CONTROVERSIAL ASPECTS OF PROCEDURAL IMMUNITIES OF WITNESS IN THE CRIMINAL PROCEEDINGS OF LITHUANIA

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Annotation. *The items of the content and scope of the immunity of the close person, as a witness, in the criminal procedure of Lithuania are analyzed in the present paper. The question on sufficiency of this immunity is raised because protection of the personal and family secret in the criminal lawsuit depends upon it. The author also perceives indeterminacy in the item of the actual and legal status of the close person, as a family member, while ascertaining and implementing one of the most important additional guarantees, granted for the witness. The following propositions are formulated, i.e. while talking about the witness' immunity against the obligation to testify against the member of his/her family or against his/her close relative, it is necessary to assess reciprocally not only the formal attributes of the concepts „the family" or „the marriage", but also the actual nature of the relations of the persons, who are bound with family or similar ties.*

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

Preface

Protection of the personal, family secret and ascertainment of the truth in the criminal case are the procedures, which, as they may seem, have neither the direct points of contact, nor the common final goal. Moreover, they serve as the social goals, which, quasi, are such self-dependent, to say nothing about the common tools, which are assigned for their achievement. However, while analyzing the content of the topic of these values in the social, legal and philosophical context, it appears that, seeking for ascertainment of the truth in the criminal case

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and for implementation of the other tasks of criminal justice, the item of protection of the personal and family secret is particularly topical and closely related, i.e. it is closely related with assignment of the criminal procedure. Indeed, the right of a member of the culprit‘s family or close relative, as a witness, to refuse testifying or to reply only towards certain questions, which is foreseen by the law, symbolizes one of the corner-stone values, which are protected by the state, the pursuits, which are consolidated in the Constitution, i.e. the family interests. They are unarguably considered to be one of the most important core of social life, without which any procedure whatsoever becomes senseless and lacks the social basis. Thus, it is natural that the phenomenon of the family relations in the course of consideration of the criminal lawsuits makes this consideration more sensitive and, correspondingly, requesting extra protectors.

The item of the close person‘s immunity in the Lithuanian criminal procedure, which has attained only solitary discussions till nowadays, is one of such questions in theory and practice, which is still awaiting for the definite answer. Though this reason, the author of the paper doubts again and again, if the immunity, which is actually analyzed in the practical legal activity, is correctly assessed, if its content and scope are really clear. It is a usual case when, according to people, the content of this immunity is clear and it is inexpedient to talk about it further on. However, according to the foreboding, it is particularly the phenomenon of this immunity, which is as unknown as the ambiguous content of the concept „family“. One of the unknown and ambiguous questions is as follows, i.e. what is meant while talking about the family member‘s immunity in the criminal case? Are we talking about the so called official „juridical“ family or is the actual nature of the family relations also implied, in spite of the fact that, from the legal point of view, the family as if does not exist, however, it cannot be said about the actual situation, etc. Thus, this reasoning is to be directly related with explicitness of the procedural status of the witness, as the culprit‘s close person, in the criminal procedural activity. All this determines the purpose of the present scientific paper, which could be defined as follows, i.e. to scrutinize the essence and content of immunity of the witness, as the culprit‘s close person, and the scope of its application in the context of criminal cases.

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

The historical, genetic and comparative methods, the methods of systemic analysis and of the document analysis as well as the other scientific methods were applied, seeking for implementation of the purpose of the present scientific paper.

The items on the witness' immunity in the criminal procedure used to be analyzed in one way or another in the scientific papers, issued by certain authors[3]. However, while assessing the extent, to which the problem, which is analyzed, has been investigated in the mentioned papers, it should be acknowledged that still there is lack of attention to be drawn towards the problems, which are related with the scope of the immunity, which is being analyzed, with the sphere of its application and, finally, with its actual and juridical explicitness.

1. Essence of the close person's immunity in the criminal procedure

The right of the members of the suspected person's or of the culprit's family or of his/her close relatives to refuse testifying, which is foreseen in Part 2 of Article 82 of the Code of Criminal Procedure[4] (hereinafter referred to as the CCP), is the witness' immunity of the personal nature, which is assigned for protection of the personal or family secrets. It is one of the guarantors of preservation of harmony of the family, as an actual or formal union, or of the other relations, related with the family ties. This provision permits to protect the close person, whose concept in the context of analysis of the present paper covers the family members and the close relatives, against any interference into his/her personal family space. Any interference, which is non-considered or neglecting the social balance, into the relations of the family, as the basis of the society and the state, which is protected by the Constitution, is equal to destruction of stability of the society. The Constitutional Court of the Republic of Lithuania stresses the aspiration and

