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CASE LAW AS THE STATE FAMILY POLICY FORMATION INSTRUMENT

Gediminas Sagatys

Mykolas Romeris University, Faculty of Law
Department of Civil and Commercial Law
Ateities 20, LT-08303 Vilnius, Lithuania
Phone (+370 5) 2714 593
E-mail sagatys@mruni.eu

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Annotation. *The aim of the present article is to explain the role of the judiciary in forming the family policy in Lithuania. For this purpose in the first part of the article the legal basis for the state family policy formation is discussed. The conclusion is drawn that the judiciary is not separated from the formation of the family policy by any constitutional means. The article further describes how this function is actually implemented by the judiciary. The actual influence of the judiciary is demonstrated by an analysis of the Lithuanian case law in three different areas: dissolution of marriage, child maintenance and the protection of the rights of children born outside marriage. The results of the analysis suggest that the influence of the judiciary on the state family policy works in diverse ways: when filling in legal gaps overlooked by the legislator; determining specific criteria which are important to the state family policy (while the legislator has determined only general principles); introducing international human rights standards in the national legal system, etc. One of the most controversial ways for the case law to influence the state family policy is through the modification of the legal regulation models prescribed by the laws.*

In summary of the study, a conclusion is drawn that case law may be considered to be an effective and reliable instrument for the formation of the state family policy. Besides, the article points out the advantages of case law: it is always more flexible and human oriented. and in the case of flaws in the legislator's work, case law may prevent material violations of human rights.

Keywords: *family policy, family, case law, judiciary.*

Introduction

Family policy is ostensibly aimed at addressing the problems families are perceived to experience in a society and is constituted of a series of separate but interrelated policy choices that address such problems as unwed parenthood, family break-up, poverty, suicide, unemployment, long-term care, lack of transportation, decline in family values, language barriers, mental illness, domestic violence, poor health, homelessness, drug/alcohol abuse, violence/crime, welfare dependency, absence/availability of abortion services, sex education in the schools, drunk driving, mental retardation, loss of parental authority, widened income disparities, lack of affordable health care, sex/race discrimination, lack of affordable child care, work demands, parent involvement in children's schooling, school safety, urban sprawl. The goal of family policy is to promote the well-being of families, just as the goal of policy is to promote the well-being of individuals¹.

The word "policy" is first of all associated with the legislative and executive functions of government. Therefore, family policy(ies) is mostly analysed through the study of the legislators' decisions and choices at various levels of government. However, taking into account the principle of subdivision of the state powers established in the Constitution², the question is what is the role, if any, of the third power (not in the order of importance), i.e. the judiciary, in forming the state family policy in Lithuania? For the above question not to be considered unconstitutional or even impudent, it may be formulated in a different manner: could the state family policy in Lithuania be judged solely from the analysis of legal acts adopted by the legislative (the Seimas) and the executive (the President, the Government and the ministries) powers of the state? The objective of this article is to find answers to the above questions.

1. The Legal Basis for the State Family Policy Formation

The overview of the institutions having the right to form the state family policy in Lithuania will be started from the analysis of the functions of the legislative power of the state. According to Paragraph 1 (4) of Article 64 of the Statute of the Seimas of the Republic of Lithuania³, one of the functions of the Committee on Social Affairs and Labour is "to draft laws and other legal acts, as well as proposals on the issues of family policy, social security and labour". This provision allows to make a conclusion, although not

1 Zimmermann, S. L. *Family Policies: Constructed Solutions to Family Problems*. California: Sage Publications. 2001, p. 2.

2 In Lithuania, the powers of the state shall be exercised by the Seimas, the President of the Republic and the Government, and the Judiciary (See: Art. 5 Para. 1 of the Constitution of the Republic of Lithuania).

3 The Statute of the Seimas of the Republic of Lithuania. *Official gazette*. 1999, No. 5-97.

straightforward, that the Seimas of the Republic of Lithuania has assumed the functions of the state family policy formation. The above conclusion is also supported by particular actions of the Seimas, primarily, by the Resolution of the Seimas of the Republic of Lithuania of 3 June 2008 On the Approval of the State Family Policy Concept⁴, the purpose of which is to “substantiate the necessity of the general family policy when implementing the constitutional provision of the Republic of Lithuania that family is the basis of society and the State, that the principal ethnic and culturally valuable objects are fostered in the family, ensuring every person’s welfare and historical survival of the Lithuanian State and the nation”.

The principle of the separation of powers allows to suppose that according to the effective legal acts the executive power (the Government, the ministries) is considered as an executor (implementer) of the family policy. The obligation of the Government to create the basis for the “implementation of the concept of the state family policy” is designedly included in the Action Programme of the 15th Government of the Republic of Lithuania⁵, while the Regulations of the Ministry of Social Security and Labour, approved by the Government⁶, provide for an objective of the Ministry “to coordinate the implementation of the family policy”.

However, in the case of the practical formation of the state family policy, the difference between the institutions of the legislative and the executive powers is insignificant. Not only the Seimas but also the Government are actively involved in the formation of the family policy. This statement is best substantiated by the fact that there were even two concepts of family policy in Lithuania since the restoration of its independence in 1990. The first Concept of Family Policy was approved by the contemporary Government in 1996⁷. The Concept provided for a rather detailed plan of actions to be taken by public authorities, specifying also the deadlines for the implementation of such actions. After 12 years, Lithuania got the second Concept of Family Policy, this time approved by the Seimas⁸. Noteworthy is the fact that although the latter concept defines many new areas and courses of action of the state family policy, the former Concept approved by the Government has been neither revoked nor invalidated till now. This fact shows that, in practice, there is no distinct line between the roles of the legislative and the executive powers in forming the state family policy. A logical question arises: why the third power, i.e. the judiciary, should avoid this function in such a case?

