

PECULIARITIES OF THE LEGAL REGULATION OF THE PARTNERSHIP INSTITUTE IN THE REPUBLIC OF LITHUANIA

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Abstract

In a global assessment of the partnership institute, it is clear, that it becomes an important legal issue element of a democratic and tolerant state. It is being talked more and more about partnership, about the need to change the concept of family definition, raising questions not only related to partnership emotionally, but also from a legal point of view, also when the government is considering the partnership institute operation and assurance, it is important to pay attention to the peculiarities of legal regulation. Legislator back in 2001 made a promise to enable the partnership institute, but for two decades there are no obvious changes. The Civil Code that entered into force in 2001 created prerequisites and opportunities for legal regulation, but the norms have not yet entered into force. According to other European Union the country's court practice shows the specificity and complexity of this institute, and for each state – uniqueness.

Keywords: partnership, family, legal regulation

Introduction

The Charter of Fundamental Rights of the European Union clearly states its position on discrimination. Article 21 of the Charter states that any discrimination is prohibited. This includes not only religion or belief, national or social origin, age, etc., but also sexual orientation. This presupposes that the European Union pursues a common policy of non-discrimination in all in member states (Charter of Fundamental Rights of the European Union 2016/C 202/02).

Member States have a positive obligation to legalize same-sex relationships. In Denmark, same-sex civil partnerships were enacted in 1989, and same-sex marriage was legalized in the Netherlands in 2011. During this decade, about fifty countries around the world found a way out by recognizing same-sex unions. However, some members of the Council of Europe, including Lithuania, do not take sufficient measures to protect the rights of same-sex couples.

The Lithuanian legislator is regulating family legal relations, while back in 2008 the concept of family policy was approved, which tried to present a unified family definition. The latter states that the definition of family is applicable to all legal entities' relationships, and the family itself is defined as "spouses and their children, if any" (Dr. Beliūnienė L., Lankauskas M, Pajaujis V., Baltrimas J. "Regulation of the Partnership Institute of Europe countries. Legal opportunities in Lithuania" Legal e-news... 2016).

There is a growing trend in Europe and around the world to give equal status to same-sex couples recognition of relationships. The agreement and contract between two people to live as a family becomes paramount in terms of achieving equality in all human relationships.

The Constitutional Court of the Republic of Lithuania, in its ruling of September 28, 2011, stated that the concept of family not only associated with marriage, which is an integral part of the family, but the family is perceived in a broader sense (the ruling of the Constitutional Court of the Republic of Lithuania of September 28, 2011 in the case No. 21/2008). However, there is no room for partnerships in today's legislative framework of the Republic of Lithuania for the institute, nor for the variety of forms of family.

The European Court of Human Rights has found in the case "Affaire Chapin and Charpentier vs. France" that, under the Convention, member states are free to choose whether to extend marriages institute for same-sex couples. Considering this, Lithuania, like other countries, does not have a direct duty to enable same-sex marriage or partnership. This freedom of state discretion and this does not oblige to change the Constitution. Also, this corresponds to the position of the European Court of Human Rights as well. The problem is with other, alternative family relationships to marriage failure to ensure legal protection (Affaire Chapin et Charpentier v. France... 2016 Strasbourg: European Court of Human Rights).

Research object. Legal regulation of the partnership institute.

Research goal. To review, analyse and evaluate aspects of the legal regulation of the partnership institute, ensuring the interests of people seeking partnership.

Tasks: to define the concept of partnership institute. To review the set of measures ensuring the interests of people of the same sex, which are related to the possibility of creating a family. Review and analyse legal acts and norms related to partnership opportunities.

Research method. Historical, descriptive, comparative, analytical and systematic. The works of Lithuanian and foreign scientists, articles, laws and jurisprudence are analysed.