[3] *Report on Competence and Compellability of Spouces as Witness*. Dublin: The Law Reform Commission, 1985, p. 1; Witness – Privileged Communications – Husband and Wife – asking Incompetent Questions. *Criminal Law Magazine & Reports*, 1891, 12: 436-449; Competency of Wife as Witness against Husband – Evidence. *Criminal Law Magazine & Reports*, 1891, 13: 358; Green, M. S. The Paradox of Auxiliary Rights: the Privilege against Self-Incrimination and the Right to Keep and Bear Arms. *Duke Law Journal*. 2002, 52: 133; Stewart, H. Spousal Incompetency and the Charter. *Osgoode Hall Law Journal*. 1997, 34(3): 412-413; Woolley, A. Excluded by Definition: Same-Sex Couples and the Right to Marry. *University of Toronto Law Journal*, 1995, 45: 471; Sagatys, G. *The Right of the Child to Family Relations in the European Convention of Human Rights and Fundamental Freedoms and in the Law of the Republic of Lithuania*. Doctoral Dissertation. Social Sciences (Law). Vilnius: Law University of Lithuania, 2004, p. 32.

[4] Code of Criminal Procedure of the Republic of Lithuania. *Valstybės žinios (Official Gazette)*. 2002. No. 37-1341.

necessity to protect the family relations: „C*onstruing the said constitutional norms in a systematic manner, it needs to be noted that Part 2 of Article 38, Part 1 of Article 39 and Part 2 of Article 41 of the Constitution are to be linked with Part 1 of Article 38, thereof establishing that the family shall be the basis of the society and the state. The provisions of Parts 1 and 2 of Article 38 of the Constitution mean the obligation of the state to establish such legal regulation by laws and other legal acts, which might ensure that the family, as well as motherhood, fatherhood and childhood, would be fostered and protected in all ways possible as the constitutional values*“[5]. The family is one of the most ancient institutions of the society, is an essential value from the social and metaphysical viewpoint. From ancient times the spiritual teachers, philosophers, theologists, lawyers, educologists and the specialists of other spheres used to show interest towards the family. According to sociology, the family is a group of people, who are united by the kinship, marriage or child adoption relations, making the household-management combination, the members of which are familiar with each other and communicate according to the husband‘s and wife‘s, mother‘s and father‘s, son‘s and daughter‘s, brother‘s and sister‘s roles[6]. It follows from herein that the immunity of the family member – a close person, as a witness in the criminal case, which is being analyzed, symbolizes a clear and unambiguous obligation of the state to maintain the balance of the values under protection, i.e. protection of the family relations, as the process and the result to be pursued, and cannot be trampled in the context of execution of justice. Otherwise, such justice would not be fair, although is lawful. The meaning of this immunity is derived from the person‘s bias towards his/her own and towards the close person‘s nature. The author of „Leviathan” philosopher Th. Hobbes talks about it. According to him, „the covenant to accuse oneself is void, without being certain that you‘ll be exculpated. [...] The same suits for accusation of those people, whose condemnation stipulates occurrence of the person in deprivation and troubles, as accusation of the father, wife or benefactor, because such accuser’s evidence, if it is testified non-voluntarily, is acknowledged as

[5] The Constitutional Court of the Republic of Lithuania, Ruling of 13th of June, 2000 “On the compliance of Item 5 of Article 1, Parts 3 and 4 of Article 10, Part 1 of Article 15, Article 20, Item 2 of Article 21, Part 2 of Article 32, Parts 2, 3 and 4 of Article 34, Items 2 and 5 of Article 35, Item 2 of Article 37 and Items 2 and 3 of Article 38 of the Republic of Lithuania Law on Education with the Constitution of the Republic of Lithuania”. *Valstybės žinios (Official Gazette)*. 2000. No. 49-1424.

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

biased through its nature, thus, it cannot be acknowledged as fair"[7]. From the philosophical point of view, if the person has to testify against his/her close person, it means that he/she cannot behave otherwise than to infringe adherence to his/her word, which, in its turn, forms the witness' faithfulness because such witness is faithful to his/her close person. It is worth to invoke Cicero's providence herein, i.e. if the person is forced to infringe his/her word, then he/she is forced to become a non-reliable witness[8].

Historically, the idea of the immunity, which is being analyzed, is derived from the principle, which was formulated in the countries, observing the *common law* traditions, at the beginning of the XVII century, according to which the wife could not testify in favor or against her husband (lat. – *quia sunt duae animae in carne una*)[9]. However, this principle had exceptions. It was conceded at the trial of *Lord Audley* (the year 1631) that the spouse could testify against her spouse in the case, in which the husband was prosecuted for raping his wife. Such exceptions also used to be applied in the cases on murdering of the wife by poisoning her, on restriction of freedom and on the forcible marriage. One of the spouses from the second marriage (when the second marriage was concluded, without having dissolved the first marriage) could testify against his/her spouse, who had concluded two marriages, in the bigamy cases. This principle acquired the precedent shadow, stipulating formation of the judiciary practice in one or another direction, some time later, i.e. at the end of the XIX century. The rule was formulated in the United States of America already in the year 1890 (the cases *Monroe v. Twisleton* and *Commonwealth v. Sapp)*, according to which the person could not testify against the other former spouse, if the circumstances, which had to be testified, became known to the spouse while being in wedlock. It was the rule of the absolute nature because such prohibition did not foresee any term, after expiry of which such prohibition could not be applied. Realistically, prohibition to testify used not to be applied, if the person became aware of the circumstances of the former spouse's criminal deeds already after dissolution of their marriage, in spite of the fact, if those criminal deeds were committed while they were in wedlock or after dissolution of their marriage[10]. It was not

