

Who is Entitled to the Right to Respect for Family Life Under the European Union Law?

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The article investigates the right to respect for family life, established by Article 7 of the Charter of Fundamental Rights of the European Union, as applied and interpreted in conjunction with the right to marry and the right to found a family, laid down in Article 9 of the Charter. The standard of protection set by European Union law regarding these rights is identified by taking into account the standard of protection of the relevant rights established by the European Convention on Human Rights and the established case law of the European Court of Human Rights. Topical issues relating to the consolidation of these individual rights at the national level in the Republic of Lithuania are also addressed in the article. In doing so, an emphasis is laid on the content of the concepts of “family” and “family life” under supranational and national law.

Keywords: family life, right to found a family, right to marry, individual rights.

Šeimos gyvenimo apsauga Europos Sąjungos teisėje: šeimos samprata

Straipsnyje nagrinėjama Europos Sąjungos pagrindinių teisių chartijos 7 straipsnyje įtvirtinta teisė į pagarbą šeimos gyvenimui, ją taikant ir aiškinant kartu su teise į santuoką ir teise kurti šeimą, užtikrinama Chartijos 9 straipsnio nuostatomis. Europos Sąjungos teisėje įtvirtintas šių teisių apsaugos standartas nustatomas atsižvelgiant į šias teises reglamentuojančias Europos žmogaus teisių konvencijos nuostatas bei Europos Žmogaus Teisių Teismo jurisprudenciją. Straipsnyje atskirai analizuojami ir teisės į pagarbą šeimos gyvenimui įtvirtinimo Lietuvos Respublikos nacionalinėje teisėje probleminiai aspektai. Šiuo požiūriu daugiausiai dėmesio skiriama šeimos ir šeimos gyvenimo sąvokų turiniui supranacionalinėje ir nacionalinėje teisėje.

Pagrindiniai žodžiai: teisė į pagarbą šeimos gyvenimui, teisė į santuoką, teisė kurti šeimą, individualios teisės.

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Introduction

Proclaimed in 2000 as a single document bringing together the rights, freedoms and principles recognised in the European Union (hereinafter referred to as the EU), the Charter of Fundamental Rights of the European Union¹ (hereinafter referred to as the Charter) became part of EU primary law and legally binding on EU institutions and Member States with the entry into force of the Treaty of Lisbon² on 1 December 2009. Despite the fact that the Court of Justice of the European Union (hereinafter referred to as the CJEU) had more than once in its case law preceding the entry into force of the Charter emphasised the importance of EU law in ensuring the protection of fundamental human rights, it was specifically through the Treaty of Lisbon, once it recognised the rights, freedoms and principles laid down in the Charter and granted the Charter the same legally binding value as attributed to the Founding Treaties, that citizens were provided with greater clarity and legal security. As follows from the provisions of the Charter and the jurisprudence of EU judicial institutions interpreting these provisions, the central figure in the EU is no longer purely a “homo economicus” or “homo politicus”, but rather an individual (“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms”, Article 52(1)). According to the Preamble of the Charter, the Union “places the individual at the heart of its activities”. Under Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter, which “shall have the same legal value as the Treaties”. Consequently, the rights, freedoms and principles enshrined in the Charter took on a new crucial aspect: they have been linked with the protection of fundamental human rights, which has come to constitute an interest of such a dimension (weight) that, in the event of a collision between the human rights and freedoms consolidated in the Charter and the fundamental (economic) freedoms laid down in EU primary law, this interest could justify the non-fulfilment of the obligations imposed under EU law, even those related to EU fundamental (economic) freedoms, or the limitation of the rights resulting from these freedoms.

Under the title “Freedoms”, Article 7 “Respect for private and family life” of the Charter provides that “Everyone has the right to respect for his or her private and family life, home and communications.” The provision of Article 7, insofar as it relates to the protection of family life, is inextricably linked with the application and interpretation of Article 9 of the Charter, consolidating the right to marry and the right to found a family. The effective protection of the rights guaranteed under the said articles is essential for ensuring the autonomy of a person and the possibility for a person to freely build his or her personal life.

The aim of this article is to reveal the key aspects of the content of the right to respect for family life consolidated in Article 7 of the Charter, as interpreted in parallel with Article 9, which establishes the right to marry and to found a family, to identify the standard of protection set by EU law regarding these rights, taking into account also the standard of protection of the relevant rights established by the Convention for the Protection of Human Rights and Fundamental Freedoms³ (hereinafter referred to as the ECHR) and the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR), to address topical issues relating to the consolidation of these individual rights at the national

¹ Charter of Fundamental Rights of the European Union. *OJ*, 2012, C 326, p. 391-407.

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. *OJ* C 306, 17.12.2007, p. 1–271.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, *ETS No. 005*), as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 [interactive, accessed 2018-03-01]. Available at: <https://www.echr.coe.int/Documents/Convention_ENG.pdf>.

level in the Republic of Lithuania and provide an evaluation of the standard of protection of the said individual rights established by national law.

The subject matter of this article is the problematic aspects of defining the content of the right to respect for family life, in connection to the right to marry and to found a family, as established by the Charter, the ECHR and the Constitution of the Republic of Lithuania. The present research focuses on the analysis of the problematic aspects (both at the supranational level and national level) in relation to the protection of the said individual rights; the analysis does not extend to an overall detailed and systemic examination of the multiple specific elements of the content of these rights.

Apart from the texts of the Charter, the ECHR, and the Constitution of the Republic of Lithuania, the main sources of research also include the relevant jurisprudence of the CJEU and the ECtHR, EU secondary legislation, the official constitutional doctrine of the Constitutional Court of the Republic of Lithuania, as well as the legal acts and draft legislation of the Republic of Lithuania. The analysis also draws on the insights of Lithuanian and foreign authors expressed in the scientific doctrine.

Methods of research used in drafting this article include the method of linguistic analysis, the analysis of the source content, systematic analysis, comparative research and the analytical-critical method of research (the latter three being of greatest relevance). The method of linguistic analysis was, *inter alia*, used while analysing the concepts of the family life and family, other legal concepts, the texts of the Charter, the ECHR, the Constitution, as well as the case law of supranational and national courts, national laws. The application of the source content analysis and logical analysis methods allowed to explore scientific literature, supranational and national legal acts and case law, as well as provide a critical evaluation of the content thereof, to prepare motivated generalizations, conclusions and proposals. The method of comparative research was applied in finding and evaluating the similarities and differences between the provisions of the different supranational and national legal acts, and the corresponding case law. The method of systematic analysis allowed for the establishment of the essential features of the researched individual right, as established under supranational and national law, its significant links to other individual rights, and the interrelation and compatibility thereof. The analytical-critical method was invoked in order to assess the risks and problems of the existing legal regulation in Lithuania with regard to the protection of the analysed individual rights, and in offering possible solutions and ways of eliminating the aforesaid risks and problems.

1. The right to respect for family life under EU law (as applied and interpreted in the light of ECHR law)

Article 52(3) of the Charter states that, “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. Therefore, Article 8 (the right to respect for private and family life) and Article 12 (the right to marry) of the ECHR, in the light of their interpretation by the ECtHR, should be seen as establishing the necessary minimum standard for the content and protection of the rights consolidated respectively in Articles 7 and 9 of the Charter. Given the scope of the Charter as outlined in Article 51, this standard should be observed by EU institutions, establishments and bodies with due regard for the principle of subsidiarity and by the Member States when they are implementing Union law. “Implementing” Union law, within the sense prevailing in the case law of the CJEU and the scientific doctrine, is understood not merely

formally as meaning the implementation of EU secondary law, but also as encompassing those actions by the Member States that bear a functional link to EU law⁴. As the CJEU has outlined in the case of *Akerberg Fransson*, the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law⁵.

