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Property rights of informally cohabiting couples: analysis of Estonian private law

Master Thesis

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Tallinn 2017

I hereby declare that I am the sole author
of this Master Thesis and it has
not been presented to any other
university of examination.

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…….. 2017

The Master Thesis meets the established requirements

Supervisor Tatjana Evas

…….. 2017

Accepted for examination " ..... " 2017

Board of Examiners of Law Master's Theses

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Abbreviations

AÕS – Estonian Law of Property Act

ATS – Estonian Civil Servise Act

ECHR – Decision of the European Court of Human Rights

KAS – Estonian Credit Institutions Act

KooS – Estonian Partnership Act

KrMS – Estonian Code of Criminal Procedure

KS – Estonian Courts Act

KVTS – Estonian Military Service Act

LGBT – Lesbian, Gay, Bisexual, and Transgender

OAS – Estonian Victim Support Act

PankrS – Estonian Bankruptcy Act

PärS – Estonian Law of Succession Act

PkS – Estonian Family Law Act

PS – Estonian Constitution

RKHKo – Decision of the Administrative Law Chamber of the Supreme Court

RKPJKo – Decision of the Supreme Court

RKTKo Decision of the Civil Chamber of the Supreme Court

SHS – Estonian Social Welfare Act

TsMS – Estonian Code of the Civil Procedure

TsÜS – General Part of the Estonian Civil Code Act

VÕS – Estonian Law of Obligations Act

Introduction

The concept of family has always been one of the most discussed issues in the history of a mankind – represented in the classic works of literature, cinema, philosophical works and mass media publications. Matrimonial relations after the influence of the feminist reforms, globalization, and many other political and social factors brought out the questions regarding the traditional approach to creating a family. Family as a social unit reached to the point where the couple – not the government neither the church – could decide whether they are partners or not. This consent of a couple from now on became the starting point in recognition[1] of civil marriages with common children, property, and rights protected under the Estonian Family Law Act. With the growing tendency, people stand for the civil rights of *de facto* spouses to be treated as part of one union legally identified as 'the family'. Marriage in this society would describe a moral but not a legal relationship between persons.[2]

The main objective of the thesis is to critically analyze the cohabitants' rights in unregistered civil unions from the view of Estonian civil law. Specifically, the research focuses on the comparative analysis of property and ownership rights of unregistered couples in Estonia to the spousal rights and obligations granted by the Estonian Family Law Act. Additional descriptive comparison concerns basic principles of informal cohabitants' rights in European Union Member States, which recognize these consensual unions in terms of legislation: Austria, Belgium, Croatia, England and Wales, France, Hungary, Netherlands, Portugal, and Sweden. Those jurisdictions are selected because, according to the Commission on European Family Law (CEFL) national reports, the direct recognition of informal cohabitants was observed in the legislation of these countries.[3]

Furthermore, procedural guarantees related to the household contribution, property possession, and ownership, provision of maintenance and separation consequences of informally cohabiting couples in Estonia are compared with procedural guarantees applicable to consensual unions in other European countries. The thesis also identifies differences and gaps in legislative provisions applicable to cohabiting couples in comparison with the formally registered relationships under Estonian family law as well as legislation in other European countries.

[1] However, it depends on a state, whether the recognition is legal or factual, direct or indirect.
[2] As cited in Houlgate, L.D. Must the Personal Be Political? Family Law and the Concept of Family. International Journal of Law, Policy and the Family 12, (1998), p 112.
[3] Commission On European Family Law, Country reports by jurisdiction. Available at: www.ceflonline.net/country-reports-by-jurisdiction.

The main hypothesis of this research is that **in Estonia property rights of informally cohabiting partners are limited in terms of family life protection.**

Specifically, to test the hypothesis the three main questions will be analyzed:

1. Whether and to what extent Estonian law limits individual rights in consensual unions?

2. Whether and what type of additional legal burdens on informal cohabitants, who want to protect their rights in accordance with the Family Law Act are imposed by Estonian law?

3. Whether optional conclusion of contracts for each separate sector of everyday life is an additional legal burden on consensual unions?

Due to the active LGBT rights' movement and social conflict people follow through the mass media the topic of alternative forms of family relations is highly discussed in the society. In this context, it is highly important to highlight that the current thesis does not aim to:

- provide the detailed review of Registered Partnership Act[4] related issues
- evaluate pros and cons living in consensual unions
- analyze informal relationship psychological or behavioral aspects

Even though points mentioned above are important and they can be easily connected with the problematic legal issues of unregistered partnership related to property rights analyzed in this thesis, the main priority of this research is to provide an objective assessment of legal aspects in an unbiased manner.

Until recent years, the cohabiting families formally were not recognized by Estonian law as families. However, after legislative amendments,[5] as of 9th October 2014, there are two types of registered family unions recognized in Estonian law: – matrimonial relations, regulated by Estonian Family Law Act[6] and civil partnerships regulated by Estonian Registered Partnership Act.[7] Now both types of family unions are officially acknowledged by national law and the official status information on these unions is entered into the population register. The optional solutions introduced recently is the Estonian Registered Partnership Act aimed to regulate property rights

[4] Kooseluseadus (adopted on 9 October 2014, entered into force on 1 January 2016). - RT I, 16.10.2014, 1. Available in English at: www.riigiteataja.ee/en/eli/527112014001/consolide.
[5] *Ibid.* See also Implementing acts of Registered Partnership Act passed first reading, www.riigikogu.ee/en/sitting-reviews/implementing-acts-of-registered-partnership-act-passed-first-reading.
[6] Perekonnaseadus (adopted on 18 November 2009). - RT I 2009, 60, 395; RT I, 21.12.2016, 12. Available in English at: www.riigiteataja.ee/en/eli/527122016004/consolide.
[7] *Supra* nota 4.

and obligations of partners who are not able or do not want to enter into matrimonial relations. In practice, however, lack of implementing acts brings legal uncertainty to the alternatively registered unions urging them to refer their issues to the Courts[8] or to wait until the implementing acts are adopted remain living in unregistered consensual unions.

Meanwhile, civil unions, i.e. unions that are not formally registered, are still not recognized under Estonian law, meaning that the rights and obligations of the partners are not specifically regulated by law.[9] Therefore, the rights and obligations of the partners in the consensual unions remain unclear and require further legal analysis, especially as concern issues related to property rights and mutual obligations of the partners.

The thesis focuses on the civil law aspects related to the informal cohabitants. Specifically, thesis analyses on the Estonian Law of Obligations Act[10] and applicable Estonian Family Law[11] provisions. Legislation of selected European countries, which have introduced package of rights and duties on the legislative level in regards to the informally cohabiting partners is analyzed from the perspective of possible application in Estonian legal context.

