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Chapter 2

Non-traditional Sexual Relationships:**Law, Forgetting, and the Conservative Political Discourse in Russia***Alexander Kondakov*

On the 6th of October 2013, a Moscow federal court heard a case about hate speech initiated by *Tsentr 'E'* (the Anti-Extremist Police Unit) against a pensioner. According to the materials in the case file, the pensioner (I will call her Maria for the purposes of a smooth narrative) was inspired by the ultra-conservative movement *Sut' Vremeni* (The Essence of Time) and went to the movement's rally supported by and organised together with United Russia, the country's ruling party. There, Maria disseminated her home-made leaflets that, as the judge on the case cited, shaped the general public's 'negative feelings and emotions about persons of Jewish ethnicity and about social group of homosexuals'.¹ Knowing these facts and considering the conservative nature of Russia, it is puzzling why the woman was at all brought to the court. To begin with, Maria had many reasons to believe that her hateful materials would look appropriate at a state-sponsored manifestation, as they were. After all, 2013 was the year of official federal ban of so called 'propaganda of non-traditional sexual relationships', the law that institutionalised discrimination and officially designated LGBT people as targets of hate.²

Furthermore, state outlets had already been broadcasting hatred towards Russia's queer populations for several years by then.³ The following example is especially relevant. Thus, in 2012, a vice-director of the government's official TV channel *Rossiya* hosted a discussion in his programme *The Historical*

¹ Decision No. 1-2/2013, Moscow. All quotes originally in Russian are translated by the author. The court decisions can be accessed through the official database at <https://sudrf.ru/>.

² Edenborg, E. 'Homophobia as Geopolitics: "Traditional Values" and the Negotiation of Russia's Place in the World', in *Gendering Nationalism: Intersections of Nation, Gender and Sexuality*, eds. Mulholland, J., Montagna, N. and Sanders-McDonagh, E. (Cham: Palgrave, 2018), 67–88;
Kondakov, A. 'The Censorship "Propaganda" Legislation in Russia', in *State-sponsored homophobia, 13th edition*, ed. Mendos, L.R. (Geneva: ILGA-Europe, 2019), 213–15;
Utkin, R. 'Introduction', *The Russian Review* 80, no. 1 (2021): 7–16.

³ Pronkina, E. 'Osobennosti LGBT-diskursa v rossijskih media, iniciirovannogo diskussijami o regulirovanii seksual'nosti', *Zhurnal Issledovanii Sotsial'noi Politiki* 14, no. 1 (2016): 71–86.

Process that was devoted to the topic of ‘protection’ of children from gays. At one point, the host argued that gay people were worthless to the point that their hearts should be burnt in fire and buried in the ground.⁴ Interestingly enough, this programme was previously hosted by Sergey Kurginyan, the head of The Essence of Time movement which organised the rally that Maria went to with unfortunate legal consequences for her. In other words, all events leading to Maria’s trial made her believe that she was doing the right thing. Yet, the judge on her case sided with experts from a state institution who concluded that ‘in the examined leaflets, there are indications of incitement of discord (animosity, hatred) towards a group of persons united on the ground of their sexual orientation, i.e. homosexuals’.⁵ Maria was found to have violated Criminal Article 282 (on hate speech), but could not assume guilt because of mental health problems and was sent for psychiatric treatment.

Maria is a very unlikely candidate for such a legal process. Not only is she a pensioner – a respected social position in Russia and other societies – but she is also a clear political ally of the Russian elite, both TV-celebrities and government officials. She actively participated in a ‘sanctioned’ rally where she upheld the government’s negative position on the issue of LGBT rights and where she expected to be among like-minded people – a sort of conservative safe space, since it was organised by Kurginyan’s far right movement and the ruling party. Instead of this, she was apprehended by the police, indicted with a criminal offence, and brought to the court which did not rule in her favour. Although many news reports have been circulating around about people in Russia being sentenced for simple reposts on social media and for participating in a protest rally, this case stands out. Whereas prosecution can be expected when people criticise or oppose the government, cases like Maria’s where people praise the government’s position tend to yield nothing. Were the judge and police officers independent from the state’s conservative ideology and simply following the rule of law in her case?

In this Chapter, I explore the idea that Russian conservatism is a new phenomenon for the discursive arrangement of justice (the legal field) in the country. I argue that as a new discursive phenomenon it has been only recently enacted and this explains law enforcement and the judge’s confusion. My analysis traces the enactment of conservatism through tracking down the emergence of the notion of ‘non-traditional sexual relationships’ in law that currently signifies sexualities outside of the

⁴ Essig, L. “‘Bury Their Hearts’”: Some Thoughts on the Specter of Homosexuality Haunting Russia’, *QED: A Journal in GLBTQ Worldmaking*, no. 1 (2014): 39–58.

⁵ Decision No. 1-2/2013, Moscow.

heterosexual standard (lesbian, gay, bisexual, and trans* sexualities). This enactment of ‘non-traditional sexual relationships’ is supported through a very particular way of forgetting: legal professionals exhibit the kind of collective memory that ignores a rich history of non-heterosexual subcultures in Russia from the 19th century urban homosexual circles to hidden queer underground of the Soviet time to contemporary commercial and political LGBT venues.⁶ Hence, the use of this notion in law is a technique of memory politics that advances conservatism by forgetting instances of sexual diversity and by making the impression that Russia is and has always been heterosexual. This technique of memory starts functioning, I argue, as soon as the legal notion of ‘non-traditional sexual relationships’ is embraced by conservative political discourse that seeks to forget, that rejects the LGBT Russians.

In what follows, I scrutinise the role of courts of law in advancing the new conservative ideology and supporting the memory politics of forgetting in their everyday practice of legal decision-making.⁷ I ask, do judges bring innovation and social change through law? Or do they confirm the overall sense of ideology supported by the government when interpreting legal norms? The sphere of queer sexuality is especially relevant in the discussion of Russian conservatism.⁸ As the ban of ‘propaganda of non-traditional sexual relationships’ was adopted at the federal level in 2013,⁹ the very notion of ‘non-traditional’ was pushed to the legal and political discourse to manipulate collective memory. My study is based on an overview of literature to date about ‘non-traditional sexual relationships’

⁶ Essig, L. *Queer in Russia. A Story of Sex, Self, and the Other* (Durham: Duke University Press, 1999); Healey, D. *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent* (University of Chicago Press, 2001);

Kondakov, A. Rethinking the sexual citizenship from queer and post-Soviet perspectives: Queer urban spaces and the right to the socialist city. *Sexualities* 22, no. 3 (2019): 401–417;

Brock, M. and Edenborg, E. “‘You Cannot Oppress Those Who Do Not Exist’”: Gay Persecution in Chechnya and the Politics of In/visibility’, *GLQ* 26, no. 4 (2020): 673–700.

