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Non-married Cohabiting Couples and Their Constitutional Right to Family Life

1. Introduction

The traditional model of the family, consisting of husband, wife, and children, has ideological roots that extend far back through history and plays an important role in most societies.^{*1} However, it cannot be claimed to be the only form of family life, not least because there are many other forms, among them non-marital cohabitation, present in modern society.^{*2} The number of non-married cohabiting couples and the number of children born in such relationships are both rising steadily in Europe.^{*3} There have been significant increases in non-marital cohabitation in recent decades in Estonia too^{*4}, and relative to other European countries, Estonia has one of the highest numbers of children born outside marriage.^{*5} These changes in family structure, along with favourable attitudes toward new forms of family, have brought with them an expectation of family law that reflects these societal changes.

Legislation specifically aimed at non-traditional forms of the family has been enacted in many jurisdictions, but these vary considerably in their details,^{*6} often causing a lot of confusion from one jurisdiction to the next and in translations. More than half of the European Union's member states have adopted laws on cohabitation.^{*7} The traditional approach of considering marriage to be the only officially recognised personal

¹ M. Ebejer, E. Mills. *Focus: Family Law*. 4th edition. Chatswood, N.S.W.: LexisNexis 2010, p. 1.

² J.M. Scherpe. The legal status of cohabitants—requirements for legal recognition. – K. Boele-Woelki (ed.). *Common Core and Better Law in European Family Law*. Antwerp; Oxford: Intersentia 2005, p. 283.

³ In Sweden, Denmark, France, and Slovenia, some 40–50% of all children are born outside marriage. *Ibid*.

⁴ According to the 2011 Population and Housing Census (PHC 2011), 34.5% of the population aged 15 and older lived with a legal spouse and 15.6% lived in a *de facto* union. From the figures in the 2000 Population Census, the proportion of persons living with a legal spouse fell by 5.4 percentage points and that of persons living in a *de facto* union increased by 4.7 percentage points. In 2011, of all cohabiting persons, 428 were cohabiting with a same-sex partner. See this press release of Statistics Estonia: PHC 2011: Popularity of consensual union is growing. 24.4.2013. Available at http://www.stat.ee/65350&parent_id=39113 (most recently accessed on 1.6.2013).

⁵ Overall, 59% of children in Estonia were born out of wedlock (including to single mothers) in 2009. Only Iceland showed a higher percentage for this (64%). See European Commission, Eurostat. Live births by mother's age at last birthday and legal marital status. Available at <http://appsso.eurostat.ec.europa.eu/> (most recently accessed on 1.6.2013).

⁶ W.M. Schrama. General lessons for Europe based on a comparison of the legal status of non-marital cohabitants in the Netherlands and Germany. – K. Boele-Woelki (ed.). *Common Core and Better Law in European Family Law*. Antwerp; Oxford: Intersentia 2005, p. 280.

⁷ See Appendix 1 in I. Curry-Sumner. *All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-marital Registered Relationships in Europe: A Comparison of the Laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*. Antwerp; Oxford: Intersentia 2005, pp. 537–541.

relationship changed in 1989, when Denmark became the first country in the world to grant legal recognition to (same-sex) non-married cohabiting couples and thus created a new institution referred to as registered cohabitation—⁸ a term also used for opposite-sex cohabiting couples in some jurisdictions. In recent years, several studies have been published in Estonia on the social and legal aspects of non-marital cohabitation⁹, and debates over the need for a Cohabitation Act have been given a clearer framework. A general vision of the provisions that a Cohabitation Act should contain, according to the opinion of the former Minister of Justice Kristen Michal, was drawn up in 2012¹⁰; however, this did not lead to a distinct legislative initiative on the subject, no matter the vital statistics and the rapid developments seen in other jurisdictions.

Family is at the core of society, and the effective functioning of families creates an important foundation for societal welfare in general. This is one of the main reasons many international instruments and the constitutions of most legal systems feature rules pertaining to marriage and the family.¹¹ In Estonia, the fundamental rights and obligations of family members are dealt with primarily in §§26 and 27 of the Constitution.¹² For measurement of the extent of these rights and obligations, it is crucial to ascertain which personal relationships are covered by the notion of family in the Constitution.¹³ The main purpose of this paper is, therefore, to examine which types of non-marital cohabitation are and should be covered by the notion of family in the Constitution of Estonia, whether there is a governmental obligation to enact special regulations on non-marital cohabitation, and how any such obligation has been met.

