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## IMMUNITY OF A CLOSE PERSON AS A WITNESS IN CRIMINAL PROCEDURE OF LITHUANIA: PROBLEM WITH SUFFICIENCY

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***Annotation.** This article analyzes the issues of content and scope of the immunity of a close person as a witness in criminal procedure of Lithuania. The question on sufficiency of this immunity is raised because protection of a personal and family secret in criminal proceedings depends upon it. The author also perceives uncertainty of the actual and legal status of a close person as a family member, while ascertaining and implementing one of the most important additional guarantees granted for witnesses. The following propositions are formulated: as regards witness' immunity from obligation to testify against a member of his/her family or against his/her close relative, it is necessary to assess not only the formal aspects of the concepts "family" or "marriage", but also the actual nature of the relations of persons who are bound by family or similar ties.*

***Keywords:** close person, witness, family, immunity, criminal procedure, sufficiency.*

## Introduction

Protection of a personal or family secret and determination of truth in criminal case are procedures, which (as it may seem) are neither directly interconnected, nor have a final common purpose. Moreover, they serve as social objectives that are supposedly self-dependent, to say nothing about the common tools assigned for their achievement. However, analysis of the content of these values in social, legal and philosophical contexts reveals that in order to determine the truth in a criminal case and implement other objectives of criminal justice, the protection of personal and family secret is particularly topical and relevant. It is closely related with assignment of criminal procedure. Indeed, the right of a member of the offender's family or a close relative to refuse testifying or to reply only to certain questions, which is provided by the law, symbolizes one of the cornerstone values protected by the state, and one of the pursuits consolidated in the Constitution, i.e. family interests. Family interests are unarguably considered to be one of the most important cores of social life, without which any procedure becomes senseless and lacks a social basis. Thus it is natural that the phenomenon of family relations in criminal proceedings makes this consideration more sensitive and adequately, further protective mechanisms are needed.

The issue of a close person's immunity in the criminal procedure of Lithuania, which has attained only several discussions to this date, is one of such questions in theory and practice that still awaits for the definite answer. The author of the paper doubts whether the immunity, which is actually analyzed in practice, is correctly assessed, and whether its content and scope are really clear. Most people claim that immunity is clear and it is inexpedient to talk about it any further. However, the phenomenon of this immunity is particularly unknown, and the content of the concept "family" is ambiguous. One of the unclear questions is as follows: what is the meaning of the family member's immunity in criminal proceedings? Are we talking about the so-called official, "legal" family, or could the actual nature of the family relations also be implied, in spite of the fact that from the legal point of view the family does not exist, but the same cannot be said about the actual situation, and etc. Thus, this reasoning should be directly related with certainty of the procedural status of a witness, who is a offender's close person, in criminal proceedings. All of this determines the purpose of this scientific paper, which could be defined as follows: to scrutinize the essence and content of witness (as an offender's close person) immunity, and the scope of its application in the context of criminal cases.

The object of the scientific paper: the content of witness' immunity, which is being analyzed, the legal mechanism of operation of this additional guarantee, and its relations with the institutes of other branches of law.

The historical, genetic and comparative methods, the methods of systemic analysis and of the document analysis, as well as other scientific methods have been applied for the purposes of this scientific paper.

The issue of witness' immunity in criminal procedure has been analyzed in one way or another in scientific articles of certain authors.<sup>1</sup> However, while assessing the extent to which the analyzed problem has been investigated in these papers, it should be acknowledged that there is still a lack of attention paid to the problems that are related with the analyzed scope of the immunity, the field of its application, and finally, with its actual and legal explicitness.

## 1. Essence of Close Person's Immunity in Criminal Procedure

The right of the family members of a suspect or an offender, or his/her close relatives to refuse testifying, which is provided in Article 82(2) of the Code of Criminal Procedure<sup>2</sup> (hereinafter referred to as the CCP), is the witness' immunity of personal nature aimed at protection of personal or family secrets. It is one of the guarantees of preservation of harmony in a family, whether it is an actual or formal union, or relations related with family ties. This provision permits protection of close persons - this concept in the context of analysis of the present paper covers family members and close relatives - against any interference into personal family space. Any interference into relations of a family (as the basis of society and state protected by the Constitution) that is not reasonable or neglects the social balance, is seen as destroying the stability within society. The Constitutional Court of the Republic of Lithuania stresses the aspiration and necessity to protect the family relations: “*Construing the said constitutional norms in a systematic manner, it needs to be noted that Part 2 of Article 38, Part 1 of Article 39 and Part 2 of Article 41 of the Constitution are to be linked with Part 1 of Article 38, thereof establishing that the family shall be the basis of the society and the state. The provisions of Parts 1 and 2 of Article 38 of the Constitution mean the obligation of the state to establish such legal regulation by laws and other legal acts, which might ensure that the family, as well as motherhood, fatherhood and childhood, would be fostered and protected in all ways possible as the constitutional values.*”<sup>3</sup> The family is one of the most ancient institutions of the society; it is an essential value from the social and metaphysical viewpoint. Since