⁷ My analysis is primarily focused on the language of law. See, Sarat, A. *Rhetorical Processes and Legal Judgments: How Language and Arguments Shape Struggles for Rights and Power* (Cambridge University Press, 2016);

Conley, J.M., O’Barr W.M. and Conley Riner, R. *Just Words: Law, Language, and Power, 3rd Edition* (Chicago University Press, 2019).

⁸ Muravyeva, M. ‘Conservative Jurisprudence and the Russian State’, *Europe-Asia Studies* 69, no. 8 (2017): 1145–52, p. 1146–1147.

⁹ The Code of Administrative Offences of the Russian Federation 2001, as amended in 2013, Article 6.21

and two sets of texts that represent the views of media and of lawyers on the matter respectively. The first set of data consists of 4,398 titles of media publications across Russia about violent attacks on LGBT people retrieved from the Intergum database for the years 2011–2016. The second set of data represents 283 full texts of criminal court rulings where such attacks against LGBT people are assessed by judges from various regions across the country in the years 2010–2016. I shall perform a content analysis of these original databases to determine how the term ‘non-traditional sexual relationships’ and its derivatives were used there before and after the introduction of the ‘propaganda’ law. This will help to demonstrate the changes that the law conveys, as well as the transformations that the law experiences under the pressure of forces from legislators who are acting in the political rather than legal field.

The Legal Field

What is the role of law and judges in politics? This question serves as a starting point of my analysis because it focuses on the workings of law as both cementing social norms and changing societies. For over a century, the question of the role of legal professionals in ensuring social change has been central to various approaches that are currently united under the umbrella of the sociology of law.¹⁰ Consider, for example, the arguments put forward at the outset of social theorising about law by both jurists and sociologists. They were against legal formalism that viewed law as a collection of self-referential rules set in stone forever which judges mechanically applied to specific cases. Instead, legal scholars argued that law is living or that law takes its actual form in action as opposed to the law-in-books.¹¹ Hence, it is a dynamic institution that stabilises relevant changes with legal tools or can even drive societal improvements. Accordingly, the role of lawyers would be either to identify social norms which merit stabilisation, or to behave as activists to offer nouvelle solutions to social issues.

Although many of such lawyers’ views may now be regarded as naïve at best, the connection between law and society is also stressed in classical sociological accounts of law. Thus, Emile Durkheim spotted a state of lawlessness as a result of industrial development and argued that societies must find

¹⁰ Roach Anleu, Sh. *Law and Social Change* (London: Sage, 2000).

¹¹ Ehrlich, E. *Fundamental Principles of the Sociology of Law* (New York: Russel and Russel, 1962); Pound, R. ‘Law in Books and Law in Action’, *American Law Review* 44, (1910): 12–36.

shared values to ensure solidarity and survival.¹² Max Weber engaged in a more political discussion of law pointing out that as various groups struggled for power, there was one that seemed to win by rationalising the relationship between the state and people through distant rule of written norms – it was the bureaucracy.¹³ It was Marx, however, who explicitly declared that law was an ideological tool of the ruling class to maintain oppression of the workers by creating a false impression of equality and objectivity, simultaneously privileging the interests of the powerful.¹⁴

However inspiring all these ideas may be, they are perhaps only partially fit to currently more complex societies. It is too simple to say that judges influence politics, unless these judges already occupy high-ranking positions of power, for example in a country's Constitutional Court. Yet, getting to that high point in one's career involves a set of formal and informal checks that ensure only the right kind of person moving on.¹⁵ Similarly, mixing up law and politics may look convincing at a certain level of abstraction, but in order for the very mixture to take place, law and politics should be understood as different. Hence, I base my understanding of law and politics as interaction between these two fields, rather than as absorption of law by political interests. In this understanding, law influences politics in some way, whereas politics influences law in its ways. But they are never fully the same.

Pierre Bourdieu's conception of law is informative in this respect.¹⁶ According to his general theory of 'fields',¹⁷ the juridical (or legal) field 'is in practice relatively independent of external

¹² Treviño, A.J. *The Sociology of Law: Classical and Contemporary Perspectives* (London: Routledge, 2017), 233.

¹³ Treviño, A.J. *The Sociology of Law: Classical and Contemporary Perspectives* (London: Routledge, 2017), 163.

¹⁴ Hunt, A. 'Marxism, Law, Legal Theory, and Jurisprudence', in *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, ed. Fitzpatrick P. (Durham: Duke University Press, 1991), 102–32.

¹⁵ Garoupa, N. and Ginsburg, T. 'Hybrid Judicial Career Structures: Reputation Versus Legal Tradition', *Journal of Legal Analysis* 3, no. 2 (2011): 411–48; Batton, C. and Wright, E.M. 'Patriarchy and the Structure of Employment in Criminal Justice: Differences in the Experiences of Men and Women Working in the Legal Profession, Corrections, and Law Enforcement', *Feminist Criminology* 14, no. 3 (2019): 287–306.

¹⁶ Madsen, M.R. and Dezalay, Y. 'Pierre Bourdieu's Sociology of Law: From the Genesis of the State to the Globalisation of Law', in *Law and Social Theory, 2nd Edition*, eds. Banakar, R. and Travers, M. (Oxford: Hart, 2013): 111–28.

¹⁷ Bourdieu, P. *Outline of a Theory of Practice. 28th Edition* (Cambridge University Press, 2013).

determinations and pressures'.¹⁸ This relative independence rests on the assumption that for the purpose of determining the law, the field must maintain a certain level of autonomy through its own vocabulary, symbolic capital, hierarchies, and sources of legitimacy. In other words, for this fragile social fabric to work properly, law should be determined by lawyers whose legal competences are confirmed by relevant credentials and the weight of whose voice depends on the amount of various capital that they have managed to acquire throughout their careers. If politicians determine the law, then the legal field fails and deteriorates.