2. Terminology

To understand the legal issues surrounding non-marital cohabitation, one first must understand the relevant terminology. There is lack of uniformity in the terminology used to refer to individual forms of cohabitation in Estonian legislation¹⁴ and judicial practice¹⁵, resulting in simultaneous usage of various terms, covering different semantic fields. One possibility for the arrangement of the terminology¹⁶ is to use ‘cohabitation’ (the Estonian concept of *kooselu*) as a general term, covering all possible forms of cohabitation, including marriage, neutral sharing of a dwelling by friends or relatives, etc. Under the general term, the intimate types of cohabitation are marriage (*abielu*) and non-marital cohabitation (*mitteabieluline kooselu*). The term ‘non-marital cohabitation’ does not comply with the linguistic recommendations made

⁸ D. Jakob. *Die eingetragene Lebenspartnerschaft im Internationalen Privatrecht*. Cologne: Schmidt 2002, p. 13.

⁹ The Ministry of Social Affairs published a study of social aspects of non-marital cohabitation in 2008. See L. Järviste, K. Kasearu, A. Reinomägi. *Abielu ja vaba kooselu: trendid, regulatsioonid, hoiakud* [‘Marriage and free cohabitation: Trends, regulations, attitudes’]. – *Poliitikaanalüüs. Sotsiaalministeeriumi toimetised* 2008/4. Available at <http://www.sm.ee/fileadmin/meedia/Dokumentid/V2ljaanded/Toimetised/2008/04.pdf> (most recently accessed on 1.6.2013) (in Estonian). The Ministry of Justice published a study analysing the legal aspects of same- and/or opposite-sex non-marital cohabitation in 2009. See A. Olm. *Mitteabieluline kooselu ja selle õiguslik regulatsioon* [‘Non-marital cohabitation and its legal regulation’]. Tallinn: Ministry of Justice 2009. Available at <http://www.just.ee/35424> (most recently accessed on 28.5.2013) (in Estonian).

¹⁰ The Ministry of Justice prepared a project for a Cohabitation Act in 2012, offering a legislative scheme for registered and *de facto* cohabiting couples. See *Kooseluseaduse kontseptsioon* [‘The Project for a Cohabitation Act’]. Ministry of Justice 27.8.2012, p. 4. Available at <http://www.just.ee/orb.av/class=file/action=preview/id=57140/Kooseluseaduse+kontseptsioon.pdf> (most recently accessed on 1.6.2013) (in Estonian).

¹¹ D. Coester-Waltjen. Human rights and the harmonization of family law in Europe. – K. Boele-Woelki, T. Sverdrup (eds). *European Challenges in Contemporary Family Law*. Antwerp; Oxford; Portland, Oregon: Intersentia 2008, p. 5.

¹² Eesti Vabariigi Põhiseadus [‘The Constitution of the Republic of Estonia’]. – RT I 1992, 26, 349; RT 27.4.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

¹³ See also A. Henberg, K. Muller, A. Alekand. *Perekonna kohustused (sotsiaalsete probleemide tõttu) abi vajavate pereliikmete ees* [‘The obligations of family to members of the family in need of help (due to social problems)’]. Tallinn 2012, p. 29 (in Estonian).

¹⁴ E.g., *de facto* marriage (*faktiline abielu*) in §84 (2) of the Credit Institutions Act (*krediidiastutuste seadus*. – RT I 1999, 23, 349; 29.06.2012, 1 (in Estonian)); stable cohabitation (*püsiv kooselu*) in §§23 and 257 (1) of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*. – RT I 2005, 26, 197; 5.4.2013, 1 (in Estonian)); a relationship similar to marriage (*abieluga sarnanev suhe*) in §15 of the Public Service Act (*avaliku teenistuse seadus*. – RT I, 6.7.2012, 1; 26.3.2013, 3 (in Estonian)). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

¹⁵ E.g., *de facto* marital cohabitation (*faktiline abieluline kooselu*) in Tartu Circuit Court civil chamber decision II-2-97/95, of 28.4.1995 (in Estonian); *de facto* marital relationship (*faktiline abielusuhe*) in Tallinn Circuit Court civil chamber decision II-2/1487/01, of 14.12.2001 (in Estonian); non-binding marriage (*vabaabielu*) in CCSCd 20.12.2005, 3-2-1-142-05, para. 13.