The influence of the judiciary on the state family policy depends on many factors such as the prevailing legal system, political (constitutional) framework of the state,

4 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.

5 Resolution No. XI-52 of the Republic of Lithuania of 9 December 2008 on the Programme of the Government of the Republic of Lithuania. *Official gazette*. 2008, No. 146-5870.

6 Resolution No. 892 of the Republic of Lithuania of 17 July 1998 on Approval of Regulations of the Ministry of Social Security and Labour of the Republic of Lithuania. *Official gazette*. 1998, No. 66-1916.

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

8 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.

activity of the judiciary, etc. The attempt to eliminate case law from the factors forming the state family policy could be based on the explanation that family policy is formed through positive law (which is the result of an expedient and purposeful lawmaking mechanism)⁹, while court rulings are not invariable and predictable. However, it is obvious that such an approach does not correspond to the present realities any more; to begin with, the increased role of court practice (or judge-made law), which could have been observed in Lithuania over the last decade. Firstly, the Constitutional Court had ruled in 2006 that the courts were empowered to fill the legal gaps left by the legislator where that was necessary, *inter alia*, for the protection of the rights and freedoms of a particular individual¹⁰. Secondly, seeking to ensure the continuity of the jurisprudence, the Constitutional Court had explicitly indicated that judicial precedents were sources of law and that by following previous decisions a uniform and consistent practice of courts would be achieved. Therefore, the courts of lower instance are bound by their own decisions and by the decisions of higher courts, whereas higher courts, including the Court of Appeal and the Supreme Court, are bound by their own earlier decisions¹¹.

The above actions of the Constitutional Court allow to discuss the potential influence of the judiciary on the formation of the state family policy. Surely, in order for the court to become not only the executer but also the developer of the state family policy, certain conditions are required (proper legislative framework, “uplifting” of the jurisprudence developed by the courts from the secondary to the primary sources of law) as well as an active and socially responsible court. The court should not cause chaos or disharmony in the state family policy. On the contrary, court decisions which may have influence on the state family policy should be well considered and made taking into account not only the literal interpretation of laws but also social reality. This also allows to discuss the possible advantage of the case law as an instrument for the family policy formation: it is always more flexible and human oriented since it is being developed directly upon settling specific disputes. Besides, the court is obliged to apply not only national but also international law and take into consideration the practice of the supranational judicial institutions. Therefore, the international human rights standards are more likely to be transferred into the national family policy namely because of the judicial precedent and not by way of positive law since the “conventional” developers of the positive law are often constrained by the prevailing standpoint of their electors and are safeguarded by their “unconstrained mandate”¹².

9 The term “positive law” is defined as the “law actually and specifically enacted or adopted by proper authority for the government of an organized jural society” (See: *Black’s Law Dictionary*. 5th ed. West Publishing Co, 1979).

10 Decision of the Constitutional Court of 8 August 2006, Case No. 34/03 Regarding the compliance of Art. 11 of the Law on Courts and Other Laws with the Constitution of the Republic of Lithuania.

11 Decision of the Constitutional Court of 24 October 2007, Case No. 26/07 Regarding the compliance of Art. 4, 165 of the Code of Civil Procedure with the Constitution of the Republic of Lithuania.

12 For instance, even though according to the judgement of 2007 of the European Court of Human Rights in the case *L. v. Lithuania* (Application No. 27527/03), Lithuania having refused to acknowledge gender-reassignment and issue new documents of identity, was adjudged to have violated the rights of the person who had changed sex by surgical means, the Seimas did not reconsider the Draft Law on Gender-Reassignment

With regard to this, several areas of the state family policy, which were considerably influenced by the judiciary, will be studied and evaluated below.

2. Influence of Case Law on Separate Areas of the State Family Policy

2.1. Legal Regulation of the Dissolution of Marriage

The legal regulation of the procedures for the dissolution of marriage is an important indicator of the family policy carried out by the state. Although the majority of the states acknowledge the right of spouses to terminate marriage, the systems of the dissolution of marriage are very diverse and differ in the degree of liberalism. In this regard, the major dichotomy is the division of the systems of the dissolution of marriage into the systems where marital dissolution is possible only in the case of the fault of one of the spouses and only if it is proved that the marriage has been broken up and there is no possibility to save it (fault-laws system), and the systems where marriage may be terminated following the request of one of the spouses neither the fault of the other spouse nor the inability to save the marriage (no-fault laws system) are necessary to be proved.