[7] Hobbes, Th. *Leviathan*. Vilnius: Pradai, 1999, p. 152.
[8] Kučinskienė, A. Cicero's Attitude to Greek and their Culture. *Culture*, 2006, 48(3): 72.
[9] *Report on Competence and Compellability of Spouces as Witness*. Dublin: The Law Reform Commission, 1985, p. 1. See also: Witness – Privileged Communications – Husband and Wife – asking Incompetent Questions. *Criminal Law Magazine & Reports*, 1891, 12: 436-449.
[10] Competency of Wife as Witness against Husband – Evidence. *Criminal Law Magazine & Reports*, 1891, 13: 358.

prohibited to testify against the close person after dissolution of the marriage on the *vinculo matrimonii*[11] grounds. All these, although fragmentary, historical examples prove that the immunity, which is being analyzed, from ancient times used to be significant in the social relations, including the legal ones. The truth is, that this guarantee had both its supporters and opponents. The author J. Bentham was one of them; while criticizing the social value of this immunity, he wrote that „the social shelter for criminals should not be built with the help of this immunity; on the contrary, it is necessary to destruct any mutual trust between them and, if it is possible, even in the abyss of their family"[12]. „Such phenomenon does not have any moral substantiation; it cannot be substantiated neither from the point of view of its conception, nor from the point of view of its function. All this can be named as the constitutional mistake"[13], – J. Bentham's congenial author M. S. Green wrote. Indeed, the path of evolution of the close person's immunity in the criminal procedure was various; it faced the critics' and apologists' assessment; however, today it is clear that the mentioned additional guarantee of protection of the person's rights and freedoms in the criminal procedure serves not only the direct addressee, i.e. the family member, but is also deemed as the state's singular highroad, leading the society towards reliance on itself.

The close person's – the witness'- immunity in the criminal procedure is fixed and implemented in many criminal laws of the European states. According to Part 1 of Paragraph 52 of the Code of Criminal Procedure of Germany, the culprit's fiancé / fiancée, spouse (even in case the marriage is dissolved), the person, who is or was a direct relative or is related with the marriage, whose part is or was accused, etc., can make use of his/her right to refuse testifying. According to Paragraph 2 of Chapter 36 of the Code of Judicial Procedure of Sweden, the spouse, the former spouse, the relative according to the the kinship or marriage, the party's brother or sister, the person, who is or was bound by the conjugal ties with the lawsuit party's brothers or sisters, etc., are not obliged to testify. According to Article 182 of the Law on Criminal Procedure of Poland, the culprit's close relatives have the right to refuse testifying. This right also remains

[11] Eng. – "from the bond of marriage".

[12] Литвинцева, Н. Ю. *Процессуальный статус свидетеля в Российском уголовном судопроизводстве.* Диссертация на соискание ученой степени кандидата юридических наук. Иркутск, 2005, p. 110. [Litvinceva, N. U. *Procedural Status of Witness in Russian Criminal Procedure.* Doctoral Dissertation (Law). Irkutsk, 2005, p. 110]

[13] Green, M. S. The Paradox of Auxiliary Rights: the Privilege against Self-Incrimination and the Right to Keep and Bear Arms. *Duke Law Journal*. 2002, 52: 133.

valid, if the conjugal or child adoption legal relations become discontinued. According to Paragraph 122 of the Code of Criminal Procedure of Norway, the culprit‘s spouse, direct relatives, brothers, sisters and the relatives, who are related with the culprit‘s marriage, are released from the obligation to testify. These provisions are also applied towards the former spouses as well as towards the persons, who live together without having concluded their marriage (the cohabitants). The child adoption relations are equated to the family relations. The Norwegian court has the right to release the culprit‘s fiancé / fiancée, the culprit‘s guardian and wards from the obligation to testify. According to Article 158 of the Code of Criminal Procedure of Albania, the culprit‘s close relatives are released from the obligation to testify, except the cases, when they belong to the party, which is accused as well as the spouse through the reason of being aware of the facts, which became known to him/her while being in wedlock with the culprit, the person, who had previously concluded the marriage with the culprit, the culprit’s cohabitant, the person, who is bound to the culprit with the child adoption legal relations. According to Chapter 20 of the Code of Judicial Procedure of Finland, the person, who is or was married with the part of the case as well as the fiancé / fiancée of the party of the case, the person, who is a close relative of the party of the case, the spouses’ brothers and sisters, adopted children and guardians are not obliged to testify against their will. All these examples of the foreign countries prove that the immunity, which is being analyzed, depending upon the legal traditions and foundations of social relations, covers a sufficiently wide sphere in the criminal justice, related with the family and relative relations. Not only the culprit‘s spouse, family members or close relatives, but the person, who has the fiancé’s / fiancée’s status or the cohabitant‘s status and even the former spouse may make use of this immunity as well. Thus, the following presumption is to be made, i.e. it is allowed to make use of this immunity for the persons, who are bound not only by formal, legal ties, but the persons‘ actual relations, grounded by the kinship ties, by the commitments, grounded by morals, by constancy of the persons‘ mutual links, trust and by the other social links, proving the persons‘ moral nearness, interference into which would mean destruction of the future family or of the other similar union of the persons, should be taken into consideration. Thus, it is to be accepted that the witness‘ right to refuse testifying is based not only of the family legal relations, but is also based on such valuable categories as conscience, compassion, etc., which serve as the grounds for the witness‘ and his/her close persons‘ relations. A professor of the Toronto University H. Stewart offered a correct remark