¹⁶ Similar terminology has been used in the draft work in the Project for a Cohabitation Act (see Note 10).

by Estonian philologists¹⁷, though it does express the nature of the phenomenon most precisely, referring to a marriage-like relationship of cohabitants and at the same time distinguishing it from marriage, and is commonly used internationally, especially in Germany.¹⁸ Therefore, it is used also in this paper to refer to a personal relationship of cohabitants outside marriage. Non-marital cohabitation can, in turn, be divided into registered cohabitation (*registreeritud kooselu*), for cases wherein a formal legal act is required and in which the cohabiting couple enters into the legal regime willingly and consciously, and *de facto* cohabitation (*faktiline kooselu*), for which the legal rules are to be applied under certain factual circumstances and possibly against the explicit wishes and decisions of the cohabitants. All these types of intimate cohabitation may be either gender-neutral (encompassing both same- and opposite-sex couples)¹⁹ or classified on the basis of the gender of the cohabitants²⁰, depending on the jurisdiction.

3. Non-marital cohabitation under the Constitution

According to a study carried out by the Ministry of Social Affairs, non-marital cohabitation of opposite-sex couples is recognised and supported in Estonian society alongside the institution of marriage. According to the study, these two models of cohabitation are considered similar and should, therefore, enjoy similar legal guarantees. The prevailing opinion is not that positive in the case of same-sex cohabiting couples, recognised by only about a third of the respondents.²¹ The attitudes in society matter, given that family law is substantially inextricable from the prevailing social values and moral norms and that it depends on the development of society more than any other field of private law does.²² However, family law does not operate in isolation. It is important to bear in mind the constitutional factors when one is attempting to adjust family law with respect to informal lifestyles.²³

The second chapter of the Estonian constitution stipulates fundamental rights, freedoms, and duties. In its §26, the Constitution stipulates the right to respect for private and family life, and §27 (1) emphasises governmental protection of the family. These two sections create the basis for the governmental family policy.

Pursuant to §26 of the Constitution, '[e]veryone is entitled to inviolability of his or her private and family life. Government agencies, local authorities, and their officials may not interfere with any person's private or family life, except in the cases and pursuant to a procedure provided by law to protect public health, public morality, public order or the rights and freedoms of others[;] to prevent a criminal offence[;] or to apprehend the offender'. Two separate fundamental rights are protected by §26: to family life and to private life. The spheres of protection of these two fundamental rights partially overlap. Both are part of the *forum internum* (personal life), tied up with the principles of freedom, human dignity, and free self-realisation or self-determination.²⁴ Every person and couple unquestionably enjoys the protection of private life, irrespective of sex or gender. There is less certainty when it comes to the protection of family life, since the protection provided by this norm is constantly broadening, following the changes in understanding of the notion of the family in society. The aim of §26 of the Constitution is to protect a person against the arbitrary intervention of governmental institutions, giving all people the right to expect that these institutions will not interfere in their family and private life other than for the purpose of reaching the objectives listed in the

¹⁷ L. Seestrand. *Mitteläbimõeldud väljendite mittekasutamisest tõuseks mittekahju kõigile* ['The non-usage of non-considered expressions would be non-harmful to everyone']. – *Õiguskeel* 2002/3, pp. 25–27 (in Estonian).

¹⁸ The concept of *Nichteheliche Lebensgemeinschaft* (non-marital cohabitation) is used in the same meaning in Germany. See, for example, H. Grziwotz. *Nichteheliche Lebensgemeinschaft*. Munich: Verlag C.H. Beck 2006.

¹⁹ E.g., a *pacte civil de solidarité* (PACS) in France. See Code Civil, Articles 515–1 to 515–7. Available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20080121> (most recently accessed on 1.6.2013).

²⁰ For example, *eingetragene Lebenspartnerschaft* (registered cohabitation) in Germany is open only to same-sex partners. See Gesetz über die eingetragene Lebenspartnerschaft. Available at <http://bundesrecht.juris.de/lpartg/BJNRO26610001.html#BJNRO26610001BJNGOO200305> (most recently accessed on 1.6.2013).

²¹ L. Järviste, K. Kasearu, A. Reinomägi (see Note 9), pp. 16–17.

²² T. Götting, T. Uusen-Nacke. *Perekonnaõiguse seosed teiste tsiviilõiguse valdkondadega* ['The connections of family law with other branches of civil law']. – *Juridica* 2010/2, p. 86 (in Estonian).