Accordingly, though Articles 7 and 9 of the Charter cover a whole range of legal relationships or related specific aspects that do not directly fall within the regulatory scope of EU law (e.g. family relationships, relationships of partnership and marriage, reproductive decisions of a person or a family, adoption relationships, etc.), the functional approach to the scope of application of the Charter allows for potentially wide possibilities of the application of the rights set out in these articles. Such possibilities are confirmed by the extensive case law of the ECtHR building on the dynamic interpretation of the ECHR as “a living instrument”, which has led to Article 8 of the Convention, protecting the right to respect for private and family life, home and correspondence, being at times referred to as a “charter of individual autonomy”⁶. Accordingly, this directly determines the broad content of the rights laid down in Article 7 of the Charter.

When interpreted in the context of the case law of the ECtHR, the notion of “respect” in the wording of Article 7 of the Charter implies both the negative and positive obligations of EU institutions and Member States, implementing EU law. The ECtHR has held on more than one occasion that, although the object of Article 8 of the ECHR is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference, but may also mean positive obligations. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the positive and negative obligations of the state under Article 8 of the ECHR do not lend themselves to precise definition; the applicable principles are nonetheless similar: in both instances, regard must be had to the fair balance to be struck between the competing interests, which may include competing private and public interests or ECHR rights; and, in both contexts, the state enjoys a certain margin of appreciation⁷.

At the same time, the rights enshrined in Article 7 of the Charter are relative, i.e. the exercise of these rights is related to the establishment of a particular relationship, or a balance between the possibilities of different individuals to exercise these rights or an individual as the right holder and the interests of society. Specifically, the general criteria set out in Article 52(1) of the Charter must be followed, i.e., any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms; subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. In deciding whether a particular case fulfils these criteria, the case law of the ECtHR should

⁴ See KAVALNĖ, S.; DANĖLIENĖ, I. Europos Sąjungos pagrindinių teisių chartija kaip individualių teisių gynimo instrumentas. In *Jurisprudencija*, 2015, 22(2), p. 231–251; ROSAS, A. When is the EU Charter of Fundamental Rights Applicable at National Level? In *Jurisprudencija*, 2012, 19(4), p. 1269–1288. On the relationship between EU law and the ECHR, also see DOUGLAS-SCOTT, S. The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon. In *Five Years Legally Binding Charter of Fundamental Rights*, Portland, USA, 2015, pp. 21–47.

⁵ Judgment of the CJEU of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, paragraph 19.

⁶ JANIS, M. W., et al. *European Human Rights Law – Text and Materials*, 3rd edition, Oxford: Oxford University Press, 2008, p. 374.

⁷ The judgment of the ECtHR of 3 November 2011, *S. H. and Others v Austria* [GC], no 57813/00, paragraph 87; the judgment of the ECtHR of 7 February 2012, *Von Hannover v Germany (No 2)* [GC], nos 40660/08 and 60641/08, paragraphs 98–99.

serve as an important guide. Accordingly, the limitations which may legitimately be imposed on this right laid down in Article 7 are, according to the Explanations relating to the Charter of Fundamental Rights, the same as those allowed by Article 8 of the ECHR⁸. However, while the said criteria are close to those guaranteed in Article 8(2) of the Convention, the specificity of EU law (e.g. the link of specific rights with the fundamental freedoms of the Union) and the established practice in applying the principle of proportionality in the jurisprudence of the CJEU determine that a particular situation may not necessarily be assessed by the CJEU in the manner identical to its assessment by the ECtHR.

It is, thus, also pertinent to observe that family relationships fall beyond the traditional areas of EU regulation. The concept of family life emerged in EU legislation and questions concerning the protection of family life or rights (of a family and family members) stemming from family life gained their relevance gradually and consequently later than issues regarding the protection of human rights and fundamental freedoms were raised in general. Therefore, the decision to include the right to respect for family life, as well as the right to marry and found a family, in both the body of the provisions of the Charter proclaimed on 7 December 2000 and the text of the Charter having entered into force on 1 December 2009 should be considered as particularly important – it means the commitment of the EU and its institutions to ensure the rights relating to family life of both EU citizens and residents and other nationals coming to the EU. For the reasons mentioned above, the development of the protection of rights stemming from family life has not been fully consistent so far. It has in the first place been determined by the well-known common aspirations for ensuring the single EU market, a closer political integration and, thus, the fundamental EU freedoms – the free movement of persons, services, goods and capital. Given this, the development of the regulation governing family relationships in EU law today is twofold: firstly, it is in part influenced by individual issues that come before EU institutions and the CJEU; and secondly, it is most visible, i.e. most progressive (the applicability of the provisions of Article 7 of the Charter in terms of family life is currently most relevant and most likely) in three areas: gender equality (the implementation of the principle of equality between men and women (non-discrimination on the ground of gender) in employment relationships, i.e. ensuring the equal treatment of women and men in matters of recruitment, equal remuneration, etc.); social security (including the protection of children's rights); and free movement, including the matters of free movement of workers, immigration, and asylum⁹.

⁸ Explanations relating to the Charter of Fundamental Rights, *OJ C* 303, 14.12.2007, p. 17–35.

⁹ This conclusion is supported by the analysis of the provisions of EU secondary law and soft-law instruments. See, e.g. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which prohibits discrimination on the grounds of sexual orientation; Communication from the Commission COM (2010)78 of 5 March 2010 on a strengthened commitment to equality between women and men – A Women's Charter, which expresses the commitment to ensuring equality between women and men. In 2016, the Commission proposed new rules under the Brussels IIa Regulation which, once adopted, should improve the protection of children in cross-border parental responsibility disputes related to custody. Two new regulations were also adopted aimed at providing assistance to international couples (both in a marriage or a registered partnership), to manage their property on a daily basis and to divide it in the event of divorce or the death of one of them. (See Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ L* 183, 8.7.2016, p. 1–29; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *OJ L* 183, 8.7.2016, p. 30–56). For more see: European Commission, 2016 Report on the Application of the EU Charter of Fundamental Rights, Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59189.

1.1. The search for the standard of protection for family life in supranational law: the concepts of “family” and “family life” under the Charter and the ECHR

Questions related to the clarification of the concepts of “family” and “family life” are among the essential constituents for revealing the content of the right to respect for family life. As the right at issue is relatively new and, thus, the relating case law of the CJEU is only in the process of development, the interpretation of the content of the rights relating to the protection of family life relies greatly on the jurisprudence of the ECtHR. When dealing with the application of the provisions of Article 7 of the Charter, the CJEU, as rule, refers to the importance of the official doctrine of the ECtHR in interpreting and applying Article 8 of the ECHR as being essential for revealing the content of family life¹⁰.

Consequently, the law in Europe provides no unified concept of “family”. Even within the national legal frameworks of individual EU Member States, the concepts of “family” or “family member” depend on the legal relations and are perceived differently in different legal acts¹¹.

Supranational law regards family relationships as falling within the remit of sensitive matters, dependent, *inter alia*, on the understanding of morality, and leaving the Member States a wide margin of appreciation that enables them to maintain or establish legal regulation that consolidates the protection of individual rights at a level equivalent to that accorded under the corresponding supranational legislation, or to set a higher standard of protection. The ECtHR has concluded that the national authorities have more freedom as to the necessity and stringency of protection afforded to, according to their assessment, important moral values¹², while, in the event of a clash between this right and certain moral values, the balance generally shifts from the former towards the latter. The said discretionary right of the states is not, however, unlimited.