According to the Marriage and Family Code (MFC)¹³ which was effective until 1 July 2001 in Lithuania, a submission of an application of one or both spouses to the civil registry office or the court was enough to get divorced. If the marriage was requested to be dissolved by both spouses who did not have underage children and there were no dispute between the spouses over the payment of alimony to the disabled spouse or over the division of property, the marriage would be dissolved in the civil registry office. In other cases, one or both spouses had to make a claim to the court regarding the dissolution of marriage. The MFC provided for only one exception applicable to both procedures: a spouse did not have the right to file claim regarding marriage dissolution without the consent of his wife if the wife was pregnant and before the child turned one year old. The court would dissolve the marriage having established that the spouses were not able to live together and save the marriage. However, in principle, the reasons for the failure of the marriage were not important to the court. Hence, the no-fault laws system was effective at that time.

which could have allowed L. (the petitioner) to change the documents. It was decided instead to pay the applicant the damages in the amount of EUR 40,000, awarded by the European Court of Human Rights as an alternative law on gender-reassignment would not be passed within 3 months. However, 2 years after the decision of the Seimas to omit the question from the Draft Law on Gender-Reassignment, the 1st District Court of Vilnius had examined two similar cases and satisfied the claims of persons who had changed sex by surgical means, and obliged the state (respective services) to change the documents (See: Infolex.lt. *Lytį pakeitusiai asmeniui turi būti skubiai išduotas kitas dokumentas* [In the case of the reassignment of sex a new document for the person should be issued immediately] [interactive] [accessed 12-11-2009]. <<http://www.infolex.lt/portal/start.asp?act=news&Tema=49&Str=34296>>).

13 Marriage and Family Code. *Official gazette*. 1969, No. 21-186.

A completely different system of the dissolution of marriage is established in the Family Law in Book 3 of the new Civil Code of the Republic of Lithuania (CC)¹⁴ which came into force on 1 July 2001. In any case, marriage shall be dissolved following the judicial procedure. The fault of one of the spouses (or both spouses) is recognised as a ground for the dissolution of marriage. Other two grounds for the dissolution of marriage are related either to the clearly expressed wish of both spouses to get divorced (divorce by the mutual consent of the spouses¹⁵) or the exceptional circumstances which generally do not depend on the will of the spouses (divorce on the application of one of the spouses¹⁶). A number of negative legal consequences shall be applicable to a spouse found by the court at fault for the breakdown of marriage¹⁷. Thus, instead of the previously effective no-fault laws system, the fault-laws system was chosen to regulate the dissolution of marriage. The legal doctrine confirms that it was a deliberate choice of the legislator. It was aimed at differentiating the legal consequences of the dissolution of marriage, borne by the faulty and non-faulty spouse, thus, encouraging awareness of the spouses, strengthening the marriage itself, and preventing divorce¹⁸.

However, the analysis of the divorce case law applying the provisions of the new Civil Code shows that the fault-laws system has been practically refuted.

Firstly, the procedural prerequisites giving the courts considerable discretion over determining the *mutual fault* of the spouses were developed in the case law of Lithuania. Already in 2004 the Supreme Court of Lithuania (SCL) provided an explanation that a claim regarding the dissolution of marriage may be substantiated not only by the statement that a marriage had actually failed because of the other spouse's, i.e. the

14 The Civil Code of the Republic of Lithuania. *Official gazette*. 2000, No. 74-2262.

15 A marriage may be dissolved by the mutual consent of the spouses provided all the following conditions have been satisfied: 1) over a year has elapsed from the commencement of the marriage; 2) the spouses have made a contract in respect of the consequences of their divorce (property adjustment, maintenance payments for the children, etc.); 3) both the spouses have full active legal capacity (Article 3.51 of the CC).

16 A marriage may be dissolved on the application of one of the spouses filed with the court of the district where the applicant resides, if at least one of the following conditions are satisfied; 1) the spouses have been separated for over a year; 2) after the formation of the marriage one of the spouses has been declared legally incapacitated by the court; 3) one of the spouses has been declared missing by the court; 4) one of the spouses has been serving a term of imprisonment for over a year for the commission of a non-premeditated crime (Article 3.55 of the CC).

17 Where a divorce is granted on the basis of the *fault of one of the spouses*, the spouse at fault shall lose the rights of a divorcee under the law or under the marriage contract including the right to maintenance (Article 3.70 (1)). A spouse other than the one determined to be at fault for the breakdown of the marriage may ask the court to rule that the legal consequences of divorce to the interests of the spouses shall be produced from the day of their actual separation (Article 3.67 of the CC). Where a marriage is dissolved on the basis of the fault of one of the spouses, the court may, at the request of the other spouse, prohibit the spouse at fault from retaining his or her married surname, except in cases where the spouses have children (Article 3.69 (2) of the CC). At the request of the other spouse the spouse at fault for the breakdown of the marriage shall return the gifts received from him or her except for the wedding ring unless the marriage contract provides otherwise (Article 3.70 (3) of the CC). However, a divorce based on the *fault of both spouses* shall have no negative impact on either spouses: the same consequences as the dissolution of marriage by the mutual consent of the spouses would apply (Article 3.61 (3) of the CC).

18 See: Mikelėnas, V., *et al. Civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė*. [Mikelenas, V., *et al. Commentary on the Civil Code. Third Book. Family Law*] Vilnius: Justitia, 2002, p. 130.

defendant's, fault, but also by the statement that the claimant or both spouses might also be blamed for the failure of the marriage¹⁹. It was a big advantage to the spouses who were seeking divorce but did not have concrete evidence on the other spouse's fault. Although the interpretations of the SCL were removed from the list of the sources of law²⁰ in 2006, the already established case law did not change. Besides, according to the rule established by the SCL, when considering whether the marriage had failed because of the fault of one or both spouses, the court is not bound by the claimant's request to dissolve the marriage because of the other spouse's fault even in the absence of a counterclaim: it is sufficient for the defendant to set out his/her rejoinders with regard to the fault of the spouse having filed the claim in his/her answer to the claim²¹.