²³ W.M. Schrama (see Note 6), p. 276.

²⁴ R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* ['Constitutionalism and the Protection of the Fundamental Rights and Freedoms']. Tallinn: Juura 2004, p. 421 (in Estonian).

Constitution. According to the Supreme Court of Estonia, family members also have a justified expectation that the state will not wrongfully and excessively hinder their cohabitation.^{*25}

While §26 of the Constitution is the general provision protecting the sphere of private life, §27 (1) is the specific provision for the protection of family life.^{*26} According to §27 (1) of the Constitution, '[t]he family, which is fundamental to the preservation and growth of the nation and which constitutes the foundation of society, enjoys the protection of the government'. This entails the exterior protection of family life, giving a person the right to positive actions by the governmental power, enabling him or her to enjoy genuine family life^{*27} and proceeding from the governmental power to enact regulation and designate legal remedies in order to avoid violation of family and private life^{*28} by other persons. Unlike §26 of the Constitution, §27 (1) provides for protection of family life without reservation^{*29} and the sphere of protection of §27 (1) encompasses all issues related to the family, from its creation to the most different aspects of familial cohabitation.^{*30}

Because the recognition of family life as a constitutional value obliges government agencies to offer protection to families, support the fundamental rights of family members, and ensure the inviolability of family life, it is essential to determine the forms of non-marital cohabitation that fall under the notion of family according to the Constitution. The constitutional protection entitles the members of these formations to insist on enactment of appropriate regulation allowing them to enjoy genuine family life.^{*31}

Family is based either on a stable and close personal-intimate relationship or on close affinity.^{*32} The commentators on the Constitution class under protection of family life primarily the relations of a married man and woman and the relations of a child and his or her biological and—equally—adoptive parents, and they note that even relations between a child and his or her step-parent or foster parent might fall under that protection.^{*33} In addition, opposite-sex cohabiting couples ('the familial cohabitation of a man and woman that is not formalised according to law') constitute a family in the view of the Supreme Court.^{*34} The commentators on the Constitution support these views, stating that '[i]n view of the diversity of human relationships in contemporary society, it is not justified to bind the constitutional notion of family solely to formal marriage^{*35}. Hence, it is clear that *de facto* cohabitation of an opposite-sex couple is covered by the notion of family in the Constitution.

There is no clear position taken in legislation and judicial practice, however, on whether same-sex cohabitants should be considered family under the Constitution.^{*36} Political and legal debates on this subject still tend to be polarised. The reproductivity argument is quite often employed for countering interpretation of the constitutional notion of family as encompassing same-sex couples. For example, former judge of the European Court of Human Rights and current chairman of the Constitutional Committee of the Riigikogu, Rait Maruste, stated in 2004 that the constitutional protection of family life is bound to the preservation and growth of the nation, which refers to the function of reproduction, referring to a family with children in a traditional sense, with any other type of cohabitation remaining a question of private life.^{*37} Former Chancellor of Justice, Allar Jõks, shared his views over the possible discrimination of same-sex cohabiting couples in 2006. Under his interpretation, marriage is seen as a sustainable unit consisting of a man and

²⁵ ALCSCd 13.10.2005, 3-3-1-45-05 (in Estonian), para. 16.

²⁶ *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* ['The Constitution of the Republic of Estonia: Commentary']. Tartu: Juura 2012, commentary on §26 of the Constitution, para. 7. Available via <http://www.pohiseadus.ee/> (most recently accessed on 1.6.2013) (in Estonian).

²⁷ CRCSCd 5.3.2001, 3-4-1-2-01, para. 14 and ALCSCd 17.3.2003, 3-3-1-10-03, para. 32 (both in Estonian).

²⁸ R. Maruste (see Note 24), p. 283.

²⁹ *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §26 of the Constitution, item 7.1.

³⁰ ALCSCd 18.5.2000, 3-3-1-11-00 (in Estonian), para. 2.

³¹ Section 14 of the Constitution stipulates 'the duty of the legislature, the executive, [and] the judiciary, and of local authorities, to guarantee the rights and freedoms provided in the Constitution', where the obligation to guarantee the rights and freedoms does not refer only to prohibition of state authorities' intervention in the fundamental rights. Rather, the governmental power is, according to §14, obliged also to create appropriate procedures to ensure the protection of these rights. See CRCSCd 14.4.2003, 3-4-1-4-03 (in Estonian), para. 16.