It is important to note that, with a view to ensuring the right to respect for family life in supranational law (both under the ECHR and EU law), priority is given to the protection of the so-called “traditional family” and the interests of children. Accordingly, under Article 7 of the Charter, protection is, first of all, afforded to a “traditional family”, which, in the light of the doctrine formulated by the ECtHR and reaffirmed by the CJEU, is primarily understood as a “traditional family unit”. In the latter instance, recognition of family relations is essentially subject to the form and not the content of a relationship, i.e., to a man and a woman who are married (and either have or do not have children) are immediately regarded as a family. The members of such a family unit are guaranteed “the protection of family life” under Article 7 of the Charter. Further evidence or the satisfaction of further conditions (such as, e.g.,

¹⁰ See, e.g. the judgment of the Grand Chamber of the CJEU of 9 November 2010, *Volkerund Markus Schecke GbR and Hartmut Eifert v Land Hessen*, C-92/09 and C-93/09; the judgment of the CJEU of 5 October 2010, *J. McB. v L. E.*, C-400/10 PPU; and the judgment of the Grand Chamber of the CJEU of 15 November 2011, *Murat Dereci and Others v Bundesministerium für Inneres*, C-256/11; etc.

¹¹ E.g. Paragraph 2 of Article 248 of the Criminal Code of the Republic of Lithuania states that “Family members of the perpetrator shall be the parents (adoptive parents), children (adopted children), brothers, sisters and their spouses living together with him, also the spouse of the perpetrator or the person living with him in common law (partnership) and parents of the spouse” (Official Gazette *Valsstybės žinios*, 2000, No 89-2741). Paragraph 4 of Article 2 of the Republic of Lithuania’s Law on the Legal Status of Aliens provides that “Family members of a citizen of an EU Member State mean the citizen’s spouse or the person with whom a registered partnership has been contracted, his direct descendants if they are under the age of 21 or are dependants, including the direct descendants of the spouse or person with whom the registered partnership has been contracted if these descendants are under the age of 21 or are dependants, and the dependent direct relatives in the ascending line of the citizen of an EU Member State, of the spouse or of the person with whom the registered partnership has been contracted” (Official Gazette *Valsstybės žinios*, 2004, No 73-2539).

¹² For more on this, see the judgment of the ECtHR of 18 March 2008, *Kuliš v Poland*, no 15601/02; also MC BRIDE, J. Proportionality and the Convention on Human Rights. In *The Principle of Proportionality in the Laws of Europe* (ed. E. Ellis), Oxford: Hart Publishing, 1999, p. 30.

cohabitation) is usually not required. Even families, which are undergoing the process of divorce may also meet this concept¹³. In this regard, a privileging approach defined by supranational courts as a “difference in treatment” of spouses (compared to unmarried couples living a life comparable to that of family life) is confirmed by the extensive case law of the ECtHR¹⁴. The said “difference in treatment” can also be evidenced in the case law of the CJEU, as, for example, in the case concerning the rights of family members related to freedom of movement, in which the Court denied an unmarried companion the treatment of a spouse, i.e. a family member¹⁵, or, in other cases, where certain rights were recognised only with respect to the descendants born within a marriage to EU citizens¹⁶.

The right to marriage is both laid down in the provisions of the Charter and the ECHR as a distinct fundamental human right. The exclusiveness of marital relationships is viewed in the case law of international courts as based on the clearly expressed aim to found a family, which takes a legal form upon marriage. Accordingly, marriage as a basis for family relationships is afforded a special status in domestic law of all the Member States of the EU and the Council of Europe. Article 38 of the Constitution of the Republic of Lithuania (hereinafter also referred to as the Constitution) stipulates that “Marriage shall be concluded upon the free mutual consent of a man and woman” (Paragraph 3) and “Family, motherhood, fatherhood, and childhood shall be under the protection and care of the State” (Paragraph 2).

In terms of the comparative analysis of the provisions consolidating the right to marriage in the ECHR, the Charter and the Constitution, it is important to draw attention to the fact that, unlike the above-mentioned provision of Paragraph 3 of Article 38 of the Constitution, or Article 12(1) of the ECHR stating that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”¹⁷, the wording of Article 9 of the Charter is gender-neutral. It declares that: “The right to marry and the right to establish a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

Furthermore, the above-quoted provisions of the Charter and the ECHR consolidate the right to marry (the right to conclude a marriage) and the right to found a family as two separate rights. This, on a number of occasions when applying and interpreting the relevant provisions of Article 12 of the ECHR, was later reaffirmed by the ECtHR.

Although marriage-based family relationships can be seen as “privileged”, the aim to establish a family can be pursued and, accordingly, family status can be gained also by unmarried couples living in a partnership¹⁸. The existence or non-existence of the fact of marriage between parents also may not have a negative impact on the status of a minor child as a family member. As early as in the case of *Marckx v Belgium* in 1979, the ECtHR held that, while the support and encouragement of the traditional family is in itself legitimate or even praiseworthy, recourse must not be had in the achievement of this end to measures whose result is to prejudice the natural family; the members of the natural family enjoy the guarantees of Article 8 of the ECHR, regulating, *inter alia*, the right to respect for family life, on an

¹³ E.g. by stating that the right of a surviving spouse to social security is justified by a difference in treatment of spouses; see the judgment of the ECtHR of 28 May 1985, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, nos 9214/80, 9473/81 and 9474/81.

¹⁴ Decision of the ECtHR of 27 April 2000 on admissibility, *Shackell v the United Kingdom*, no 45851/99.

¹⁵ Judgment of the CJEU of 17 April 1986, *State of the Netherlands v Ann Florence Reed*, C-59/85.

¹⁶ Judgment of the CJEU of 17 September 2002, *Baumbast and R. v Secretary of State for the Home Department*, C-413/99.

¹⁷ Article 12 of the ECHR.

¹⁸ Judgment of the ECtHR of 9 June 2016, *Chapin and Charpentier v France*, no 40183/07.

equal footing with the members of the traditional family¹⁹. This position was given articulation in the case of *Keegan v Ireland*, in which the ECtHR clarified that a child born to a couple (independently of the very fact of marriage) is *ipso jure* part of that family unit from the moment of his or her birth and, thus, there exists a bond amounting to family life between the child and his or her parents even if, at the time of his or her birth, the parents are no longer co-habiting or their relationship has then ended²⁰. On the other hand, following an assessment of the situation from the perspective of the right of parents to respect for family life, the ECtHR has concluded that a mere biological kinship between a parent and a child, without any further legal or factual elements indicating the existence of a close personal relationship, is in itself insufficient to create family life protected under Article 8 of the ECHR²¹.

The protection of family life in the latter cases is recognised upon the so-called functional test, where the principal criterion is “*the ascertained intention to create family life*”²², i.e., the intention to create a particular state. The existence of this intention can be supported by various factual circumstances, e.g., by providing proof of the commitment by a parent to the child both before and after the birth²³. The functional test is also relevant in other instances. The ECtHR has taken a principled stance that the existence or non-existence of “family life” is essentially the question of fact, depending on the real existence in practice of close personal ties²⁴. Extensive jurisprudence of the ECtHR demonstrates that, in assessing whether a particular relationship is covered by the notion of “family life”, various factors, such as whether the couple live together, the stability of their relationship, the nature of commitment to each other, etc., may be taken into consideration. According to the ECtHR, the notion of “respect for family life” entails that biological and social reality prevail over a legal presumption that is openly at variance with the established facts²⁵.

The ECtHR has been gradually extending the concept of family life, and family life has been held by the Court to encompass not only relationships (either within or outside marriage) between parents and their children, but also those between other persons, *inter alia*, ties between near relatives, since such relatives may play a considerable part in family life²⁶. Thus, the ECtHR has found relationships embraced by the concept of family life with regard to, for example, a grandparent and grandchild²⁷, a brother and sister²⁸, a transsexual father and his child²⁹, an uncle and nephew³⁰, also a child conceived through a surrogacy agreement and the spouses who are raising such a child³¹.

