and inequality are paired constructions, where the first is not always ensure justice and harmony, and the second - injustice and conflict; inequality is unjust, because people, men and women should have equal rights; inequality is true, as it allows to compensate social costs of different people, men and women differentially and addressable [2, p.24-25; 3 p.199-200]. Second, the right, as one of the key regulators of social relations, applies equal scale to different people, which is both fair and unfair. Third, in order to harmonize the withdrawal of the contradictions of state conflicts, jurisprudence resorting to provide additional guarantees, the benefits of "positive discrimination" [4, p.21-23] and enforcement discretion [5 p.140-152].

The main directions of Russian jurisprudence development in the context of gender equality, positive inequality and gender neutralization are concentrated in constitutional, administrative, criminal, penal enforcement, labor, social, and family law. [6]

## 2. Gender in the Branches of Law

As it supposed to be, the first contains the fundamental ideas of gender equality (Article 19 of the Constitution of the Russian Federation), Priority maternity protection (Article 38) and the exceptional nature of the restriction of rights and freedoms (Article 55). Particular emphasis is placed on the doctrine of the quota of women's representation in political and public power structures. This idea has been discussed and implemented in practice with very variable success. For example, the gender composition of the Supreme Council of the USSR superficially had a favorable impression: there were up to 30% of female deputies in its various convocations. However, since the real power belonged to the Communist Party (Article 5 of the Constitution of the USSR, 1936), the gender political horizon, essentially looked different: party consists 79.1% men and 20.9% women; Central Committee - respectively 97.2 % and 2.8%, and in the Politburo - 100% of men. The world of politics was really male, women in the "Political Bureau" played the role of "pots of pink geraniums" and carried out "imitation policy" of gender equality. Further, during the adjustment period to the end of the 20th century, the idea of women's quota was "buried" under a bushel of political and economic issues - apparently more relevant and less harmful for the "worst half of humanity". Only in 2003, the State Duma introduced a bill "On state guarantees of equal rights and freedoms of men and women and equal opportunities for their implementation." However, he "hung on decade" - the work was resumed only in 2011. We can assume that it was not without the influence of the updated gender policy of the United Nations: an international organization "UN Women" was established in 2011. However, there are still no outcomes; there is only a process of increasing number of women in legislative bodies, governmental structures, public organizations (for example, regional public chambers). It is a real process, but without legislative quotas [7 p.1977-1978].

In administrative law norms are gender-neutral - in the context of gender question, actually, is all about the same "hovering" bill, which, along with the political gender quotas, provided the idea of a priority for vacant civil service positions of the sex, which is in the minority on this office or public service.

As we have noted, the gender context to a greater or lesser extent is represented in the criminal justice branch of Russian law. Analysts of gender asymmetry of criminal and criminal-executive legislation emphasize that it uses two methods of building standards that take into account peculiarities of the sexes: on the one hand, women traditionally have been provided by certain privileges, "special" rights; on the other hand - gender neutral norms have been gradually introduced [8, p.52-53]. The first category primarily includes rules specifying additional protection of the life and health of women, as well as its social and economic rights associated with the performance of reproductive function: Article 123 of the Criminal Code (illegal abortion), Article 131 (rape), art.145 (unjustified refusal to employ or unjustified dismissal of pregnant women or women with children up to 3 years). In this regard, there are a certain redundancy rules on sexual offenses as a special case of any violent acts: overprotection of women in criminal law is not always good, because it can be modified in the discrimination that is based on gender, so such rules must be justified and correlated with the status of men. Criminal women's liability is also significantly differentiated. Among the factors that determine its characteristics are pregnancies, presence of children, and specific physiological characteristics. A number of exemptions in the doctrine of criminal law have been discussed. Very essential privilege is the norm on the application of respite of punishment (st.82) for pregnant women and women with a child. However, in 2010, this opportunity extended to cover men who have a child - as a consequence of the second method of criminal law regulation of relations with the gender element - gender neutralization. Law prohibits life imprisonment and the death penalty against women (Article 57, 59): use of colony of strict regime and special regime are excluded for them, as well as a prison. According to the penal legislation, pregnant women and women with young children are not limited in purchasing food, getting transmissions, are provided with free food, and are exempted from work (Article 88, 90, 99 of the Criminal Executive Code of the Russian Federation); children's home are organized in the colonies (Article 100), etc. We believe that such acts of humanization of punishment are legitimate and fair and should receive consistent development.

Since labor and family are major social factors that are responsible for the reproduction of humans, thus it is objectively, inevitable and traditionally that gender component presents in the labor, social security and family law, studied in their respective branches of law.