³² A. Henberg, K. Muller, A. Alekand (see Note 13), p. 36.

³³ *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §27 of the Constitution, para. 14 to item 15.4.

³⁴ ALCSCd 19.6.2000, 3-3-1-16-00 (in Estonian), para. 1.

³⁵ *Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne* (see Note 26), commentary on §27 of the Constitution, para. 14.

³⁶ Henberg, Muller and Alekand also note this in their analysis (see Note 13), pp. 35–36.

³⁷ R. Maruste (see Note 24), p. 442.

a woman who are capable of having children with each other and therefore of securing the preservation of society and same-sex couples' lack of this opportunity is a difference justifying different treatment of same- and opposite-sex couples.^{*38}

Historically, the family unit evolved indeed in virtue of the need of caring for the protection and socialisation of children; hence, reproduction has traditionally been seen as the primary function of the family.^{*39} However, various economic and cultural factors, especially the growth of individualism, have been moulding people's priorities and have resulted in increasing importance being accorded to the function of the family as expressive of a wish to be with the partner and spend time together, which is among the most important motives for establishing a family in a modern welfare state.^{*40} While same-sex cohabiting couples' possibilities for fulfilling the function of reproduction are limited, these couples can still successfully perform all other main functions of the family, such as the economic and companionship function, along with the function of socialisation, so do not differ significantly from opposite-sex couples in the associated respect.

The creation of a family that helps and supports its members, ensuring also the preservation and growth of the nation, shall indeed enjoy special protection^{*41}, yet the reproduction function of a family should not be overemphasised. Overemphasising the function of reproduction in case of marriage would in addition rule out unions of elderly or otherwise infertile people, which was presumably not the intention of Maruste or Jõks. The family shall be protected also as the foundation for an individual's existence and lifestyle.^{*42} In the opinion of the Supreme Court, one should not conclude from the wording of §27 (1) of the Constitution that family is protected only as long as it ensures the preservation and growth of the nation; instead, this norm highlights family as the foundation of society and in need of special protection, assuring its constitutional protection. If family were only the tool of preservation and growth of the nation, there would be no reason to give it special, explicit mention in the Constitution. On the contrary, §27 (1) proves that family has independent value under the Constitution, since it entails a subjective right to protection by the governmental power.^{*43} Defining the notion of family only in terms of the function of reproduction would mean treating it as a solely collective interest and would therefore result in an excessively narrow interpretation.

The Supreme Court of Estonia often relies on the views of the European Court of Human Rights (ECtHR) and refers to its case law when interpreting the norms of the Constitution.^{*44} The Supreme Court has also pointed out that the influence of Article 8 of the European Convention of Human Rights^{*45} (ECHR) is evident from the wording of §26 of the Constitution.^{*46} The ECtHR is the primary actor in the European human rights arena, and in its interpretations of the ECHR a shift from the previous, restrictive policy toward recognition of non-marital cohabitation is visible.^{*47} The notion of family in the case law of the ECtHR has grown year by year to encompass broader variety in the forms of personal relationships. However, until recently the ECtHR accepted the relationship of a same-sex couple only as being covered by the protection of private life, not by that of family life, and allowed contracting states a wide margin of discretion in this area. The breakthrough for same-sex couples arrived in 2010, when the ECtHR recognised in *Schalk and Kopf v. Austria* the right of homosexual couples to family life under Article 8 of the ECHR.

³⁸ See the letter of the Chancellor of Justice to the Gay and Lesbian Information Centre 'The position on the legalisation of same-sex familial relationships', of January 2006, No. 6-1/060166/0600782. This was also reflected in the press release of the Chancellor of Justice entitled 'The unequal treatment of same-sex couples in the regulation of family relationships is in accordance with the Constitution', of 2.2.2006. Available at <http://oiguskantsler.ee/et/oiguskantsler/suhted-avalikkusega/pressiteated/samasooliste-isikute-ebavordne-kohtlemine-peresuhte> (most recently accessed on 1.6.2013) (in Estonian).

³⁹ F. Swennen. *O tempora, o mores! The evolving marriage concept and the impediments to marriage.* – M. Antokolskaia (ed.). *Convergence and Divergence of Family Law in Europe.* Antwerp; Oxford / Amsterdam: Intersentia 2007, p. 121.