The concept of the Institute of Partnership in the Republic of Lithuania

Attitude to the family, first of all, begins not with society, but with regulatory acts. The Constitution of the Republic of Lithuania, which, in principle, protects and cares for the family defines the basic concept of the family. In the interaction between the state and the family, there are all sorts of problems of a practical and even theoretical nature, so the Constitution is the basis not only for the adoption of laws, but also for adapting them to solve those emerging problems. The laws regulating family relations and marriage are reflected in the Civil Code of the Republic of Lithuania. The Civil Code establishes the institute of cohabitants, but it should be emphasized that this institute contradicts the Constitution. Although this basically defines property relations, other than marriage forms of the family can be found in the regulatory acts. (Civil Code of the Republic of Lithuania... 2000)

In 2011, the Constitutional Court of Lithuania spoke out and adopted a resolution on the concept of family policy. In the ruling, the court declares that relationships legalized only in marriage are recognized as a family contrary to the Constitution. The court did not diminish marriage as an institution for the legalization of relations, and even noted that it is an extremely important and essential element for society and the state.

The constitutional concept of the family cannot be derived only from the institution of marriage embed in the provisions of Article 38(3) of the Constitution. The fact that the institutions of marriage and family are enshrined in the same Article 38 of the Constitution shows an inseparable and indisputable relationship between marriage and family. Marriage is one of the foundations of the constitutional institution of the family for building family relationships. (Resolution of the Constitutional Court of the Republic of Lithuania, On the concept of the family... 2011, Vilnius)

Based on that and raising doubts, the court admits that families are not always obliged and can enter marriage. The joint life of individuals may have other factors that give family status: ... inter alia, the cohabitation of an unmarried man and woman which is based on constant emotional attachment, mutual understanding, responsibility, respect, joint upbringing of children and similar ties, and the voluntary decision to assume certain rights and responsibilities, which are the basis of the constitutional institutions of motherhood, fatherhood, and childhood. (Resolution of the Constitutional Court of the Republic of Lithuania, On the concept of the family... 2011)

Thus, the court concludes that the constitutional concept of the family is based on the mutual responsibility, understanding, emotional affection, assistance, and similar connections of family members, and on the voluntary determination to assume certain rights and obligations, i.e., the content of the relationship, and the form of expression of these relationships is of no fundamental importance for the constitutional concept of the family.

Meanwhile, Chapter XV of The Civil Code of the Republic of Lithuania, VI d. XV, establishes the institute of cohabitants, and Article 3.229 of the same Code indicated that the norms determine the property relationship between a woman and a man who, having registered a partnership in the manner prescribed by law. (Civil Code of the Republic of Lithuania... 2000)

When creating the new Civil Code of the Republic of Lithuania, the codes and legal acts of various foreign countries were based on the regulation of cohabitation relationships, but the characteristics of the Lithuanian Cohabitation Institute do not correspond to any state. (Tamašauskienė V. Legal issues of the Institute of Partnership... 2010: MRU).

Since there is still no law on partnership and no partnership institute in Lithuania, the before mentioned section of the Civil Code applies to couples living together, but who have not registered their cohabitation in any form. It should not be forgotten that there have already been several drafts of the partnership law, and although both the Civil Code and the draft law contain the foundational aspects of the partnership institute, neither the law nor the norms of the code are yet valid.

It should be noted that partnership in a broad sense is covered not only by the institute of cohabitants, but also by a registered and unregistered partnership. As Mastauskaitė P. states in her work, the main emphasis of unregistered partners is that such a relationship is based on the conduct of a common farm by people of two different sexes, while in the case of registered partnerships, such a union can also be legalized by partners of same sex. (Mastauskaitė P. "Can a partnership legally concluded abroad be recognized in Lithuania? Master's thesis... 2016, Kaunas: VMU)