Bourdieu also recognises that in comparison to other fields (political, economic, social, cultural), the legal field stands out as something very special for current societies and its special status compromises its autonomy. Law holds a very potent discursive power: it has the capacity to produce what it pronounces. In her work, Judith Butler insisted that law possesses a strong performative power: it turns words into actions.¹⁹ For example, as soon as a judge pronounces the sentence, the defendant turns into a convicted criminal and goes to prison, two people start being married, or a disenfranchised societal group is recognised as rights holders. This power is supported not only by a certain legal discourse, but also by institutional arrangement of the system of justice that channels coercive forces onto subjects via legitimate forms of violence, such as police or prison industrial complex.²⁰ Because of this power, elites are always attentive to the legal field to use it in their own political interests. However, the use of the legal field with purely political (or economic) objectives also diminishes its performative powers. Consequently, there must be a subtle balance. In Bourdieu's own words: 'As the quintessential form of legitimized discourse, the law can exercise its specific power only to the extent that it attains recognition, that is, to the extent that the element of arbitrariness at the heart of its functioning (which may vary from case to case) remains unrecognized.'²¹

¹⁸ Bourdieu, P. 'The force of law: Toward sociology of the juridical field', *Hastings Law Journal* 38, no. 5 (1987): 814–54, p. 816.

¹⁹ Butler, J. *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997). Compare with Bourdieu's account: 'Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. ... The law is the quintessential form of "active" discourse, able by its own operation to produce its effects'. Bourdieu, P. 'The force of law: Toward sociology of the juridical field', *Hastings Law Journal* 38, no. 5 (1987): 814–54, pp. 838–39.

²⁰ Foucault, M. *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1975).

²¹ Bourdieu, P. 'The force of law', 844.

Bourdieu's nuanced analysis of the legal field positions it as per se conservative. Its main function is to preserve the current order and, if transformations are necessary to maintain it, to make sure that the changes still conform to the past: 'contained within a logic of conservation, juridical labor serves as one of the major foundations of the maintenance of symbolic order.'²² Law works with the help of words (legal notions) that make things happen.²³ The main discursive instrument of the legal field, according to Bourdieu, is formalisation: it makes things that are necessary to maintain the order formal by the institutional power of law – literally, by pronouncing them as effective (in a form of a piece of legislation, court decision, or a warrant, for example). In conducting this operation, the actors in the legal field (judges, police officers, or attorneys) have their own – legal – agenda (and, therefore, deviate from the interests of the powerful). Yet, because of complex interconnections between various fields, they tend to ally with the interests of already privileged social groups:

There is no doubt that the practice of those responsible for “producing” or applying the law owes a great deal to the similarities which link the holders of this quintessential form of symbolic power to the holders of worldly power in general, whether political or economic. ... Consequently, the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and world-views are unlikely to disadvantage the dominant forces.²⁴

Hence, for my analysis, I acknowledge Bourdieu in that the legal field is autonomous and should maintain its autonomy to be considered legal. However, its specific power to turn words into action, to produce social practices and groups, is attractive to the actors in other fields, especially the political field. Regardless of the exact instances of the use of that power of law by authorities, legal professionals support and reproduce power relations anyway, which is beneficial for elites. In other words, the legal field is designed to conserve rather than revolutionise. Now we turn to my interpretation of how the explicitly conservative political discourse in Russia has been embraced by law. My study critiques the usage of the vocabulary in the legal field in the process of formalising this conservative shift, from multiple perspectives, and the ways in which the legal field has reacted

²² Bourdieu, P. 'The force of law', 845.

²³ Austin, J.L. *How to Do Things with Words* (Oxford University Press, 1962); Butler, J. *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997).

²⁴ Bourdieu, P. 'The force of law', 842.

to the new conservative ideology of the elites by reproducing conservative notions with more frequency.

The Conservative Turn

Russian politics has hardly been free from conservative trends, despite radical changes – including revolutions – punctuating its recent and more distant history. However, post-Soviet transformation in Russia required a long-standing regime of changes manifested in politics, law, and even everyday memory. Because of this dynamic, it has been rarely referred to as ‘conservative’. Although one might find many features that define conservative ideology in Russian post-Soviet politics, it was still seen as liberal with ‘liberal reforms’ and ‘liberal reformers’ acting as the most trending signifiers of the political field. Note, though, that Philip Boobbyer identified a popular strand of Russian conservatism, ‘liberal conservatism’, that unites together adherence to a strong state, mild nationalism, religious spiritualism, imperialist aspirations, and the limiting powers of the rule of law. He defined it as ‘a middle way, a political doctrine which seeks balance’²⁵ and this definition clearly reflected the political practice that took place in the 1990s.

The disregard of explicit articulation of conservatism in the political field was shaken when Putin started to strengthen his position. Assessing his vague political message from a discursive perspective, Sergei Prozorov argued that many features pointed to the turn to conservatism in Putin’s agenda from the very beginning, including ‘the rhetoric of consolidation and normalisation after the turbulent and antagonistic politics of the 1990s, the abandonment of doctrinaire policy orientations in favour of a variably understood “pragmatism”, the refusal of the wholesale condemnation of Soviet history, the reaffirmation of sovereignty in foreign policy, etc.’²⁶ In other words, with the change of rhetoric from ‘reform’ to ‘stabilisation’, Putin’s government paved the way for the crystallisation of conservatism in the Russian political discourse. On one hand, this allowed the setting aside of liberal conservative politicians associated with the turbulence of the 1990s. On the other hand, this type of

²⁵ Boobbyer, Ph. ‘Russian Liberal Conservatism’, in *Russian Nationalism Past and Present*, eds. Hosking, G. and Service, R. (London: Palgrave Macmillan, 1998), 35–54, p. 37.

²⁶ Prozorov, S. ‘Russian conservatism in the Putin presidency: The dispersion of a hegemonic discourse’, *Journal of Political Ideologies* 10, no. 2 (2005): 121–43, p. 124.

discourse helped to address concerns of the people, who were tired of dealing with stormy politics, which in turn yielded a populist twist in the development of Putin's conservatism.