Issues discussed in the thesis are related to everyday life property matters. When a couple starts living together and rents an apartment, it may lead to certain consequences depending on the rental agreement and other contractual circumstances. Also, sole ownership rights concerning the place of living (if *de facto* spouses or one of them owns an apartment) may put in disadvantage one of the parties when specific measures were not taken on time. These measures can be derived from the Estonian Law of Obligations Act,[12] as well as from the General Part of the Civil Code Act.[13]

When analyzing legal aspects of administration or ownership of the property, the legal terminology is explained, especially in regards to the following definitions:

- movable and immovable property;
- common and joint property;

[8] See Decision of the Administrative Chamber of the Tallinn Circuit Court 3-15-2355.
[9] At the same time, even though the unregistered partnerships are not directly recognized neither regulated by Estonian legislation, meanwhile there are legal acts which acknowledge the existence of 'other' family like relationship, See Chapter 1.1 below for analysis.
[10] Võlaõigusseadus (adopted on 26 September 2001, entered into force on 1 July 2002). – RT I 2001, 81, 487; RT I, 31.12.2016, 7. Available in English at: www.riigiteataja.ee/en/eli/524012017002/consolide
[11] PKS RT I, 21.12.2016, 12.
[12] VÕS RT I, 31.12.2016, 7.
[13] Tsiviilseadustiku üldosa seadus (adopted on 27 March 2002, entered into force on 1 July 2002). - RT I 2002, 35, 216; RT I, 12.03.2015, 107. Available in English at: www.riigiteataja.ee/en/eli/528082015004/consolide.

– shared and owned property.[14]

One of the fundamental provisions in regards to the spouses stipulated in the Estonian Family Law Act[15] is a duty to support each other.[16] – In this research unregistered cohabitants' rights to receive maintenance (under the Family Law Act) and contribution to the household by the work and assets (under the Estonian Law of Obligations Act) are analyzed.

Legal analysis is conducted to identify optional solutions including types of contracts, their prerequisites, and restrictions in relation to the following matters:

– the right to represent each other;
– succession rights;
– transaction of property.

Although, there are several instruments in Estonian legislation which can be used by the couple to avoid property related conflicts, in the worst-case scenario Estonian courts may be referred to for seeking protection of the individual rights. In the selected case law, Estonian courts also provide a determination of the ownership of movable and immovable property in consensual unions. By the relevant judicial procedure, the Court reviews rights and obligations of the parties who file a claim on the requests, such as compensation for contribution to the household during the relationship, child maintenance, and division of the joint or common property.

Based on the analysis of the legislation, case law and existing literature, the thesis argues, that the Estonian civil law lacks a transparent system which would grant protection of property for the both parties of unregistered civil unions and integrate informally cohabiting couples into the scope of the family law. Although the contractual relations ensure some guarantees similar to the Family Law Act provisions, partners in an informal relationship still lack comparable legal protection as a member of the same family union.

Accordingly, the thesis calls for the legislative amendments to improve the protection of persons living together in informal relationships. In this context, the research identifies possible legal solutions for the better protection of Estonian informally cohabiting couples' civil rights with the

[14] See legal definitions in Asjaõigusseadus (adopted on 9 June 1993, entered into force on 1 December 1993). - RT I 1993, 39, 590; RT I, 25.01.2017, 1, § 40 and § 80. Available in English at: www.riigiteataja.ee/en/eli/526012017002/consolide.
[15] PKS RT I, 21.12.2016, 12.
[16] Langdell, C. C. Mutual Promises as a Consideration for Each Other. Harvard Law Review 14.7 (1900-1901): pp 496-508.

main emphasis on property relations during cohabitation period and also after its termination – separation or death of one of the partners.

On the basis of analysis of 28 national reports on European Family Law,[17] Charlotte Moll concluded that the levels of regulation of informal relationships varied greatly: six jurisdictions (including Estonia) do not recognize or grant statutory rights to informal relationships.[18] The necessity of seeking for the better regulation in Estonia may also arise from the factor of globalization and cultural diversity which lead to the emerging in Estonia those type of families which entered into the matrimonial relationships following their culture traditions.[19] Even though the national law enables residents of Estonia to enter into officially recognized conjugal relations, which may bring additional risks to the couples obtaining the permission for the residence which would enable them to conclude the marriage in Estonia. These views require detailed analysis, additional statistical data, sociological and political disputes and a wide range of discussions concerning acceptance of the traditionally concluded unions. The topic also worth researching to ensure additional protection for the refugee families which, depending on the culture could be also the subject of non-official marriages. Thus, the possibly emerging difficulties such unions may face could be foreseen in advance. Arguably, couples living in the permanently unregistered unions need special legal protection to ensure their property rights during the family life beyond the marriage.

The thesis is mainly based on the qualitative methodology, including doctrinal analysis of legal texts, case law, and secondary literature. The qualitative approach is supplemented by basic quantitative analysis of statistical data.

The methods for legal research include analysis of Estonian law and comparative legal analysis of other EU MS legislation. The EU comparative analysis is mainly based on the compilation of materials collected in the 2015 country specific publication on informal relationships in the EU.[20] As the main focus of the thesis is on the situation in Estonia the EU comparative data is used to illustrate the situation in Estonia vis-a-vis other jurisdictions. The law of several EU Member

[17] Boele-Woelki, K., Mol, C., Gelder, E. European family law in action: 2015: Volume V: Informal relationships, Intersentia, 2015.
[18] Charlotte Moll, Reasons for Regulating Informal Relationships: A comparison of nine European jurisdictions, Volume 12, Issue 2 (June) 2016, Utrecht Law Review, p 1.
[19] As discussed in Navarro, C. Roma Marriage and the European Convention on Human Rights: European Court Judgment in the Muñoz Díaz v. Spain Case. European Journal of Social Security (2009) 12, pp 74-86.
[20] *Supra* nota 17.

States, including the Netherlands, Croatia, Belgium and Austria is selected and discussed in the thesis in the context of the specific problematic issues.

Other relevant sources that are used in the research include case law of Estonian courts, jurisprudence of European Court of Human Rights and selected cases of EU Member States; secondary literature including, books and peer reviewed journals – with the focus on Juridica[21] articles on the property and family law issues in Estonia. For the analysis of the Estonian case law, Riigi Teataja[22] is used. Statistical data is acquired through publicly accessible sources including Eurostat, Population Census, and National Statistics databases.

Organization of the Thesis consists of the three analytical chapters and final conclusions of the author.

The first Chapter – "The Concept of Informal Cohabitation" explains the differences between formal and informal relationships based on provisions of Estonian and EU MSs national legislation.[23] The aim of this chapter is to explore if there are any prerequisites for the unregistered partnership to be legally considered as a family unit – to test whether Estonian legislation limits cohabitants' rights and to compare it with the selected EU MSs legal acts. In addition to the national law research, international and EU instruments are brought in relation to the applicability of Estonian legislation. The statistical data on consensual unions is presented and discussed to illustrate the growing phenomenon of this type of family unions.

Second Chapter, "Property Relations", provides analysis of Estonian legislation applicable to property rights and obligations of unregistered cohabitants. The aim of this chapter is to specify legal ways for regulating property relations in unregistered partnerships, including situations of the joint material liability for certain actions. Sections include analysis of the shared, jointly and commonly owned property and options to regulate contributions to the household. Maintenance rights covered in terms of common children and the right to social assistance[24] from the State. Consequences and restrictions are also discussed in terms of representative and successor's rights

The aim of the Third Chapter, "Separation", is to examine whether, during the separation process, the rights of informal cohabitants are recognized equally to the spousal rights derived from

[21] Tartu University Faculty of Law journal.
[22] The State Gazette is an Official Online Publication of the Republic of Estonia. Available at: www.riigiteataja.ee.
[23] Austria, Belgium, Croatia, England and Wales, France, Hungary, Netherlands, Portugal, Sweden.
[24] Sotsiaalhoolekande seadus (adopted on 8 February 1995, entered into force on 1 April 1995). - RT I 1995, 21, 323; RT I, 21.12.2016, 21. Available in English at: www.riigiteataja.ee/en/eli/517012017002/consolide.