⁴⁰ E.-M. Tiit. *Sündimuse dünaamika Eestis. Mõjutused, trend ja prognoos Euroopa rahvastikuprotsesside taustal* ['The dynamics of birth rate in Estonia: Influences, trends, and prognosis in the background of the demographic processes in Europe']. Report of the research project. University of Tartu 2000, p. 14 (in Estonian).

⁴¹ P. Smith. *Liberalism and Affirmative Obligation.* New York; Oxford: Oxford University Press 1998, p. 14.

⁴² R. Alexy. *Põhiõigused Eesti põhiseaduses* ['Fundamental rights in the Estonian Constitution']. – *Juridica*, special edition, 2001, p. 85 (in Estonian).

⁴³ ALCSCd 3-3-1-11-00 (see Note 30), para. 2.

⁴⁴ See, for example, ALCSCd 3-3-1-11-00 (*ibid.*).

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (most recently accessed on 1.6.2013).

⁴⁶ CRCSCd 5.3.2001, 3-4-1-2-01 (in Estonian), para. 14.

⁴⁷ C. Sörgjerd. *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society.* Cambridge; Antwerp; Portland, Oregon: Intersentia 2012, p. 275.

Here, the ECtHR noted the rapid evolution of social attitudes toward same-sex couples in many Member States, the fact that a considerable number of Member States have afforded legal recognition to same-sex couples, and certain provisions of EU law that reflect a growing tendency to encompass same-sex couples by the notion of family. Accordingly, the Court considered it artificial to maintain the view that, unlike an opposite-sex couple, a same-sex couple cannot enjoy family life with respect to Article 8 of the ECHR.^{*48} This statement undoubtedly proves that the stable *de facto* relationship of a same-sex couple is, according to the ECHR, covered by the notion of family and even though the protection spheres of §26 and §27 (1) of the Estonian constitution differ from the sphere of protection of Article 8 of the ECHR^{*49}, the new position of the ECtHR on the notion of family reflects a general trend in Europe with respect to the rights of same-sex couples and is likely to influence future interpretation of the notion of family in the Estonian constitution.

Departing from the opinion of the former Chancellor of Justice and in accordance with the views recently expressed by the ECtHR, the current Chancellor of Justice, Indrek Teder, is convinced that same-sex cohabiting couples form families and should enjoy the constitutional protection of family life. Teder considers the current situation in Estonia, wherein the family relations of same-sex couples are not specified by legislation, unconstitutional and emphasises the need to create an appropriate legal framework for the regulation of these relationships. According to him, it is the constitutional obligation of the governmental power to encompass the creation of a procedural framework acknowledging the family life of same-sex cohabiting couples and, in connection with that, regulating the personal, proprietary, and other kinds of relations derived from their family life.^{*50}

Following the recommendations given in the memorandum of the Chancellor of Justice and the conclusions drawn on the basis of previous analysis^{*51}, the Ministry of Justice drafted the project work for a Cohabitation Act^{*52} in August 2012. The project entailed a proposal to allow same- and opposite-sex couples to register their cohabitation after concluding a notarial contract of cohabitation. The intent with this contract of cohabitation was to cover issues such as the property regime of the cohabitees, maintenance obligations toward each other, and inheritance. The project covered, in addition, the main legal problems associated with a *de facto* relationship that involves children. However, the project did not find sufficient support from the coalition parties of Parliament and the Ministry of Justice abandoned the plan to draft a Cohabitation Act proceeding from the project work.

4. The legal position of *de facto* cohabitees

Several provisions in current legislation are applicable to *de facto* cohabitees. Unlike that of same-sex couples, constitutional protection of family life for opposite-sex *de facto* couples does not entail an obligation of the state to create additional possibilities for the registration of a relationship, since the cohabitees already have the option of getting married. In most cases, *de facto* cohabitees do not wish to exercise that option.^{*53} Yet the cohabiting couple choosing not to marry might still wish for some legal guarantees similar to the ones foreseen with married couples, for example, for avoidance of unjust consequences in the event that the relationship breaks down. Special attention should be given here to the position of economically vulnerable partners and children.^{*54} The simplistic argument that it is 'these people's own fault if they do not marry' does not hold true in all cases, particularly—but not exclusively—if the couple have children.^{*55}

⁴⁸ *Schalk and Kopf v. Austria*, ECtHR 24.6.2010, application No. 30141/04, pp. 93–94.