Thus, although the national authorities enjoy a margin of appreciation in the regulation of family relationships, the criteria for the assessment of the existence of family relations have increasingly become consolidated in the jurisprudence of the ECtHR. As no conclusive list of such criteria exists, the specific

¹⁹ Judgment of the ECtHR of 13 June 1979, *Marckx v Belgium*, no 6833/74.

²⁰ Judgment of the ECtHR of 26 May 1994, *Keegan v Ireland*, no 16969/90, paragraph 44.

²¹ Judgment of the ECtHR of 15 September 2011, *Schneider v Germany*, no 17080/07, paragraph 80; the judgment of the ECtHR of 1 June 2004, *L. v the Netherlands*, no 45582/99, paragraph 35.

²² PEERS, S. *et al.* *The EU Charter of Fundamental Rights: A Commentary*. Bloomsbury Publishing, 2014, p. 203; also see, e.g. the judgment of the ECtHR of 26 May 1994, *Keegan v Ireland*, no 16969/90; the judgment of the ECtHR of 8 July 2003, *Sahin v Germany*, no 30943/96.

²³ Judgment of the ECtHR of 15 September 2011, *Schneider v Germany*, no 17080/07, paragraph 81.

²⁴ Judgment of the ECtHR of 12 July 2001, *K. and T. v Finland*, no 25702/94, paragraph 150.

²⁵ Judgment of the ECtHR of 27 October 1994, *Kroon and Others v the Netherlands*, no 18535/91.

²⁶ Judgment of the ECtHR of 13 June 1979, *Marckx v Belgium*, no 6833/74.

²⁷ Judgment of the ECtHR of 27 April 2000, *L. v Finland*, no 25651/94.

²⁸ Judgment of the ECtHR of 26 September 1997, *El Boujaidi v France*, no 25613/94.

²⁹ Judgment of the ECtHR of 22 April 1997, *X, Y and Z v the United Kingdom*, no 21830/93.

³⁰ Judgment of the ECtHR of 8 January 2008, *Boyle v the United Kingdom*, no 55434/00.

³¹ Judgment of the ECtHR of 26 June 2014, *Menesson v France*, no 65192/11.

situation in each case is judged by taking into account, among other things, an overall shifting context of life. Even though the jurisprudence of the ECtHR in applying and interpreting the provisions of Articles 8 and 12 of the ECHR continues to lend essential weight in revealing the content of the right to respect for family life under Article 7 of the Charter, it has been in parallel complemented by the case law of the CJEU, as well as by EU secondary legislation, which can be considered to have significantly changed over time (notably, in the before-mentioned areas of gender equality, social security and freedom of movement, including the matters of immigration and asylum). For instance, the Employment Directive³² explicitly lays down the prohibition of discrimination on the grounds of sexual orientation; mention should also be made of the documents regulating freedom of movement, immigration and the right to asylum, such as the Directive on the right to family reunification³³, the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States³⁴, as well as the Directive laying down the minimum standards for the reception of asylum seekers³⁵; all of these instruments contain the concepts of the family (family member) whereby family relationships are not solely confined to families based on marriage between a man and woman³⁶, and the term “spouse” provided therein is gender neutral.

1.2. The right of same-sex couples to respect for family life

The approach of both the ECtHR and the CJEU towards the protection of the right of same-sex couples to respect for family life has, in the last decade, developed progressively. For instance, in the case of *Grant v South West Trains*³⁷ considered twenty two years ago (in 1996), the CJEU rejected the request of the applicant to apply Article 141 of the European Community Treaty³⁸ (currently Article 157 of the Treaty on the Functioning of the European Union³⁹), ensuring the principle of equal pay for equal

³² Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation, *OJ*, 2000, L 303.

³³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ*, 2003, L 251.

³⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), *OJ*, 2004, L 158.

³⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ*, 2003, L 31.

³⁶ E.g. according to Article 2 of the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, “family member” means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnership as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b). Meanwhile, the Directive on the right to family reunification (whose purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States) consolidates by far the most extensive definition of the family: besides the already enumerated groups, Article 4 of Chapter II “Family members” of this directive, among other things, provides that “The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.”

³⁷ Judgment of the CJEU of 17 February 1998, *Grant v South West Trains*, C-249/96.

³⁸ Treaty establishing the European Community (Consolidated version 2002), *OJ* C 325, 24.12.2002, p. 33–184.

³⁹ Consolidated version of the Treaty on the Functioning of the European Union, *Consolidated version of the Treaty on the Functioning of the European Union* *OJ* C 326, 26.10.2012, p. 47–390.

work, and the provisions of the Directive on equal pay; specifically, the Court refused to allow the applicant's female partner, with whom the applicant had had a permanent relationship, to be granted travel concessions applied by the applicant's employer to long-term partners of either married or unmarried heterosexual couples. The case of *D and Kingdom of Sweden v Council of the European Union*⁴⁰ resulted in the refusal by the CJEU to grant the applicant a household allowance in respect of his partner regardless of the fact that they had been living in a registered partnership. These two cases are typical examples of discrimination prohibited under the provisions of the ECHR and the Charter alike, which would only later be recognised by both courts.

In one of its most recent judgments in the case *Coman and Others*⁴¹, the CJEU once again stressed that the family status of an individual is a matter falling within the competence of the Member States – the states are free to provide or not provide for marriage for persons of the same sex (para. 37), which are also free to provide or not provide for an alternative form of legal recognition of their relationship⁴². The CJEU, however, further explained that the right to respect for private and family life guaranteed by the EU Charter is a fundamental right (para. 48), and that, following the developed case-law of the ECtHR, the relationship of a homosexual couple may fall within these notions, just as the relationship between a heterosexual couple in the same situation (para. 49). The CJEU stressed that, under EU law, specifically the rights relating to the freedom of an EU citizen to move and reside within a Member State other than his or her state of origin, nationals of Member States enjoy the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to that Member State (para. 32). Accordingly, the CJEU acknowledged the obligations of EU Member States to recognize the marriage of homosexual couples, concluded in another Member State, for the purpose of ensuring the protection of their right to free movement, guaranteed under EU law, also for granting the derived right of residence to a third country national (paras. 45-46). As this interpretation of EU law establishing the right to free movement, as applied in conjunction with the right to respect for family life, is, under relevant circumstances, applicable to all EU member states, it will, undoubtedly, influence national law by expanding the scope of application of the constitutional right to respect for family life, through the acknowledgment, in certain instances, of family member status to individuals, which would not have otherwise enjoyed this status, as well as the relating family rights under national law.

Accordingly, the right of same-sex couples to found a family, their right to the protection of family life and their right to marriage represent matters that have already for some time been addressed by both the ECtHR and EU law. The jurisprudence of the ECtHR, as well as EU law, has to this day provided the following answers that are not available in the national law of all EU Member States: first, the differential treatment of individuals based on their sexual orientation (i.e. the prohibition of discriminatory treatment in this respect) has come gradually to be approached not only in terms of the right to private life, but also in the context of the right to family life. A case in point is *Schalk and Kopf v Austria*⁴³, where the ECtHR stressed that the changing attitude of the general public towards same-sex couples had developed rapidly over the past decade and there was a number of states providing for the legal recognition of same-sex couples. The ECtHR observed that certain provisions of EU law also reflected the growing tendency to include same-sex couples in the notion of “family”. In view of

⁴⁰ Judgment of the CJEU of 31 May 2001, *D and Kingdom of Sweden v Council of the European Union*, C-122/99 P and C-125/99 P.

⁴¹ Judgment of the CJEU of 5 June 2018, *Coman and Others*, C-673/16.

⁴² Judgment of the CJEU of 24 November 2016, *Parris*, C-438/15, para. 59.