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- 1 *Report on Competence and Compellability of Spouses as Witness*. Dublin: The Law Reform Commission, 1985, p. 1; *Witness – Privileged Communications – Husband and Wife – Asking Incompetent Questions. Criminal Law Magazine & Reports*. 1891, 12: 436-449; *Competency of Wife as Witness against Husband – Evidence. Criminal Law Magazine & Reports*. 1891, 13: 358; Green, M. S. *The Paradox of Auxiliary Rights: the Privilege against Self-Incrimination and the Right to Keep and Bear Arms. Duke Law Journal*. 2002, 52: 133; Stewart, H. *Spousal Incompetency and the Charter. Osgoode Hall Law Journal*. 1997, 34(3): 412-413; Woolley, A. *Excluded by Definition: Same-Sex Couples and the Right to Marry. University of Toronto Law Journal*. 1995, 45: 471; Sagatys, G. *The Right of the Child to Family Relations in the European Convention of Human Rights and Fundamental Freedoms and in the Law of the Republic of Lithuania*. Doctoral Dissertation. Social Sciences (Law). Vilnius: Law University of Lithuania, 2004, p. 32.
  - 2 *Code of Criminal Procedure of the Republic of Lithuania. Official Gazette*. 2002, No. 37-1341.
  - 3 *The Constitutional Court of the Republic of Lithuania, Ruling of 13<sup>th</sup> of June, 2000 “On the compliance of Item 5 of Article 1, Parts 3 and 4 of Article 10, Part 1 of Article 15, Article 20, Item 2 of Article 21, Part 2 of Article 32, Parts 2, 3 and 4 of Article 34, Items 2 and 5 of Article 35, Item 2 of Article 37 and Items 2 and 3 of Article 38 of the Republic of Lithuania Law on Education with the Constitution of the Republic of Lithuania”.* *Official Gazette*. 2000, No. 49-1424.

ancient times, spiritual teachers, philosophers, theologians, lawyers, educators and specialists of other fields have devoted their attention to the notion of family. According to sociology, a family is a group of people who are united by their kinship, relations of marriage or child adoption, and household-management combination, the members of which are familiar with each other and communicate according to the roles of a husband and wife, mother and father, son and daughter, brother and sister.<sup>4</sup> It follows that the immunity of a family member – a close person, as a witness in ongoing criminal proceedings, symbolizes a clear and unambiguous obligation of the state to maintain the balance of protected values. The protection of family relations, as the process and the result to be pursued, cannot be trampled in the context of execution of justice, otherwise such justice would not be fair, notwithstanding its lawfulness. The meaning of this immunity is derived from the person's bias towards his/her own and the nature of a close person. The author of "Leviathan," philosopher Thomas Hobbes, analyses these issues. According to him, "a covenant to accuse oneself, without assurance of pardon, is likewise invalid. [...] The same is also true of the accusation of those by whose condemnation a man falls into misery; as of a father, wife, or benefactor. For the testimony of such an accuser, if it be not willingly given, is presumed to be corrupted by nature, and therefore not to be received."<sup>5</sup> From the philosophical point of view, if a person has to testify against his/her close person, it means that he/she cannot behave otherwise than not to keep to his/her word, which in turn forms the witness' faithfulness to his/her close person. It is worth to invoke the insights of Cicero herein, who claimed that if the person is forced to infringe his/her word, then he/she is forced to become a non-reliable witness.<sup>6</sup>

Historically, the idea of the analyzed immunity is derived from a principle that was formulated in countries observing the *common law* tradition at the beginning of the XVII century. In accordance with the principle, a wife could not testify in favor or against her husband (lat. – *quia sunt duae animae in carne una*).<sup>7</sup> However, this principle had exceptions. At the trial of *Lord Audley* (1631) it was admitted that a spouse could testify against her spouse in a case, where a husband is prosecuted for raping his wife. Such exceptions have also been applied in cases of wife murder by poisoning, restriction of freedom, and forcible marriage. In bigamy cases, one of the spouses from a second marriage (when the second marriage was concluded without having dissolved the first marriage) could testify against his/her spouse, who has concluded two marriages. This principle resulted in shadow precedent, stipulating formation of judicial practice in one or another direction later in the end of the XIX century. The rule that a person could not testify against the other former spouse if the circumstances which had to be testified upon became known to the spouse while being in wedlock, was formulated in the United

4 Maksvytis, S. Unity and Indissolubility of Christian Marriage (according Canon 1056). *Soter*. 2008, 28(56): 113.

5 Hobbes, Th. *Leviathan*. Vilnius: Pradai, 1999, p. 152.

6 Kučinskienė, A. Cicero's Attitude to Greek and their Culture. *Culture*. 2006, 48(3): 72.

7 *Report on Competence and Compellability of Spouses as Witness*. Dublin: The Law Reform Commission, 1985, p. 1. See also: Witness – Privileged Communications – Husband and Wife – asking Incompetent Questions, p. 436–449.