regarding this note, i.e. while analyzing the items on the family members‘ immunity (competence), he states that, in essence, two reasons justify the family member‘s immunity against his/her obligation to testify against his/her close person. One of them is the witness take-up (interest) in the circumstances of the case and its result. While talking about the second one, the author notes that the family member cannot be forced to testify against his/her close person, for example, against the other spouse, because „the husband and the wife in the family are deemed to be one person in law[14]. Indeed, with taking into consideration the first reason, the interest is each person‘s, as well as the witness‘, constituent condition of existence in the lawsuit as it is the person‘s natural demand for self-preservation[15].

Thus, prohibition or impossibility to force the family member or the close relative to testify against his/her will, thus, stabbing the close person, reflects the essence of the close person‘s immunity in the criminal procedure. Any contraposition of the interests of the persons, who is bound with the family or other close personal ties, even if it is related with the demand to ascertain the truth in the criminal case, is unjustifiable. Protection of the family ties and the interests of justice, as the values, should be regulated; the social compromise between them should be searched for. After having reached it, the person‘s honor and dignity, inviolability of the private life, non-divulgement of the personal and family secret and, of course, the right to a fair trial[16] should be secured. Thus, it is certainly true that the criminal procedure in the democratic state cannot be „unilateral“, whereas the other interests, which occur in it, and particularly which are related with protection of the family harmony, should not be positioned in the background.

2. Problem of the immunity scope

The analysis of the right to refuse testifying or of the right not to reply to certain submitted questions allows to state that relativity is typical of the immunity under consideration. It means that the state retains freedom for the person to resolve whether to disclose or not to

[14] Stewart, H. Spousal Incompetency and the Charter. *Osgoode Hall Law Journal*. 1997, 34(3): 412-413.
[15] Jurka, R. Controversial Aspects of the Existence of Witness' Interest in the Criminal Procedure. *Jurisprudence*, 2009, 1(115): 362.
[16] Jurka, R. Prohibition to Compell the Persons to Give Evidence against Themselves as the Constitutional Guarantee in the Criminal Procedure. *Jurisprudence*, 2006, 1(79): 34.

disclose the secret; the legal practice also testifies to it: „ [...] *the suspected person's and the culprit's family members or close relatives may not testify at all or may not answer certain submitted questions. The data of the lawsuit* [...] *prove, that R. D. spouse and son refused to participate in the investigative operations and expressed their disinclination for giving evidence about the circumstances of the case, known to them*."[17] What is more, even the vividly (voluntarily) expressed decision to testify is deemed to be relative because a person has the right to make his/her choice freely which questions are to be answered and which are not to be answered. It depends upon their content. Article 188 of the Code of Civil Procedure, which fixes the right of the parties or of the third persons to refuse the examination, and Article 191 of the same law, which defines the catalogue of the witness' rights and obligations, regulate this item similarly. Witnesses may refuse explaining and testifying, if such explanations or evidence would be inexpedient for them themselves, their family members or close relatives (Article 188 and Part 2 of Article 191 of the Code of Civil Procedure). If the mentioned persons agree to submit such explanations and to testify, they are obliged to submit the truthful explanations and evidence to the court. In such cases, as it is stated in literature, the person's potential possibility (actual and simultaneously juridical) to act as a witness depends directly upon his/her related or family ties with the persons, participating in the lawsuit, and upon the person's consent (dissent) to give appropriate evidence[18].

Further on, the question arises how the conceptions "the family members" or „the close relatives" and their legal status in the sphere of criminal procedure should be construed; this is directly related with the immunity scope. Indeed, though these concepts are defined in Articles 15 and 38 of the CCP, but a number of miscellaneous questions may arise while assessing and applying these provisions in practice. For example, how should the legal status of the person, who was the family member when the culprit was committing the criminal deed, for example, of the spouse, be construed with taking into consideration the fact that the conjugal legal relations between those persons were dissolved in the course of the trial? Secondly, does the person have the right to refuse testifying against the suspected person or against the culprit, if neither the conjugal, nor the extramarital (the conjoint life without having registered the marriage) ties bind the person with the culprit, however, the person is the suspected person's or the culprit's fiancé /