The norm of Article 3 of the Labor Code explicitly prohibits discrimination, including on grounds of sex and marital status, of citizen (worker). At the same time, these characteristics are the bases of differentiation in the legal regulation of labor and social-security relations. At the same time, gender differentiation involves applying general rules for women (for example, through establishing the list of works with harmful working conditions), despite silence of the legislator, and gender

positive "discrimination" in the form of women privileges, advantages, additional security measures and protection, and gender negative differentiation in the form of partial restrictions. At the same time, the trend of labor law and doctrine, as well as in other areas of law, is to construct ideas and norms of gender neutralization.

Special rules governing the employment of women and persons with family, including, therefore, men are grouped into three sections: 1) for women - taking into account the physiological characteristics of the organism, its reproductive function to be protected from adverse production factors (gender labor protection of women); 2) for the period of active motherhood - pregnancy, childbirth, and care for infants and young child (maternal health); 3) for combining work with family responsibilities - for women and men in connection with the care of children or care for sick family members [6, p.419]. Preferential treatment to certain categories of persons intended to make them competitive in the labor market, to protect the most vulnerable of them from the tyranny of the employer.

Norms of the RF Labor Code (LC) may justifiably puzzled employer, who has decided to hire a woman. Specific examples of such rules are the following: the prohibition of dismissal of pregnant women, except liquidation of an organization or termination of individual entrepreneur (art.261 LC), nursing breaks (Article 258 LC), the ban on sending for business trips, attraction to work overtime, work at nights, weekends and public holidays for pregnant women (ch. 1, Art. 259 LC) and many other things that can generates desire to protect potential employer from such inconveniences.

Arguments against the revision of the current approach of completely prohibiting pregnant women to travel on business trips, work overtime, at night, on weekends and public holidays, basically boil down to the fact that the employer has the opportunity to abuse their position and force a woman to perform such work.

The Labor Code of the Russian Federation contains almost absolute ban on the termination of the employment contract with a pregnant woman at the initiative of the employer, which is in line with the provisions of ratified ILO Convention number 103 "On Maternity Protection". Although, the ILO itself in 2000 in the new Convention number 183 replaces the previously accepted standards, limiting the protection of pregnant women at dismissal features that are directly related to the state of pregnancy or childbirth, probably recognizing their shortcomings from the perspective of gender neutrality and shifted towards greater equality of both parents.

Decisions of the regional courts of Russian Federation led to the conclusion that the judicial protection of pregnant women can be classified as "absolute." In principle, it is not surprising, since the judge's decision has been made in accordance with the current legislation. The impetus for the emergence of a new regulations "pregnant woman is right, even if she is not pregnant" was the position outlined in paragraph 2 p. 25 Resolution of the Plenum of the Supreme Court from 28.01.2014 N 1 "On the application of legislation governing the work of women, persons with family responsibilities and minors". On the basis of this regulation, if employment contract of pregnant woman was terminated by the employer, it becomes a subject of restoration, even though in court her pregnancy has not been preserved. It is very controversial on how to justify the new rigid position of Plenary Supreme Court, which, in fact, exhaust from the principle of the validity of protecting the rights of pregnant women because of pregnancy.

In our opinion, many of the provisions of the Labor Code, that somehow protect women's rights, must be converted by the legislator from peremptory into discretionary rules. Thus at the level of collective or individual employment contracts ,an employer with an employee could envisage the presence or absence of privileges to women determined by reproductive function, mental and physical characteristics of the gender.

Gender stereotypes that had successful influence in the 20th century to the formation of labor laws in foreign and Russian society are gradually disappearing, and taking with them provisions that provide enhanced protection of motherhood with almost complete disregard for the rights of fathers to participate in child rearing. The modern practice of having completely different forms of family life, show that the "breadwinner" in the family is often mother, while father is not considered shameful to take care of the children.

This is confirmed by the jurisprudence. Thanks to the "flashing" precedents in which the applicant seeks to draw the attention of the court and the legislature on the gender imbalance; labor laws changes in line with the gender neutrality for persons with family responsibilities, in particular, changes in the art. 261 Family Code of RF - regarding guarantees for men when terminating an employment contract. The Constitutional Court declared the provision of Part 4 of Article 261 inconsistent with the Constitution of Russia, its rules from Articles 7, 19, 37 (part. 1) and 38 (part 1 and 2), to the extent that, in the current system of legal regulation, it prohibits employer to fire a women with children under the age of three, and others with children of this age without a mother. However, it excludes father from opportunity to use this warranty,

even if he is the only breadwinner in a family, raising young children, including children under the age of three, where mother is not involved in the labor relations and has been taking care of children [9 p.89-101].

Family law represents also vivid picture of gender differentiation. Idea of equality of status of the spouses, preservation and protection of maternity and paternity (Article 1 of the Family Code) can be viewed among its general principles, but specific family law norms and related regulation still allow gender differentiation, limitations and advantages. Gender is still an "agent of influence".