States of America already in the year 1890 (the cases *Monroe v. Twisleton* and *Commonwealth v. Sapp*). It was the rule of absolute nature because such prohibition did not provide any expiry term. In practice, the prohibition to testify was not applied if a person became aware of the circumstances of a former spouse's criminal deeds already after dissolution of their marriage, despite the fact whether these criminal deeds were committed while they were in wedlock, or after dissolution of their marriage.<sup>8</sup> It was not prohibited to testify against a close person after dissolution of marriage on the *vinculo matrimonii*<sup>9</sup> grounds. All of these historical examples, although fragmentary, prove that the analyzed immunity since ancient times has been significant in social relations, including the legal relations. The truth is that this guarantee had both its supporters and opponents. The author Jeremy Bentham was one of them; while criticizing the social value of this immunity, he wrote that “*social shelter for criminals should not be built with the help of this immunity; on the contrary, it is necessary to destruct any mutual trust between them and if it is possible, even in the abyss of their family.*”<sup>10</sup> “*Such phenomenon does not have any moral substantiation; it cannot be substantiated neither from the point of view of its conception, nor from the point of view of its function. All this can be named as the constitutional mistake*”<sup>11</sup>, – Bentham's congenial author Michael Steven Green wrote. Indeed, the path of evolution of the close person's immunity in criminal procedure was diverse; it had both critics and supporters. However, today it is clear that the mentioned additional guarantee of protection of rights and freedoms in criminal procedure serves not only the direct addressee, i.e. the family member, but is also deemed as the state's method to increase the society's self-reliance.

The immunity of a close person as a witness in criminal procedure is established and applied in many criminal laws of the European states. According to Paragraph 52(1) of the Code of Criminal Procedure of Germany, an offender's fiancé / fiancée, a spouse (even in case the marriage is dissolved), a direct relative or a former direct relative, or a person related to marriage, whose partner is or was accused, and etc., can make use of his/her right to refuse testifying. According to Paragraph 2 of Chapter 36 of the Code of Judicial Procedure of Sweden, a spouse, a former spouse, a relative by kinship or marriage, a defendant's brother or sister, a person bound or formerly bound by marital ties with the defendant's brothers or sisters, etc., are not obliged to testify. According to Article 182 of the Law on Criminal Procedure of Poland, an offender's close relatives have the right to refuse testifying. This right also remains valid in case of former legal relations of marriage or child adoption. According to Paragraph 122 of the Code of Criminal Procedure of Norway, an offender's spouse, direct relatives, brothers, sisters and relatives related to an offender's marriage are released from the obligation to testify. These provisions are also applied to former spouses and persons who live together

8 Competency of Wife as Witness against Husband – Evidence, p. 358.

9 Eng. “from the bond of marriage”.

10 Литвинцева, Н. Ю. *Процессуальный статус свидетеля в Российском уголовном судопроизводстве*. Диссертация на соискание ученой степени кандидата юридических наук. [Litvinceva, N. U. *Procedural Status of Witness in Russian Criminal Procedure*.]. Иркутск, 2005, с. 110.

11 Green, M. S., p. 133.

without entering into marriage (cohabitants). The child adoption relations are equated to the family relations. Norwegian courts have the right to release an offender's fiancé / fiancée, his/her guardian and his/her wards from the obligation to testify. According to Article 158 of the Code of Criminal Procedure of Albania, close relatives of an offender are released from the obligation to testify, except in cases when they are accused as well as the spouse of being aware of the facts that became known to him/her while being in wedlock with the offender. The immunity also applies to former spouses, cohabitants, and persons who are bound to an offender with legal relations of child adoption. According to Chapter 20 of the Code of Judicial Procedure of Finland, a spouse or a former spouse, as well as a fiancé / fiancée of the party of the case, a close relative, spouses' brothers and sisters, adopted children and guardians are not obliged to testify against their will. All these examples of legislation applied abroad prove that the analyzed immunity depending upon the legal traditions and foundations of social relations is sufficiently wide in criminal justice related with family and kinship relations. The immunity may be applied not only by an offender's spouse, family members or close relatives, but also by a person who has the status of a fiancé's / fiancée's or a cohabitant, and even a former spouse. Thus, it could be presumed that the immunity is applicable not only in case of persons who are bound by formal legal ties, but also as regards persons' actual relations based on ties of kinship, commitments, morals, constancy of relationships, trust and other social relations, proving the moral closeness, interference into which would mean destruction of a future family or another similar union. Therefore, it is to be accepted that a witness' right to refuse testifying is based not only of legal relations of a family, but also on such value categories as conscience, compassion, etc., which are the vases of relations of a witness' and his/her close persons. A professor of the Toronto University Hamish Stewart made some correct observations on this issue while analyzing the immunity (competence) of family members. He stated that in essence two reasons justify the immunity of a family member from his/her obligation to testify against his/her close person. One of these reasons is a witness' interest in circumstances of the case and its result. While talking about the second one, the author notes that a family member cannot be forced to testify against his/her close person, for example, against the other spouse, because "*the husband and the wife in the family are deemed to be one person in law.*"<sup>12</sup> Indeed, while taking into consideration the first reason, an interest means interest in each person's, as well as a witness', constituent condition of existence in a lawsuit, as it is a person's natural demand for self-preservation.<sup>13</sup>

Thus, the prohibition or impossibility to force a family member or a close relative to testify against his/her will reflects the essence of the close person's immunity in criminal procedure. Any different position on interests of persons bound with family or other close personal ties, even if it is related with the requirement to determine the truth in a criminal case, is unjustifiable. Protection of family ties and interests of justice as values should be regulated; a social compromise between them should be pursued. Such

12 Stewart, H., p. 412–413.

13 Jurka, R. Controversial Aspects of the Existence of Witness' Interest in the Criminal Procedure. *Jurisprudence*. 2009, 1(115): 362.

social compromise should secure human dignity and honor, inviolability of private life, non-divulgement of personal and family secret, and of course, the right to fair trial.<sup>14</sup> Therefore, it is certainly true that criminal procedure in democratic states cannot be “unilateral”, whereas other rising interests, and particularly the interests that are related to protection of family harmony, should not be undermined.