[17] Supreme Court of Lithuania, Criminal Division Ruling of 22 of June, 2007 (case No. 2K-445/2007).
[18] Laužikas, E.; Mikelėnas, V.; Nekrošius, V. *Civil Procedure Law.* Vol. I. Vilnius: Justitia, 2003, p. 473.

fiancée? Thirdly, can the accused person‘s or the culprit‘s former spouse (who became aware of the circumstances, which are important for the case after dissolution of the marriage), who together with the culprit gave birth to the child, make use of the immunity, which is being analyzed? Fourthly, what kind of the decision should be taken in the following situation: for example, the witness *X* and the suspected person *Y* had been living together from the year 2000 till the year 2009, excluding three years, which *Y*, serving his sentence, spent in penitentiaries. A child was born to *X* and *Y* in the year 2003. *X* was officially married to the other man; however, they had not actually been living together since the year 2000, whereas their marriage was dissolved only in the year 2009. Thus, with taking into consideration this particular case, how should *X‘s* right not to testify against *Y* be construed and is such right substantiated? There are many similar or other related questions; thus, it is necessary to analyze and to construct clear fundamentals of possible decisions, seeking for finding the answers to these and other questions.

It would seem that no larger problems would arise while assessing the conception of the family members, who can make use of the immunity against the obligation to testify. As it was already mentioned, the appropriate criminal laws define the concepts „the family members“. Moreover, the sources, which construe these legal acts, also confine to general attributes of this concept, which are related with the provisions of the civil laws. According to certain sources, the fact of the marriage in the criminal process is ascertained on the grounds of the civil laws; thus, the former spouse, with whom the marriage was dissolved, cannot be deemed as the family member[19]. The author is convinced that such construing is imprecise. Thus, it may be considered that, wishing to understand when the person, as a fiancé / fiancée or as the former spouse, etc., can be acknowledged or cannot be acknowledged as the family member, it is necessary to perceive the family‘s conception in the context of the immunity analysis. It will help also to reveal the problem of the scope of the immunity, which is being analyzed. The above-mentioned H. Stewart is one of the eminent authors, who had been analyzing this problematic sphere, seeking for disclosure of the content of the family and of the marriage, so as to substantiate the topic of sufficiency of the immunity of the close person, as a witness. This author singles out three theories, which construe the essence of the family (of the marriage), upon which

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

formulations of the answers towards the questions on legitimacy and sufficiency of such immunity depends.

The first theory construes the marriage via its functions. Being ruled by it, the judicial institutions should assess the functional characteristic of the conjugal relations, which covers the content of existence of the conjugal relations, probability of continuation of these relations, identification of the spouses with the family phenomenon, publicity of their union as the family, emotional positive of their relations, sexual union, attachment of the parties to each other, bringing the children up and taking care of them, attendance of the children or parents, sharing the household duties, community of the ownership, its usage, financial liabilities, other economic cooperation, etc. The author, referring to this characteristic, acknowledges that even the so called modern marriage, i.e. cohabitation, is equated to the official marriage from the functional point of view. It is true, he acknowledges, that somewhat other attributes of the functional characteristic may be singled out herein; for example, the mutual relations between the persons, who do not have the intercourse but live together, are dependent upon each other economically, bring the children up and take care of them, etc.

The *second* theory is related with the liberal marriage, the essence of which depends upon the persons' perception of the benefit, which is achieved out of their union. The author reveals the content of this theory via criticism of the first theory, i.e. via superiority of the liberal theory, if compared with the functional theory. According to the initiator of this criticism author A. Woolley[20], the attributes, which outline the characteristic of the „functional family", create the preconditions for discrimination of the persons of the same sex, who are the cohabitants (the same-sex marriage). The last-mentioned „marriage" does not protect a person, who lives with the person of the same sex, from his/her obligation regarding the state to testify against his her close person (his/her partner). A. Woolley, keeping to her viewpoint, invokes essentially the idea of the marriage, as the actual or formal union, which was formulated by Hegel. According to him, „the marriage is free universality with concrete individualities"(the marriage as the union of „free universality" with „concrete individuality"). Thus, H. Stewart states that this theory is more superior to the first one for the following reasons, i.e. there is no necessity to differentiate the legal (official) marriage, cohabitation, i.e. living together without having registered the marriage,

[20] Woolley, A. Excluded by Definition: Same-Sex Couples and the Right to Marry. *University of Toronto Law Journal*, 1995, 45: 471.

and the relations between the persons of the same sex because any of these unions let the persons strive for their self-realization.

The *third* theory is based on the post modernistic philosophy. According to this theory, whatever the marriage may be, it does not have any characteristic because the definition of the marriage, as a certain union, causes a lot of discussions in the plane of the social phenomena. Herein, perception of the „functional" marriage is also criticized, i.e. the theory, which construes the marriage via its functions, is erroneous both from the strategic and conceptual viewpoint. In the first case, the statement that any union of the persons should align with perception of the „traditional" marriage negates acknowledgement of the union of the persons, seeking for the mutual (intimate) relations of the other kind. From the conceptional viewpoint, probably, it is not expedient to talk about the necessity of the marriage, cohabitation or union of the other kind as the more or less formalized relation. Instead of it, it is more important to acknowledge that there is the social phenomenon, in which the persons' mutual actual relations and their content are the most important[21].