⁴⁹ According to the views of ALCSC, the possible restrictions to the subjective right listed in Article 8 of the ECHR and §26 of the Constitution, in combination with the existence of §27 of the Constitution, prove to be different spheres of protection. See ALCSCd 18.5.2000 (see Note 30), para. 2.

⁵⁰ Memorandum of the Chancellor of Justice to the Minister of Justice No. 6-8/110661/1102390, of 23.5.2011. Available in Estonian at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_samasooliste_isikute_pere-suhe.pdf (most recently accessed on 1.6.2013) (in Estonian).

⁵¹ A. Olm (see Note 9).

⁵² Kooseluseaduse kontseptsioon (see Note 10).

⁵³ In most countries foreseeing the possibility for opposite-sex couples to register their cohabitation as an alternative to marriage, this option has been rarely used, unless the status of registered cohabitees provides significant tax or other kinds of benefits.

⁵⁴ W.M. Schrama (see Note 6), p. 281.

⁵⁵ J.M. Scherpe (see Note 2), p. 283.

In Estonia, there is currently no special type of contract addressing intimate relationships other than marriage. Similarly to Germany's, Estonia's regulation of marriage may be applied to *de facto* cohabitation by analogy only if it pertains to very specific aspects of cohabitation and expresses general principles of law relevant to close personal relationships.^{*56} In most cases, using analogy is not allowed, because not every *de facto* cohabiting relationship can be seen as a broad community of rights and obligations.^{*57} Therefore, *de facto* cohabitees can determine their legal relations only by entering into contracts in accordance with the law of obligations (e.g., a contract of partnership^{*58}) or the law of succession (e.g., a contract of succession^{*59}). However, with it being rather uncommon in Estonia to conclude contracts in the context of personal relationships, most cohabiting couples normally become conscious of legal problems only after these problems emerge.

In cases of a property adjustment claim deriving from *de facto* cohabitation, it is crucial to determine which investments either party made in any property acquired by the other party during the cohabitation^{*60}, and the only kind of non-proprietary contribution that is recognised at all by some Estonian courts is the physical labour of one partner to improve the property of the other or increase its value without compensation—for example, by building or renovating a family dwelling.^{*61} The non-proprietary contributions to the welfare of the family are usually not taken into account. If a relationship breaks down, the matter of reimbursement for proprietary contributions by cohabitees can be resolved by means of the law of obligations, as a party to a relationship may, for example, claim reimbursement on grounds of unjust enrichment.^{*62} However, no special recognition, whether on the legislative level or in judicial practice, is granted to the non-proprietary contributions of the cohabitees. Injustice might appear when one of the partners' participation in working life was altered during the relationship, for purposes of caring for the home and family. This usually is seen upon the birth of a child.^{*63} Estonia's generous parental-benefit system^{*64} and recent addition of a maintenance obligation in the case of birth of a child^{*65} have reduced the possible injustice derived from *de facto* cohabitation, though caring for a child has broader financial impact, which needs to be taken into account.

Regardless of the above, even in cases of proprietary relations, the possibilities for applying the principles of a contract of partnership to cohabitants, unless they have concluded such a contract in writing, are limited, according to the judicial practice of the Supreme Court. Firstly, the Supreme Court has emphasised that, even if the cohabitants' intention to buy property (for example, a dwelling for the family) jointly is ascertained, co-ownership should be created at the moment of the purchase.^{*66} Secondly, if the cohabitants have a common goal of jointly acquiring that kind of property whose acquisition is subject to certain formal restrictions (e.g., notarial certification in the case of real estate), the contract endorsing their common goal (e.g., a contract of partnership) needs to meet the same formal requirements.^{*67} As a result, an economically vulnerable *de facto* partner who has, for example, been caring for children during the cohabitation might find him- or herself in a financially difficult situation if the relationship breaks down. Such circumstances could lead to injustice in many relationships, given the large number of children being born outside wedlock in Estonia.

⁵⁶ E.g., the assumption of confidentiality between cohabitees. See also *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 7. 1. Halbband: Familienrecht I. 5. Aufl. Munich: Verlag C.H. Beck 2010, p. 105.

⁵⁷ H. Grziwotz (see Note 18), p. 22.