Estonian Family Law Act. As Estonian legislation does not have any special act regulating informal cohabitants, the recognition of civil rights is controlled by the following means:

- jurisdiction of the court,
- maintenance of the partner,
- division of property and
- compensation of contribution.

Final Conclusions present the reasoned answer to the hypothesis and recommendations for the application of Estonian Law of Obligations Act's Partnership Contract[25] provisions to the scope of Estonia Family Law Act[26] when such agreement is concluded for the purposes of ensuring property protection for the family life in a common dwelling.

[25] VÕS RT I, 31.12.2016, 7. Part 7.
[26] PKS RT I, 21.12.2016, 12.

1. The Concept of Informal Cohabitation

The main aim of this chapter is to provide a comparative analysis of different types of partnerships currently recognized under Estonian law. The definitions and rights provided under the law of different types of relationships are compared to other recognized forms of partnerships under national law as well as regulations of recognized partnerships in other EU MSs.

First, the definitions of various legal types of partnerships are discussed (Section 1), then statistical data is presented (Section 2) followed by the analysis of legal rights and freedoms under the national constitution and binding international and EU instruments (Section 3). The chapter concludes with the analysis of a special contractual form, Contract of Partnership,[27] and its applicability to the informal cohabitations.

1.1. Definitions

In general, there are two types of personal relationship between people: official, i.e. registered and recognized under the law and non-official – not formally registered. As far as family is concerned, according to the conservative approach,[28] the official relationship between two people is a registration of a marriage between man and woman.[29] Nowadays there are countries and states which recognize registration of the relationship between same-sex couples.[30] Even though, the conservative approach used to vary depending on the country's legal order and religious views, the recognized (by the certain official authority) union signified as a creation of the new family unit.[31] Together with the matrimonial relationship, or marriage, the new concept appeared in the society – the 'registered partnership' as officially recognized (by the certain authority) family union.

[27] *Supra* nota 25.
[28] Hill, M. Parliamentary Conservative Party: The leadership elections of William Hague and Iain Duncan Smith. Doctoral thesis, University of Huddersfield 2007.
[29] PKS RT I, 21.12.2016, 12, § 1.
[30] For example, the same-sex marriages recognized in Netherlands from April 2001 (see Dutch Civil Code Book 1, in force from January 1970, last updated of 4 February 2014). Recognition of foreign same-sex unions in Estonia from 2016 (see KooS RT I, 16.10.2014, 1).
[31] Smith, B.G. The Oxford encyclopedia of women in world history. Oxford University Press, Oxford 2008.

The table[32] on "Levels of recognition of different-sex and same-sex couples"[33] below represents data on European countries and types of recognition for other than the formal marriage partnerships. In short, as presented in this table, there are two main types of alternative forms of partnerships recognized in European countries: (1) registered partnership, which could include protection (a) of rights and duties comparable or equal to formal marriage or (b) of more restricted set of rights in comparison to formal marriage; (2) unregistered cohabitation. Those two alternative forms of partnerships apply differently to the different and same-sex couples as well as great differences exist among various European jurisdictions on the scope of the recognition. Estonia is not included in the list for the reasons discussed below.

Applying categories presented in Appendix 1 to Estonia, under current legislation there is a status of 'registered partnership' from 2014 recognized by the Estonian Registered Partnership Act.[34] This status, as analyzed below, cannot be defined under the (a) or (b) categories, due to the lack of additional implementing acts. Provisions of this act apply both to the different-sex and the same-sex couples. From the legal point of view, the registered partnership status is different from the second type of relationship unregistered partnership/cohabitation.[35] This type of relationship in Estonia is not officially recognized by any authority and it is expressed by the individual consent of each person in the couple. Unregistered cohabitation may be a transitional stage in a relationship before the marriage, or it can be permanent matrimonial relationship alternative when the couple does not want to or does not have the legal capacity to register this relationship.[36]

Unregistered cohabitation is not yet explicitly recognized in the Estonian law. However, there are several provisions in Estonian legislation that make reference to informally cohabiting couples as

[32] See Appendix 1.
[33] Wintemute, R., International Trends in Legal Recognition of Same-Sex Couples, ECHR Act Review and Human Rights in Committed Relationships, Irish Human Rights Commission and Law Society of Ireland conference Dublin, 16 October 2004, p 3.
[34] "The first, and an exceptional legislative reference to an informal relationship was made in Decree no. 82 of the Government of the Republic in 1999, now already repealed, clause 39.15 of which read 'Approval of the roll-call questionnaire, forms of roll-call sheets and the roll-call rules for the roll-call people and their dwellings in the year 2000' (RT I 1999, 32, 431, repealed by RT I 2006, 38, 289.) according to which a person who was not in a legal marriage, but rather in a self-determined marital relationship with his/her cohabitant and had a common place of residence with his/her cohabitant was considered as being in cohabitation." For the discussion and analysis see Uusen-Nacke, T. and Vahaste-Pruul, S. National Report: Estonia. European family law in action. Volume V – Informal relationships. February 2014.
[35] Other ways to refer to this type of relationship are consensual or civil union. In this thesis, the terms 'civil union', 'consensual union', 'unregistered partnership' and 'unregistered cohabitation' will be used interchangeably, unless provided otherwise.
[36] Grziwotz, H. Nichteheliche Lebensgemeinschaft. München: Verlag C.H. Beck, 1999, p 31. As cited in Olm, A. Mitteabieluline kooselu ja selle õiguslik regulatsioon. Justiitsministeerium, Õiguspoliitika osakond, Eraõiguse talitus, Tallinn 2009, p 18.

well as a decision of the Supreme Court that provides a certain degree of acknowledgment of the existence of this type of relationships in Estonia.

The existing references in the law are not straightforward definitions, rather the references to the concept of unregistered cohabitation. Thus, for example, the Estonian Code of Civil Procedure obliges the judge to remove himself or herself from the case "in a matter of his or her spouse or cohabitant, […] even if the marriage or permanent cohabitation has ended".[37] Here, to avoid the conflict of interests in judicial disputes, the cohabitant status is in fact equated with the formal status of the spouse. Other legal acts, listed below also refer to the cohabitation include:

- Code of Civil Procedure § 257 (1) item 5 "the spouse of or a person permanently living together", in context of the right of the witness to testify;[38]
- Code of Criminal Procedure § 71 (1) item 5 "the spouse of or a person permanently living together", in context of refusal to give testimony for personal reasons;[39]
- Code of Civil Procedure § 257 (1) item 5 "a spouse of a debtor or a claimant, a person permanently living together", in context of right of witness to refuse to give testimony;[40]
- Bankruptcy Act § 117 (1) item 2 "persons who live in a shared household", in context of persons connected with debtor;[41]
- Victim Support Act § 6 (2) item 3 "a grandparent, parent, brother, sister, child or grandchild, spouse or cohabitant", in context of victim support volunteers;[42]
- Credit Institutions Act § 84 (2) "persons with equivalent economic interests are the spouse or cohabitant, children, parents, sisters and brothers of a manager of a credit institution", in context of granting loans to persons related to credit institutions;[43]
- Credit Institutions Act § 84 (2) refers to *de facto* spouse in the authentic text, in the context of loans to persons related to credit institutions;[44]