While assessing the advantages or disadvantages of the statements of these theories in the plane of the immunity, which is being analyzed, the author is inclined to turn back to the previously expressed thought about the essence of the immunity. It was mentioned that this additional guarantee, granted to the witness, secures harmony of the family, even though in the wide sense, no matter in what social relations it or its certain elements are involved. Protection of the family is the most important thing. Thus, the author is inclined to endorse the statements of the theory, which construes the marriage via its functions through a sufficiently simple reason, i.e. two subsequent theories, according to the author, construe the circle of the family or of the marriage subjects and its perception too broadly; this, in its turn, may correspondingly bring confusion while talking about the addressees, who can make use of the immunity, which is being commented. Moreover, the conception of the first theory, at least from the marginal viewpoint, meets more or less the traditions of jurisprudence of European Court of Human Rights (hereinafter referred to as the ECHR), which dominates nowadays.

[21] Stewart, H. Spousal Incompetency and the Charter. *Osgoode Hall Law Journal*, 1997, 34(3): 421-427.

So, Article 8 of the Convention on Protection of Human Rights and Fundamental Freedoms[22] (hereinafter referred to as the Convention), which fixes each person‘s right towards respecting the family life, provides the analogous meaning for this right as well as for the other fundamental freedoms and rights. This Convention provision is assigned for protection of the family against unrestricted interference of the state institutions. The proper balance, which should be fixed between the compeeting interests of the person and of the society as well as the freedom, which is assessed by the state (the case *Keegan v. Ireland* (the year 1994)[23]). Though this right cannot be absolute, if it meets the conditions, fixed in Part 2 of Article 8 of the Convention, the ECHR expressed the following opinion in a number of lawsuits (the case *Lebbink v. the Netherlands* (the year 2004)[24], the case *Marckx v. Belgium* (the year 1979)[25], the case *Johnston and others v. Ireland* (the year 1986)[26], the case *Berrehab v. the Netherlands* (the year 1988)[27], etc.), i.e. that the concept „the family life“ is not restricted only to the conjugal relations and can also cover the „family“ relations *de facto.* The Court gives us to understand that each time the value, which is protected by Article 8 of the Convention, should be identified *ad hoc, i.e.* in the light of the definite case, with taking into consideration the constantly changing social, economic and cultural conditions and traditions[28]. The family conception should be construed with taking into consideration the nowadays conditions. Thus, of course, the family, as a natural phenomenon, should be acknowledged as the family, without taking into consideration the fact whether the family is only „natural“ or only „legal“, or both this and that. The person‘s right towards respecting the family life should be construed in the wide sense and should cover all the actual family relations, not being restricted to perception of the „family life“ *de jure*[29]. Coming out of the scope of Article 8 of the Convention, the ECHR noted in the case *Abdulaziz*, *Cabales*,

[22] Convention on Protection of Human Rights and Fundamental Freedoms. *Valstybės žinios (Official Gazette)*. 1995. Nr. 40-987; 1996, Nr. 5-112; 1999, Nr. 61-1975; 2000, Nr. 96-3016; 2004, Nr. 77-2654; 2005, Nr. 74-2677; 2006, Nr. 17-595.
[23] *Keegan v. Ireland*, 26 May 1994, § 50, Series A no. 290.
[24] *Lebbink v.the Netherlands*, no. 45582/99, ECHR 2004-IV.
[25] *Marckx v. Belgium*, 13 June 1979, § 2, Series A no. 31.
[26] *Johnston v. Ireland*, 18 December 1986, § 26, Series A no. 112.
[27] *Berrehab v.the Netherlands*, 21 June 1988, § 21, Series A no. 138.
[28] Sagatys, G. *The Right of the Child to Family Relations in the European Convention of Human Rights and Fundamental Freedoms and in the Law of the Republic of Lithuania*. Doctoral Dissertation. Social Sciences (Law). Vilnius: Law University of Lithuania, 2004, p. 32.
[29] *Ibid.*, p. 33.