## 2. Problem of the Scope of Immunity

The analysis of the right to refuse testifying or the right not to reply to certain submitted questions allows to conclude that the analyzed immunity is relative. It means that the state provides persons with the discretion to resolve whether to disclose or not to disclose the secret; the legal practice also substantiates this conclusion: “[...] *the suspected person’s and the offender’s family members or close relatives may not testify at all or may not answer certain submitted questions. The data of the lawsuit [...] prove that R. D. spouse and son refused to participate in the investigative operations and expressed their unwillingness to provide evidence about the circumstances of the case, known to them.*”<sup>15</sup> Furthermore, even the clearly (voluntarily) expressed decision to testify is deemed to be relative because a person has the right to decide freely, which questions are to be answered and which are not to be answered, depending on their content. Article 188 of the Code of Civil Procedure establishes the right of the parties or third persons to refuse the examination, and Article 191 of the same law defines the catalogue of the witness’ rights and obligations. Witnesses may refuse explaining and testifying, if such explanations or evidence would be inexpedient for themselves, their family members or close relatives (Article 188 and Part 2 of Article 191 of the Code of Civil Procedure). If the mentioned persons agree to submit such explanations and to testify, they are obliged to submit the truthful explanations and evidence to the court. In such cases, as it is stated in literature, the person’s potential possibility (actual and legal) to act as a witness directly depends on his/her kinship or family ties with the persons, participating in the lawsuit, and upon that person’s consent (dissent) to provide appropriate evidence.<sup>16</sup>

Moreover, a question arises how the concepts “family members” or “close relatives” and their legal status should be construed in the field of criminal procedure law; this is directly related with the scope of immunity. Indeed, although these concepts are defined in Articles 15 and 38 of the CCP, a number of miscellaneous questions may arise while assessing and applying these provisions in practice. For example, how should the legal status of a person, who was a family member (e.g., a spouse) when the offender committed the criminal deed, be construed with taking into consideration the fact that the marital legal relations between those persons were later dissolved by court? Secondly, does a person have the right to refuse testifying against a suspect or an accused, if

14 Jurka, R. Prohibition to Compell the Persons to Give Evidence against Themselves as the Constitutional Guarantee in the Criminal Procedure. *Jurisprudence*. 2006, 1(79): 34.

15 Supreme Court of Lithuania, Criminal Division Ruling of 22 of June, 2007 (case No. 2K-445/2007).

16 Lauzikas, E.; Mikelenas, V.; Nekrosius, V. *Civil Procedure Law*. Vol. I. Vilnius: Justitia, 2003, p. 473.

the person and the offended are not bound by marital nor extramarital (common marriage without registration) ties, but the person is the offender's fiancé / fiancée? Thirdly, can a former spouse who became aware of important circumstances after dissolution of the marriage, and who has a common child with the offender, make use of the analyzed immunity? Fourthly, what kind of decision should be taken in the following situation: a witness *X* and a suspect *Y* had been living together from 2000 to 2009, excluding three years, when *Y* served his sentence in prisons. A child was born to *X* and *Y* in 2003. *X* was officially married to another man; however, they had not actually been living together since 2000, whereas their marriage was dissolved only in 2009. Thus, taking into consideration this particular case, how should *X*'s right not to testify against *Y* be construed and is such right substantiated? There are many similar or other related questions. Thus, it is necessary to analyze and to construct clear grounds for possible decisions, in order to find the answers to these and other questions.

It would seem that no big problems should arise while assessing the concept of family members, who can make use of the immunity against an obligation to testify. As it was already mentioned, the relevant criminal laws define the concepts "family members." Moreover, the sources of these legal acts also confine to general attributes of this concept, which are related with provisions of civil laws. According to certain sources, the fact of marriage in criminal process is ascertained on the grounds of civil laws; thus, a former spouse cannot be deemed as the family member.<sup>17</sup> The author is convinced that such construing is imprecise. Therefore, in order to understand when the person, as a fiancé / fiancée or as a former spouse, etc., can be acknowledged as a family member, it is necessary to perceive the concept of "family" in the context of the analysis of the immunity. It will also help to reveal the problem of the scope of the analyzed immunity. The above-mentioned H. Stewart is one of the eminent authors who has analyzed this problematic sphere aiming to disclose the content of "family" and "marriage" in order to substantiate the question of sufficiency of the immunity of a close person as a witness. This author has distinguished three theories on construing the essence of family (marriage), the concept that is the basis for formulation of answers to questions on legitimacy and sufficiency of the analyzed immunity.