Idea of heterosexuality of conjugal union is very relevant in the institution of marriage, despite the lack of a definition of marriage in the Family Code of the Russian Federation, the composition of male and female. It becomes quite obvious from the wording of Part 3, Article 1 and Part 1 of Article 12 of the Family Code. The legitimacy of the provision of this statement, was disputed in the constitutional justice, and on 16<sup>th</sup> of November, 2006 the Constitutional Court of the Russian Federation in determining N496-About refusal to accept the complaint E.Murzina outlined its legal position: heterosexuality provides an essential function - human reproduction (birth and parenting), makes a Russian national tradition, is not in conflict with a provision of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms; lack of legal possibility to register same-sex partnerships does not affect the level of recognition and guarantees the rights and freedoms of the applicant.

Of course, consistent supporters of the gradual evolution of the institution are not agreed (for some European models). Indeed, on the one hand, within the meaning of international legal instruments, in particular the European level, family law basically refers to the number of spheres of national regulation; it gives Russian lawmakers formal right to ignore the European trend in the legal recognition of same-sex partnerships as marriage or a family union. On the other hand, as in the case of heterosexual de facto marriages, which has a "hopping" Russian history of recognition and refusal (as opposed to modern European models); monosexual communities exist, including those with signs of family relations. This does not exclude, albeit in a very distant future, some of the legal recognition of these family communities - the question is when it will happen and what could be a form of legal recognition. The latest situation in the country, deepening ideological contradictions between Russia and the European Union, non-obvious tolerant experiments of the EU, strengthening of religious influence on decision-making in this case and in general social practices in Russian - even more to keep us away from the liberalization of marriage and family institutions (maybe for the better) [10, p.48-52].

Attempts to "mislead" gender equality had been taken in the issue of monogamous marriage: not quite clear eastern polygamous tradition (both international and domestic) is considered a prerequisite for liberalization in this direction. Opposed to this attempt is, on the one hand, the idea of Russian legislation federalism on fundamental aspects of social life, on the other - a feminist concept of formal equality (polygamy into correspondence to polyandry).

Retains the right to limit the spouse right to divorce (Article 17 of the Family Code of RF) during pregnancy of his wife and one year after giving birth. This limitation, as opposed to a more balanced position of the Belarusian and Ukrainian legislators, allowing certain exceptions; for example, what we have repeatedly criticized, in connection with the establishment of paternity of another man, limitation still remains as "absolute" [11 p.192-194].

With the development of assisted reproductive technology and medical intervention in the sexual sphere, further gender differences are increasing. So, when you change one of the spouses gender, and they have common minor children, than it become monosexuality parenthood, to which the Russian legislator still does not respond directly, and with respect to which the doctrine haven't come to the consensus and to the proposal de lege ferenda. In addition, Family Code prohibits international adoption to citizens of countries where they received legal recognition of same-sex partnerships. The gender rule of Part 4 of Article 51 of Part 3 of Article 52 of the Family Code and Parts 3, 9 Article 55 Federal Law "On the basis of the health of citizens the Russian Federation": the first permit in the surrogacy program participation allows only spouses and unmarried women, the second - "men and women", apparently including not constitute an official married couple, as well as "a single woman." However, both legal acts are united on the issue of the restriction of the unmarried men rights. Although the latter has been criticized by some representatives of the family law doctrine, and, in our view, there are certain reasons for that in the absence of gender-neutrality rules: a woman, within the meaning of health legislation can be a "customer," that can "order" services of a surrogate mother, if she, on objective indicators, can not bear and give birth [12, p.245-249].

As we have noted, same-sex parenting, international adoption (pretty much domestic within the meaning of the law, although there is no direct prohibition), and other welfare are not legally possible. However, the actual result may be - in

the case of sex change of one of the parents or adoptive parents, as well as in the case of guardianship monoscheme (unmarried woman, unmarried men). In all such situations, the role of the administrative or judicial discretion, quality of the civil case inevitably strengthens (research on family circumstances of the applicants and their personal qualities, including their sexual orientation).

LGBT community and some of the human rights organizations will also increase their pressure on the Russian legislator and public opinion in the case of monosexual marriage. Just in a very distant future we can see whether it is implemented into positive regulatory decisions. Russian system of marriage and family still remains traditional, even allowing gender neutral norm, in comparison to labor law field.

### 3. Conclusions

Thus, a generalized analysis of the gender context of Russian theoretical and practical jurisprudence indicates contradictory ideas and solutions concerning the legal regulation of relations of gender element; complex, not always justified, interaction of rules and practices, including positive discrimination and gender neutralization of capabilities; and maintaining conservative contexts in a number of industries (primarily in the family law). However, complexity and inconsistency are common characteristics in the social space that do not always indicative of deviance lawmaking and enforcement of existence. The aim is to harmonize the first and reduce the amount of the second.

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