Balkandali v. the United Kingdom (the year 1985)[30] that ascertainment of the „family life“ fact is deemed to be more the question of the fact than of the law, the settling of which in each case will depend upon the actual circumstances, ascertained in the case. Significance of the qualitative attributes of the „family life“, according to the author G. Sagatys, was revealed in the lawsuit *Kroon and others v. the Netherlands (*the year 1994)[31], in which the ECHR stated that „ [...] *while ascertaining the relations, covered by the „family life“, many factors, such as the conjoint life, constancy of relations, nature of manifestation of the mutual obligations, etc., may be taken into consideration.*“[32] It may be stated that, by allocating a new quality to the concept, which is being analyzed, it should be acknowledged that it may cover not only the actually existing „family life“, but in certain cases the intended „family life“ as well. Thus, ascertainment of the family life is the question of the fact, depending upon the fact, if the real mutual relations bind the persons. The family phenomenon in the sphere of criminal justice should be perceived wider than in the private law. A famous novelist G. La Pira keeps to this position; while trying to understand the family, he had been searching for the answer in the antique law philosophy, i.e. in the ontological plane. Wishing to demonstrate the structural differences between the agreements, regulated by the public and private law, and the marriage, the author states that the conjugal act oversteps the limit of the private law and becomes a part of the public law[33]. The condition of the family member is important for the criminal procedure to the extent, to which it is related with the constitutional guarantees of such person in the sphere of the criminal legal relations (Articles 38 and 82 of the CCP and Articles 235 and 248 of the Criminal Code). One of the first attempts to realize it is reflected in the ruling, passed by the Supreme Court of Lithuania on the 16-th of November, 2004: **„***According to Article 3.229 of the Civil Code, which summons to register the partnership, the legal consequences arise within the limits of application of the civil law and do not regulate the personal intangible relations of the cohabitants. Besides, according to Article 28 of the Law on approval, validation and implementation of the Civil Code,* [...] *the rules, specified in chapter XV of the III book of the Civil Code, about cohabitation will get validated after validation of the law, regulating the order of registration of the partnership. Such law has not been adopted yet. The edits of Articles 82 and 38 of the Code of Criminal Procedure and of Articles 235 and 248 of*

[30] *Abdulaziz, Cabales, Balkandali v. The United Kingdom*, 28 May 1985, Series A no. 94.
[31] *Kroon and others v. The Netherlands*, 27 October 1994, § 30, Series A no. 297-C.
[32] Sagatys, G. *op. cit.,* p. 34.
[33] Meilius, K.; Žilinskaitė, R. Diriment Impediments in Canon Law. *Soter*, 2009, 29(57): 31.

the Criminal Code came into effect on the 1-st of May of the year 2003. Application of these rules cannot be restricted by relating it with validation and application of the rules of the Civil Code, which regulate the property relations of the people, who are cohabitants; thus, the mere fact that life of the cohabitants I. D. and E. D., who hadn't registered their marriage, was not or could not be registered, does not give occasion for stating that the first instance court, by acknowledging I.D. as E.D.'s family member, had been incorrectly construing and applying the mentioned rules of the CC and of the CCP. After having ascertained the fact that I. D. was E. D.'s family member, thus, I. D. had the right to relinquish testifying, but was not familiarized with this right, the court applied appropriately the criminal law, Part 3 of Article 235 of the Criminal Code, and, being ruled by parapgr.1 of part 1 of art.3 of the Code of Criminal Procedure, passed the exculpatory sentence. "[34]

The item, pertaining to the scope of the immunity, as a matter of fact, is to be related not only with the persons' family or conjugal relations with the legal shadow. Seeking for appropriate implementation of the witness' immunity, i.e. seeking for protection of his/her lawful interests, it is necessary to ascertain and to take into consideration the persons' actual relations, mutual ties and the other circumstances, which prove these persons' close relations, based on constancy of such ties, moral nearness, ties of kinship, mutual commitments, etc. In a word, the immunity should cover not only the persons' formalized relations, but the materialized relations, i.e. marrowy relations. It also stipulates the following conclusion, i.e. it is particularly important to see within the limits of the theme, which is being commented, not only the "juridical" family, but also (or only) the actual nature of its relations.

3. Discussion on certain aspects of the close person conception

The concept of the family member in the sphere of criminal justice also covers the other circle of the persons, related with the family ties *a priori* or *post factum*. From the point of view of *a priori*, these persons are the engaged persons, from the point of view of *the post factum*, these persons are the former spouses (the divorced persons).

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

One of the main factors, determining the possibility of the engaged persons or of the former spouses, as the witnesses, to make use of the immunity, which is consolidated in Part 2 of Article 82 of the CCP, is the social actual (and sometimes former juridical) relation of these people with the culprit (the suspected or the accused person). Cohabitation of these persons, constancy and tightness of their relations, the nature of their mutual (personal and/or tangible), children (wards), etc. substantiate it and, correspondingly, expedience of the immunity. For example, the ECHR notes that usually the natural family relations do not break, when the parents start to live apart or get divorced and the child remains to live with one of the parents (the case *Berrehab v. the Netherlands,* the case *Keegan v. Ireland*, the case *Irlen v. Germany* (the year 1987)[35]). Indeed, the list of such and similar circumstances cannot be finite; these are the factors of the alternating nature, which stipulate individualization of the definite situation. These are the circumstances of a more or less evaluative nature; thus, in each case the subjects, who execute the criminal procedure, by minding and respecting the person's right towards his/her family life, should assess, if the circumstances, existing in the case, and the other data allow to state that one or another person, related with the culprit, is or can be acknowledged as the family member.