[37] Tsiviilkohtumenetluse seadustik (adopted on 20 April 2005, entered into force on 1 January 2006). - RT I 2005, 26, 197; RT I, 28.12.2016, 22, § 23 (3). Available in English at: www.riigiteataja.ee/en/eli/510012017004/consolide.
[38] *Ibid.*
[39] Kriminaalmenetluse seadustik (adopted on 12 February 2003, entered into force 01 July 2004). - RT I 2003, 27, 166; RT I, 31.12.2016, 46. Available in English at: www.riigiteataja.ee/en/eli/530012017002/consolide.
[40] *Supra* nota 37.
[41] Pankrotiseadus (adopted on 22 January 2003, entered into force on 01 January 2004). - RT I 2003, 17, 95; RT I, 22.06.2016, 25. Available in English at: www.riigiteataja.ee/en/eli/504072016002/consolide.
[42] Ohvriabi seadus (adopted on 17 December 2003, entered into force pursuant the § 35). - RT I 2004, 2, 3; RT I, 04.11.2016, 5. Available in English at: www.riigiteataja.ee/en/eli/502012017002/consolide.
[43] Krediidiasutuste seadus (adopted on 09 February 1999, entered into force pursuant the § 142). - RT I 1999, 23, 349; RT I, 23.03.2017, 7. Available in English at: www.riigiteataja.ee/en/eli/528032017001/consolide.
[44] *Ibid.*

- Military Service Act § 92(3) item 4 "a person in a relationship similar to marriage (hereinafter unmarried partner)", in the context of appointment to peacetime post;[45]

- Civil Service Act § 15 item 4[46] "a partner in the marriage-like relationship (hereinafter unmarried partner)", in the context of persons who may not be employed in service.

Thus, a number of Estonian legislative act indirectly refer to the recognition of unregistered cohabitations. As cited above, however, the main reason is not to provide any definition of the cohabitation, but rather to avoid the conflict of interests among closely related parties. In this specific context of conflict of interests' situations, arguably the consensual unions are treated similarly to the registered parties. In the decision from June 19, 2000, the Administrative Chamber of the Supreme Court held that subsection 1 of § 27 of the Estonian Constitution provides protection from an unfounded intervention by the state also to a form of family cohabitation that has not been registered according to the terms prescribed by law.[47] In the same paragraph, it held that subsection 1 of § 27 of the Estonian Constitution also protects a family cohabitation between a man and a woman, which is not that which is prescribed by the law, from unfounded interventions by the state.[48]

Different legal literature referred to the 'cohabitation' as a general term applied to the various types of informal unions (including conjugal relations) even before the Estonian Registered Partnership Act was adopted.[49] However, it was rejected, as the term 'non-marital cohabitation' does not comply with the linguistic recommendations made by Estonian scholars,[50] although for example in Germany the similar term is known and used 'Nichteheliche Lebensgemeinschaft' (non-marital cohabitation).[51] Due to the fact that in the legal literature the terminology of defying informal cohabitation varies from one act to another – from *de facto* marriage[52] to family-like relationship, it gives many options to choose any relevant expression which describes the informal cohabitations.

[45] Kaitseväeteenistuse seadus (adopted on 13 June 2012, entered into force on 01 April 2013). - RT I, 10.07.2012, 1; RT I, 01.03.2017, 3. Available in English at: www.riigiteataja.ee/en/eli/513032017006/consolide.
[46] Avaliku teenistuse seadus (adopted on 13 June 2012, entered into force on 01 Aprill 2013). - RT I, 06.07.2012, 1; RT I, 06.10.2016. Available in English at: www.riigiteataja.ee/en/eli/515122016001/consolide.
[47] Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-16-00 at para. 1.
[48] *Ibid.*
[49] Olm, A. Non-married Cohabiting Couples and Their Constitutional. Tartu, Juridica Interational, 2013 XX, p 105.
[50] Seestrand, L. Mitteläbimõeldud väljendite mittekasutamisest tõuseks mittekahju kõigile. Tallinn, Õiguskeel, 2002, pp 25-27.
[51] Grziwotz, H. Nichteheliche Lebensgemeinschaft. Munich: Verlag C.H. Beck 2006. Supra nota 49, p 106.
[52] KAS RT I, 23.03.2017, 7.

Following analysis of Estonian legislation, for comparative reasons below is a concise overview of regulatory regimes in selected EU Member States as applies to the cohabiting couples including legislative provisions applicable to definition and determination of the formal cohabiting status. The main aim of this comparative overview is to show how legislators in other jurisdiction have approached the similar issue.

In Croatia, the heterosexual informal cohabitants are regulated by the Croatian Family Law Act, as spouses. Except in family law, cohabitation and marriage are legally equal in many other areas of law, e.g. inheritance law, social security law, pensions law etc.[53] Meanwhile, homosexual couples are regulated by the Croatian Partnership Act. Croatian Family Law Act in its Article 11 paragraph 1 provides more narrow, compared to Estonian '*de facto* spouse', definition on the informal cohabitation: "a relationship between an unmarried woman and an unmarried man, which lasts for at least three years or less if the partners have a common child or if the relationship has been succeeded by marriage".[54] After the analysis of legal regulations of non-marital relationships, Estonian scholar Andra Olm concluded, that partners in an informal relationship are considered in Estonian law as persons who are close to the person performing certain acts.[55] Such definition, used by Andra Olm is the most objective and relevant to summarize the nature of unregistered partnerships legal recognition in Estonia. Each reference to cohabitants in *de facto* marriage relationships is applied to the certain situations (i.e. Civil or Criminal Procedure). Thus, the Croatian,[56] precise approach, indicating the time of cohabitation and distinguishing same-sex from different-sex unions is in direct contrast to Estonian legislation which neither formally recognizes cohabiting couples nor does it distinguish same-sex from different-sex unions in terms of unregistered partnerships.

In England and Wales, both different and same-sex couples recognized in different legal acts and include different definitions. The distinction is in the scope of protection, which in England and Wales falls down under the Means-Tested Social Security benefits and Tax Credits.[57]

[53] Rešetar, B. and Lucić, N. National Report: Informal Relationships – Croatia. European family law in action. Volume V – Informal relationships. January 2015, p 1.
[54] Croatian Family Act of 22 September 2015 (Text No. 1992).
[55] Olm, A. Mitteabieluline kooselu ja selle õiguslik regulatsioon. Justiitsministeerium, Õiguspoliitika osakond, Eraõiguse talitus, Tallinn 2009.
[56] Comparison to Croatian legislation is used as an example of the State where the rights of heterosexual *de facto* spouses – under objective conditions are equal to the rights persons in conjugal relationships.
[57] Lowe, N.V., Douglas. G, Bromley, P.M.'Bromley's family law. Oxford University Press, Oxford 2014, pp 775-785.

The Tax authority (HMRC) states in their manuals[58] the following criteria to decide on the recognition of the consensual union:[59]

- Living in the same household;
- Stability of relationship;
- Financial support;
- Dependent children;
- Public acknowledgment of the couple relationship;
- Sexual relationship.

In these manuals, a cohabitant is referred to as 'spouse' and 'civil partner'. This approach is also different to the Estonian approach; as currently Estonian law does not provide any formal criteria for the recognition of consensual unions.