It is significant to mention that the absence of a law on partnership is not just a problem for Lithuania, in recent decades the attitude of society has changed significantly, and the understanding of marriage, family, equal opportunities for same-sex couples has also changed. According to Nicola Barker and Daniel Monk in their work “From Civil Partnership to Same-Sex Marriage. Interdisciplinary reflections”, all states have faced the problem of partnership, some react to it more broadly and quickly, others adhere to strict family policies. However, it should not be forgotten that during liberalization and while observing such pace of globalization, a complex solution to the problem of the absence of partnership laws is necessary, because we are increasingly faced with unequal rights for individuals who can legalize partnership in one country, but in another country such union of two people is not only invalid, but and not recognized. (Barker N., Monk D. “From Civil Partnership to Same-Sex Marriage. Interdisciplinary reflections...2015)

Law on the Institute of Partnership in the European Union

The Directive 2004/38/EC of the European Parliament and of the Council specifies: “family member” – is: a) spouse; b) a partner with whom a Union citizen has entered a registered partnership under the law of a Member State, if the host Member State treats the registered partnership as equivalent to marriage and in accordance with the requirements laid down in the relevant legislation of the host Member State; c) direct descendants under the age of 21 or dependents of a citizen and a spouse or partner as defined in point (b); d) dependent direct relatives of a citizen and a spouse or partner as defined in point (b) above the line of consanguinity. (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004)

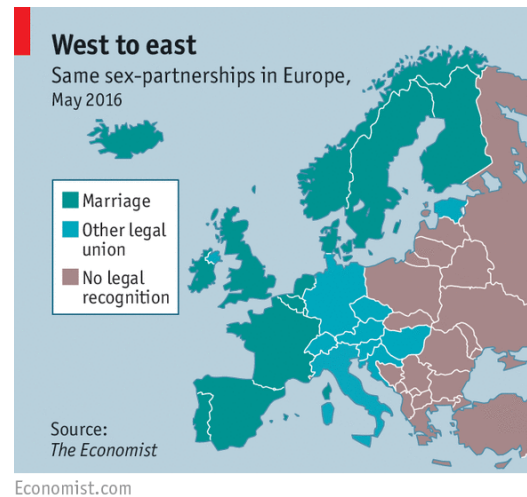
In 2009 December 10 and 11 The European Council meeting in Brussels adopted a new multi-annual program “Stockholm Program – An open and secure Europe for the benefit and security of citizens”. Although the adopted program is no longer valid today, as it no longer reflects the present, these are important guidelines indicating possible changes not only in European Union law, but also of great relevance to the Lithuanian Family Institute. (Publication of the European Council... 2010) The European Union’s priorities are set out in the Stockholm Program, which focus on the areas of justice, freedom, and security. Building on the achievements of the previous programs, The Hague and Tampere, the new program aimed to prepare for the challenges of the future and to further strengthen the area of justice, freedom and security through actions focusing on the interests and needs of citizens. And here today the needs and expectations associated with the concept of the family with the legitimization of human relationships are very relevant. (Reports by the institutions, offices and agencies of the European Union. The European Council. The Stockholm Program is an open and secure Europe for the benefit and security of its citizens. 2010/C 115/01)

Partnership from the point of view of legislative regulation is simpler than marriage. It can be dissolved transparently and without the long legal disputes that arise in the process of divorce. Once the civil partnership has been legalised, the partners could determine the issues of the division of jointly acquired and used property after the end of their joint life. It would also ensure the protection of the rights of children of unmarried couples. (Proposals for the Draft Law on Partnership of the Republic of Lithuania No. XIVP-537... 2021, Coalition of Human Rights Organizations)

Terms of legal regulation of partnership in EU law and law of the Republic of Lithuania

In order to assess the differences and similarities between family law institutes, it is important to take into account the jurisprudence of the European Court of Human Rights. In its resolution of 28 September 2001, the Constitutional Court of the Republic of Lithuania stressed the relevance of the ECHR’s decisions to cases of interpretation and application of Lithuanian law, stating that “the jurisprudence of the European Court of Human Rights as a source of interpretation of the law is also relevant for the interpretation and application of Lithuanian law”.