*The first* theory construes marriage via its functions. The judicial institutions that apply this theory should assess functional characteristics of marital relations. It covers the content of marital relations, probability of continuation of these relations, identification of spouses with the family phenomenon, publicity of the union, emotional positiveness of their relations, sexual union, attachment of the parties to each other, bringing up their children and taking care of them, attendance of the children or parents, sharing the household duties, community of ownership, its usage, financial liabilities, other kind of economic cooperation, and etc. The author, referring to these characteristics, acknowledges that even so-called modern marriage, i.e. cohabitation, is equated to official marriage from the functional point of view. He acknowledges that that other attributes of

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17 Goda, G. *et al. Commentary of the Code of Criminal Procedure of the Republic of Lithuania*. I-IV parts (Articles 1-220). Vilnius: Legal information centre, 2003, p. 80.

functional characteristics may be distinguished: for example, mutual relations between persons who do not have intercourse but live together, are dependent upon each other economically, bring up children and take care of them together, and etc.

The *second* theory is related with liberal marriage, the essence of which depends upon perception of the benefit achieved from their union. The author reveals the content of this theory via criticism of the first theory, i.e. via superiority of the liberal theory in comparison to the functional theory. The initiator of this criticism author Alice Woolley<sup>18</sup> claims that attributes that outline the “functional family” create preconditions for discrimination of partners of the same sex (same-sex marriage). This “marriage” does not protect a person who lives with a person of the same sex from his/her obligation to the state to testify against his/her close person (his/her partner). A. Woolley essentially invokes the idea of marriage as an actual or formal union, which was formulated by Hegel. According to him, “*the marriage is free universality with concrete individualities*” (the marriage as the union of “free universality” with “concrete individuality”). Meanwhile, H. Stewart states that this theory is more superior to the first one for the following reason: it is not necessary to differentiate legal (official) marriage, cohabitation (living together without having registered marriage), and relations between persons of the same sex, because any of these unions allow persons to pursue self-realization.

The *third* theory is based on post-modern philosophy. According to this theory, whatever the marriage may be, it does not have any characteristic because the definition of marriage as a certain union causes a lot of discussions in the context of social phenomena. Therefore, perception of “functional” marriage is also criticized, i.e. the theory that construes marriage via its functions is erroneous both from the strategic and conceptual point of view. In the first case, the statement that any union of persons consists with perception of “traditional” marriage negates acknowledgement of the union of persons who seek other kind of mutual (intimate) relations. From the conceptual viewpoint, it is probably not expedient to talk about necessity of marriage, cohabitation, or other kind of union, as more or less formalized relation. Instead, it is more important to acknowledge that there is this social phenomenon, in which persons’ actual mutual relations and their content are most important.<sup>19</sup>

While assessing the advantages or disadvantages of the statements of these theories in the context of the analyzed immunity, the author is inclined to turn back to the previously expressed thought on essence of the immunity. It was mentioned that this additional guarantee granted to witnesses, secures harmony of family in a wide sense, regardless what social relations or their elements are involved. Protection of family is the most important thing. Therefore, the author is inclined to endorse the statements of the theory, which construes marriage via its functions, based on a sufficiently simple reason, i.e. the other two theories, according to the author, construe the circle of family or subjects of marriage and perception or marriage too broadly. This in its turn may correspondingly result in confusion while talking about the addressees of the analyzed

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18 Woolley, A., p. 471.

19 Stewart, H., p. 421–427.

immunity, namely, who can take use of it. Moreover, the conception of the first theory, at least from the marginal viewpoint of view, more or less corresponds to the traditions of jurisprudence of the European Court of Human Rights (hereinafter referred to as the ECHR), which is nowadays prevailing.

Article 8 of the Convention on Protection of Human Rights and Fundamental Freedoms<sup>20</sup> (hereinafter referred to as the Convention), which establishes each person's right to respect for one's family life, provides analogous meaning for this right, as for other fundamental freedoms and rights. This provision is aimed at protection of family against unrestricted interference of state institutions. The proper balance should be established between competing interests of person and society, as well as freedom assessed by the state (*Keegan v. Ireland*, 1994).<sup>21</sup> Although this right cannot be absolute, if it meets the conditions established in Article 8(2) of the Convention, the ECHR considers that the concept "family life" is not restricted only to marital relations and can also cover *de facto* "family" relations (an opinion expressed in a number of lawsuits).<sup>22</sup> The Court explains that the value protected by Article 8 of the Convention each time should be identified *ad hoc*, i.e. in the light of the definite case, with taking into consideration constantly changing social, economic and cultural conditions and traditions.<sup>23</sup> The family concept should be construed with taking into consideration the present circumstances. Thus, of course, the family as a natural phenomenon should be acknowledged as "family," without taking into consideration the fact whether the family is only "natural" or only "legal", or both. The person's right to respect of family life should be construed in a wide sense and should cover all actual family relations, and not to be restricted to perception of "family life" *de jure*.<sup>24</sup> Coming out of the scope of Article 8 of the Convention, the ECHR noted in case *Abdulaziz, Cabales, Balkandali v. the United Kingdom* (1985)<sup>25</sup> that ascertainment of the "family life" is deemed to be the question of fact rather than the question of law; determination of this fact in each case should depend upon the actual circumstances, ascertained in the case. According to Gediminas Sagatys, the significance of the qualitative attributes of "family life", was revealed in the lawsuit *Kroon and others v. the Netherlands* (1994)<sup>26</sup>, where ECHR stated that while ascertaining the relations covered by the "family life", many factors, such as conjoint life, constancy of relations, nature of manifestation of the mutual obligations, etc., may be taken into consideration.<sup>27</sup> It may be stated that by allocating a new quality to the analyzed concept, it should be acknowledged that it may cover not only the actually existing "family life",

20 Convention on Protection of Human Rights and Fundamental Freedoms. *Official Gazette*. 1995, Nr. 40-987; 1996, Nr. 5-112; 1999, Nr. 61-1975; 2000, Nr. 96-3016; 2004, Nr. 77-2654; 2005, Nr. 74-2677; 2006, Nr. 17-595.