⁴³ Judgment of the ECtHR of 24 June 2010, *Schalk and Kopf v Austria*, no 30141/04.

this evolution, the Court held it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, in the case at issue, the Court found the relationship of the applicants, a cohabiting same-sex couple living in a stable partnership, to fall within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

In the case of *Schalk and Kopf v Austria*, the ECtHR reiterated that, compared to the provisions of the Charter, Article 12 of the ECHR secures the right to marry to a man and woman. While clarifying the wording used in the ECHR, the ECtHR noted that the choice of these terms must be regarded as deliberate; in the 1950s, when the ECHR was drafted and adopted, marriage was clearly understood in the traditional sense of being a union between partners of different sex. In contrast, Article 9 of the Charter, enshrining the right to marry, does not link this right exclusively to marriage between two persons of the opposite sex. As pointed out in the Explanations relating to the Charter of Fundamental Rights, “the wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family”⁴⁴. Accordingly, Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. The standard of protection of individual rights established by the Charter is thus similar to that of the ECHR, but it may be higher (the scope of application of the said provision of the Charter may be wider), when national legislation so allows.

Thus, the Charter leaves the decision on whether or not to allow same-sex marriage to the Member States. However, with regard to the provisions of the ECHR, the ECtHR has pointed out that it would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Nevertheless, taking into account that marriage has deep-rooted social and cultural connotations, which may differ largely from one society to another, and that the national authorities are best placed to assess and respond to the needs of society, the Court held that the question whether or not to allow same-sex marriage is a matter of regulation by the national law. It is also worth noting that, in *Schalk and Kopf v Austria*, the ECtHR did not accept the applicants’ argument that, if a state chooses to provide same-sex couples with an alternative means of recognition of the status of their relationship, it is obliged to confer on them a status that corresponds to marriage in each and every respect.

Although the gradual changes in Europe towards the greater legal recognition of marriage between same-sex persons were acknowledged in *Schalk and Kopf v Austria*, the position that Article 12 of the ECHR may not be read as obliging the Member States to grant access to marriage to same-sex couples was reiterated by the ECtHR in 2015 in the case of *Oliari and Others v Italy*⁴⁵. However, with regard to Article 8 of the ECHR, the ECtHR reached significant conclusions in this case by recognising that Italy had failed to comply with its positive obligation to establish a specific legal framework providing for the recognition and protection of same-sex unions.

In this connection, the ECtHR attached particular importance to the position adopted by the Constitutional Court of Italy in its judgments calling for the legal recognition of the relationships of homosexual unions. In addition, the ECtHR highlighted the evidence of popular support among the Italian population on this matter, as shown through official surveys. Having held that a prolonged failure by the national legislators to take account of the Constitutional Court’s pronouncements and

⁴⁴ Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

⁴⁵ Judgment of the ECtHR of 21 July 2015, *Oliari and Others v Italy*, nos 18766/11 and 36030/11, paragraphs 191–192.

recommendations was undermining the authority of the judiciary and, in that specific case, had left the concerned individuals in a situation of legal uncertainty, the ECtHR found a violation of Article 8 of the ECHR⁴⁶. Thus, it can be maintained that this case provides a notable example of the interaction between national and supranational standards for the protection of individual rights.

The rights of same-sex couples at issue, among other things, are also closely connected with the right to adopt children. It is apparent that the scope of protection of the right to family life in supranational law has continuously been expanding and the approach to the right of homosexual persons to adopt children has shifted from the perspective of the right to private life towards the right to family life. In this context, it is necessary, first of all, to mention the case of *E. B. v France*⁴⁷, examined by the ECtHR in 2008. Pointing to a wide margin of appreciation left to the states and the sensitivity of the matters at hand and, among other things, departing from its previous case law, the ECtHR recognised that the refusal to grant authorisation to adopt a child to a single woman living in a homosexual relationship violated the provisions of Articles 8 and 14 of the ECHR. It is true, however, that the refusal to grant the homosexual person authorisation was in this case weighed only against the right to private life (rather than the right to family life). Meanwhile, in *X and Others v Austria*⁴⁸ in 2013, when interpreting the right to family life in the context of Article 8 of the ECHR, the ECtHR found the prohibition precluding one female partner of a same-sex unmarried couple living in a permanent relationship from adopting the other partner's child (without severing the ties between that partner and the child) to be in violation of Article 14, taken in conjunction with Article 8, of the ECHR. Based on its previous jurisprudence and the circumstances of the case, the ECtHR emphasised that the female partners living together as a couple and a child of one of them should be regarded as a family in the sense of Article 8 of the ECHR. The Court also pointed out that Article 8 of the ECHR does not impose on the Contracting States the obligation to extend the right to second-parent adoption to unmarried couples. Nevertheless, having regard to the fact that Austrian law allowed second-parent adoption in unmarried different-sex couples, the ECtHR did not find a sufficient reason to substantiate the difference in treatment between different-sex and same-sex unmarried couples in respect of second-parent adoption⁴⁹.

A coherent move towards ensuring the greater protection of individual rights with regard to same-sex couples in exercising the right to family life is also obvious in the judgment delivered in the case of *Chapin and Charpentier v France*⁵⁰ on 9 June 2016. In this case, the ECtHR reiterated the right of both different-sex and same-sex couples to the protection of family life and the possibility of defending this right on the basis of Article 8 of the ECHR. Moreover, the Court once again reaffirmed that a family relationship can be created not exclusively upon marriage, but also while living *de facto* family life, whether by having registered a partnership, or by declaring this fact otherwise or without declaring it. The ECtHR noted that, if family life exists upon mutual agreement of persons, the states are under the positive obligation to provide the persons living *de facto* family life with legal protection.

⁴⁶ *Ibid.*, 179–187.

⁴⁷ Judgment of the ECtHR of 22 January 2008, *E. B. v France*, no 43546/02.

⁴⁸ Judgment of the ECtHR of 19 February 2013, *X and Others v Austria*, no 19010/07.

⁴⁹ It should be mentioned that, in this case, the Court declined to compare the rights of this (unmarried) couple with the rights of married couples. – *Comment of the author.*

⁵⁰ Judgment of the ECtHR of 9 June 2016, *Chapin and Charpentier v France*, no 40183/07.

1.3. The right to respect for family life in the context of divorce

The ECtHR has a number of times stressed that neither Article 12 nor Article 8 of the ECHR can be interpreted as guaranteeing individuals a right to divorce⁵¹: the *travaux préparatoires* of the ECHR indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the ECHR; the national legislator enjoys a wide margin of discretion with regard to the legal regulation of divorce and the implementation of divorce laws. It has also clearly established that, in cases when national law allows divorce, the right to remarry (to found a new family) is, accordingly, guaranteed under Article 12 of the ECHR, while the right to respect for family life is also secured to the newly found family under Article 8 of the ECHR.

However, mention must also be made to cases when, under national law, due to one of the spouse's refusal to consent to a divorce, the other spouse may not be granted a divorce by the national courts, even if a complete and irretrievable marriage breakdown is concluded⁵². Under such circumstances, even if the spouse that wishes to leave the marriage is in an another relationship, which, according to the well-established case law of the ECtHR, corresponds with the concept of family relationship, he or she is not entitled to the right to found a family under Article 12 of the ECHR. The ECtHR has stressed that this is true even with regard to situations when an estranged spouse forms a stable relationship with a new partner, which results in a number of years of co-habitation and even in common children⁵³. According to the ECtHR, under Article 8 of the ECHR, *de facto* families and relationships are protected, however, such protection does not mean that legal recognition is granted to them.