Nonetheless, a clearly defined political ideology was not something Putin's government was known for,²⁷ at least, not until the 2010s when conservatism was openly claimed by the Kremlin. Although expressed interest in this discourse had been felt by scholars and political pundits for longer,²⁸ at the beginning of the 2000s Russian political elite tended to associate themselves with pragmatism and technocratic tasks, while distancing from any ideology that was reminiscent of the Soviet past.²⁹ Yet, as Putin's regime started to deteriorate in the aftermath of the 2011–2012 protests, the Kremlin offered conservatism to solidify power since it was seen as appealing to both political elites and people more generally.³⁰ This explicit turn to conservatism as official state ideology was first pronounced in 2009 at the United Russia convention³¹ and then tested on Dmitry Medvedev in 2012, who drew the line under his presidency by self-identifying as 'conservative'.³² Putin, ascending to his third presidential term, followed Medvedev by the same public self-identification in 2013.³³

Thus, in the realm of law-making, the conservative turn was sensed immediately when Putin's expressed self-identification with conservatism 'gave the green light to a number of essentially

²⁷ Kaylan, M. 'Kremlin Values: Putin's Strategic Conservatism,' *World Affairs* 177, no. 1 (2014): 9–17.

²⁸ Chebankova, E., 'Russian fundamental conservatism: in search of modernity', *Post-Soviet Affairs* 29, no. 4 (2013): 287–313.

²⁹ Makarychev, A. and Yatsyk, A. A., 'New Russian Conservatism: Domestic Roots and Repercussions for Europe', *Notes Internacionals* 93, (2014): 1–6, p. 2.

³⁰ Makarychev, A. and Yatsyk, A., 'Refracting Europe: Biopolitical Conservatism and Art Protest in Putin's Russia', in *Russia's Foreign Policy: Ideas, Domestic Politics and External Relations*, eds. Cadier, D. and Light, M. (Basingstoke: Palgrave, 2015), 138–55, p. 142–44.

³¹ Busygina, I. and Filippov M., 'The Limits of Conservative Influence on Economic Policy in Russia', in *New Conservatives in Russia and East Central Europe*, eds. Bluhm, K. and Varga M. (New York: Routledge, 2019), 157–77, p. 157.

³² Granik, I., 'Ni razu ne liberal. V "Edinuju Rossiju" Dmitrij Medvedev vstupaet kak stojkij konservator', *Kommersant* 77, (2012): p. 1.

³³ Krechetnikov, A., 'Putin opredelilsja s ideologiej – on konservator', *BBC* December 12, 2013, accessed 28 September 2020. Available at: https://www.bbc.com/russian/russia/2013/12/131212_putin_address_analysis.

conservative legal initiatives'.³⁴ In fact, gender scholars have long argued that the government turned conservative as manifested in its politics related to gender and sexuality.³⁵ The first signs of this turn appeared in 2006 when Putin tasked the government and legislators with development of pro-natalist measures that would support a narrow definition of femininity as heterosexual and necessarily procreative, as well as confined within a multi-children family.³⁶ This soon will be termed 'the conservative turn' that is characterised by stronger reliance on religious – namely, the Russian Orthodox Church's – notions of gender and sexuality in political rhetoric and policies.³⁷ Law has served this cause from the very beginning, but in 2013 it has become an obvious instrument in the hands of the government to advance its conservative political agenda.³⁸ It was in 2013 when the notorious law banning 'propaganda of non-traditional sexual relationships' was enacted.³⁹

Yet, in Russia, the making of law belongs to legislators who act within the political field in Duma and other appropriate state bodies. As I consider the law in action (given in the form of court

³⁴ Muravyeva, M., 'Conservative Jurisprudence and the Russian State', *Europe-Asia Studies* 69, no. 8 (2017): 1145–52, p. 1146.

³⁵ Buyantueva, R., 'LGBT Rights Activism and Homophobia in Russia', *Journal of Homosexuality* 65, no. 4 (2018): 456–83, p. 474;

Neufeld, M. and Wiedlack, K., 'Visibility, Violence, and Vulnerability: Lesbians Stuck between the Post-Soviet Closet and the Western Media', in *LGBTQ+ Activism in Central and Eastern Europe: Resistance, Representation and Identity*, eds. Buyantueva, R. and Shevtsova, M. (Basingstoke: Palgrave, 2020) 51–76, p. 64–5.

³⁶ Rivkin-Fish, M., 'Pronatalism, Gender Politics, and the Renewal of Family Support in Russia: Toward a Feminist Anthropology of Maternity Capital', *Slavic Review* 69, no. 3 (2010): 701–24;

Kazenin, K. I. and Kozlov, V. A., 'Regional Measures of Support for Families with Three and More Children: An Overview', *Zhurnal Issledovaniy Sotsial'noi Politiki* 18, no. 2 (2020): 191–206.

³⁷ Temkina, A. and Zdravomyslova, E., 'Gender's crooked path: Feminism confronts Russian patriarchy', *Current Sociology* 62, no. 2 (2014): 253–70, pp. 264–65.

³⁸ Muravyeva, M., 'Traditional Values and Modern Families: Legal Understanding of Tradition and Modernity in Contemporary Russia', *Zhurnal Issledovaniy Sotsial'noi Politiki* 12, no. 4 (2014): 625–38.

³⁹ Kondakov, A., 'Konfiguracii prava: kak dejstvuet zakon o 'propagande' v shkolah', *Zhurnal sociologii i social'noj antropologii* 20, no. 5 (2017): 187–206;

Kondakov, A., 'The Censorship "Propaganda" Legislation in Russia', in *State-sponsored homophobia, 13th Ed.*, ed. Mendos, L.R. (Geneva: ILGA-Europe, 2019a), 213-5; Shtorn, E., 'Ubijstva negeteroseksualov na pochve nenavisti (analiz materialov sudebnyh reshenij)', *Sociology of Power* 30, no. 1 (2018): 60–78.

decisions), my question is this: have courts of law easily embraced conservative ideology in their everyday decision-making to support the government's memory politics of forgetting? Marianna Muravyeva suggests that justices on specific cases selectively interpret written legal norms to justify limitation of rights and liberties within conservative ideology understood as reference to 'tradition'.⁴⁰ In other words, when reviewing particular cases, judges – if they want to act conservatively – refer to 'traditions' to offer decisions that limit the rights of people in the sphere of gender and sexuality and advance government's memory politics. I further review the notion of 'non-traditional sexual relationships' to provide an empirical study of how exactly this is done, if at all, in the practice of the courts of law in Russia.

