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THE CONCEPT OF FAMILY IN LITHUANIAN LAW

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Abstract. *Recognition of the status of family in the Constitution of the Republic of Lithuania mandates the state authorities to care and provide for the family, to ensure the family members' constitutional rights, and to ensure respect for family life. Such duties fall on both, the legislative and executive authorities. However, the enforcement of constitutional imperatives is not straightforward. One reason for this is that the Constitution does not contain any legal definition of 'family' or 'family members'. Nor does the jurisprudence of the Constitutional Court of the Republic of Lithuania reveal the content of these notions. This, in turn, allows for various interpretations as to the scope of duties of state authorities and state attitude towards the family in general. In this context, the article aims to present approaches to the legal concept of family in Lithuanian legal doctrine, positive law and court practice. First, the article analyses the constitutional background of the concept of family and presents an overview of the ongoing political debate concerning this concept. Second, we analyse Lithuanian legal doctrine, scanty as it may be on this issue. Third, we examine the legislative specifics and the case law developed by the country's highest judicial bodies with regard to the legal definition of 'family' and 'family members' in order to assess their impact on the state family policy in general.*

Keywords: *Constitution, family, family policy.*

Introduction

The concept of family in a legal sense has always been a factor that distinguishes and characterizes different legal systems. The European context presents great diversity among national legal systems with respect to the legal notion of family. There also appear to be significant differences on the Community level in the legal notions of family that both national courts and Community case law enforce.¹

The traditional concept of a legal family resulting from the historical development of different legal traditions is based on the institution of marriage. Whether it is a common-law marriage, or the so-called ‘continental’ marriage, or even an Islamic marriage with its own specific features including openness to polygamy, marriage as the institution founding the family is historically a union between a man and a woman.² As Federica Giardini suggests, two important changes are currently taking place in the development of contemporary legal systems in this area. First, the institution of matrimony no longer constitutes the sole, exclusive title upon which the recognition of the legal entity of family is based within a legal system. Second, the concept of marriage itself is changing and evolving to the point of including a union between two persons of the same gender. On the other hand, the European Union (EU) contains legal systems that are firmly anchored by traditional relations in which not only is the concept of legal family still solely and exclusively based on marriage, but also a marriage is an institution contracted solely between a man and a woman.³

In this context, the article will present the Lithuanian approach to the legal concept of family and its practical implications. First, the constitutional background of the concept of family will be analyzed. Second, we will examine the legal definition of ‘family’ and ‘family members’. Third, the case law developed by the highest judicial bodies will be analysed in order to assess its impact on the development of these concepts and on state family policy in general.

1. The Protection of the Family under the Lithuanian Constitution

In the ambit of legal systems and sources of law among the European Union countries is extremely diverse. There are systems where the basic principles governing the family are contained in the constitution (e.g., the Italian system); while in others, the

1 Marella, M. R. The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law. *European Law Journal*. 2006, 12(1): 78–105.

2 Giardini, F. The Concept of “Legal Family” in Modern Legal Systems: a Comparative Approach [interactive]. [accessed 02-02-2010]. <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Giardini.pdf>>.

3 *Ibid.*

written constitution (i.e., in France) or the unwritten constitution (i.e., in Britain) ignore the family entirely.⁴

In the Constitution of the Republic of Lithuania⁵ adopted by the people of Lithuania by referendum in 1992, the family is protected as a separate value. Article 38 of the Constitution states: ‘The family shall be the basis of society and the State. Family, motherhood, fatherhood and childhood shall be under the protection and care of the State. Marriage shall be concluded upon the free mutual consent of man and woman. The State shall register marriages, births, and deaths. The State shall also recognize church registration of marriages. In the family, the rights of spouses shall be equal. The right and duty of parents is to bring up their children to be honest people and faithful citizens and to support them until they come of age. The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage.’ Article 39 of the Constitution contains a provision on the State’s social commitment towards children and families that raise and bring up children: ‘The State shall take care of families that raise and bring up children at home, and shall render them support according to the procedure established by law. The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and other concessions. Children who are under age shall be protected by law.’

The notions of ‘family’, ‘family life’ and ‘family members’ are directly mentioned in a number of other articles of the Constitution: ‘The law and the court shall protect everyone from arbitrary or unlawful interference in his private and family life, from encroachment upon his honour and dignity’ (Art. 22 para. 4), ‘It shall be prohibited to compel one to give evidence against himself, his family members or close relatives’ (Art. 31 para. 3); ‘In all courts, the consideration of cases shall be public. A closed court hearing may be held in order to protect the secrecy of private or family life of the human being, or where public consideration of the case might disclose a State, professional or commercial secret’ (Art. 117 para. 1); ‘The State shall take care of and provide for the servicemen who lost their health during the military service as well as for the families of servicemen who lost their lives or died during the military service. The State shall also provide for citizens who lost their health while defending the State as well as for the families of the citizens who lost their lives or died in defence of the State’ (Art. 146).