In conclusion, the right to respect for family life under Article 7 of the Charter, as applied and interpreted in conjunction with the right to marry and the right to found a family under Article 9 of the Charter (interpreted, accordingly, in the light of the corresponding provisions of Articles 8 and 12 of the ECHR), due to, inter alia, the functional approach to the scope of application of the Charter, allows for potentially wide possibilities of the application of the rights set out in these articles, and thus guarantees a sufficiently high standard for the protection of the individual rights in question. Under these provisions, the right to respect for family life is guaranteed to “traditional families”, i.e. “traditional family units” (giving priority not to the content but to the form of relationship) – a man and woman who are married and who either have or do not have children are immediately regarded as a family, while the members of this unit are guaranteed “the protection of family life”. This notion is, however, supplemented by application of the so-called functional test, whose principal criterion in identifying a family is the intention of those in a relationship to create a particular state, i.e. the intention to create family life. In such cases, the existence or non-existence of family life is considered essentially the question of fact, depending on the real existence in practice of close personal ties. Though a conclusive list of the criteria against which questions concerning the concept of both “family” and “family life” should be assessed has not been confirmed, such criteria have over the years become quite evident and well-established in the jurisprudence of the ECtHR. It must also be taken into account that a significant number of aspects within the scope of the content of the rights entrenched in Articles 7 and 9 of the Charter are not directly regulated by EU law, as they are regarded as sensitive matters linked to the social and cultural development of a particular state and society, therefore, the national authorities are allowed to retain a margin of appreciation in the regulation of family relationships.

⁵¹ Judgment of the ECtHR of 18 December 1986, *Johnston and Others v Ireland*, no 9697/82, paragraph 57; judgment of the ECtHR of 10 January 2017, *Babiarz v Poland*, no 1955/10, paragraph 49 and judgment of the ECtHR of 22 November 2018, *Andrzej PIOTROWSKI v Poland*, no 8923/12, paragraph 46.

⁵² Judgment of the ECtHR of 10 January 2017, *Babiarz v Poland*, no 1955/10, paragraph 54.

⁵³ *Ibid.*

2. The importance of the right to respect for family life under Article 7 of the Charter within the national law. The concept of the family

Questions concerning the concept of the family have also been an object of political and legal discussions in Lithuania for over the last 10 years. The attempts by the national Parliament (the Seimas of the Republic of Lithuania) to consolidate a unified concept of the family in legal acts were assessed by the Constitutional Court of the Republic of Lithuania in 2011, when it examined the constitutionality of the resolution of the Seimas of 3 June 2008 on the approval of the State Family Policy Concept, insofar as the State Family Policy Concept (hereinafter also referred to as the Concept), as approved by the said resolution, consolidated the definitions of the concepts of the family, harmonious family, extended family and incomplete family⁵⁴. Under the Concept, the family was directly related to the fact of the conclusion of a marriage, i.e. the Concept consolidated the definition of the family based exclusively on marriage. Although meeting all the criteria of the harmonious family, multi-child family, family living through a crisis or family at social risk, a man and woman living together but not married to each other were not regarded as a family. Respectively, in contrast to a man or woman who had previously lived in a marriage, a single man or woman who had not been married and his/her children (adopted children) born outside marriage were not regarded even as an incomplete family (“an incomplete family” consisting of one parent and a child or children, born to parents, who had been married to each other). The Concept was designed to form the foundation for the national family policy and the legal regulation in this area. In this way, an inevitable outcome of the adoption of this Concept would have been the exclusion of families other than those founded on the basis of marriage from the area of national legal protection.

After examining the case, the Constitutional Court held that, having narrowed the content of the family as a constitutional institution, the Seimas had not observed the concept of the family as a constitutional value stemming from the Constitution, which, otherwise than had been envisaged by the Concept, may be founded not only on the basis of marriage. The Constitutional Court recognised that the provisions of the State Family Policy Concept were discriminatory against families established otherwise than on the basis of marriage; therefore, the resolution of the Seimas of 3 June 2008 was declared in conflict with Paragraphs 1 and 2 of Article 38 of the Constitution, insofar as the provisions of Item 1.6 of the State Family Policy Concept, as approved by this resolution, consolidated the concepts of the harmonious family, multi-child family, extended family, family living through a crisis, incomplete family, family at social risk and family – which all were considered to be founded exclusively on the basis of marriage.

In principle, the Constitutional Court followed two lines of reasoning. First of all, the Constitutional Court held that even the formal (literal) interpretation of the text of the Constitution was not sufficient to substantiate the assertion of the drafters of the Concept that the notions of marriage and the family could be regarded as overlapping and noted that the constitutional concept of the family may not be derived solely from the institution of marriage. These notions are entrenched in the same article, i.e. Article 38 of the Constitution, but in different paragraphs, and their contexts differ (Paragraph 1 of Article 38 of the Constitution stipulates that the family is the basis of society and the state; Paragraph 2 provides that family, motherhood, fatherhood and childhood are under the protection and care of the state; under Paragraph 3, marriage is concluded upon the free mutual consent of a man and woman;

⁵⁴ Ruling of the Constitutional Court of the Republic of Lithuania of 28 September 2011, Official Gazette *Valstybės žinios*, 2011, No 118-5564.

and under Paragraph 5, the rights of spouses are equal in the family). The Constitutional Court noted that “the fact that the institutions of marriage and the family are consolidated in the same Article 38 of the Constitution is indicative of an inseparable and unquestionable relationship between marriage and the family. Marriage is one of the grounds of the constitutional institution of the family for the creation of family relationships. It is a historically established family model, which has undoubtedly had an exceptional value in the life of society and ensures the viability of the nation and the state, as well as their historical survival.”⁵⁵ However, as held by the Constitutional Court, it is not the sole family model. The Constitutional Court pointed out that the Seimas, as the institution of legislative power, when exercising its constitutional powers and regulating family relationships by legal acts, *inter alia*, formulating the concepts of subjects of these relationships, must pay regard to the Constitution and the requirements stemming from it, *inter alia*, those of the equality of rights, human dignity and respect for private life.

In the case at issue, the Constitutional Court revealed the content of the notion of the family, by clarifying the constitutional concept of the family. The Constitutional Court noted that “the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities, i.e. on the content of relationships, whereas the form of expression of these relationships has no essential significance for the constitutional concept of the family”⁵⁶. It should be mentioned that this concept was based not only on the extensive jurisprudence of the ECtHR, but also on the official constitutional doctrine of other European states (the Czech Republic, the Republic of Slovenia, the Republic of Croatia and the Federal Republic of Germany). The Constitutional Court underlined that the constitutional concept of the family must also be interpreted in the light of the international obligations undertaken by the Republic of Lithuania upon the ratification of the Convention, and took into account the jurisprudence of the ECtHR analysing the concept of the family, whereby this concept is not confined to the traditional family based on marriage: “Other types of the relationship of living together are also defended in the sense of Article 8 of the Convention, as those which are characterised by the permanence of the relationship between persons, the character of the assumed obligations, common children, etc.”⁵⁷. This conclusion was reached by invoking the judgments of the ECtHR adopted in, among other things, the cases of *Marckx v Belgium*⁵⁸, *Kroon and Others v the Netherlands*⁵⁹, *Keegan v Ireland*⁶⁰, *El Boujaidi v France*⁶¹, etc.

It is necessary to note in this context that the duty of the Constitutional Court to follow the European standards of human rights protection derives from the Constitution. Both in an explicit and implicit manner, the Constitution consolidates the interrelated principles that imply the openness of the Constitution to international law, in particular in the area of human rights protection, and thus also the openness of the Constitution to ECHR law⁶². In this respect, the following principles are identified: the principle of respect for international law; the principle of an open, just and harmonious civil society; and the principle of the geopolitical orientation of the state. Among them, primary

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Judgment of 13 June 1979, *Marckx v Belgium*, no 6833/74.