French legislation has a special word for informal relationships "concubinage", which is regulated under the provisions of the French Civil Code. Similarly to Croatian and England and Wales legislation, concubinage is defined as "a factual union, characterized by common life with the character of stability and continuity, between two persons of the opposite or same sex, living as a couple".[60] In the French legislation, before Law Act no. 2011-814 of 7 July 2011, the *concubins* had to establish that they had been living together for at least two years (however, this requirement has now been deleted).[61]

In Hungary, informal relationships are regulated with the two Books of Hungarian Civil Code and the so-called consequences of the family law in consensual unions are regulated by the Family Law Book.[62] National report on Hungarian legislation provides important explanation on the co-existence of informal relationships when one or both partners are married: the existence of a mere matrimonial bond without a matrimonial community of life on either cohabitant's side[63] does not exclude their qualification as cohabitants but if there is also a matrimonial community of life or a community of life with a registered partner no cohabitation exists.[64] Even though Estonian

[58] HMRC have four manuals which provide online guidance on the legislation. See for example, HMRC Tax Credits Claimant Compliance Manual, Section CCM15040, 'Undisclosed Partners: Couples who are Unmarried and not Civil Partners'. Available at www.hmrc.gov.uk/manuals/ccmmanual/CCM15040.htm.
[59] Barlow, A. and Lowe, N. National Report: England & Wales. Informal Relationships, January 2015, p 3
[60] French Civil Code Art. 515-8, Book I, Chapter II.
[61] Ferrand, F. and Francoz-Terminal, L. National Report: France. European family law in action. Volume V – Informal relationships. January 2015, footnote at p 3.
[62] Szeibert, O. National Report: Hungary. European family law in action. Volume V – Informal relationships. February 2015, pp 1-3.
[63] The same is true if the registered partnership exists as a mere bond without a community of life.
[64] Szeibert (2015), *supra* nota 62, p 3.

legislation does not recognize informal relationships directly, the possible application of this principle will be discussed in the Partnership Agreement subchapter.

Netherlands recognize both different and same-sex marriages and informal relationships, however, unregistered unions are regulated separately.[65] An exception to the policy of ignoring informal couples was recently made in the Criminal Code: in case a person physically abuses his/her life partner, the same provision applies as for spouses and registered partners, resulting in a possibility to increase the sentence by one-third.[66] Similarly in Belgium, where the informal relationships are not regulated with special legal acts, the Criminal Code provides optional requirements for the recognition of unregistered relationships in terms of domestic violence, by defining unregistered partnership a "durable sexual relationship",[67] which does not necessarily fits unregistered partners into the 'cohabitation' criteria.

In Portugal, civil unions are regulated by Law No. 23/2010, of 30 August, which protects *de facto* spouses' everyday life. It deals with the requisites for recognition, evidence, equivalence to marriage in labor, tax and pensions law, permanence in the household in the event of death or a breakdown, adoption and the requisites of a formal dissolution whenever any of the members intend to receive any benefits derived from the union.[68]

In direct translation, Estonian Partnership Act, *Kooseluseadus*, is a Cohabitation Act, as '*kooselu*' is translated as cohabitation, but it regulates formally registered partnerships. In Sweden, Cohabitation Act[69] focuses on two people who habitually live together as a couple sharing a joint household[70] without registering their relationship.[71] First Article of the Swedish Cohabitation Act[72] consists of three reasonable criteria which must be fulfilled to count as a cohabitee:

1) The cohabitee must live with his/her partner on a permanent basis. Thus, it is a question of relationships that are not of short duration;
2) The cohabitee and his/her partner must live together as a couple;

[65] Schrama, W. National Report: The Netherlands. European family law in action. Volume V – Informal relationships. March 2015, p 1.
[66] *Ibid*, p 4.
[67] Belgian Criminal Code, Article 410.
[68] Vítor, P. Oliveira, G. Martins, R. National Report: Portugal. European family law in action. Volume V – Informal relationships. January 2015, p 1.
[69] Sambolag 2003:376.
[70] *Ibid*, § 1.
[71] Jänterä-Jareborg, M., Brattström, M., Eriksson, L.M. National Report: Sweden. European family law in action. Volume V – Informal relationships. March 2015, p 2.
[72] Swedish Act (2003:276) on Cohabitation (Cohabitees Act).

3) The cohabitee must share a household with his/her partner, which means sharing chores and expenses. Hence, two siblings living together are not considered to be cohabitees.

Swedish approach is quite similar to the Austrian case-law where the recognition of informal relationship is identified if the three requirements are cumulatively fulfilled, although in the individual case on of the criteria may be less marked or even completely non-existent:[73]

- Similarity to marriage
- Residential, economic and sexual community[74]
- Long-term relationship.[75]

From the brief comparative analysis of the EU jurisdictions with Estonian legislation, certain conceptual similarities were found, i.e. although, Estonian law does not provide any objective prerequisites for the couple to be considered as a family once the person lives with another person together as *de facto* spouse.[76]

Thus, for the purpose of direct recognition of unregistered partnerships in Estonia, the best regulatory example related to the concept and criteria may be developed throughout the Swedish law and Austrian case law.[77] According to this approach, as analyzed above - permanent, stable relationships, in economic, residential and sexual terms – are similar to marriage. The last factor was found as the most important in many countries. It is not always necessary to live in the common dwelling to have better protection being recognized as a family unit, as for instance, in Belgian Criminal Code – the 'durable sexual relationship' is the only criteria specified. Estonian legislation does not provide any instructions on the 'duration' of such relations, but it gives a clear concept of living together in a close relationship (cohabitation) to fall under the provisions which recognize unregistered unions.[78] In a comparison of more restricted concepts, the Croatian law requires three years of cohabitation and former provisions of French law on the duration of the partnership to be considered as cohabitants (that fall under the scope of relevant regulations on "concubinage") – two years of cohabitation used to be the criteria of recognition. Such condition is not objective, as the start of cohabitation does not require registration or fixation of the date. In

[73] Austrian Supreme Court, Judgement of 27.05.1988, 3 Ob 61/88; Austrian Supreme Court, Judgement of 31.01.1990, 2 Ob 503/90; Austrian Supreme Court, Judgement of 16.03.2007, 6 Ob 28/07x.
[74] Wohn-, Wirtchafts-, Geschlechtsgemeinschaft, see Roth, M. and Reith, C. National Report: Austria. European family law in action. Volume V – Informal relationships. March 2015, p 6.
[75] Stabentheiner, J. Die Nichteheliche Lebengemeinschaft – ein Überblick. NZ, 1995, at p 49.
[76] KAS RT I, 23.03.2017, 7.
[77] *Supra* nota 73.
[78] *Supra* nota 37-46.

these matters – Estonian legal provisions, discussed above[79] are applicable to any cohabiting couple, who believes that their consensual union has stable and *de facto* spousal relationships.

1.2 Statistics

How many people in Estonia live as informally cohabiting couples? In other words, for how many people the issue of legal definition and associated rights could be an important matter in Estonia. This subsection aims to answer this question by analyzing available statistical data on the informal relationship.[80]

To support the relevance of the thesis, statistical variables were selected to show:

- number of the cohabiting couples during the recent decade;
- age groups of cohabiting persons – from perspective of their legal capacity, potential and needs;
- number of children born in consensual unions.