Secondly, courts interpreting the concept of the spouse's fault were constantly lowering the "threshold" for determining the fault and, thus, altering the very concept of the *fault*. For instance, the SCL in its ruling of 28 November 2005 in the civil case No. 3K-3-608/2005 declared both spouses at fault only on the grounds that a spouse who had lived abroad for a long time initiated the divorce proceedings upon return in Lithuania, and that "it was not possible to determine from the case evidence that one spouse was at fault for the marriage break-up". The SCL substantiated its decision to dissolve the marriage due to the mutual fault of both spouses referring to the "lack of loyalty, mutual respect, moral and material support, family neglect and failure to perform other duties", stating that "both spouses were at fault for that; therefore, the marriage had to be dissolved because of the fault of both spouses"²². In another case marriage was dissolved upon the request of the claimant because of the fault of both spouses on the grounds that "living together became impossible because of different attitude towards many values, duties of each of the spouses in handling family matters"²³. In another case the SCL developed probably the most liberal concept of *fault* according to which "having determined the mutual causes for marriage break-up where the degree of fault of any of the spouses cannot be established, the marriage shall be dissolved due to the fault of both spouses"²⁴. Indeed, in separate rulings of the SCL it is possible to notice attempts to seriously consider the concept of *fault* and determine the main duties of the spouses as the

19 Interpretation No. A3-103 of the SCL of 8 April 2004.

20 As stated in the decision of the Constitutional Court of 28 March 2006, "courts of general jurisdiction of greater power (and their judges) may not interfere in the cases considered by courts of general jurisdiction of lower instance, nor give them any instructions, either obligatory or recommendatory, on how corresponding cases must be decided, etc. From the aspect of the Constitution, such instructions (whether obligatory or recommendatory) would be assessed as acting of corresponding courts (judges) *ultra vires*" (see the decision of the Constitutional Court 28 March 2006 regarding the compliance of Item 2 of Paragraph 1 of Article 62, Paragraph 4 (wording of 11 July 1996) of Article 69 of the Law of the Constitutional Court and Paragraph 3 (wording of 24 January 2002) of Article 11, Paragraph 2 (wording of 24 January 2002) of Article 96 of the Law on Courts with the Constitution of the Republic of Lithuania [interactive] [accessed 12-11-2009]. <<http://www.lrkt.lt/dokumentai/2006/r060328.htm>>).

21 Ruling of the SCL of 28 November 2005, civil case No. 3K-3-608/2005.

22 Ruling of the SCL of 28 November 2005, civil case No. 3K-3-608/2005.

23 Ruling of the SCL of 8 March 2006, civil case No. 3K-3-178/2006.

24 Ruling of the SCL of 4 January 2006, civil case No. 3K-3-7/2006.

failure to perform the duties may be considered a proof of a spouse's *fault*²⁵. However, such attempts are unlikely to become a generally followed rule²⁶.

Thirdly, although in Article 3.57 (3) of the CC it is provided that “the court having regard to the age of one of the spouses, the duration of marriage, the interests of the minor children of the family may refuse to grant a divorce decree if the divorce may cause significant harm to the property and non-property interests of one of the spouses or their children”, this Article is practically not applied in the Lithuanian case law.

Fourthly, the Lithuanian legislator having implemented the fault-laws system has also implemented the institute of separation (spouses living separately), i.e. has developed a mechanism granting the right to any of the spouses to file application for divorce also in such cases where the fault of another spouse is absent or difficult to be proved²⁷. However, the separation institute has not taken root and is practically disregarded. Obviously, for the spouses it is easier to apply to court regarding the dissolution of marriage, than initiate separation and the dissolution of marriage afterwards.

The circumstances discussed above allow to state that case law had “amortised” the mechanism of the dissolution of marriage, which was based on a rather strict fault-laws system chosen by the legislator. Such an “amortisation” undoubtedly influences the state family policy since the strict model chosen by the legislator has been adjusted in reality by lessening or nearly eliminating the criterion of *fault*. It may be maintained that due to case law, the fault-laws system was basically rejected and substituted by the no-fault laws system in Lithuania, i.e. what should have been done following the decision of the legislator. A question arises: what reasons determined such tendencies in case law; is it the negative public attitude towards the fault-laws system²⁸, the inertia of courts or are there other reasons? In any case, such developments suggest the potential of the case law as an instrument for the formation of the state family policy.

25 For instance, the ruling of the SCL of 28 January 2008 in the civil case No. 3K-3-14/2008 states that two points are important in determining the instance of failure to perform spousal duties as a condition for dissolution of marriage: 1) nature of violated duties; 2) nature of violation. Speaking about the first point, the Court had stressed that “the fact of violation of spousal duties provided for in Book Three of the Civil Code make the basis for dissolution of marriage at the fault of a spouse but not violation of all his/her duties as an individual in general”.

26 See: Ruling of the SCL of 18 May 2009 in the civil case No. 3K-3-222/2009 where the basis for stating the fault of both spouses is the “violation of moral (but not legal duties as mentioned in the Court ruling of 28 January 2008, civil case No. 3K-3-14/2008 – author’s note) duties of spouses committed by both spouses”.

27 One of the spouses may apply to the court for the approval of the separation if due to certain circumstances, which may not depend on the other spouse, their life together has become intolerable (impossible) or can seriously prejudice the interests of their minor children or the spouses are no longer interested in living together. If the spouses have been separated for over a year, a marriage may be dissolved on the application of one of the spouses. A spouse’s application for divorce shall be examined in a simplified procedure (Articles 3.73 - 3.80 of the CC).