The above provisions of the Constitution constitute the basis of state family policy. As the Constitution is the principal national source of family law and a measure of control over the legislative authority’s decisions, family relations must be regulated according to the Constitution. Recognition of the status of family as a constitutional value mandates the state authorities to care and provide for the family, ensure the family members’ Constitutional rights, and ensure respect for family life. Such duties fall on both legislative and executive authorities. However, enforcement of constitutional imperatives is not straightforward. One reason for this is that the Constitution does not con-

4 Alpa, P. G. Future of family contracts, comparative law and European law [interactive]. [accessed 02-02-2010]. <http://www.ccbe.eu/fileadmin/user_upload/document/Family_law_Conference_bxl_2008/Speeches/EN_Alpa.pdf>.

5 Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.

tain any definition of ‘family’ or ‘family members’. Nor does the jurisprudence of the Constitutional Court of the Republic of Lithuania reveal the content of these notions. We therefore lack any official constitutional doctrine on what ‘family’ is. This in turn allows for various interpretations as to the scope of duties of state authorities and state attitude towards the family in general. Divergence between liberal and conservative ideologies is particularly evident in debates on legal regulations related to the status of the family or State support for families. For example, during the Seimas (Lithuanian parliament) debates in 2007 on the Draft Law of the Principles of Support to Family, the leader of Conservative Party, Andrius Kubilius proposed that ‘the notion ‘family’ arising from the text of the Constitution is obvious—it is ‘spouses and their children’ and no other arrangements—‘cohabitation’ or any other novelty could be considered or referred to as “family”’.⁶ Proponents of the liberal concept of family criticize this view and state that ‘ignorance leads some representatives of the people to a violation of human rights or discrimination of people. The concept of family where the family is made equivalent to the matrimonial relationship between a man and a woman should drive defenders of human rights to despair’.⁷ They state that ‘traditional family has virtually been transformed by the processes of industrialization, urbanization and globalization. The traditional family has also changed due to the influence of various policies, education, science, gender equality, and family planning, and also due to a decrease in the dogmatic influence of church on secular life. Contemporary society no longer believes in absolute, unchanging truths and acknowledges a variety of opinions.’⁸

However, we should also note that the majority of leading political forces in Lithuania have thus far chosen to follow the classical, conservative interpretation of the concept of family. Firstly, discussions on the political level regarding the constitutional concept of family are actually confined to the question of whether a *man and woman* living together but not married can be treated as family. The question of whether same-sex couples living together could be considered a family is altogether outside the scope of this discussion. Secondly, the Seimas voting results in 2008 on the *State Family Policy Concept*⁹ reveal a clear dominance of the conservative sentiment. A concept reflecting a particularly conservative understanding of family¹⁰ was approved by an overwhelming majority of votes in the Seimas, with representatives of only some parties—mainly social democrats and liberals—voting against or abstaining.¹¹ Since nearly 80% of the Li-

6 Kubilius, A. Parama šeimai, teisė ir Konstitucija ir pinigai [Support for the family, law, Constitution and finances]. [interactive]. [accessed 02-02-2010]. <http://politika.kubilius.lt/2007_10_01_archive.html>.

7 Press conference of M. A. Pavilionienė and O. Valiukevičiūtė (both MOP) ‘Why some members of Parliament consider cohabitants to be lepers?’ [interactive]. [accessed 02-02-2010]. <http://www3.lrs.lt/pls/inter/w5_show?p_r=4912&p_d=61992&p_k=1>.

8 *Ibid.*

9 Resolution No X-1569 of the Seimas of the Republic of Lithuania of 3 June 2008 On the Approval of the State Family Policy Concept. *Official Gazette*. 2008, No. 69-2624.

10 The Concept defines family as ‘spouses and their children (including adopted), if any’.

11 See at <http://www3.lrs.lt/pls/inter/w5_sale.bals?p_bals_id=-2204>.

thuanian population consider themselves Roman Catholic,¹² we may presume that such voting is dictated by the dominant values of a Catholic society.¹³