21 *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290.

22 *Lebbink v. the Netherlands*, no. 45582/99, ECHR 2004-IV. *Marckx v. Belgium*, 13 June 1979, § 2, Series A no. 31; *Johnston v. Ireland*, 18 December 1986, § 26, Series A no. 112; *Berrehab v. the Netherlands*, 21 June 1988, § 21, Series A no. 138.

23 Sagatys, G., p. 32.

24 *Ibid.*, p. 33.

25 *Abdulaziz, Cabales, Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94.

26 *Kroon and others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C.

27 Sagatys, G., p. 34.

but in certain cases the intended “family life” as well. Thus, ascertainment of family life is the question of fact, depending whether there are real mutual relations binding the persons. The family phenomenon in the field of criminal justice should be perceived wider than the same phenomenon under private law. A famous novelist G. La Pira keeps to this position; while trying to understand the concept of family, he had been searching for answer in antique law philosophy, i.e. in the ontological context. Wishing to demonstrate the structural differences between agreements regulated by public and private law, and marriage, the author states that a marital act oversteps the limits of private law and becomes a part of public law.<sup>28</sup> The condition of the family member is important for the purposes of criminal procedure as much as it is related with constitutional guarantees provided to person in the field of criminal legal relations (Articles 38 and 82 of the CCP and Articles 235 and 248 of the Criminal Code). One of the first attempts to realize it is reflected in the ruling of the Supreme Court of Lithuania adopted on 16 of November, 2004: “*According to Article 3.229 of the Civil Code, which requires registration of partnership, legal consequences arise within the limits of application of the civil law and do not regulate personal intangible relations of the cohabitants. Moreover, according to Article 28 of the Law on approval, validation and implementation of the Civil Code, [...] the rules, specified in chapter XV of the III Book of the Civil Code on cohabitation without registration of marriage will come into force only after the law, regulating the order of registration of the partnership, comes into force. Such law has not been adopted yet. The editions of Articles 82 and 38 of the Code of Criminal Procedure and Articles 235 and 248 of the Criminal Code came into effect on the 1 of May 2003. Application of these rules cannot be restricted by relating it with coming into force and application of the mentioned rules of the Civil Code, which regulate property relations of cohabitants; thus, the mere fact that the conjoint life of the cohabitants I. D. and E. D., who had not registered their marriage, was not or could not be registered, does not allow to state that the court of first instance had incorrectly construed and applied the mentioned rules of the CC and of the CCP by acknowledging I. D. as E. D.’s family member. After having ascertained the fact that I. D. was E. D.’s family member, thus I. D. had the right to refuse to testify, but was not familiarized with this right, the court correctly applied the criminal law, Article 235(3) of the Criminal Code, and in accordance with Article 3(1)(1) of the Code of Criminal Procedure, passed the exculpatory sentence.*”<sup>29</sup>

The scope of the immunity, as a matter of fact, is to be related not only with the persons’ family or marital relations with the legal shadow. For the purposes of appropriate implementation of the witness’ immunity, i.e. seeking to protect his/her lawful interests, it is necessary to ascertain and to take into consideration actual relations, mutual ties and other circumstances, which prove these persons’ close relations, based on constancy of such ties, moral closeness, ties of kinship, mutual commitments, and etc. In other words, the immunity should cover not only formalized relations, but also the materialized rela-

28 Meilius, K.; Zilinskaitė, R. Diriment Impediments in Canon Law. *Soter*. 2009, 29(57): 31.

29 Supreme Court of Lithuania, Criminal Division Ruling of 16 of November, 2004 (case No. 2K-615/2004). For comparison see: Supreme Court of Lithuania, Criminal Division Ruling of 8 of January, 2008 (case No. 2K-113/2008).

tions, i.e. content relations. It also allows to conclude that it is particularly important to see within the limits of the analyzed issue, not only the “legal” family, but also (or only) the actual nature of the relations.

### 3. Discussion on Certain Aspects of the Concept of Close Person

The concept of family member in the field of criminal justice also covers another circle of persons related by family ties *a priori* or *post factum*. From the point of view of *a priori*, these persons are the engaged persons (fiancées/ fiancés), from the point of view of *the post factum*, these persons are former spouses (divorcées, divorcés).