28 A move towards fault-laws system was viewed rather adversely in the outer world. Researches raised doubts on the efficiency of fault-laws system in the modern society. Statements were made that “such systems would support existence of dysfunctional families (conflictive, violent, failing to perform their duties)”. The provisions on divorce prevention were asked not to be confused with the “save the marriage at any cost” attitude (See: Maslauskaitė, A. *Family and Family Policy: Experience and Guidelines of Non-Conservative Policy*. Vilnius: Institute of Democratic Policy, 2005).

2.2. Parents' Obligation to Support their Children

Parents have the duty to maintain their underage (in some cases also adult) children. If for some reasons parents fail to properly fulfil this duty, the state undertakes this obligation²⁹. Therefore, there are no doubts that the legal regulation of children's maintenance is to be regarded as an important area of the state family policy.

We can confidently say that the institution of children's maintenance in Lithuania has been significantly impacted (and still is impacted) by case law.

Firstly, the practical exercise of the child's right to maintenance depends on how the issue regarding the parties' duty to maintain the child (roles of the creditor and the debtor) is solved. In the course of time, the answers to the question about who is perceived as a creditor with regard to the duty to maintain the child (i.e., a person having the right to receive maintenance) have been changing in Lithuania. According to the Marriage and Family Code³⁰, children's rights were derived from those of their parents. Therefore, no wonder that for quite a long time, in the cases when a child's parents lived separately, the courts used to adjudge maintenance not to the child itself, but to the parent with whom the child lived. After Lithuania ratified the United Nations Convention on the Rights of the Child in 1995, the legal status of a child as an independent person with regard to law has changed fundamentally. Case law was the first to react to this conceptual change in the rights of the child. It is noteworthy that precisely in case law, not in the legislation, the essential turning point, which is to be linked to the appearance of the status of the child as an independent person with regard to law in the Lithuanian legal system, is found. When the Marriage and Family Code was still in effect, the SCL in its ruling of 19 April 2000 in the civil case No. 3K-3-471/2000 stated that "the person entitled to the alimony is an underage child, who, according to the law, has the individual right to receive maintenance from its father or mother, whereas the mother or the father claiming alimony for maintenance of the child is not the person entitled to the alimony, but a lawful representative of the underage child. Therefore, when it is established that the father or the mother performs the duty provided for in Article 80 of the MFC and maintains his or her underage children, then alimony for maintenance of such children cannot be adjudged to the other parent as the statutory representative of the child"³¹. The status of the child as an independent person with regard to law was finally consolidated in the new Civil Code of the Republic of Lithuania that clearly and unambiguously separated the child's property rights from the property rights of its parents³². This not only

29 The state is to maintain underage children receiving no maintenance from their parents or adult close relatives who are in a position to maintain the child (Article 3.204 of the CC). Under the Law on Children's Maintenance Fund, the Fund is to pay child maintenance that has been awarded by the court's decision or stipulated in a child's (children's) maintenance agreement approved by the court and, in the case the child receives only a part of the fixed child maintenance, the difference between the amount awarded by the court's decision or stipulated in a child's (children's) maintenance agreement approved by the court and the amount actually paid by the debtor. In both cases, the payment from the Fund for one child per month is not to exceed 1.5 MSL (minimum standard of living).

30 Marriage and Family Code. *Official gazette*. 1969, No. 21-186.

31 Ruling of the SCL of 19 April 2000, civil case No. 3K-3-471/2000.

32 Paragraph 1 of Article 3.185 of the CC establishes that "property owned by underage children shall be man-

entitled but also obliged the courts to consider the child as an independent person in the legal relationship of maintenance. For case law it is of utmost importance to consistently continue to move in this direction³³.

Secondly, the Marriage and Family Code which was in effect in Lithuania until 1 July 2001, provided for a uniform criteria for establishing the amount of maintenance (alimony) to be adjudged to parents: one fourth of the earnings (income) of the parents for one child, one third for two children, a half for three and more children, but in any case not less than one minimum standard of living (MSL) for each child³⁴. Meanwhile, the new Civil Code provides neither a uniform formula (percentage) for the calculation of the child maintenance, nor the minimum amounts for the maintenance of the child to be adjudged. Instead, paragraph 2 of Article 3.192 of the CC provides for the main principles for establishing the amount for the child's maintenance, pursuant to which "the amount of maintenance must be commensurate with the needs of the children and the financial situation of their parents; it must ensure the existence of conditions necessary for the child's development"³⁵. Thus, the law gives the discretion of establishing the specific amount of maintenance to the court examining the case. It can be stated that in this way the legislator has consciously transferred some of the competence to courts that had to solve a rather socially than legally complicated matter. The courts have readily assumed this competence. First of all, the legislator's choice not to establish the *average* amount of the child's maintenance to be adjudged was assessed as a gap in the law that had to be filled in by analogy. In one of the first of such cases, the SCL, drawing an analogy with paragraph 2 of Article 6.461 of the CC, established that if the contract of life annuity is made, the value of the total amount of maintenance per month may not be less than the amount of one minimal monthly wage (MMW), and noted that "this criterion must also be applicable when deciding on the maintenance of children"³⁶. In another case, the SCL made an analogous statement that "indicative criteria for establishing the amount of

aged by the parents under right of usufruct". Article 3.186 of the CC establishes the general principle of managing the child's property: "parents must manage their underage children's property by giving paramount consideration to the interests of the children".