An analysis of Lithuanian legal doctrine, though quite scanty on this issue, also reveals a rather conservative attitude towards the constitutional concept of family. According to one of the drafters of the Constitution, former Judge of the Constitutional Court, professor Egidijus Jarašiūnas, the Constitution establishes a concept of effective, functioning, but not formal family. This means that in the Constitution, the family is understood as certain functioning social reality, the essence of which is relations or a certain integral set of relations. He distinguishes ‘two constitutionally important pillars of the family—two principal anchors: matrimony and consanguinity. Matrimony refers to a union between man and woman, a voluntary agreement to live as a family. Consanguinity refers to relation by birth between persons as the basis for living together.’¹⁴ According to Jarašiūnas, any other unions between persons should not be considered a family because in such case the significance of the protection of the family as a special social unit would be obliterated: ‘we have to clearly distinguish between constitutional values and things that are tolerated. The fact that the family is a constitutional value does not mean that all citizens of the state must live in families. There is nothing to force a person to enter into matrimony, and there is nothing to force a person to stay in marriage throughout life. Nothing precludes or forbids a person from choosing other forms of cohabitation. Nevertheless, only a family which ensures the existence of society itself is constitutionally protected, because human rights make sense only in the context of society.’¹⁵

Professor Pranciškus Stanislovas Vitkevičius provides an even narrower concept of family. He states that ‘marriage constitutes the basis and onset of a normal family that the State protects and cares for above all else’.¹⁶ He is convinced that ‘upon the dissolution of marriage, the family automatically breaks up. After the dissolution of marriage, children remain to live with one of the parents and thus a new family is formed. Meanwhile, the other parent who, after the dissolution of marriage, does not live together or lives in a separate room of the same apartment is no longer a member of the former family and remains only the subject of *familial* relations according to blood relations with respect to the children.’¹⁷ According to Vitkevičius, ‘we should distinguish between family members and subjects of familial relations. Legal relations of family members

12 Results of a poll conducted by the Public Opinion and Market Research Centre Vilnius in November 2007 show that as much as two thirds of the Lithuanian population identify family with marriage (see Viluckas T. Ar mums šeima tebėra vertybė [interactive]. [accessed 02-02-2010]. <<http://stage.bernardinai.lt/straipsnis/2008-01-09-tomas-viluckas-ar-mums-seima-tebera-vertybe/4074>>.

13 Stanaitis, A.; Stanaitis, S. Lietuvos gyventojų religijos ir jų paplitimas. *Geografija*. 2004, 40(2): 26–33. [Religions and their distribution in the Lithuanian population]

14 Jarašiūnas, E. Šeimos koncepcijos pagrindai 1992 m. Lietuvos Respublikos Konstitucijoje [The basis of the conception of family in the 1992 Constitution of Lithuania]. [interactive]. [accessed 02-02-2010]. <http://www.lrkt.lt/APublikacijos_20071211a.html>.

15 *Ibid.*

16 Vitkevičius, P. S. *Šeimos narių turtiniai teisiniai santykiai* [Legal relations between family members]. Vilnius: Justitia, 2006, p. 34–36.

17 *Ibid.*

should be considered *family* relations, while legal relations of persons who are not family members but have certain rights and duties should be called *familial* relations.¹⁸

One way to get at the meaning of notions used in legal acts is to analyse their *travaux préparatoires*. According to Jarašiūnas, ‘For the drafters of the Constitution, the family based on marriage was a naturally understandable category and there was no need to convince each other of what marriage or family means or to explain what legal reality we are going to create. Therefore, in the Constitution we can see an indivisible bond between family and marriage.’¹⁹ Jarašiūnas points out that ‘the drafters of the Constitution and, ultimately, the people who approved this decision clearly appreciate such a bond’.²⁰ However, he recognizes that ‘if we go back to the year 1992, many things were different—the reality was different and our understanding of reality was also different. Now we are living in the twenty-first century and have to search for an answer with regard to the state of society and the development of the legal system.’²¹

Such an approach appears reasonable enough: during the nearly 20 years since the adoption of the Constitution, Lithuania has experienced a very rapid transformation in the models of social life, influenced by both, internal and external factors. Among external factors, particularly significant are changes in the legal system related to the integration of Lithuania into European structures, such as the ratification of the Convention for Protection of Human Rights and Fundamental Freedoms, and accession to the European Union. Moreover, as Alpa points out, the Constitutions and other state laws are no longer ‘history’s notary’, as it once was; it now also works as a set of rules promoting social development, so that in nearly all countries it takes on the two faces of Janus: on the one hand, it reflects social evolution; on the other—it promotes its development.²²

In this regard we should take note of the indivisible bond between the concept of family and the protection of human rights. Only an establishment of full respect for human rights both outside and within the family unit can allow us to face the challenges posed now and in the future by developments in the concept of legal family.²³ Therefore, the concept of family established in the Constitution cannot be interpreted separately from the state’s international commitments in the area of human rights and EU legislation (e.g. the state’s duty to respect ‘family life’ under Art. 8 of the ECHR or Art. 7 of Charter of Fundamental Rights of the European Union). It is important to note that according to the case law of most supranational judicial institutions when applying international documents, the scope of human rights established in such documents is interpreted using the so-called ‘evolutive’ or ‘dynamic’ technique of interpretation, which means

18 Vitkevičius, P. S. *Šeimos narių turiniai teisiniai santykiai* [Legal relations between family members]. Vilnius: Justitia, 2006, p. 34–36.