This position is also taken by the Supreme Court of Lithuania, which, in its ruling of 15 May 1998, clarified to the courts that the courts must follow the jurisprudence of the ECHR when applying the legal acts of the European Union. Thus, the practice formed by the ECHR is an integral part of the law of the Republic



of Lithuania, which must be taken into account when applying and interpreting the law of the Republic of Lithuania and the European Union. (Lapinskas K., Problems of the link between the jurisdiction and jurisprudence of European international courts and national constitutional courts, eighth conference of the Constitutional Court of the Republic of Lithuania and the Constitutional Tribunal of the Republic of Poland “Constitution, National Law and European Law”, Druskininkai, 24-27 June 2003)

The European Court of Human Rights has already repeatedly commented on the eighth article of the Convention, which deals with the definition of the concept of family. It is this article that establishes that everyone has the right to a respected private life for himself and his family. When examining the limits of the application of this Article in each different and unique case, the European Court of Human Rights determines in a particular case whether the relationship between people falls within those limits and into the concept of “family” set out in the article. Here in the case *Marckx p. In Belgium*, it was established that the protection of Article 8 of the Convention includes not only families created based on marriage, but also families formed on other grounds. (The case of the European Court of Human Rights: *Marckx v. Belgium*, 6833/74, 1979-04/27)

In *Lebbink vs Kingdom of the Netherlands*, the court noted that the protection of Article 8 of the Convention to respect for family life is guaranteed only in relation in which ‘legal or factual elements exist which indicate the existence of a close personal connection’. In this case, the court concluded that the relationship between unmarried persons and their child is considered to be family. (European Court of Human Rights case: *Lebbink v. the Netherlands*, 45582/99, 06/01/2005)

In the case of *Johnston and others vs Ireland*, the court found the relationship between unmarried persons, but living together, to be indistinguishable from the marriage-based family. This shows that the court itself treats relations arising both on the basis of marriage and partnership in the same way, without analysing the legal consequences that these institutes entail, but takes into account the closeness of the existing relationships between individuals, the connections between individuals. (The case of the European Court of Human Rights: *Johnston and others v. Ireland*, 9697/82, 18.12.1986)

While analysing court practices, we can see that the jurisprudence of the European Court of Human Rights does not form a list of specific criteria by which the concept of family can be defined. Thus, it can be reasonably stated that the family in the meaning of Article 8 of the Convention includes various forms of family – marriage, unmarried people, relationships between one parent and a child, etc. The practice itself suggests that the differences between partnership and marriage are of no fundamental importance, since it is clear that the essential element for consolidating the fact of family life is the presence of personal ties and the relationship between individuals.

This position reflects the fact that in order to ensure family legal relations that have arisen on various grounds, legal security and equal legal regulation of the rights, duties and responsibilities of people of various family forms must be established.

Partnership Law. Why is it not there?

In the absence of registration of cohabitation, the emergence of partnerships is associated with the adaptation of legislators and courts to the needs of a changing society. Such a phenomenon can be motivated by the fact that individuals, avoiding the formal requirements for the marriage and the consequences arising from marriage, have developed an alternative form of creating family relationships, the conclusion of which requires the implementation of minimum formal rules and the consequences arising from it are of a narrower scope than in the case of marriage. (Schwenzer I. Editorial: *The Evolution of Family Law – From Status to Contract and Relation...* 2012, Kluwer Law International)

Due to the many cultural differences, marriage and partnership are generally considered to be the domain of national law and are therefore not strictly regulated by the powers of EU law. But now this situation is changing rapidly. While creating an area of freedom, security and justice, the EU began to pay more and more attention to the legal system, including family law.

Based on the already discussed position of the Civil Code, a draft Law of Partnership was created, but it was not adopted by the Sejm of the Republic of Lithuania. The regulation of the partnership chosen in the above-mentioned project raised great doubts, since in practice it equated the partnership with marriage. In principle, in most cases, the relevant provisions of the Civil Code apply *mutatis mutandis*.

In some EU countries, civil unions and registered partnerships are considered equivalent or comparable to marriage. All countries that allow same-sex marriage generally recognize same-sex registered partnerships in other countries.