- 33 For example, the SCL stated in the civil case No. 3K-3-364/2003 that maintenance intended for the child must be used only for the child's interests (paragraph 1 of Article 3.203 of the CC), as the property and monetary funds received for maintenance purposes is the child's property. After the Civil Code of 2000 came into effect on 1 July 2001, the property rights of children and parents were separated. Article 3.185 of the CC establishes that parents or one of them with regard to the child's property have the right only to manage it (usufruct). This rule consolidates the general principle that the property of children and the property of parents are separate: children are not owners of their parents' property, whereas parents are not owners of their children's property. If it is determined that the respondent performs his duty properly, there is no basis for adjudging maintenance to him, as remedies for the protection of civil rights (including the obligation to fulfil the duty in kind) are applicable only if an infringement of a right is stated.
- 34 Marriage and Family Code of the Republic of Lithuania. *Official gazette*. 1969, No. 21-186.
- 35 It is noteworthy that the legal doctrine explains this change in the systems to be due to the change in the economic and social reality of the life of the society, which displaced the economic equality, equal quality of life of all members of the society, the guaranteed work pay and other social conditions, the presence of which used to make it possible to establish in the law certain mandatory limits of the child's maintenance, that would be within the possibilities of parents in any case (cf. Mikelėnas, V., *et al.*, *supra* note 18, p. 374).
- 36 Ruling of the SCL of 13 May 2002, civil case No. 3K-3-713/2002.

maintenance to be adjudged can, for example, be the provision of paragraph 2 of Article 6.461 of the CC to the effect that the value of the total amount of maintenance per month may not be less than the amount of one minimal monthly wage (MMW). Such criteria can be applicable, taking into account specific circumstances and making a decision on the maintenance of children³⁷.

Pronouncing on the *minimum* limit of the amount of the maintenance of the child to be adjudged, the SCL has stated more than once that the minimum amount of the maintenance of one child must be 1 MSL³⁸. Difficult financial situation of parents is usually to be regarded as a reason for adjudging a smaller amount of maintenance (paragraph 2 of Article 3.192 of the CC), but “in no case should it be less than the minimum standard of living (MSL)”³⁹.

Thirdly, after the amendment to Article 3.194 of the Civil Code (which came into force on 26 November 2004) the Civil Code regulates not only the relations which appear when the parents do not fulfil their duty to provide their underage children with material support (or they did not agree on the support of their underage children), but also the relations which are linked to the powers of the court to adjudge support to the children of full legal age, to whom the support is necessary and who study at day-time departments of secondary, higher education or vocational schools and who are not older than 24 years of age⁴⁰. However, in 2007 the Constitutional Court ruled that the aforementioned amendment to the Civil Code establishing that the court must in all cases adjudge (that it does not have powers not to adjudge) the support from the parents (or one of them) to the person of full legal age, to whom the support is necessary, who has acquired secondary education and who still studies at the day-time department of a higher education or vocational school, provided he is not older than 24 years of age, is in conflict with the Constitution of the Republic of Lithuania. It was also stated that as “the adjudgment of support for the persons of full legal age may not be grounded on the same principles as for the underage children”; therefore, “there are big gaps in the legal regulation”. However, the Constitutional Court noted that it “does not mean that the courts, which decide cases where they face the issue of application of paragraph 3 of Article 3.194 of the Civil Code, can choose not to decide them only because of the fact that the legislator has not yet properly regulated the corresponding relations by the law”⁴¹.

37 Ruling of the SCL of 26 April 2004, civil case No. 3K-3-259/2004.

38 Ruling of the SCL of 13 May 2002, civil case No. 3K-3-713/2002.

39 Ruling of the SCL of 26 April 2004, civil case No. 3K-3-259/2004.

40 Under paragraph 3 (wording of 18 July 2000) of Article 3.194 of the Civil Code “the court shall adjudge support until the child attains full legal age except in cases where the child lacks capacity for work due to a disability determined before the full legal age or when the support is necessary to the child when he studies at day-time departments of secondary, higher education or vocational schools and he is not older than 24 years of age.”

41 The ruling of the Constitutional Court of the Republic of Lithuania of 7 June 2007 “On the compliance of paragraph 3 (wording of 11 November 2004) of Article 3.194 of the Civil Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania” [interactive] [accessed 12-11-2009]. <<http://www.lrkt.lt/dokumentai/2007/r070607.doc>>.

The fact is that the legislator remained silent in this regard: no laws were passed to implement the aforementioned ruling of the Constitutional Court. Moreover, no draft laws have been registered yet. Thus, courts remain the only power to formulate and express the state's position on the principles of parents' obligation to support their full age children. The Supreme Court of Lithuania has done it repeatedly in several cases⁴² creating the main principles in this regard, for instance:

- parents' maintenance of their full age child <...> is to be adjudged subject to the fulfilment of the entirety of legal conditions: the child is studying in a day-time department of the secondary school honestly and with good evaluations; the child needs support and the parents have a possibility to provide it. Good evaluations in the secondary school <...> would be evidenced by the promotion of the pupil to the next grade with satisfactory annual marks or the admission to graduation exams and the passing of such exams;
- if all types of income of the child and property the child owns are sufficient to ensure the meeting of his basic needs, such a pupil cannot be recognised a party to the relations of maintenance regulated by paragraph 3 of Article 3.194 of the CC;
- adjudging maintenance of a full age pupil from parents that themselves are in need of support, care, etc. would be in breach of the principles of justice and reasonability in legal family relations;
- in deciding the issue regarding maintenance of a full age child who is studying in a day-time department of the secondary school and who needs support, possibilities of parents, their duties to other persons (*inter alia* underage children, other family members, dependants) may not be overlooked; etc.