19 Jarašiūnas, E., *supra* note 14.

20 *Ibid.*

21 *Ibid.*

22 Alpa, P. G. Future of family contracts, comparative law and European law [interactive]. [accessed 02-02-2010]. <http://www.ccbe.eu/fileadmin/user_upload/document/Family_law_Conference_bxl_2008/Speeches/EN_Alpa.pdf>.

23 Giardini, F. The Concept of ‘Legal Family’ in Modern Legal Systems: a Comparative Approach [interactive]. [accessed 02-02-2010]. <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Giardini.pdf>>.

that legal acts must be interpreted in the light of present day conditions.²⁴ The ‘living instrument’ doctrine is one of the best known principles in the case-law of the European Court of Human Rights. It expresses the principle that the Convention is interpreted in the light of present day conditions, and that it evolves through the interpretation of the Court. This principle of dynamic interpretation was first referenced in relation to corporal punishment following criminal proceedings. However, it has received its most frequent expression in relation to Article 8. This is hardly surprising not only because of the breadth of the interests covered by Article 8, which are private and family life, correspondence and home, but also because it is precisely these interests that are most likely to be affected by changes in society. As a dynamic instrument, Article 8 has proved to be the most elastic provision. Thus, it has embraced such matters as taking of children into state care, family planning issues, transsexual rights, corporal punishment in schools, access to confidential documents related to an applicant’s past in the care of the public authorities, the choice of a child’s first name, application of immigration rules, disclosure of medical records, etc.²⁵

It is interesting to note, that the ‘dynamism’ of the Convention relates not only to the actions or inactions of the state, but also to the choices of individuals in the private sphere, such as restriction of the freedom of testation.²⁶ It seems inevitable that this ‘dynamism’ should have an impact on the interpretation of the concept of family embedded in the Constitution. A constitutional concept of family that ensures state protection for a group of persons that is narrower compared to that arising from the state’s international commitments in the area of human rights can hardly ever be considered sufficient. We have to admit that the constitutional concept of family is not static and unchanging; it will always be influenced by both internal and external factors—social changes in society, international law and supranational jurisprudence.

2. The Legal Definition of Family in Positive Law

It is common knowledge that constitutional provisions cannot be interpreted based on concepts established in ordinary law (laws and secondary legislation). However, if we want to determine the subject matter of state family policy and the limits of its application, we first have to search for a definition of ‘family’ and/or ‘family members’ in the laws.

The main source of Lithuanian family law—the Civil Code—will not provide an answer to the question what ‘family’ is. The code only provides a definition of marriage as ‘a voluntary agreement between a man and a woman to create legal family relations

24 Arai-Takahashi, Y. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR*. Intersentia, 2001, p. 15.

25 Wildhaber, L. The European Court of Human Rights in action [interactive]. [accessed 02-02-2010]. <<http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr21/wildhaber.pdf>>.

26 ECtHR 13 July 2004, *Pla and Puncernau v. Andorra*, Reports 2004-VIII.

executed in the procedure provided for by law'.²⁷ Furthermore, the Civil Code provides for the rights of a man and woman to live in registered partnership.²⁸ Though in the process of drafting the Civil Code there was an idea to provide a definition of family, the idea was abandoned for purely practical reasons. According to professor Valentinas Mikelėnas, the drafters of the Civil Code perfectly understood that the definition of family in the code would inevitably have led to heated debates, which in turn would have postponed or even blocked the adoption of the Code.²⁹

In addition, Lithuanian positive laws provide a variety of definitions of 'family' and 'family members'. For example, the Law on State Benefits to Families Raising Children³⁰ defines family as 'spouses or cohabiting persons, as well as a married person with whom by court order their children have stayed to live because of the separation of the spouses, or one of the parents, their children and adopted children aged 18 and under. The family shall also include persons between the ages of 18 and 24 who are unmarried and not cohabiting with another person: full-time school-children and students of secondary schools and other institutions of formal education, as well as persons from the day of graduating from a secondary school which they attended as full-time students until the 1st of September of the same year. The guardian's (curator's) family shall not include children who are placed under guardianship (curatorship) in accordance with the procedure established by law' (Art. 2 para 6).

The Law on Financial Social Assistance for Low-Income Families (Single Residents)³¹ defines family as 'spouses or man and woman of legal age living together, as well as a married person with whom their children have stayed to live by the court's decision because of the separation of the spouses, or one of the parents, their children being under 18 years of age' (Art. 2 para. 12).