⁵⁹ Judgment of 27 October 1994, *Kroon and Others v the Netherlands*, no 18535/91.

⁶⁰ Judgment of 26 May 1994, *Keegan v Ireland*, no 16969/90.

⁶¹ Judgment of the ECtHR of 26 September 1997, *El Boujaidi v France*, no 25613/94.

⁶² ŽALIMAS, D. Europos Žmogaus Teisių Teismo praktikos įtaka Lietuvos Respublikos Konstitucinio Teismo jurisprudencijai. *Konstitucinė jurisprudencija*, 2016, Nr. 3(43), p. 154.

importance is attached to the principle of respect for international law (*pacta sunt servanda*), which entails the imperative to fulfil in good faith the obligations assumed by the Republic of Lithuania under international law, including both international treaties and the general norms of international law. This principle is entrenched in Paragraph 1 of Article 135 of the Constitution and, as held by the Constitutional Court, it is an inseparable element of the constitutional principle of a state under the rule of law. The principle of respect for international law is complemented by two other constitutional principles (the principle of an open, just and harmonious civil society and the principle of the geopolitical orientation of the state), which imply the integration of the State of Lithuania into the community of democratic states, united through respect for inherent human rights⁶³. As mentioned above, all these principles entail the openness of the Constitution to the standards of European human rights protection; however, they also give rise to the obligation to accept them within the national legal framework as the minimum constitutional standards⁶⁴ and to take into account supranational law when the provisions of the Constitution are interpreted.

It is worth further mentioning that the attempts to define the family have not been abandoned by the Seimas of the Republic of Lithuania up to date. In 2016, following the first reading, the Lithuanian Parliament approved the constitutional amendment whereby the family is defined through marriage⁶⁵. In the opinion of the drafters of the Law on Amending the Constitution, the provisions of Article 38 of the Constitution should be supplemented by explicitly providing that: “The family shall be created upon marriage”; “The family also derives from motherhood and fatherhood”; and “Marriage, family, motherhood, fatherhood and childhood shall be under the protection and care of the State”. Against this background, however, it is important to take into account the constitutional concept of the family as set out in the ruling of the Constitutional Court of 28 September 2011, also the official constitutional doctrine under which it is not permitted to introduce such constitutional amendments that would deny any of the values forming the foundation of the State of Lithuania, including the innate nature of human rights and freedoms⁶⁶, as well the constitutional principle of respect for international law as entrenched in Paragraph 1 of Article 135 of the Constitution, i.e. the principle of *pacta sunt servanda*, which implies the imperative to fulfil in good faith the obligations assumed by the Republic of Lithuania under international law, *inter alia*, international treaties. In view of this, it can be presumed that the constitutionality of the above-mentioned amendment to the Constitution could be assessed in terms of its compliance with the substantive limitations applicable to constitutional amendments (with regard to the content of the current Constitution and the overall integrity of its provisions).

It should be mentioned that, in its ruling of 28 September 2011, the Constitutional Court did not address and, thus, did not consider other related questions, which are even more sensitive for society, such as, e.g. families formed on the basis of the union of same-sex partners. Nevertheless, as noted before, the changing context of life, as well as the adjusted legal regulation in the EU and individual European states, was one of the reasons behind the changes in the case law of the ECtHR, including the recognition of a broader concept of the family, not linked exclusively to a family founded on the basis

⁶³ *Ibid.*, p. 155.

⁶⁴ *Ibid.*, pp. 159, 162.

⁶⁵ The draft Law on Amending Article 38 of the Constitution of the Republic of Lithuania, No XIIP-1217(2). For a constitutional amendment to be adopted, it would yet have to undergo two votes before the Seimas, with a break of not less than three months between these votes. During each of the votes, 2/3 or more Members of the Seimas must vote in favour thereof (See Article 148, paragraph 3 of the Constitution of the Republic of Lithuania).

⁶⁶ Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014. *The Register of Legal Acts*, 24-01-2014, No 478; ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014. *The Register of Legal Acts*, 11-07-2014, No 10117.

of marriage between a man and woman. It is also necessary to note that a wide margin of appreciation reserved to the states in the area of family rights can be subject to various factors, among them, the common consensus of European states on matters related to family rights, i.e. such consensus can have a significant weight for extending the protection of family life.

In this respect, a recently adopted Law on the Strengthening of Family⁶⁷ proclaims in its Preamble that “the basis of the family is the free determination of the man and woman to assume the family’s moral and legal duties, as well as the kinship between the close relatives”. It further declares, i.e. the family is the basis of the State and the society (Preamble) and, therefore, aims “to create legal and organizational preconditions for strengthening the institution of family, to consolidate institutions ensuring the implementation of family policy, to define their main functions and to provide for the organization of family strengthening through the application of the system of formation and implementation of family policy” (Art. 1). Without deeper analysing the content of the said law, a general conclusion can be made that the said law has once again stressed that a family is, firstly, a union between a man and a woman who together assume moral and legal duties, in other words, the law once again limits the concept of family to a traditional marriage between heterosexual partners, and to family relations between close relatives. In doing so, the said law must be regarded as possibly narrowing the scope of protection of family life as it has been established by the Constitution and developed through the official constitutional doctrine of the Constitutional Court, and thus raises doubts with regard to the constitutionality of its according provisions.

As mentioned before, the Constitution ensures the right to marriage⁶⁷ concluded exclusively upon the free mutual consent of a man and woman (Paragraph 3 of Article 38). In addition, Lithuania is one of the six EU Member States⁶⁸ that have not established the institution of civil partnership in their legislation. The entry into force of the provisions providing for the right to civil partnership in the Civil Code of the Republic of Lithuania adopted on 2000 is linked with the entry into force of a law regulating the procedure for the registration of partnerships⁶⁹. Regardless of the efforts to achieve this, such a law has not been adopted yet over the period of more than 16 years. It should be pointed out that, according to the law drafted in 2016 by the Ministry of Justice of the Republic of Lithuania⁷⁰, the procedure for registering partnerships was proposed to be established in the Civil Code. Besides, under this draft law, it was envisaged that the wording of the provisions consolidating the “institution of registered partnership” in the Civil Code⁷¹ would provide that “a partnership shall be the union of a man and woman (partners) who build family relationships without concluding a marriage [...]”. The

⁶⁷ Law on the Strengthening of the Family of the Republic of Lithuania. *The Register of Legal Acts*, 2017, No. 17495.

⁶⁸ It should be noted in this respect that the institution of civil partnership, as a form of family relationships, has not yet been consolidated only in 6 out of 28 EU Member States, i.e. Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia. Meanwhile, access to same-sex marriage is granted in 10 EU Member States – Belgium, Denmark, France, Ireland, Luxembourg, the Netherlands, Spain, Portugal, Sweden and the United Kingdom (except Northern Ireland) and 12 European states (in addition to those already mentioned EU Member States, also in Iceland and Norway). Although no European consensus has been reached on this matter so far (in particular, regarding the right of homosexual persons to marry), a majority of states have recognised the consolidation of family relationships in forms other than traditional marriage between a man and woman.

⁶⁹ Article 28 of the Civil Code of the Republic of Lithuania provides the following: “The entry into force of the provisions of Part XV of Book Three of the Civil Code: the provisions of Part XV of Book Three of the Civil Code regarding the union without concluding a marriage shall enter into force from the moment of the entry into force of a law regulating the procedure for the registration of partnerships”.

⁷⁰ The draft Law Amending Articles 2.18, 2.19, 3.3, 3.16, 3.140, 3.141, 3.143, 3.146, 3.147 and 3.150, Section XV of Chapter VI of Third Book, and Articles 5.13, 6.588, 6.590 and 6.744 of the Civil Code of the Republic of Lithuania, No 16-6609(2).