It is obvious that in this way the gap in the law that appeared due to omission of the legislator was not simply filled. It is highly probable that sooner or later the legislator will have to consider the issue of establishing the abovementioned principles in the law. If that happened, we could speak about a peculiar precedent of forming the state family policy when the policy formation initiative lies with the judiciary. We tend to be of the opinion that there exist more than enough reasons for this to happen.

2.3. Protection of the Rights of Children Born Outside Marriage

If we were looking for positive examples of the legacy of the Soviet law in the Lithuanian law, one of them would be the protection of the rights of children born outside marriage⁴³. It can be said with confidence that Lithuania would never have had

42 Ruling of the SCL of 25 May 2009, civil case No. 3K-7-204/2009.

43 To the socialist ideology attempts to discriminate people, including discrimination on the basis of a person's origin were alien. That, in its turn, had an effect on the laws applicable to the procedure of establishing fatherhood, mutual rights and duties of parents and children, parents' disputes regarding the child: they practically contained no restrictions of rights applicable to children born out of wedlock and their parents. Parents were guaranteed the same rights with regard to the child, no matter whether the child was born to married or unmarried parents. The only basis for the appearance of the parental power is deemed to be the child's origin from specific persons, confirmed under the procedure established by the laws. The procedures of establish-

problems in connection with infringement of rights of such children similar to those that some of the democratic countries in the Western Europe had in their own time⁴⁴.

The Lithuanian law confidently declares the equality of the legal status of both “illegitimate” and “legitimate” children, the equality of their rights⁴⁵. The Law on Fundamentals of Protection of the Rights of the Child⁴⁶ stipulates that “every child shall enjoy equal rights with other children and cannot be discriminated for reasons of gender, age, nationality, race, language, religion, convictions, social, monetary and family position, state of health of the child or his parents or other legal representatives of the child or any other circumstances” (Article 4). Paragraph 5 of Article 3.161 of the Civil Code establishes that “children born within or outside marriage shall have equal rights”. Due to all of the above, the ratification of the 1975 European Convention on the Legal Status of Children Born out of Wedlock made in 1996 did not introduce any essential changes into the Lithuanian legal system.

The above circumstances allow to believe that there should be no problems with regard to this area of the family policy; thus, in this aspect there is not much for the courts to do. Still, there are some exceptions.

In order to protect the child’s right to a place to live, Article 3.71 of the Civil Code provides for the right of an underage child to use a dwelling place when the child’s parents divorce: “[w]here the matrimonial dwelling is owned by one of the spouses, the court may make an usufruct order and allow the other spouse to remain in the matrimonial dwelling if their minor children live with him or her. The usufruct order shall be valid until the child (children) attain majority.” This legal regime may not be changed by an agreement of the spouses. Still, establishing these provisions, the legislator has not thought of the analogous rights of illegitimate children and did include any corresponding provisions⁴⁷. No wonder that Lithuanian courts soon had cases where this problem needed to be solved.

In 2006 the SCL examined the case where the claimant (the child’s mother), with whom the child’s was determined to reside, requested to establish the right of usufruct to the apartment owned by the defendant (the child’s father). As the child’s father and mother had never been married, the Court had to decide whether Article 3.71 of the CC can also be applicable in the case when a child is born outside marriage; therefore, the SCL stated that “[t]he European Convention on the Legal Status of Children Born out

ing fatherhood (motherhood) in the Lithuanian law have always been (both when the Marriage and Family Code was in effect and now, when the new CC came into effect) flexible, not burdened with any formalities, enabling to use the realistic method of determining the child’s origin (i.e. based on blood ties).

44 Cf. Cases of the European Court of Human Rights *Marckx v. Belgium* (Application No. 00006833/74), *Inze v. Austria* (Application No. 8695/79), *Kroon v. Netherlands* (Application No. 18535/91), etc.

45 It is important to note that the concept of “illegitimacy” has never been used in the Lithuanian law: it is replaced by the non-offensive concept of “children born outside marriage” (Lith. *nesantuokiniai vaikai*).

46 The Law on Fundamentals of Protection of the Rights of the Child. *Official gazette*. 1996, No. 33-807.

47 Paragraph 5 of Article 3.234 stipulates that “the dwelling house or the flat which belonged to one of the cohabitantes before their life together can be left to the other cohabitee under right of usufruct if he or she has underage children born to the cohabitation or due to health, age or other important reasons does not have his or her own dwelling place.”). However this article, as well as the entire chapter of the Code regulating cohabitation, has not come into force yet.

of Wedlock, the constitutional principle of equality of persons (paragraph 1 of Article 29 of the Constitution) substantiate the necessity to equally defend rights of children both of married and unmarried parents <...>. Taking into account that there is no rule of law directly providing for guarantees for the rights of children of unmarried parents and parents who have not registered their partnership in the aspect of the survival of the right to use a dwelling place, <...> the effective Article 3.71 of the Civil Code, which provides for such guarantees protecting children's rights when the child's parents are married, is to be applied by analogy". Rejecting the respondent's arguments that the establishment of usufruct would be in conflict with the principle of inviolability of his property provided for in Article 23 of the Constitution, the Court noted that "this principle is not absolute and the restriction can be imposed on a person's property on the grounds provided for in the law, inter alia for protection of children's rights and interests, leaving an underage child the right to use a dwelling place by the right of usufruct"⁴⁸.