According to Art. 2 para. 5 of the Law on State Support to Acquire or Rent a Dwelling and Renovate (Modernize) Multi-apartment Houses,³² 'Family means spouses, also a married person with whom, by a court's decision on the living of spouses separately, their children stay to live, or one of parents, their children under 18. The family also includes unemployed persons from 18 to 24 years of age if they study at full-time secondary schools and other full-time programmes at formal education institutions (school-children and students), also persons in the period from graduation from a full-time secondary school until the 1st of September of the same year. Family members are also

27 Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

28 However, the partnership institute is not effective as of yet, because a special law establishing partnership registration procedures has not been adopted. Until this law is adopted, *de facto* relations of partners do not have special legal regulation, and separate elements of such relations are subject to the rules of general civil law, but not the rules of family law (e.g. division of assets that partners have jointly acquired are subject to the rules under Book IV 'Material Law' of the Civil Code, regulating the relations of co-owners).

29 Mikelėnas, V. *Šeimos teisė* [Family Law]. Vilnius: Justitia, 2009, p. 26.

30 Law on State Benefits to Families Raising Children. *Official Gazette*. 2004, No. 88-3208.

31 Law on Financial Social Assistance for Low-Income Families (Single Residents). *Official Gazette*. 2006, No. 130-4889.

32 Law on State Support to Acquire or Rent a Dwelling and Renovate (Modernise) Multi-apartment Houses. *Official Gazette*. 2002, No. 116-5188.

persons who are recognized as family members by the court's decision. Parents (foster parents) of a spouse or a single person residing together may also be considered members of the family.'

According to Art. 2 para. 26 of the Law on the Legal Status of Aliens,³³ 'family members mean the spouse or the person with whom a registered partnership has been contracted, children (adopted children) <...> under the age of 18, including children under the age of 18 of the spouse or the person with whom a registered partnership has been contracted, on the condition that they are not married and are dependent, as well as direct relatives in the ascending line who have been dependent for at least one year and are unable to use the support of other family members residing in a foreign country'.

Actually, the definitions of 'family' and 'family members' established by the above laws do not purport to be universal. Each of them is autonomous, i.e., applied only to relations regulated by the particular law. Legislative authority was conscious of the plurality of family forms and therefore chose different levels of family protection and support in separate areas.

However, practical problems can eventually arise, especially when we have to apply laws granting certain rights to *family members* or *persons who have families*, but cannot explain which persons should be considered *family members* or *family* within the context of regulation of the particular law. For instance, the Law on the Organization of the National Defence System and Military Service³⁴ provides that professional military servicemen shall be paid a sickness allowance, if the serviceman nurses a sick family member, for a period not exceeding seven calendar days. However, the law does not define which persons are regarded as servicemen's 'family members'. Consequently, problems concerning the practical scope of servicemen's rights may arise (e.g., it remains unclear, whether a serviceman would be paid sickness allowance if he nurses his/her unmarried partner).

A similar problem, most probably for the first time in Lithuanian courts, came up in 1997 when applying Art. 283 of the Civil Procedure Code of the Republic of Lithuania of old wording³⁵ (in effect until 31 December 2002), which stated that 'proceedings for the recognition of a natural person as incapable because of mental disease or dementia may be initiated according to an application of such person's *family members*, social work and care institutions, mental institutions. Since the code did not contain a definition of *family members*, courts usually encountered questions on the application of the said rule (e.g., if a brother or sister living separately may initiate proceedings for recognition of a natural person as incapable because of mental disease or dementia). The Supreme Court of Lithuania (SCL) gave an answer to the question in its bulletin *Case Law*, section 'Consultations to Judges' and interpreted that 'the effective laws of family law do not contain a definition of a family member; therefore, when determining persons who may be regarded as family members the court should follow Art. 329 of the

33 Law on the Legal Status of Aliens. *Official Gazette*. 2009, No. 93-3984.

34 Law on the Organisation of the National Defence System and Military Service. *Official Gazette*. 1998, No. 49-1325.

35 Civil Procedure Code of the Republic of Lithuania. *Official Gazette*. 1964, No. 19-139.

Civil Code.³⁶ Pursuant to the provisions of this article, family members include spouses, cohabiting children (foster children), or parents (foster parents). Other persons may be recognized as family members if they live together and run a common household'. The SCL's position indirectly 'sent a message' to all appliers of the law, that in case there is no special legal regulation, the notion of 'family members' should be interpreted according to the notion of *family members of a tenant of residential premises* defined in the Civil Code. Thus, a group of persons who in the absence of special legal regulation may exercise the rights statutorily assigned to *family members* was defined. It is obvious that when interpreting the notion of *family members*, the SCL maintained a rather liberal position based on the evaluation of factual relations between specific persons, namely that persons could be recognised as family members irrespective of their consanguinity or in-law relations if only they live together and run a common household.³⁷