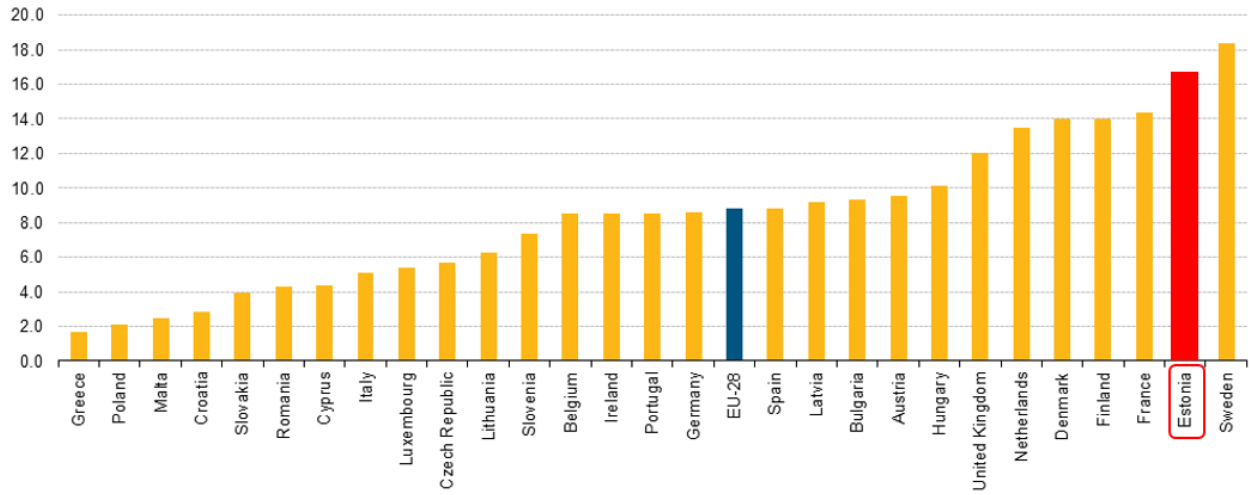
According to Eurostat data on consensual unions in EU, represented in the chart below, Estonia ranks next to Sweden in the number of unregistered unions as a proportion of the total couples living within the state.

Consensual unions of the population of 20 and over (%), 2011[81]

[79] *Ibid.*

[80] From the future perspective, these factors may be decisive if Estonia proceeds with reforms in the family law legislation. Recommendations for the future research are also provided referencing the statistical data presented in this sub-chapter.

[81] Eurostat. Marriage and birth statistics - new ways of living together in the EU. Available at: www.ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_birth_statistics_-_new_ways_of_living_together_in_the_EU.



In real numbers, according to the data of the Estonian Statistical Office, in 2011 there were 84,893 couples in Estonia living in an informal relationship (see the table below). The 2011 data is the latest available statistical data. The only available statistics on the population and dwelling census is from the years 2000 and 2011. The comparison of the data from 2000 and 2011 shows 9,5% (from a total number of all couples) increase of cohabiting partnerships in Estonia.

Couples in informal relationship in Estonia in 2000[82] and 2011[83]

2000		**2011**	
Number	**% (from total number of all couples)**	**Number**	**% (from total number of all couples)**
61,223	21,5%	84,893	31%

For the future research and for the purposes of understanding the situation in Estonia and consider the possible necessity of legal reforms the data below represents number of persons in informal relationship according to the age groups.

Persons in an informal relationship according to the age groups in 2011[84]

	Men	**Women**	**Total**	**% of persons in an informal relationship**
15-25	6,804	12,829	19,633	11,56
26-40	40,657	40,269	80,926	47,66
41-49	17,858	15,080	32,938	19,40
50-64	14,336	12,426	26,762	15,76

[82] Statistics Estonia. C206: Legally Married and Cohabiting Couples, 31 March 2000 by Place of residence, Marital status, Age of man and Age of woman.
[83] Statistics Estonia. PC0744: Married and Cohabiting Couples by Type of Family, Partners' Age and Place of Residence.
[84] *Ibid.*

65+	5,238	4,289	9,527	5,61
Total	84,893	84,893	169,786	

The more updated statistical data is available in relation to the new-born children. The data from the next table shows in the comparison the live births both in informal and matrimonial relations. Pursuant to the Population and housing census, based on the statistics of 2011, it was concluded: "the younger the children, the more often they live with cohabiting parents (41.3% of children aged less than 3 years, 20.5% of children aged 12–17). The older the children, the more often they live in families of single parents (16.8% of children aged less than 3 years, 28% of children aged 12–17). The last fact characterizes the trend of decay of families – many children are not born in the families of single parents, but stay living with one parent as a result of the decay of the traditional two-member family.[85] These observations lead to the conclusion that the protection of family rights requires protection of the children and their parents even if the couple lives in the unregistered union and especially if such relationship has terminated.

Live births by duration of cohabitation, Indicator and Year[86]

PO154: LIVE BIRTHS by Duration of cohabitation, Indicator and Year						
	2010	2011	2012	2013	2014	2015
Total						
Marital live births	6 466	5 920	5 847	5 556	5 496	5 841
Live births from consensual unions	7 721	7 555	7 301	7 161	7 298	7 478
Footnote: The number of live births from consensual unions is underestimated for 2000–2003 because of changes in data collection.						

The data above indicates that the informal relationships with shared household and children are increasing phenomenon. Also in comparison to other EU MSs Estonia has one of the largest proportions of couples living in unregistered partnerships. Therefore, the increasing number of couples with an unregistered partnership status as well as number of children born is such relationships is not an only individual important concern for people creating such families and entering into the property relationship with each other but also should be a significant factor to consider for the national legislator.

[85] Statistics Estonia. PHC 2011: Number of Households with Children is Decreasing. Available in English at: www.stat.ee/65358?parent_id=39113.
[86] Statistics Estonia. PO154: Live Births by Duration of Cohabitation.

Statistical data represented in this section illustrates the total growth of consensual unions, including partnerships with common children in the household. The popularity of consensual unions in Estonia is second in the European Union after Sweden, where, unlike in Estonia, unregistered cohabitants are regulated by the Swedish Cohabitees' Act. France is the third country by the number of civil unions and as well as Sweden, has a special recognition of unregistered partnerships in the legislation. These estimations bring the idea of necessity to bring more transparency in recognition of unregistered partnerships.