One of the main factors, determining whether engaged persons or former spouses as witnesses can make use of the immunity, is the social actual (and sometimes former legal) relation of these people with an offender (a suspect or an accused), as consolidated in Article 82(2) of the CCP. It is substantiated by cohabitation of these persons, constancy and closeness of their relations, the nature of their mutual (personal and/or tangible) relations, children (wards), and other factors; adequately, the substantiation allows to apply the immunity. For example, the ECHR notes that natural family relations usually do not break when parents start to live apart or divorce and a child remains to live with one of the parents (the case *Berrehab v. the Netherlands*, the case *Keegan v. Ireland*, the case *Irlen v. Germany*, 1987).<sup>30</sup> Indeed, the list of such and similar circumstances cannot be finite; these are the factors of alternating nature, which require considering separate cases individually. The circumstances are of evaluative nature and thus, in each case the subjects who undertake criminal proceedings, by respecting the person’s right to his/her family life, should assess whether the case-specific circumstances and other data allows to determine that a person related with an offender can be acknowledged as a family member.

In order to determine whether the offender’s fiancé/fiancée can be acknowledged as a family member and make use of the immunity, it is always necessary to take into consideration any public announcement of these persons on their agreement (plicit) to conclude their marriage in the future. Herein, it is not enough to refer to the provisions of civil laws. In the field of criminal procedure, a public agreement to get married is to be construed wider, i.e. as covering both cases when it is publicly announced about the intended church (confessional) marriage, and cases, when the intended marriage is publicly announced and this fact can be proved by appropriate data. Public announcement on agreement to conclude marriage, which aims at acquisition of personal immunity should not be formalized by requirement to register an established-form application in an appropriate institution. Not every such official registration of applications *de facto* is considered to be the publicly announced agreement on intention to conclude the marriage. Moreover, there have been cases, when later such marriage was not concluded, though the applications to conclude the marriage had been officially registered. The

30 *Irlen v. Germany*, 13 July 1987, Decisions and Reports 53, p. 225.

following examples are also possible, i.e. the persons, who have not registered their applications to conclude their marriage, announce publicly their serious intentions to conclude their marriage in future, manifesting their resolution and readiness for this step. Moreover, there could be cases that involve persons, who have a common child, announcing publicly the intended marriage and afterwards registering their applications to conclude the marriage. It proves that the subjects of the criminal procedure are obliged to assess the content of engagement relations *de facto* or *de jure*. This assessment includes consideration of constancy of the relations, nature of mutual commitments and other circumstances, which prove that in the future the relevant persons undoubtedly intend to continue the relationship, to pursue upbringing duties, household-economic family activity and other main family functions. All of this influences substantiation of preconditions of the analyzed witness' immunity.

In order to determine whether a former spouse of an offender can be acknowledged as a family member in the sense of Article 82(2) of the CCP, it should be stated that firstly, it is necessary to take into consideration the circumstances that define constancy of relations of these persons, their common offsprings, and etc. The opinion reflected in scientific literature is to be accepted, i.e. when a family falls apart and the actual family relations come to an end, the legal family relations remain. This means that certain obligations of the spouses towards each other and towards their children remain even after dissolution of their marriage.<sup>31</sup> The theory on functional family (marriage) formulated by the previously mentioned author H. Stewart partially proves this viewpoint because herein the actual nature of relations of such persons is particularly important. Secondly, it should not be disregarded that even after a marriage is dissolved, the appropriate internal, moral ties or commitments may remain; the subjects, who execute the procedure, should take them into consideration. Even when a person who was earlier married to a suspect or an accused enters into marriage with another person, it does not mean yet that such person unconditionally loses the right of witness' immunity. It is necessary to take into consideration such circumstances while assessing the definite situation in general, bearing in mind former spouses' relations, continuation and content of their remaining actual relations.

While talking about the possibility of other persons to make use of the immunity, according to certain opinions, expressed in scientific literature, such immunity should be granted not only to family members of close relatives, but also to other persons who are closely related with an offender. A person whose life, health or other type of welfare are particularly important and significant for a witness, taking into consideration his/her personal relations, is also attributed to this category.<sup>32</sup> For example, these persons may be god-parents of a suspect or an accused. It can also be a guardian, a foster-parent, a lifelong dependant of an offender, and etc. While settling this question, it is necessary

31 Michailoviene-Kudinaviciute, I. *Legal Regulation of Family Relations Establishment in Lithuania*. Doctoral Dissertation. Social Sciences (Law). Vilnius: Mykolas Romeris University, 2006, p. 26.

32 Потапов, В. Д. *Совершенствование процессуально-правового положения свидетеля в уголовном судопроизводстве России*. [Potapov, V. D. *Development of Procedural-Legal Position of Witness in Criminal Procedure of Russia*]. Диссертация на соискание ученой степени кандидата юридических наук. Москва, 2005, с. 114.

to underline that the subjects undertaking the criminal procedure should assess and take into consideration the actual relations of a witness and a suspect or an offender, about whom the witness may be deposed about. According to the author, it is necessary to approach this question carefully enough because otherwise the range of application of the procedural immunity of persons, as witnesses related with an offender, may be unreasonably expanded and this in its turn may affect the criminal proceedings. Without questioning resilience of the relations of such persons or their affection, it may be accepted that indeed from the profound social viewpoint of view, the actual relations of an offender and persons who are closely related with him/her may be of essential or crucial importance at the non-legal level. However, while talking about the field of criminal justice, it is necessary to weigh them and to have a clear answer whether the commented relations are really so important that they are to be protected even in the course of criminal procedure. Therefore, in each case it is inevitably necessary to weigh the values, which are defended and preserved by the Constitution, to see a vivid balance between these values and *inter alia* to objectively evaluate the proportion of social priorities.