Nevertheless, such a liberal position of the SCL did not remain for long. In 1999, the court again faced the problem of interpretation of the notion of family. In this case, it was done not as a form of consultations to judges, but when hearing (adjudicating) a specific civil case on the lawfulness of granting a land plot to a person under Republic of Lithuania Supreme Council Resolution of 26 July 1990 'On the Extension of Farming Land of Rural Residents'. Art. 1 of the Resolution said that 'for workers of agricultural enterprises living in rural areas, a land plot of up to 3 ha per family shall be assigned for personal farming upon request'. As the resolution did not provide for a definition of family, the question was whether an agricultural enterprise worker's family (in this particular case, spouses and their children) factually living together with the spouse's parents in their farmstead, but factually running a separate household (having their own animals, etc.) is considered a separate unit entitled to a 3 ha land plot for personal farming. SCL gave a positive answer to the question and reasoned as follows: 'Persons constituting a family have to be related by marriage or consanguinity, mutual community of moral and material interests and support, giving birth to children and raising of children, mutual personal and property rights and duties, running of common life and household. This is a complex of legal and social bonds characterising the entirety of such circumstances'.³⁸

If we compare the notion of family formulated in the latter case with the earlier notion the court presented in 1997, the difference is obvious. In the latter case, SCL kept to the position that the family is based on at least one of the two criteria—*marriage* or *consanguinity*. As to the other criteria (common life, running of household, etc.), they are only optional, supplementing one of the two features qualifying a family. Therefore, for example, the notion of family does not include unmarried couples without children. On the other hand, according to this interpretation of the SCL, family may include both single fathers (mothers) and their children and couples of partners and their children—in both cases of key importance would be the criterion of *consanguinity* joining these persons.

36 This article of the Civil Code in effect until 31 June 2001 regulated the legal status of family members of the tenant of residential premises.

37 *Teismų praktika*. Nr. 8. [Case Law]. Vilnius, 1997, p. 147.

38 Ruling of the Supreme Court of Lithuania of 29 November 1999, civil case No. 3K-3-869/1999.

The Supreme Administrative Court of Lithuania (SACL) also had to interpret the concept of family used but not defined in the law. Under the Law on Land Reform,³⁹ allotment of property without payment can be granted to those citizens of the Republic of Lithuania whose families had been moved into the Republic of Lithuania territory after 1939, from farms owned by the right of ownership in the territories of Poland and Germany (allotting those plots of land, onto which these families were moved in the course of being transferred into the Republic of Lithuania). In the case adjudicated by the court, the plaintiff claimed a 11.6 ha plot of land in Lithuania, to which her grandparents had been moved in 1941 from Poland, where the grandparents held a 4.68 ha land plot. As the law did not provide a clear concept of family, the question came up of whether the plaintiff should be treated as her grandfather's family member. The court stated that when applying the mentioned provision of the law, the notion of family had to be interpreted the same way as it is understood in the standard language—a family is a group of persons consisting of parents, children (sometimes also close relatives) living together.⁴⁰ Considering the fact that the plaintiff's parents and grandparents did not live together and did not run a common household before moving to Lithuania, the court stated that the plaintiff and her grandparents were not members of one and the same family; therefore she cannot be granted a plot of land free of charge.⁴¹

There are certain differences in the positions of the SCL and the SACL with respect to the concept of family. For example, the definition of family presented by the SCL is broader to the extent that it includes persons living together and related by consanguinity (not merely close family relations). On the other hand, according to the SCL's concept of family, the cohabitation of persons *per se*, even if consanguinity or marital relations exists, cannot guarantee that such persons will be recognized as family if other features are not identified: namely, mutual community of moral and material interests and support, running of common household, etc. These differences appear to be relevant to the subjects of the legal relationship insofar as the jurisdiction of the resolution of disputes arising from such relationships differs (whether the dispute falls within general jurisdiction or jurisdiction of administrative courts). It should be noted that both of the mentioned precedents obviously narrowed the scope of relationships satisfying the criteria of the family concept as compared to the liberal interpretation that the SCL provided in 1997. However, this scope is considered rather flexible and enables evasion of the hazard of discriminative application of law.

It is obvious that the assignment of certain rights to separate individuals depending on their relation to other individuals also demonstrates the state's attitude towards the fa-

39 Law on Land Reform. *Official Gazette*. 1997, No. 69-1735.

40 The court based this argument on the definition of 'family' found in the Dictionary of Contemporary Lithuanian Language (Mokslo ir enciklopedijų leidybos institutas, Vilnius, 2000, p. 802). The court also noted that such a concept of 'family' was factually addressed in earlier court practice; also in the Ruling of the Supreme Administrative Court of Lithuania of 24 August 2004 in the administrative case No. A8-704-04 and Ruling of the Supreme Administrative Court of Lithuania of 9 December 2005 in the administrative case No. A15-1815/2005.