⁵⁸ *Võlaõigusseadus* ['Law of Obligations Act'], Chapter 52. – RT I 2001, 81, 487; 5.4.2013, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

⁵⁹ *Pärimisseadus* ['Law of Succession Act'], Chapter 4. – RT I 2008, 7, 52; 2010, 38, 231 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

⁶⁰ Tartu Circuit Court decision II-2-249/00, of 1.11.2000 (in Estonian).

⁶¹ Tartu Circuit Court decision 2-06-8290, of 4.6.2008 (in Estonian). The Court asserted that a contract of partnership existed between the cohabitees, although the parties had not declared their intention to enter into that contract. The Court found the factual behaviour of the parties sufficient for assuming the existence of a contract of partnership, when the parties have a joint household and their behaviour reflects a common goal.

⁶² *Võlaõigusseadus*, Chapters 30–33.

⁶³ See also P. Parkinson. Quantifying the homemaker contribution in family property law. – *Federal Law Review* 2003/1, pp. 11–14.

⁶⁴ *Vanemahüvitise seadus* ['Parental Benefit Act']. – RT I 2003, 82, 549; 6.12.2012, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

⁶⁵ *Perekonnaseadus* [Family Law Act], §§ 111–112. – RT I 2009, 60, 395; 27.6.2012, 4 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 1.6.2013).

⁶⁶ CCSCd 26.1.1999, 3-2-1-8-99 (in Estonian).

⁶⁷ CCSCd 20.12.2005, 3-2-1-142-05 (in Estonian), para. 14.

5. Conclusions

By relying on judicial practice, the views of the commentators on the Constitution, and public opinion, one can conclude that, alongside 1) children with their parents and 2) married couples, 3) opposite-sex *de facto* couples are considered family in Estonia. In light of recent developments in Estonia (such as the project for a Cohabitation Act and new, favourable views expressed by the Chancellor of Justice) and Europe and regardless of rather negative public attitudes, the author of this paper is of the opinion that 4) same-sex cohabiting couples too should be considered family. Differential treatment of same- and opposite-sex couples on grounds of the argument of reproductivity as referred to by the former Chancellor of Justice appears to be artificial, given that same-sex cohabiting couples can fulfil all of the other important functions of the family. These couples should, therefore, have an equal right to enjoy the protection of family life foreseen in §§26 and 27 (1) of the Estonian constitution. This argument is supported by the new position of the ECtHR on the notion of family, which can be seen as a reflection of a general trend in Europe with respect to the rights of same-sex couples, and is likely to shift the understanding of the notion of family in the Constitution toward a more favourable interpretation in Estonian judicial practice for these couples in the future.

The constitutional right of non-married cohabiting couples (both same- and opposite-sex) to family life has a number of legal consequences. One of the most important of these is the obligation of the governmental power to offer protection to those new forms of the family. This protection does not cover merely the obligation of the state to protect a person against arbitrary intervention in his or her family and private life; it also entitles cohabitants to insist on enactment of appropriate regulations allowing them to enjoy genuine family life and seek justice when the relationship ends.

Even though (opposite-sex) *de facto* cohabiting couples are considered families in Estonia and covered by the protection of §27 (1) of the Constitution, their actual protection is limited. There is a need for additional safeguards for the weaker party in the relationship, if any, especially in view of the large number of children born outside married relationships in Estonia. Reimbursement for a cohabitee's financial contributions may currently be claimed on such grounds as unjust enrichment, foreseen in the Law of Obligations Act. However, the possibilities for a *de facto* partner to claim for non-proprietary contributions are very limited and the current regulatory system could create injustice when, for example, one of the partners changed his or her participation in working life during the cohabitation in order to care for a child. The law has been adapted very little to the increasing diversity of forms of the family, and enactment of appropriate legislation could reduce the possible injustice stemming from *de facto* cohabitation involving children. Until special regulation is adopted in Estonia⁶⁸, cohabitants ought to find suitable legal instruments from other fields of law instead of family law, in order to resolve their legal disputes—mainly the law of obligations, property law, and the law of succession.

⁶⁸ According to the work schedule of the Ministry of Justice, the first version of the draft legislation on *de facto* cohabitation should be completed in December 2013. It is intended to resolve some of the problematic elements mentioned above. See the work schedule of the Ministry of Justice for 2013, task 32. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=58158/Justiitsministeeriumi+2013.+aasta+t%F6%F6plaan.pdf> (most recently accessed on 1.6.2013) (in Estonian).