The Invention of Non-Traditions

The formula 'non-traditional sexual relationships' is a sort of derivative of 'traditional family values' (a well-known conservative slogan of US evangelicals) coupled with the Russian term 'non-traditional sexual orientation'. The attitude of Russian lawyers to any kind of 'traditions' was rather hostile: before the 1917 Revolution the term hardly existed and rather referred to customs of indigenous populations in the Russian Empire; after the Revolution, the law adhered to the more general drive to progress that led to communism by suppressing and eliminating various 'traditions' as 'vestiges of the past'.⁴¹ In terms of sexuality, in the Soviet version of memory politics, male same-sex intercourse was understood as traditional and, therefore, at least suspicious or even designated for abolition through criminal ban.⁴² In other words, homosexuality had not become 'non-traditional' until the dissolution of the Soviet Union where conservatism – as it were – was expressed in different rhetoric that had nothing to do with 'traditions'.

Besides, in the legal field, there was no pragmatic need for homosexual relationships to be called 'non-traditional'. In Soviet jurisprudence, the legal discourse already had a term for homosexuality, *muzhelozhstvo* (buggery), given in the Criminal Code. Although the term implied male same-sex

⁴⁰ Muravyeva, 'Traditional Values'; Muravyeva, 'Conservative Jurisprudence'.

⁴¹ Muravyeva, M., "(Ne)tradicionnye seksual'nye otnoshenij" kak juridicheskaja kategorija: istoriko-pravovoj analiz', in *Na pereputye: metodologija, teorija i praktika LGBT i kvir-issledovaniy: sbornik statej*, ed. Kondakov, A. (St. Petersburg: Centre for Independent Social Research, 2014b), 68–85.

⁴² Healey, D., *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent* (University of Chicago Press, 2001).

intercourse, it could be used to refer to lesbian sex, too.⁴³ However, in 1993, *muzhelozhstvo* was decriminalised in Russia, but the term stayed in the criminal law to signify homosexual rape together with a new term, ‘lesbianism’, for non-consensual same-sex between women.⁴⁴ This fact by itself meant that the term to refer to homosexuality in law was open to modification: since this practice was not subject to legal regulation anymore and since the word *muzhelozhstvo* was used to refer to something illegal (the rape), the judicial practice had to come up with a different term if there was any need to indicate non-criminal homosexuality. ‘Non-traditional sexual orientation’ turned up as a viable alternative.

Where does this term come from? I managed to locate only one account of the use of ‘non-traditional sexual orientation’ in everyday language that alleges it started in the 1980s or the beginning of the 1990s, but this account is personal and unsubstantiated.⁴⁵ In Russian academic literature, according to my search on the *E-Library* database, the term was rarely used to refer to same-sex practices until 2009.⁴⁶ On the contrary, even speaking of gender relations in a family, an author uses the term ‘non-traditional’ to refer to economic activities of a household, not sexual orientation in 2007.⁴⁷ This is despite the fact that popular literature had already appropriated the term: Dan Healey analysed Russian popular psychologist Dilia Enikeeva’s books published at the beginning of the 2000s where the author used the term colloquially.⁴⁸ Or, for example, in a 2009 book ‘Practical Psychology for

⁴³ Clech, A., ‘Between the labour camp and the clinic: tema or the shared forms of late Soviet homosexual subjectivities’, in *Soviet and Post-Soviet Sexualities*, ed. Mole, R. (London: Routledge, 2019), 32–55.

⁴⁴ Kondakov, A., ‘Regulating Desire in Russia’, in *Research Handbook on Gender, Sexuality and the Law*, eds. Ashford Ch. and Maine A. (Cheltenham: Edward Elgar, 2020), 396–408.

⁴⁵ See, blog entry at: <https://yakov-a-jerkov.livejournal.com/756240.html> (accessed 28 September 2020).

⁴⁶ See, for example, Chernov, A., ‘Narrativnyj analiz strategij samoraskrytija zhenshhin s lesbijskoj identichnost’ju’, *Rossijskij psihologicheskij zhurnal* 6, no. 2 (2009): 19–33. See, however, a piece of legal literature: Kosareva, I.A., ‘Brachnye prava lits s netraditsionnoy seksual’noy orientatsiey v Russii i za rubezhom’, *Notarius*, no. 5 (2007): 41–4. Access via: www.elibrary.ru/.

⁴⁷ Zaharov, S.V., ‘Novejshie tendencii formirovaniya sem’i v Rossii’, *Mir Rossii* 16, no. 4 (2007): 73–112.

⁴⁸ Healey, D., ‘“Untraditional Sex” and the “Simple Russian”: Nostalgia for Soviet Innocence in the Polemics of Dilia Enikeeva’, in *What is Soviet Now? Identities, Legacies, Memories*, eds. Lahusen T. and Solomon P. (Berlin: Lit Verlag, 2008), 173–91.

Girls, or how to deal with yourself and boys’ published by a major publishing house, an entire chapter was entitled ‘Non-Traditional Sexual Relationships’.⁴⁹

Dan Healey himself only remarks in his seminal book that ‘[t]he history of modern ideas of homosexuality is tied to a plethora of forms of what Russians currently call (without irony) “non-traditional sex”’.⁵⁰ Clearly, this and other evidence indicate that the term was commonly used in everyday language in the 1990s as a euphemism for homosexuality and it gradually emerged on the surface of public discourse through media. Google Search returned no results before 1996; less than 20–30 results for the years 1996–2000; then in the range of 60–90 results in 2001–2005; slightly more than 100 results in 2006–2009; and then boosts to more significant numbers after 2009.⁵¹ Moreover, in the mid-2000s, the term was increasingly used in legal contexts when newspapers discussed issues related to law enforcement – most importantly, to prosecutors’ attempts to censor dissemination of information about the ‘non-traditional sexual relationship’. An example from Moscow-Helsinki Group report published in 2009 gives a taste of this practice:

In March 2006, prosecutor office of Rostov Oblast’ issued a warning to two local TV channels (TRK Pul’s and TV-Company EkspoVIM) for broadcasting text messages “that contained propaganda of non-traditional sexual orientation”. In the prosecutor’s warning, it was stated that “propaganda of homosexuality is banned in Russia”.