Conclusions

1. In the presence of identified people who could enter a partnership, but the institute is not fully legalized and legally inactive, those people are facing difficulties in exercising their rights. It is important to note that the regulatory foundations of the partnership institute were laid in the formation of legal relations between cohabitants. (Sörgjerd C...2005, „*Neutrality: The death or the revival of the traditional family? Regulating informal partnerships in Sweden*“, Intersentia, Antwerp-Oxford)
2. It is also worth noting that the non-existence of a registered partnership institute in Lithuania causes problems related to population migration and prevents the principle of openness of society and at the same time reduces the economic potential of the state as a player in international relations. As there is no registered partnership institution equivalent to marriage, individuals are not granted the same immigration rights, partners do not have a formally legalized opportunity to travel with their partner (for example, since the rights of partners and children enshrined in the partnership institute are not protected, children or one of the partners may be expelled from the country).
3. Family members should be legally protected in the event of death, divorce, annulment of a marriage or dissolution of registered partnerships of a Union citizen. With due regard for family life and human dignity and certain requirements against abuse, measures should be taken to ensure that, in such circumstances, family members already residing in the territory of the host Member State retain their right to reside there on an exclusive personal basis.
4. The written opinion of D. Kriauciūnas, Director General of the European Law Department under the Ministry of Justice of the Republic of Lithuania, noted that under European Union law, Member States are not obliged to allow or recognise same-sex partnerships or marriages, but according to the legislation of the European Union, they are obliged to apply equal treatment to same-sex couples and opposite-sex couples. In order to properly implement the legal regulation of the European Union, Lithuanian law should provide the possibility of issuing a temporary residence permit to a foreigner in the event of family reunification, also when a person residing in the Republic of Lithuania – a citizen of the Republic of Lithuania who has exercised the right of free movement, with whom the foreigner entered a marriage in another state or a registered partnership agreement that is not recognized in the Republic of Lithuania.
5. After analysing the concepts of marriage and partnership, the question arises whether partnership can be considered as a separate institution of family law or it must be recognized as an alternative to the institution of marriage. According to Kudinavičiūtė-Michailovienė I., partnership “can be seen both as a form of a new marriage and as a new way of registering it”. In other words, partnership emerged as an alternative to the institution of marriage for individuals who do not want to implement the formal requirements for the legalization of family legal relations imposed on the institution of marriage by law. (Kudinavičiūtė-Michailovienė I. “Terms of marriage and their execution”... 2006, Vilnius:Justitia)
6. The non-functioning partnership institute in Lithuania prevents people who have legally registered a partnership abroad from properly integrating into society. In addition, the free movement of individuals and freedom of choice are restricted.

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Partnerystės instituto teisinio reglamentavimo ypatumai Lietuvos respublikoje

Santrauka

Bendrai vertinant partnerystės institutą, akivaizdu, kad jis tampa svarbiu teisiniu demokratinės ir tolerantiškos valstybės elementu. Vis daugiau kalbama apie partnerystę, apie būtinybę keisti šeimos apibrėžimo sampratą, keliant klausimus, susijusius ne tik su daline partneryste emociniu, bet ir teisiniu požiūriu, taip pat ir valstybei svarstant partnerystės instituto veikimo ir užtikrinimo klausimus, svarbu atkreipti dėmesį į teisinio reguliavimo ypatumus. Įstatymų leidėjas dar 2001 m. pažadėjo sudaryti sąlygas partnerystės institutui, tačiau per du dešimtmečius akivaizdžių pokyčių neįvyko. 2001 m. įsigaliojęs Civilinis kodeksas sudarė prielaidas ir galimybes teisiniam reguliavimui, tačiau normos dar neįsigaliojo. Kitų Europos Sąjungos šalių teismų praktika rodo šio instituto specifiką ir sudėtingumą, o kiekvienos valstybės – unikalumą.

Reikšminiai žodžiai: partnerystė, šeima, teisinis reguliavimas