While settling the question, if the culprit's fiancé/fiancée can be acknowledged as the family member, who can make use of the immunity, it is always necessary to take into consideration in the lawsuit the public announcement of these persons about their agreement (the plight) to conclude their marriage in future. Herein, it is not enough to refer to the provisions of only the civil laws. The public agreement to get married in the sphere of criminal justice is to be construed wider, i.e. covering both the cases, when it is publicly announced about the intended churchy (confessional) marriage, and the cases, when the intended marriage is publicly announced and this fact can be proved by the appropriate data. Public announcement about the agreement to conclude the marriage, seeking that the person acquires the personal immunity of the witness, should not be formalized by registering the application of the fixed form in the appropriate institution. Not every such official registration of applications *de facto* is considered to be the publicly announced agreement about the intention to conclude the marriage. Moreover, there were the cases, when such marriage was not concluded, though the applications to conclude the marriage were officially registered. The following examples are also possible, i.e. the persons, who haven't registered their applications to conclude their marriage, announce publicly their

[35] *Irlen v. Germany*, 13 July 1987, Decisions and Reports 53, p. 225.

serious intentions to conclude their marriage in future, manifest their resolution and readiness for making such a step. Not to mention such cases, when two persons, who grow up their common child, announce publicly the intended marriage and only afterwards register their applications to conclude the marriage. It proves that the subjects of the procedure are obliged to assess the content of the plights' relations *de facto* or *de jure***,** constancy of their relations, the nature of their mutual commitments and the other circumstances, which prove that in future the persons undoubtedly intend to continue the kin, to execute the upbringing duties, household-economic family activity and the other main family functions, as the goals of their marriage. All this influences substantiation of the preconditions of the witness' immunity, which is being analyzed.

While answering the question, if the former spouse of the culprit can be acknowledged the family member in the sense of Part 2 of Article 82 of the CCP, it should be stated that, firstly, it is necessary to take into consideration the circumstances, which define constancy of relations of these persons, their common offsprings, etc. The opinion, which is reflected in the scientific literature, is to be accepted, i.e. that when the family falls apart and the actual family relations come to an end, the legal family relations remain, i.e. certain obligations of the spouses towards each other and towards their children remain even after dissolution of their marriage[36]. The theory on the functional family (the marriage), formulated by the already mentioned author H. Stewart, proves partially this viewpoint because herein the actual nature of relations of such persons is particularly important. Secondly, it should not be discounted that, even after having dissolved the marriage, the appropriate internal, moral ties or commitments may remain; the subjects, who execute the procedure, should take them into consideration. Even then, when the person, who was earlier married to the suspected or the accused person, concludes a new marriage with the other person, it does not mean yet that such person looses unconditionally the right towards the witness' immunity. It is necessary to take into consideration such circumstances while assessing the definite situation generally, bearing in mind the former spouses' relations, continuation and content of their remaining actual relations.

While talking about the possibility of the other persons to make use of the immunity, according to certain opinions, expressed in the literature, such immunity should be granted not only for the family members of the close relatives, but also for the other persons, who are closely

[36] Michailovienė-Kudinavičiūtė, I. *Legal Regulation of Family Relations Establishment in Lithuania*. Doctoral Dissertation. Social Sciences (Law). Vilnius: Mykolas Romeris University, 2006, p. 26.

related with the culprit. The persons, whose life, health or other welfare are particularly important and significant for the witness, with taking into consideration his/her personal relations are attributed to this category[37]. For example, these persons may be the god-parents of the suspected or of the accused person or a guardian, a foster-parent, a person, who is being lifelong up kept by the culprit, etc. While settling this question, it is necessary to stress that the subjects, who execute the procedure, should assess and take into consideration the actual relations of the witness and the suspected person or the culprit, about whom the witness may be deposed about. According to the author, it is necessary to approach this question carefully enough because otherwise the range of application of the procedural immunity towards the persons, as the witnesses, related with the culprit, may be ungroundedly expanded and this, in its turn, may affect the assignment of the criminal procedure. Without questioning resilience of the relations of such persons or their affection, it may be accepted that, indeed, from the social, profound viewpoint, the actual relations of the culprit and the persons, who are closely related with him/her, may be of essential or crucial importance at the nonlegal level. However, while talking about the sphere of criminal justice, it is necessary to weigh and to have a clear answer, if the commented relations are really such weighty so that they are to be protected even in the course of the criminal procedure. Thus, in each case it is inevitably necessary to weigh the values, which are defended and preserved by the Constitution, to see a vivid balance between these values and, inter alia, to feel objectively the proportion of the social priorities.

Conclusions

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

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

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

3. It is also important to assess the range of the circle of the persons, towards whom the immunity can be applied, in the criminal procedure. Unconditional distention of this circle may cause a mess of the consistent patterns of the legal process itself, may contravene the established social valuable priorities and the ones, which are consolidated by the Constitution. Thus, there is an opinion that it is inevitably necessary to give a clear answer, if the impartially justified and compulsory circumstances exist, prior to settling the question on ascertainment and application of the mentioned immunity.

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