Another example is rejection of registration of the Tyumen organisation “Rainbow House”. In the official letter signed by the Directorate of the Federal Registration Service in Tyumen Oblast’, Khanty-Mansi and Yamal-Nenets Autonomous Districts, it is said, among other things: “The activities of the organisation related to propaganda of non-traditional sexual orientation can result in collapse of the Russian society and the state.” Furthermore, the

⁴⁹ Najk, A., *Prakticheskaja psihologija dlja devoček, ili Kak otnosit'sja k sebe i mal'chikam* (Moscow: AST, 2009).

⁵⁰ Healey, D., *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent* (University of Chicago Press, 2001), 12.

⁵¹ Certainly, this reflects the use of the Internet in the 1990s, not only actual lack of publications.

authors assert that propaganda of non-traditional sexual orientation threatens the territorial integrity of the Russian Federation.⁵²

Mind that by 2006 there had been no ban of such ‘propaganda’ and in 2006 the law prohibiting ‘propaganda of homosexuality (*muzhelozhstvo* and lesbianism)’ was first adopted in Ryazan Oblast. The next such regional legislation was adopted in Arkhangelsk only five years later in 2011. Yet, in all 12 regional legislatures where such law existed, the term ‘non-traditional sexual relationship’ was not used. In St. Petersburg, the legislators listed sexual identity categories in the manner that mirrored the LGBT acronym: they banned ‘propaganda of buggery, lesbianism, bisexuality and transgenderism’.⁵³ On the federal level, the same party (A Just Russia) that would eventually succeed in 2013, was trying to push the ‘propaganda’ legislation during 2003–2009.⁵⁴ Although ‘non-traditional sexual relationships’ was used in the party spokesperson’s rhetoric, it was not offered as an official wording for the legal initiative itself: the text read ‘homosexuality’ and proposed criminalisation of its public discussions.

The term ‘non-traditional sexual relationship’ was taken to the text of the federal law from a Constitutional Court decision. When LGBT activists challenged the Ryazan propaganda law, the Constitutional Court issued its decision in 2010 using the term to explain that homosexuality is alien to Russian traditions and values.⁵⁵ In other words, as the highest court in Russia, it engaged in memory politics to start the process of forgetting the queer history of Russia. The Court referred to same-sex practices as ‘non-traditional marital relationships’ (*brachnye otnosheniya*). This wording was then introduced to the federal legislation of the propaganda ban in 2013 with the change of ‘marital’ to ‘sexual’. What emerges from this overview is that the term ‘non-traditional sexual orientation’ and ‘relationships’ was a practical term for Russian judiciary and law enforcement to refer to non-criminalised forms of same-sex practices. It was taken from colloquial and media language to the court room to replace criminal notions such as *muzhelozhstvo* once it was decriminalised.

⁵² Kochetkov, I. and Kirichenko, K., *Polozhenie lesbiyanok, geev, biseksualov, trasgenderov v Rossiyskoy Federatsii* (Moscow: Moscow-Helsinki Group 2009), 70.

⁵³ Kondakov, ‘Regulating Desire,’ 403–4.

⁵⁴ Healey, ‘Untraditional Sex’;

Credo.Press. “‘*Spravedlivaya Rossiya*’ predlagaet ugovovno nakazyvat’ za reklamu ‘netraditsionnykh seksual’nykh otnosheniy’”, accessed September 28, 2020, available at: <https://credo.press/82176/>.

⁵⁵ Constitutional Court, *Opredelene N 151-O*, 2010.

Furthermore, the term travelled from the court room to the written norm of law when legislators decided to officially ban the ‘propaganda’ in their efforts to respond to the president’s call for conservative memory politics.

In this path of the term ‘non-traditional sexual relationship’, it therefore changed its meaning from a presumably neutral (although semantically charged) reference to same-sex practices to a legal definition of non-criminal, but still illicit activities (prohibited on the federal level through the Administrative Law in 2013). This change is a re-interpretation of the term from its formal legal meaning into its meaning as an instrument of conservative memory politics. Let me trace this change by looking at quantitative content analysis of the term’s use in the legal context before and after the enactment of ‘propaganda’ legislation. According to Elena Pronkina’s study, the use of the word ‘propaganda’ in LGBT-related publications was most common (25.7%) in 2012–2014 in major Russian newspapers – no other term could compete with it.⁵⁶ Other ongoing research suggests that the terms ‘propaganda’ and ‘tradition’ were rarely used in this context before 2013, when its use peaked and later declined.⁵⁷

I will use two original databases gathered to study crimes committed against LGBT people in Russia to further investigate these tendencies.⁵⁸ The first database is a collection of media articles about violence against LGBT people in Russia during 2011–2016. It contains all identified media publications from Integrum pool (the largest media database in Russia) related to the topic. The second database covers all criminal decisions related to violence against LGBT people in Russia found in the records of the Russian criminal justice system for the years 2010–2016. The search for relevant media articles and court decisions was performed with multiple key words. These studies were limited, however, as texts that use vague or unaccounted for terms have not been identified. The

⁵⁶ Pronkina, E. ‘Osobennosti LGBT-diskursa v rossijskikh media, iniciirovannogo diskussijami o regulirovanii seksual'nosti’, *Zhurnal Issledovanii Sotsial'noi Politiki* 14, no. 1 (2016): 71–86, p. 79.

⁵⁷ Weaver, C. and Koch, T., ‘The Aftermath of the Gay Propaganda Law – Mapping Trends in the Russian Media’, *European Conference on Gender and Politics*, July 4–6, 2019.

⁵⁸ Kondakov, A., ‘The influence of the “gay-propaganda” law on violence against LGBTIQ people in Russia: Evidence from criminal court rulings’, *European Journal of Criminology*, 2019: 1–20. [DOI: 1477370819887511];

Kondakov, A. and Shtorn, E. ‘Sex, Alcohol, and Soul: Violent Reactions to Coming Out after the “Gay Propaganda” Law in Russia’, *The Russian Review* 80, no. 1 (2021): 37–55.

advantage of these original databases is that they permit the analysis of how frequently the term ‘non-traditional sexual relationships’ is present in the media and in legal texts that are not directly related to the ‘propaganda’ legislation. I performed content analysis of the term ‘non-traditional’ related to sexuality in titles of media articles⁵⁹ and in full texts of court decisions using NVivo software. The results are given in Figure 1 and Figure 2.