## Conclusions

1. Immunity of a close person as a witness in criminal procedure is an additional guarantee of protection of procedural interests (protection of a personal and family secret). This guarantee also creates preconditions for cherishing family relations and harmony of mutual communication of persons. The subject of immunity covers impenetrability of the above-mentioned secret.

2. According to the law on criminal procedure applicable in Lithuania, only the members of an official, i.e. legally defined family, marriage or cohabitation without having registered the marriage, are under protection. However, the mentioned guarantee should unconditionally cover also such relations, which do not always arise formally out of the family or marital ties. Thus, in each case it is important to assess the actual nature of such relations. It reflects the close relation between the witness, as the offender's close person, and of the offender himself/herself, which is based on the ties of kinship, moral commitments, fatherhood (actual) relations, etc.

3. It is also important to assess the range of the circle of persons, towards whom the immunity can be applied in criminal procedure. Unconditional broadening of this circle jeopardizes the consistent patterns of a legal process, contravene the established social valuable priorities and the priorities consolidated in the Constitution. Therefore, it can be concluded that it is inevitably necessary to give a clear answer whether the impartially justified and compulsory circumstances exist in the case, prior to settling the question on the mentioned immunity and its application.

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## ARTIMO ASMENS, KAIP LIUDYTOJO, IMUNITETAS LIETUVOS BAUDŽIAMAJAME PROCESĖ: PAKANKAMUMO PROBLEMA

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**Santrauka.** *Moksliniame straipsnyje analizuojama ir tiriama artimo asmens, kaip liudytojo, imuniteto pakankamumo problema Lietuvos baudžiamojo proceso teisėje. Apskritai asmeninis liudytojo imunitetas, kaip papildoma procesinė garantija, sauganti liudytojo asmeninius bei procesinius interesus, leidžia apginti byloje dalyvaujantį liudytoją nuo bet kokios intervencijos į jo asmeninį ar šeimos gyvenimą. Tai reikalinga tam, kad net ir baudžiamojo proceso metu, kai iš esmės ginamas viešasis interesas, kaip liudytojas dalyvaujantis asmuo nebūtų verčiamas atskleisti asmeninės ar šeimos paslapties ir kt.*

*Asmenis, kaip liudytojus, kurie pagal baudžiamojo proceso įstatymus turi teisę atsisakyti duoti parodymus (arba atsakyti tik į kai kuriuos klausimus) prieš savo artimą byloje, apibrėžia Lietuvos Respublikos baudžiamojo proceso kodeksas. Tačiau tiek teorijoje, tiek ir praktikoje iškyla problema vertinant, ar šeimos nario, kaip artimo asmens, sąvoka šiame kontekste nėra aiškinama pernelyg siaurai, t. y. tik de jure aspektu. Straipsnio autorius įsitikinimu, siekiant apsaugoti asmeninę bei šeimos paslaptį, svarbu įvertinti ir šeimos nario statuso kokybę faktiniu aspektu. Tai reiškia, kad baudžiamojoje justicijoje šeimos sąvoka aiškintina plačiau, t. y. turi būti vertinama tiek teisiniai, tiek ir faktiniai šio fenomeno aspektai. Taip būtų apsaugota šeimos paslaptis, kuri neretai kyla ne tik iš teisiniais, bet ir faktiniais saitais susijusių šeimos santykių. Čia autorius remiasi Europos Žmogaus Teisių Teismo jurisprudencija, pagal kurią šeimos ryšių vertinimas turi būti atliekamas remiantis konkrečios bylos aplinkybėmis, t. y. nepaneigiant to fakto, jog asmeninės ar šeimos paslapties apsaugos poreikį baudžiamojoje byloje dažnai lemia faktinio pobūdžio santykiai tarp asmenų, kurie, nors*

juridiškai ir nėra laikomi šeimos nariais, tačiau yra susiję santykiškai, grindžiamais kraujo ryšiu, moraliniais išpareigojimais, galiausiai tėvystės santykiškai ir t. t.

*Dėl šios priežasties baudžiamąjį procesą vykdančios institucijos bei pareigūnai kiekvienu atveju, kai reikia spręsti klausimą dėl asmens, kaip liudytojo, imuniteto, t. y. teisės atsakyti duoti parodymus prieš savo artimą, nustatymo, turi įvertinti ne tik teisinius, jeigu tokie yra, bet ir faktinius susijusių asmenų ryšius. Kita vertus, būtina taip pat pasverti ir aiškiai atsakyti, ar iš tiesų atitinkami asmenų santykiai tokie svarūs, kad juos būtina apsaugoti net ir baudžiamojo proceso metu. Todėl kiekvienu atveju neišvengiamai būtina atsizvelgti į Konstitucijos ginamas ir saugomas vertybes, matyti aiškiai šių vertybių pusiausvyrą ir, be kita ko, objektyviai jausti socialinių prioritetų santykį.*

**Reikšminiai žodžiai:** artimas asmuo, liudytojas, šeima, imunitetas, baudžiamasis procesas, pakankamumas.

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