41 Ruling of the Supreme Administrative Court of Lithuania of 28 December 2007, administrative case No. A3-1189-07.

mily, its functions and relation of the state to the family. Therefore, we can stipulate that in all of the above-mentioned cases the courts not only ruled on the issues of application of law, but also formulated the state family policy. The precedent power of court decisions⁴² on the concepts of family established in these cases became the only legitimate source for interpretation of the concept of family in situations when the interpreters of law encounter a gap in the definition of family found in a specific law.

3. The Definition of Family in the State Family Policy Concept of 2008

An important change took place when the Seimas adopted the Resolution of 3 June 2008 ‘On the Approval of the State Family Policy Concept’ (Concept),⁴³ which established *inter alia*, an independent definition of family.⁴⁴ According to the Concept, *family* is deemed to be ‘spouses and their children (including adopted), if any’.⁴⁵

Both, the content of the new definition of family and the form of its establishment, seem to demonstrate a change in state’s attitude towards the family. First, establishment of the concept of family by the Seimas’ Resolution shows that legislative authority has taken over the initiative in defining the concept of family from the judicial bodies. Second, such narrow definition of family (tying it exclusively to marriage) is the most conservative family policy model in the history of Lithuania since the re-establishment of independence in 1990. The earlier Family Policy Concept established by the Government in 1996⁴⁶ did not even provide a definition of family. Analogous was also the case in 2003, when the Child Welfare State Policy Concept established by the Seimas emphasized *inter alia* that ‘family life models are very varied’.⁴⁷ Third, the definition of family established in the new Concept differs in its content from the criteria defining family as formulated both in the SCL’s ruling of 1999 and the SACL’s ruling of 2007.

42 Art. 33 para. 4 of Law on Courts says that ‘the courts, when adopting decisions in cases of specific categories, are bound by the legal application rules they themselves have formulated in analogous or essentially similar cases. Courts of lower instances, when adopting decisions in cases of specific categories, are bound by the legal application rules that courts of higher instance have formulated in analogous or essentially similar cases’.

43 Resolution No. X-1569 of the Seimas of the Republic of Lithuania of 3 June 2008 on the Approval of the State Family Policy Concept. *Official Gazette*. 2008, No. 69-2624.

44 The Concept is aimed at defining the exclusive value that family has for the life of the person and society, to define the functions performed by the family, to characterise the problems of family development and conditions of family life in Lithuania, to define the state family objectives and principles and to project the trends of state family policy development.

45 The Concept indicates that ‘the family may also be incomplete or extended’. *Extended family* is defined as ‘spouses, their children (including adopted), if any, and immediate family members living together’, while *incomplete family* under the Concept is ‘family or extended family, where, upon termination of marriage, the children have been deprived of one or both parents’.

46 Resolution No. 362 of the Government of the Republic of Lithuania of 19 March 1996 on the Family Policy Concept and Course of Actions. *Official Gazette*. 1996, No. 28-684.

47 Resolution No. IX-1569 of the Seimas of the Republic of Lithuania of 20 June 2003 on the Child Welfare State Policy Concept. *Official Gazette*. 2003, No. 52-2316.

It is questionable what (if any) practical implications the definition of family established in the Concept will have. It is so far unclear whether the definition of family established in the Concept will be understood in practice as autonomous (i.e., applicable exclusively in interpreting the provisions of the Concept) or as universal (i.e., applicable in all cases unless laws define otherwise). It should be noted that the Concept itself does not provide an answer to this question. On the one hand, a definition of family is given only as one of the definitions used in the Concept (see clause 1.6 ‘Definitions’), which indicates its autonomous character. On the other hand, clause 1.5 of the Concept (Limits of applying the Concept) stating that ‘this concept shall not cover a variety of family types found throughout the private and cultural sectors’ raises the question of whether the definition of family established in the Concept should be considered obligatory in all areas of legal regulation.

Even if we accept the definition of family established in the Concept as universal and obligatory, it is still unclear as to whether the Concept itself will have an exclusively guiding effect (i.e. will be seen as a ‘guiding star’ for law-makers) or will it also have practical implications manifesting in the transposition of notions established in the Concept into the law application level. The Concept has already turned out to have a practical effect on legislation. Debates on draft laws in the Seimas are often accompanied by discussions on the compliance of the notion of family proposed in a particular draft law with the Concept. For example, the Legal Department of the Seimas Office, in its Opinion of 2 July 2008 on the Draft Law on State Support for Acquisition or Rent of Dwelling or Modernization of Multi-apartment Houses, proposed that the contained notion of family be in compliance with the notion of family found in the State Family Policy Concept.⁴⁸ However, the effect of the Concept at the law application level (i.e., in case law) is still unclear. It should be noted that though the Concept has existed for nearly two years, neither the SCL nor the SACL has ever relied on it as the source of law in practice.⁴⁹

We should not forget that the definition of family established in the Concept is still waiting for revision by the Constitutional Court of the Republic of Lithuania. On 22 August 2008, the Constitutional Court of the Republic of Lithuania accepted a request from a group of Seimas members to determine whether the definitions of ‘family’, ‘harmonious family’, ‘extended family’, and ‘incomplete family’ established in the Concept do not conflict with the Constitution of the Republic of Lithuania.⁵⁰ This means that a judicial body rather than any other state authority will have the last word on the Concept.