This significant precedent was later referred to in other cases of the SCL. For example, referring to it, in the case examined in 2008 the SCL admitted that "both the parents must ensure a dwelling place for the child irrespective of whether or not the father is registered as the child's father in the statements of civil status, as the child's origin from his parents, on which mutual rights and duties of the child and parents are founded, is confirmed from the date of the child's birth and creates related rights and duties under the law from that date". In the Court's view, a breach of this duty is a basis for making the father subject to civil liability; therefore, the compensation to the child's mother was awarded for a part of the expenses of acquisition of a dwelling place for the child and herself⁴⁹.

It can be stated that such a case law guarantees the consistency of the state family policy in respect of children born outside marriage. As in the case regarding the maintenance of children of full legal age discussed above, the judiciary, in the presence of defects in the work of the legislator, is capable of preventing essential violations of human rights. This is an evidence that case law can be an efficient and reliable instrument for the formation of the state family policy.

Conclusions

The article discusses just a few areas of the state family policy where case law plays an important role. Of course, a variety of such areas exists (e.g., the intervention of the state into family, guardianship, adoption of children, etc.), besides, some of them go beyond the limits of the relations regulated by family law. In spite of that, it can be stated that the court, as one of the constituent parts of the state power, has a potential to influence the state family policy. It is obvious that the influence of case law is most noticeable in those areas of the state family policy where the legislator consciously gives courts the discretion to decide on certain issues. Still, there are quite a few cases

48 Ruling of the SCL of 26 April 2006, civil case No. 3K-3-302/2006.

49 Ruling of the SCL of 9 October 2008, civil case No. 3K-3-383/2008.

when courts are made to assume an active role, for example, when the legislator leaves gaps in legal regulation or does not react quickly enough to the changes in the context of social relations. In such cases, there is a risk of the absence of a uniform attitude of the state to certain aspects of the family policy. Logically, there is a problem: what is the most suitable instrument for the formation of the state family policy in the modern fast-changing society? It is obvious that in a contest of this type case law would hold a very strong position.

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TEISMŲ PRAKTIKA KAIP VALSTYBINĖS ŠEIMOS POLITIKOS FORMAVIMO PRIEMONĖ

Gediminas Sagatys

Mykolo Romerio universitetas, Lietuva

Santrauka. Straipsnyje siekiama atskleisti, kokių vaidmenį formuojant valstybinę šeimos politiką Lietuvoje turi (jei apskritai turi) teisminė valdžia. Šiam tikslui pasiekti pirmiausia atskleidžiamos teisinės šeimos politikos formavimo prielaidos. Nors pozityviosios teisės analizė sudaro pagrindą manyti, kad valstybinės šeimos politikos formavimas yra įstatymų leidžiamosios valdžios funkcija, praktika rodo, kad ši funkcija nesvetima ir vykdomajai valdžiai. Pastarųjų metų konstitucinė doktrina, įtvirtinusi teismo precedento kaip teisės šaltinio vaidmenį, leidžia kalbėti ir apie teisminės valdžios įtaką šeimos politikai. Daroma išvada, kad teisminė valdžia nėra kaip nors konstituciškai atribota nuo šeimos politikos formavimo. Toliau straipsnyje tiriama, kaip šią funkciją teisminė valdžia įgyvendina praktiškai. Analizuojant Lietuvos teismų praktiką pasirinktose srityse (santuokos nutraukimas, vaikų išlaidavimas, nesantuokinių vaikų teisių apsauga) identifikuojama reali teisminės valdžios įtaka valstybinei šeimos politikai. Ši įtaka pasireiškia įvairiai: šalinant įstatymų leidėjo paliktas teisės spragas, nustatant konkrečius valstybinei šeimos politikai reikšmingus kriterijus tais atvejais, kai įstatymų leidėjas apsiriboja bendrų principų nustatymu, perkeltiant tarptautinius žmogaus teisių standartus į nacionalinę teisinę sistemą ir t. t. Vienas iš kontroversiškiausių teismų praktikos įtakos šeimos politikai būdų – įstatymuose įtvirtintų teisinio reguliavimo modelių modifikavimas (tai pirmiausiai pasakytina apie santuokos nutraukimo institutą – čia teismų praktika „amortizavo“ įstatymų leidėjo pasirinkimą įtvirtinti pakankamai griežtą fault-law sistema grindžiamą santuokos nutraukimo mechanizmą).

Apibendrinant atliktą tyrimą daroma išvada, kad teismų praktika gali būti veiksmingas ir patikimas valstybinės šeimos politikos formavimo instrumentas šiuolaikiniėje greitai besikeičiančioje visuomenėje. Straipsnyje keliama mintis ir dėl teismų praktikos pranašumų šioje srityje: ji visuomet yra lankstesnė ir labiau orientuota į žmogų, o esant įstatymų leidėjo darbo brokui, ji yra pajėgi operatyviai užkirsti kelią žmogaus teisių pažeidimams.

Reikšminiai žodžiai: šeimos politika, šeima, teismų praktika, teismai.

Gediminas Sagatys, Mykolo Romerio universiteto Teisės fakulteto Civilinės ir komercinės teisės katedros docentas. Mokslinių tyrimų kryptys: šeimos teisė, civilinė teisė, konstitucinė teisė.

Gediminas Sagatys, Mykolas Romeris University, Faculty of Law, Department of Civil and Commercial Law, associated professor. Research interests: family law, civil law, constitutional law.