1.3. Protection of family in Estonian Constitutional and International Law

Following the sub-chapters on the recognition of unregistered civil unions and statistical data, this subsection focuses on the analysis of definitions regarding the 'family' in Estonian law, as specifically applied to the informally cohabiting couples' rights.[87]

In Estonian Constitution[88] there are three main applicable Articles: two related to the protection of private life (§ 26 and § 27) and one on the equal treatment.[89] Protection of the private life is ensured by the Article 26 of the Constitution. The family life guarantees are given by Article 27 (1).[90] This article specifically provides right to the family, which is indicated to be the fundament of society protected by the government in terms of 'the preservation and growth of the nation'. Based on the Estonian case law, "this entails the exterior protection of family life, giving a person the right to positive actions by the governmental power… granting the right to enjoy genuine family life"[91] and "proceeding from the governmental power to enact regulation and designate legal remedies in order to avoid violation of family and private life"[92] by other persons. In the contrast to the § 26 of the Constitution, commentary of the Estonian Constitution provides § 27 (1) with the special right for protection of family life "without reservation"[93] where the scope of protection of § 27 (1) "encompasses all issues related to the family[94] from its creation to the most different aspects of family-like cohabitation".[95] The § 12 of Estonian Constitution brings out the principle of equal

[87] Reference to the fundamental rights. The property related rights are discussed in more detail in Chapter 2 below.
[88] Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne. Iuridicum and Holtman Digital OÜ, Tartu 2012.
[89] Eesti Vabariigi Põhiseadus (adopted on 28 June 1992, entered into force on 3 July 1992). - RT 1992, 26, 349; RT I, 15.05.2015, 2, § 12. Available in English at: www.riigiteataja.ee/en/eli/521052015001/consolide.
[90] *Supra* nota 88.
[91] Decision of the Supreme Court 3-4-1-2-01, para. 14, RKHKo 3-3-1-10-03, para. 32.
[92] R. Maruste (see Note 24), p 283.
[93] *Supra* nota 88, commentary on § 26 of the Constitution, item 7.1.
[94] Olm, A. Non-married Cohabiting Couples and Their Constitutional. Tartu, Juridica interational 2013 XX, pp 104-111.
[95] RKHKo 3-3-1-11-00, para. 2.

treatment which, depending on the case, should be analyzed together with the international instruments listed below.

The principles which ensure the protection of the family life is interpreted in the binding international documents which ensure equal treatment, including:

- International Covenant on Civil and Political Rights[96] Article 26;
- European Convention on Human Rights[97] Article 14;
- International Convention on the Elimination of All Forms of Racial Discrimination;[98]
- The Convention on the Elimination of All Forms of Discrimination against Women;[99]
- Framework Convention for the Protection of National Minorities;[100]
- European Social Charter;[101]
- International Labour Organization Conventions:[102] i.e. nr. 19, nr. 100, nr. 111.

In Estonian case law, the Supreme Court also refers to the articles of the European Convention on Human Rights where it is necessary to provide supplementary interpretation of the constitutional rights.[103] As an example, in its decision of the 18 of May 2000, The Supreme Court of Estonia indicated Article 8 of the ECHR "as the evident influence from the wording of § 26 of the Constitution".[104] Interpretation of the fundamental rights based on the ECHR may be additionally examined with the decisions of the European Court of Human Rights in the more narrow terms regarding the recognition of the consensual unions in a form of informal family-like relations between *de facto* spouses.[105]

Therefore, it may be argued that constitutional and international law provisions related to family protection ensures also protection of the fundamental rights of people living in civil unions.

[96] United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.
[97] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950.
[98] United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.
[99] United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.
[100] Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995.
[101] Council of Europe, European Social Charter (Revised), 3 May 1996.
[102] International Labour Organization Indigenous and Tribal Peoples Convention. 27 June 1989.
[103] For example, RKHKo 3-3-1-11-00; see also Olm, A. Non-married Cohabiting Couples and Their Constitutional. Tartu, Juridica interational 2013 XX, pp 107-108.
[104] RKPJKo 3-4-1-2-01, para 14.
[105] Sörgjerd, C. Reconstructing Marriage: The Legal Status of Relationships in a Changing Society. Cambridge; Antwerp; Portlantd, Oregon: Intersentia 2012, p 275.

However, fundamental rights do not grant protection under any special regulation for families in terms of rights and obligations, including property-related issues.

The explanatory memorandum to the Estonian Registered Partnership Act clearly refers to the fact that partners in an informal relationship (primarily, same-sex cohabitation) have so far not been given sufficient protection in Estonian legislation.[106] In the memorandum, sent to the Minister of Justice in 2011, the Chancellor of Justice found that a permanent cohabitation between two persons of the same sex falls within the field of protection granted by the fundamental rights of the family. The Chancellor found that the fact that this form of cohabitation is legally unregulated in Estonia is not in conformity with the Estonian Constitution.[107] Thus, establishing a special regulation for the same-sex unregistered cohabitants and applying it also to the heterosexual couples already ensures the protection of fundamental rights. Even though, Estonian Registered Partnership Act entered into force on 1 of January 2016 and there are already first couples who entered into the Registered Partnership relations,[108] it still lacks implementation acts,[109] the adoption of this act granted alternative opportunity for non-married couples to enter the relationship which would be regulated in many aspects of family life by the Estonian Family Law Act provisions.[110] In the decision from 24 November 2016,of Administrative Chamber of the Tallinn Circuit the court held that a prolonged vagueness in legislative drafting which results in a group of people in society not having security with regards to how a life situation will work out and which interpretation of the law an official would cite when resolving a situation regarding them infringes upon the inviolability of the private life of an individual and may result in damage to a person's dignity.[111] Nevertheless, the provisions applicable under the Estonian Registered Partnership Act do not concern people living in permanent unregistered consensual unions.

1.4. Contract of Partnership

[106] Estonian IR. Available (in Estonian) at: www.riigikogu.ee/?op=ems&page=eelnou&eid=ea84e71c-291a-4c91-88b0-bd64af650d21&.
[107] Märgukiri: samasooliste isikute peresuhe. Available in Estonian at: www.oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_samasooliste_isikute_peresuhe.pdf.
[108] Postimees. Eesti esimesed koosellujad Mart Haber ja Taivo Piller: lepingut on vaja siis, kui midagi halvasti läheb. Available at: www.elu24.postimees.ee/3578795/eesti-esimesed-koosellujad-mart-haber-ja-taivo-piller-lepingut-on-vaja-siis-kui-midagi-halvasti-laheb.
[109] ERR. Estonia to pay damages for failing to adopt implementing legislation for civil partnership law. Available at: www.news.err.ee/120607/estonia-to-pay-damages-for-failing-to-adopt-implementing-legislation-for-civil-partnership-law.
[110] KooS RT I, 16.10.2014, 1, § 9 (5).
[111] Administrative Chamber of the Tallinn Circuit, 3-15-2355, 24. november 2016, Tallinn.

Estonian legislation does not directly recognize informal relations between people regardless duration of relationship or the number of common children. Provisions of Family Law concerning general principles of the mutual support, property division, property regime, common aims and purposes entering and living in the union do not apply to unregistered partners. Alternative opportunity to reach the agreement similar to the Family Law Act provisions on the mutual maintenance and consequences of cohabitation is regulated by Estonian Law of Obligations Act under the Part 7 Contract of Partnership. This sub-chapter presents an alternative for the couples who do not fall under the scope of protection granted by Estonian Family Law Act.