Figure 1 shows that the term ‘non-traditional’ peaks in 2013 in media publications. Although these articles do not report on ‘propaganda’ law, their authors still start using the term more actively. This enthusiasm deteriorates thereafter, however. Moreover, the polynomial trend line on the right section of Figure 1 demonstrates that journalists and editors start to prefer other terms (not the term ‘non-traditional sexual relationships’) in the aftermath of the 2013 ‘propaganda’ law: as time progresses, they opt for other words decreasing the share of ‘non-traditional’ from almost 3% in 2011 to barely 2% in 2016. This can be interpreted as the process of claiming the term by political and legal fields. The year 2013 determined the definition of the notion ‘non-traditional sexual relationship’ as pertaining to the law and conveying meanings of memory politics that the ‘propaganda’ legislation established. Hence, in order to communicate other, non-legal meanings, it seems reasonable for journalists to rely on other terms and give up ‘non-traditional sexual relationships’ to the law and memory politics. Although when discussing the issues related to ‘propaganda’, journalists may still use the introduced terminology of ‘traditions’, they clearly resort to other linguistic categories once they speak of non-propaganda contexts in relation to LGBT topics.

Figure 2 represents the results of content analysis of legal texts. Overall, the word ‘non-traditional’ (in the context of LGBT) frequents 685 times in 283 court decisions; 249 rulings contain this term. Taken in proportion, the share of the files with the term constitutes from 81% to 94%, which means that ‘non-traditional sexual relationships’ was always a preferred terminology to refer to LGBT sexualities in criminal courts in cases not related to rape where *muzhelozhstvo* or ‘lesbianism’ featured. The small number of available cases may somewhat distort understanding of the usage of the term in law. Yet, as the trend line on the right section of Figure 2 demonstrates, despite fluctuations in the share of the term in overall cases, its usage grows over time. This means that after the introduction of the term ‘non-traditional sexual relationships’ to the text of statutory law (in the Administrative Code), its use that had been already quite usual in legal practice, became even more common. Thus, even when unrelated to the ‘propaganda’ cases, LGBT sexualities are now being

⁵⁹ Not all full texts of the media articles are made available for the analysis.

referred to as ‘non-traditional’, adding an official connotation to any dealings with queerness in the courts of law and promoting people to forget about sexual diversity.

Figure 1. Frequency of the Term ‘Non-Traditional’ in the Titles of Media Publications on Violence against LGBT People in Russia (2011–2016)

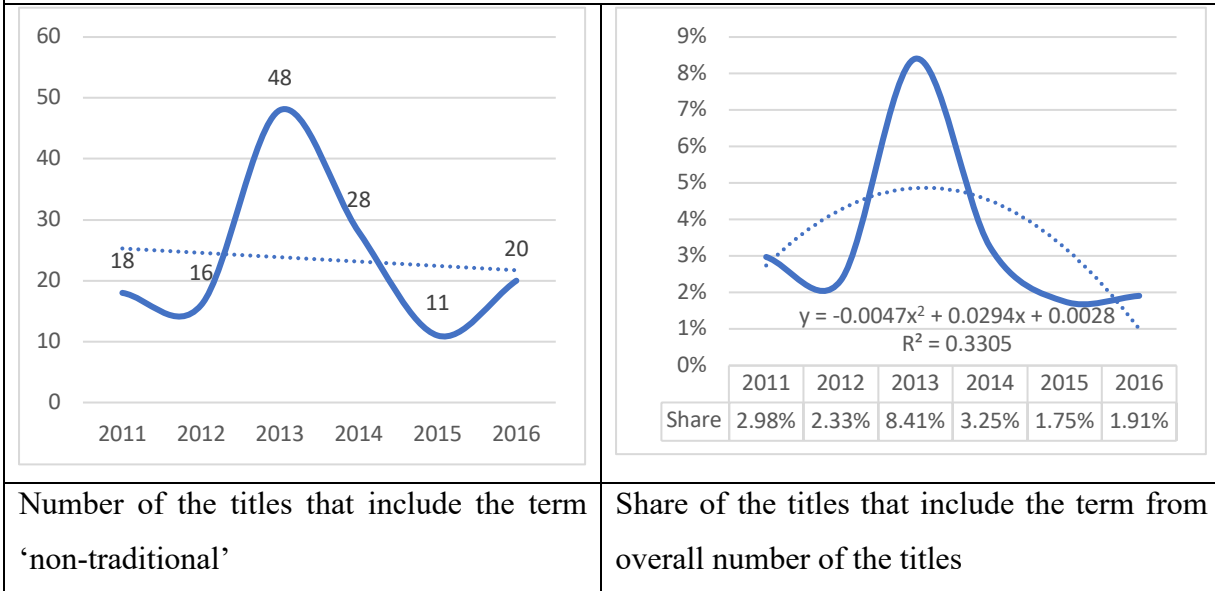
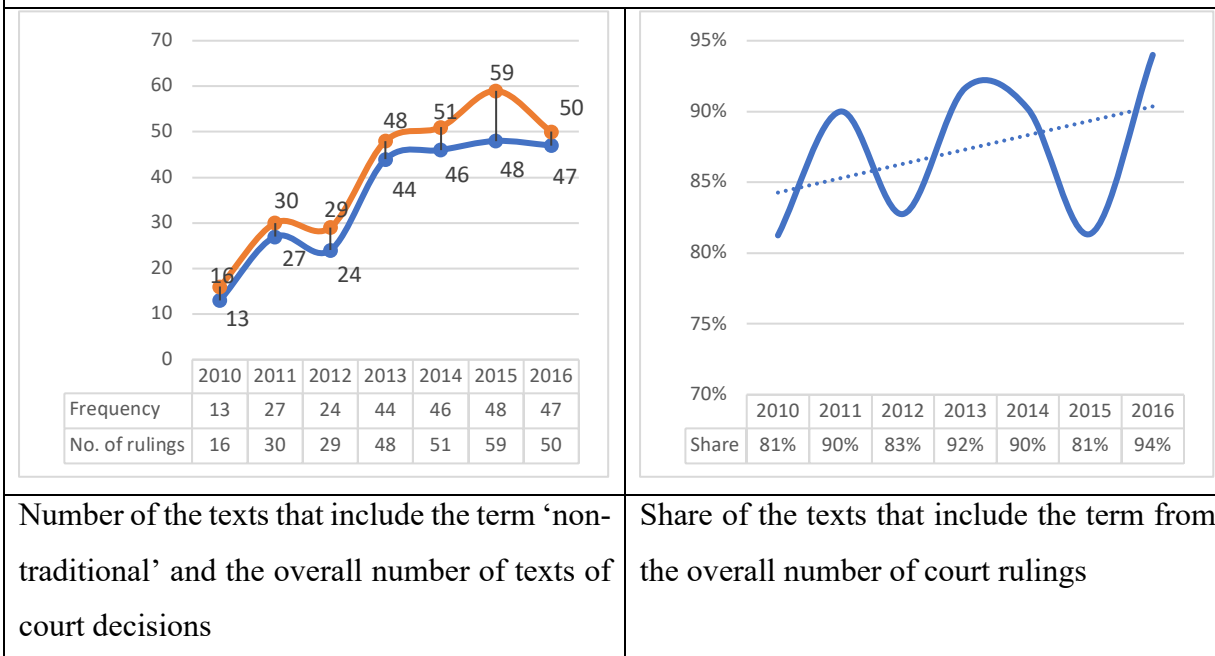