48 See at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=323714&p_query=%F0eimos%20politikos&p_tr2=2>.

49 In general, the Concept was used in court practice only once, when deciding the issue of territory planning. In the case the court *inter alia* stated that ‘when adopting appealed administrative acts no consideration was taken of lawful expectations of a part of society to create a family-friendly environment in residential districts which would comply with the needs of each family member as established in the State Family Policy Concept (creation of green areas, playgrounds for children, sports grounds, recreation zones, family-friendly infrastructure, encouragement to maintain a clean residential environment)’. See Decision of Vilnius Regional Administrative of 11 November 2009, administrative case No. I-2163-281/2009.

50 The applicants state that ‘The Seimas, having formulated in the Concept the notions of family, harmonious

Conclusions

The process of formulating the concept of family is a complicated one in Lithuania. The majority of leading political forces in Lithuania as well as legal doctrine follow the classical, conservative interpretation of the concept of family. However, in the absence of the official constitutional doctrine on this issue, any attempts to define the concept of family or that of family members in ordinary law must be strongly coordinated with Lithuania's international commitments in the area of human rights.

Gaps in national legislation have brought about a situation where supreme judicial bodies are forced to undertake the formulation of the concept of family *ad hoc*. Thus, judicial authorities, though indirectly, have been forced to deal with the creation of state family policy—a function which, though constitutionally legitimate, is not customary for judicial bodies. So far, it is difficult to predict the implications of efforts by legislative authorities to assume initiative in this area.

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ŠEIMOS SAMPRATA LIETUVOS TEISĖJE

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Santrauka. *Šeimos, kaip konstitucinės vertybės, statuso pripažinimas suponuoja vertybės pareigą saugoti ir remti šeimą, užtikrinti iš Konstitucijos išplaukiančias šeimos narių teises bei užtikrinti pagarbą šeimos gyvenimui. Šios pareigos tenka ir teisėkūros, ir teisės įgyvendinimo bei taikymo institucijoms. Deja, įgyvendinti konstitucinius imperatyvus nėra*

paprasta. Viena to priežasčių, kad Konstitucijos tekstas nepateikia nei „šėimos“, nei „šėimos narių“ sampratos. Tai suteikia pagrindą atsirasti įvairioms interpretacijoms dėl valstybės pareigų apimties ir apskritai dėl valstybės požiūrio į šeimą.

Straipsnyje siekiama atskleisti „šėimos“ sampratos įvairovės Lietuvos teisės doktrinoje, pozityviojoje teisėje ir teismų praktikoje. Pirmą, pateikiamas konstitucinio teisinio reguliavimo fone vykstančių politinių diskusijų „šėimos“ sampratos klausimu turinys, esminė motyvacija. Antra, pristatoma nors ir negausi, tačiau vertinga teisės doktrinos atstovų nuomonė, remiantis istoriniu teisės aiškinimo metodu daromos išvagos. Trečia, pateikiama „šėimos“ ir „šėimos narių“ sampratų įvairovė ordinarinėje teisėje bei teismų praktikoje. Ketvirta, vertinami bandymai sukurti universalią „šėimos“ sampratą, analizuojama galima Valstybinės šėimos koncepcijos įtaka teisei sistemai. Apibendrinant atliktą tyrimą daroma išvada, kad „šėimos“ sampratos formavimas Lietuvoje vyksta komplikotai. Dėl pasitaikančių įstatymų leidybos spragų susiklostė situacija, kai aukščiausios teisminės instancijos buvo priverstos užsūmti „šėimos“ sampratos kūrimu ad hoc. Taip teisminė valdžia, nors ir netiesiogiai, buvo priversta imtis funkcijos formuoti valstybinę šėimos politiką. Ši funkcija, nors konstituciškai teisėta, nėra įprasta teisminei valdžiai. Tuo tarpu įstatymų leidėjo bandymų kurti „šėimos“ arba „šėimos narių“ sampratą ordinarinėje teisėje praktinis poveikis kol kas sunkiai prognozuojamas. Straipsnyje taip pat pažymima, kad nesant oficialios konstitucinės doktrinos, šie bandymai privalo būti suderinti su Lietuvos tarptautiniais įsipareigojimais gerbti žmogaus teises.

Reikšminiai žodžiai: Konstitucija, šėima, šėimos politika.

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