⁷¹ The Civil Code of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2000, No 74-2262.

draft law did not provide for the possibility of registering a partnership for same-sex couples. It is true that, for the purposes of implementing EU law, the Republic of Lithuania's Law on the Legal Status of Aliens was supplemented with the provisions providing that family members of a citizen of an EU Member State (Item 4 of Article 2), family members of an asylum applicant (Item 22 of Article 2) and family members (Item 26 of Article 2)⁷² include a person with whom a registered partnership has been contracted. In this way, the national legislation, to a certain extent, recognises that civil partnership can be regarded as a basis for founding a family; however, it is applicable to those members of society that fall within the scope of regulation by this law (and EU law), i.e. it applies specifically to foreigners, citizens of other EU Member States.

In this respect, mention should be made that a case is currently pending before the Constitutional Court, in which it will have to consider whether, in cases of family reunification, the Constitution allows for a refusal to issue a temporary residence permit to a foreign national who has entered into a same-sex marriage or same-sex registered partnership in another state with a citizen of the Republic of Lithuania who resides in Lithuania (taking into account the circumstance that such marriages or partnerships are not allowed under national law)⁷³. The case was brought before the Constitutional Court by the Supreme Administrative Court of Lithuania, by the applicant, a third country national, who was at the time refused by the Department of Migration under the Ministry of the Interior a permit of temporary residence within the Republic of Lithuania on the ground of family reunification, though his spouse was a Lithuanian citizen and resided permanently in Lithuania⁷⁴. The latter administrative case, among other, demonstrates also the topicality of the issue in question.

In conclusion, it is clearly established in the official doctrine the Constitutional Court of the Republic of Lithuania that the constitutional concept of the family may not be derived solely from the institution of marriage, but rather must be based on the content of relationship, whereas the form of expression of the relationship has no essential significance in defining family relations. However, based on the analysis of the existent legal regulation, *inter alia*, the fact that national ordinary law provides for no legal regulation of civil partnership and legal preconditions for registering a legal partnership – in the form of marriage – are created only for different-sex couples, a conclusion may be made that ordinary law does not ensure the same level of protection for all individuals who are not married, but are in a relationship, the contents of which are fully consistent with the constitutional notion of family.

Conclusions

1. The right to respect for family life under the provisions of Article 7 of the Charter, as applied and interpreted in conjunction with the right to marry and the right to found a family under Article 9 of the Charter (interpreted, accordingly, in the light of the corresponding provisions of Articles 8 and 12 of the ECHR), due to, *inter alia*, the functional approach to the scope of application of the Charter, allow for potentially wide possibilities of the application of the rights set out in these articles, and thus guarantees a sufficiently high standard for the protection of the individual rights

⁷² The Republic of Lithuania's Law on the Legal Status of Aliens, Official Gazette *Valstybės žinios*, 2004, No 73-2539.

⁷³ See Petition No. 1B-22/2016 (case No. 16/2016) "On permission for temporary residence in the Republic of Lithuania"; [interactive, accessed 2018-03-15]. Available at: <<http://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1665/content>>.

⁷⁴ Supreme Administrative Court of Lithuania. *Administrative case no. eA-4175-624/2016 (process no. 3-61-3-00530-2016-0), ruling of 6 December 2016.*

- in question: the right to respect for family life applies beyond traditional families that are solely based on the conclusion of marriage between a man and a woman; the existence of family life is also established in cases of the real existence of close personal ties between family members.
2. Despite the standards of human rights protection established by supranational law, the national authorities are allowed to retain a margin of appreciation in the regulation of family relationships. However, the criteria against which questions concerning the concept of both “family” and “family life” should be assessed have become quite evident in the jurisprudence of the ECtHR. Supranational law pre-eminently served as one of the principal criteria in revealing the constitutional concept of the family, which is based on the content of relationships (especially the existence of close ties between family members), rather the form of expression thereof, and, in principle, corresponds to the concept of the family under the European Union law and the ECHR.
 3. The gender-neutral provisions of the Charter, establishing the right to marry and to found a family, the jurisprudence of the CJEU, which, *inter alia*, rely on the standards of human rights protection defined by the ECtHR, attest to the fact that European standards for the protection of the right to respect for family life are evolving towards the recognition of the legal status to families of same-sex couples. Whereas the national ordinary law of the Republic of Lithuania does not provide for the legal regulation of civil partnership, it, in this respect, ensures a lower standard for the protection of individual rights compared to supranational law.

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Šeimos gyvenimo apsauga Europos Sąjungos teisėje: šeimos samprata

Ingrida Danėlienė

S a n t r a u k a

Straipsnyje nagrinėjama Europos Sąjungos pagrindinių teisių chartijos 7 straipsnyje įtvirtinta teisė į pagarbą šeimos gyvenimui, ją taikant ir aiškinant kartu su teise į santuoką ir teise kurti šeimą, užtikrinama Chartijos 9 straipsnio nuostatomis. Europos Sąjungos teisėje įtvirtintas šių teisių apsaugos standartas nustatomas atsižvelgiant į šias teises reglamentuojančias Europos žmogaus teisių konvencijos nuostatas bei Europos Žmogaus Teisių Teismo jurisprudenciją. Straipsnyje atskirai analizuojami ir teisės į pagarbą šeimos gyvenimui įtvirtinimo Lietuvos Respublikos nacionalinėje teisėje probleminiai aspektai.

Straipsnyje konstatuojama, kad, pirma, Chartijos 7 ir 9 straipsniuose įtvirtintos individualios teisės, aiškinamos atsižvelgiant į EŽTK 8 ir 12 straipsnių nuostatas, *inter alia*, dėl funkcinio požiūrio į Chartijos taikymo sritį, lemia potencialiai plačias šiuose straipsniuose įtvirtintų teisių taikymo galimybes, tokiu būdu nustatomas ir pakankamai aukštas šių individualių teisių apsaugos standartas. Antra, daroma išvada, kad Chartijos 7 straipsnyje įtvirtinta teisė į pagarbą šeimos gyvenimui, ją taikant ir aiškinant su Chartijos 9 straipsnyje įtvirtintomis teise tuoktis bei teise kurti šeimą (kaip ir EŽTK 8 ir 12 straipsnių nuostatos), nustato pakankamai aukštą šių individualių teisių apsaugos standartą. Nors supranacionalinėje teisėje šeimos teisinių santykių sritis priskiriama jautriems klausimams, todėl valstybėms pripažįstama plati nuožiūros laisvė ir sprendžiant dėl teisės į pagarbą šeimos gyvenimui užtikrinimo, būtent supranacionalinė teisė tapo vienu iš pagrindinių kriterijų atskleidžiant konstitucinę šeimos sampratą, kuri iš esmės atitinka šeimos sampratą pagal Chartiją ir EŽTK. Trečia, atkreipiamas dėmesys, jog tiek teisė tuoktis įtvirtinanti lyčių atžvilgiu neutrali Chartijos 9 straipsnio nuostata, tiek Europos Žmogaus Teisių Teismo nustatytais žmogaus teisių apsaugos standartais grindžiama Europos Sąjungos Teisingumo Teismo jurisprudencija rodo, kad europiniai teisės į pagarbą šeimos gyvenimui standartai evoliucionuoja teisinio statuso pripažinimo ir tos pačios lyties asmenų šeimoms linkme. Ketvirta, pažymima, kad Lietuvos Respublikos nacionalinėje teisėje nesant civilinės partnerystės teisinio reguliavimo, nacionalinė ordinarinė teisė šiuo požiūriu užtikrina žemesnį individualių teisių apsaugos standartą, nei leidžia Europos Sąjungos teisė, taip pat EŽTK bei nuosekliai vystoma EŽTT jurisprudencija.