Figure 2. Frequency of the Term ‘Non-Traditional’ in the Texts of Criminal Court Decisions on Violence against LGBT People in Russia (2010–2016)



Conclusion

The research presented in this Chapter shows the journey of the term ‘non-traditional sexual relationships’ from common language to the legal discourse and from the political field to the field of law. I look at how the term has travelled as an instance of enactment of conservative memory politics in Russia, which seeks to designate LGBT people as absent from the country’s territory (seeks to forget their presence) by nominating them as ‘non-traditional’. The term ‘non-traditional sexual orientation’ appeared as a euphemism of LGBT sexualities in the 1990s and at that point hardly served any memory political purpose. Legal actors do not use the term to advance memory politics as the legal discourse absorbs it with a pragmatic objective: it was necessary to refer to same-sex relationships with a word that would somehow distance itself from already existent legal notions. Thus, ‘non-traditional sexual orientation’ seemed like a good option. This legal usage of the term represented standard practice in the legal field as conservative in Bourdieu’s sense: it simply mirrored the prejudices that were prevalent in modern heteronormative societies which tended to mark queer sexualities as alien and suspicious. For legal purposes, this meaning was enough before the tables turned in 2013 and Russian government started to actively promote their conservative memory politics.

By 2013, Russian law-enforcement agents and justices habitually used the term ‘non-traditional sexual orientation’ to reference queer sexuality, but not to advance conservative memory politics. On the contrary, it appears that they thought they refer to same-sex practices with respect (as they did not refer to them in the vocabulary of criminal law, which was available to them, too). In these circumstances, the term prevailed, but there was still some room for variance and discretion. After all, judges could use criminalised terms anyway or other colloquial notions (such as ‘sexual minorities’), as they did to a much lesser extent. The case that opened this chapter demonstrated that legal professionals did have a degree of freedom in their everyday interpretations of norms. Overall, the preference of ‘non-traditional sexual orientation’ clearly existed among Russian judiciary. It was a legal term, part of the professional vocabulary of the legal field actors, even though it was not stabilised by a statute of law adopted by the legislature. As Bourdieu would put it, the legal professionals formalised same-sex through the term ‘non-traditional sexual orientation’ within their habitual practice of law in court rooms and precincts.

As the term was formalised, it also became open to political use if ever required as a tool. Once the ruling party, Medvedev, and Putin announced the conservative turn, other actors within the political field started to produce various political enunciations of conservatism. The regional and federal laws banning ‘propaganda of homosexuality’ were such enunciations. While discussing the introduction

of this ban at the federal level in 2013, legislators faced the task of phrasing the text of their conservative statute in legal terms. *Muzhelozhstvo* (buggery) and lesbianism were already reserved by criminal law where they pointed to a non-consensual intercourse, whereas legislators were looking for a term from non-criminal vocabulary as they were amending the Code of Administrative Offences. The decision of the Constitutional Court discussing propaganda of homosexuality in Ryazan framed it as ‘non-traditional marital relationships’ to introduce memory politics in the conversation about LGBT citizens. This term came as a handy solution for the legislators also seeking to advance the conservative memory politics. The position of the Constitutional Court in between law and politics made the shift from legal vocabulary to memory manipulations feasible. Then, the role of legal professionals (judges of the courts of law and the Constitutional Court) was instrumental in the legislators’ endeavour to advance conservatism in legal statutes.

From then on, the term ‘non-traditional sexual relationships’ acquired two competing interpretations. One is political as used by political actors to ensure forgetting of the LGBT history of Russia and to make LGBT people appear as a novelty to the Russian context, their undesirability for the Russian nation. The other meaning is legal as a term that points to an offence in Administrative Law – the very fact of informing public about LGBT issues is now interpreted as malicious ‘propaganda’ which threatens to convince children to become gay. Nonetheless, starting from 2013, these meanings are intertwined and the term ‘non-traditional sexual relationships’ cannot serve a purely legal purpose anymore. If it was a legal term before the intrusion of conservative memory politics into law, the very fact of political intervention diminished its legal performative potential. In Bourdieu’s words quoted above, the intervention of politics into the legal field made evident law’s arbitrariness that was supposed to remain unrecognised for the law to be legitimate and, therefore, this intervention delegitimised the legal field to an extent.

In this analysis, I have shown how explicit political turn to conservatism in Russia (occurred in the aftermath of 2011–2012 protests) has been fed on the legal field which has offered its powers and vocabulary to formalise conservative ideas about sexuality. On the other hand, the conservative turn also contributed to demise of the legal field as legal (as the realm of law). I argue that the introduction of the ‘propaganda’ law significantly delegitimised the power of law in Russia due to its clearly political (not legal) objectives to manipulate collective memory. The ‘propaganda’ law is only one instance in a more general trend of political interference in the legal field that dramatically increased with the Russian government’s vesting into conservative ideology. There are many other examples and the trend of this open political intervention in the form of adjusting the law to conservatism

continues to date. In 2020 alone, this tendency resulted in constitutional amendments that outlawed same-sex intimacy by implying necessarily heterosexual arrangement of a family. With each step in this conservative direction, Russian law is less and less law, but more and more politics.