Estonian Family Law Act suggests marital property contract regulate possible consequences and ensure property rights agreed between the spouses. In Estonia, couples are bound to certain obligations and rights on the basis of the Family Law Act. According to the comparative analysis provided by Andra Olm, Estonian legal regulations concerning the consensual unions, indicated also as '*de facto* marriage' applied similarly in other EU MSs legislation covers only specific features of the family life in such unions.[112] This, however, restrains from using most of the general principles (excluding children-related aspects) of the Estonian Family Law, because, as discussed in Chapter 1, "not every *de facto* cohabiting relationship can be seen as a broad community of rights and obligations".[113]

To ensure non-registered life partners with special protection, rights and obligations, Estonian Law of Obligations Act has an option of concluding a 'contract of partnership'. However, research shows that so far it has been rather uncommon in Estonia to conclude contracts in the context of personal relationships. [114] Unfortunately most cohabiting couples normally become conscious of legal problems only after these problems emerge.[115]

Taking into consideration civil issues the question is whether concerning the division of tasks between cohabitants or counting contribution to the household two partners irrespective if they are in the informal relationship or not are free to enter into the contract or agreement. There might be even a contract regarding the maintenance of the partners. Provisions of Part 5 of Estonian Law of Obligations act on the Support Contracts regulate the matter. Supporting a party to a maintenance contract or a third party by providing the necessary means of subsistence and, in the case of a

[112] In example, the assumption of confidentiality between cohabitees. As cited in Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 7.1. Hallband: Familienrecht I.5. Aufl. Münich: Verlag C.H. Beck 2010, p 105.
[113] Olm, A. Non-married Cohabiting Couples and Their Constitutional. Tartu, Juridica interational, 2013 XX, p 110.
[114] *Ibid,* p 110.
[115] *Ibid,* p 110.

maintenance contract, also via guaranteeing care is characteristic of support contracts.[116] The duration of such agreements is up to the choice of both cohabitants, and these agreements shall not be contrary to the principles of good faith pursuant the § 86 (1) of the General Part of the Estonian Civil Code Act, otherwise, such transaction shall be considered as void.

As soon as it was decided to conclude the partnership contract, Estonian Law of Obligations Act does not impose any special prerequisites for entering into a contract. From the § 580 of the Estonian Law of Obligations Act, in the context of the definition of contract of partnership, any legal or natural persons may enter into the contract of partnership without any limitation on the number of possible partners.[117] Entering into the partnership contract does not preclude people from having concluded other partnership contracts. By the contract of partnership, people establish special conduct which helps to achieve certain objectives of the mutual interest. The second item of the § 580 (2) requires from the partners protection of the partnership from loss and consideration of the interests of other partners. The nature of the partnership contract between two informal cohabitants is quite specific due to the personal, sexual and emotional factors which provide a lack of transparency to the limitations on concluding such agreements.

During the research, it was discovered that in Austria, contracts of partnership, regulated by the Austrian Civil Code in a similar to Estonian manner, contains special clauses which make such contract between cohabitants void. These, restrictive clauses may be taken into consideration while concluding partnership contract under the Estonian law, as they arguably would also fall under the scope of the principle of reasonableness[118] – with regard to partnership agreements clauses regulating the following issues would be contrary to public morals and would, therefore, be void:[119]

- prohibiting one partner in an informal relationship from engaging in a business activity;
- regulating the sexual relationship between the partners, e.g. the number of children, the frequency of sexual intercourse or sexual practices;
- containing the obligation of sexual loyalty or childlessness;

[116] Varul, P., Kull, I., Kõve, V. and Käerdi, M. Võlaõigusseadus II. Kommenteeritud väljaanne. Juura, Talinn 2007, p 615.
[117] VÕS RT I, 31.12.2016, 7.
[118] Mõistlikusepõhimõtte, VÕS RT I, 31.12.2016, 7, § 7.
[119] Möschl, E. Die nichteheliche Lebensgemeinschaft. LexisNexis ARD ORAC, Vienna 2007. As cited in: Roth, M. and Reith, C. National Report: Austria. European family law in action. Volume V – Informal relationships. March 2015.

- the use of contraceptives;[120]
- ordering the submission of the woman.

Restrictions, found in the Austrian legislation, are reasonable to consider in terms of § 86 (1) of Estonian Law of Obligations Act in the protection of good morals and public order when concluding partnership contract between informal cohabitants.

Contract of Partnership is the subject to the general rules applicable to contracts, hence, everyone can determine on his or her own with whom and under what conditions and at which point in time to conclude a contract. From a practical point of view, however, partnership contracts can be concluded during the relationship, after the partners have known each other for a certain length of time and have possibly moved in together. With regard to the point in time when the partnership agreement has to be concluded, two issues may arise:[121] first, since relationships tend to become more complex over time, particularly concerning assets that are jointly purchased, partners should not wait too long before drafting an agreement.[122] Second, although it is legally possible to reach an agreement on the consequences of the separation after the breakdown of the informal relationship, it is highly likely that a separation makes a settlement even more difficult.

In conclusion, the agreements between unregistered cohabitants are binding just as the agreements between other parties not bound to each other. Parties are subjects of the Estonian private law and all the relevant provisions of the civil legislation are applied.

Following rights may fall under the optional agreements between parties concluded the contract of partnership:

- support of the partner
- contribution to the household
- the right to occupancy of the home
- rights on transactions concerning the partner's home
- the right to act as an agent
- the right to become joint owners of assets
- right for transactions in respect of household goods

[120] Austrian Supreme Court, Judgement of 27.01.1994, 2 Ob 557/93, JBl, 1994, at p 687, As cited in: Boele-Woelki, K., Mol, C., Gelder, E. European family law in action: 2015: Volume V: Informal relationships, Intersentia, 2015.
[121] Uusen-Nacke, T. and Vahaste-Pruul, S. National Report: Estonia. European family law in action. Volume V – Informal relationships. February 2014, p 2.
[122] Möschl (2007) *supra* nota 119.

- right on the administration of assets

As these rights refer to the property relations, its' consequences are discussed in more details in Chapter 2 of this research.

After the contract of partnership, Estonian laws provide one more opportunity to ensure rights of cohabitants if one of the partners dies – to conclude a contract of succession (regulated by the Chapter 4 of Estonian Succession Act). Option for such an agreement is also discussed in next chapter.

To sum up, the concept of informal cohabitation does not have any special legal protection under the Estonian laws. Nevertheless, some legal acts, discussed in the Definitions refer to the existence and recognition of the family-like relationship. For instance, in the context of loans to persons related to credit institutions, *de facto* spouse as the person with equivalent economic interest. Bankruptcy Act also identifies cohabitants as persons connected with the debtor (although, it does not grant all rights equivalent to the spouses living under the joint property regime). Estonian Code of Civil Procedure also refers to the cohabitant granting the right to refuse giving testimony. There is more evidence found in terms of indirect recognition of informal cohabitants in Estonian legislation; however, it does not have separate act or chapter in the Family Law Act or Partnership Act regulating rights and obligations of partners living in consensual unions. Although, according to Eurostat in 2011 Estonia was second EU country with the number of unregistered partnerships.[123] It is arguable, whether the Estonian Partnership Act, entered into force in 2016 could decrease these numbers bringing better protection for people living in consensual unions and not being able or willing to enter into conjugal relations.

As discovered in this chapter, the fundamental rights protected by provisions of Estonian Constitution and by the international instruments do not oblige state for direct recognition and special regulation of unregistered partnerships. Recognition of the family as the foundation of society, as discussed above, was found in different legal acts concerning cohabitants among other family members. Such indirect recognition does not, in general, limit people to enjoy 'genuine family life' neither restricts from the 'exterior protection' of family life.[124]

[123] Eurostat. Marriage and birth statistics - new ways of living together in the EU. Available at: www.ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_birth_statistics_-_new_ways_of_living_together_in_the_EU.
[124] RKPJKo 3-4-1-2-01, para. 14, RKHKo 3-3-1-10-03, para. 32.

When certain aspects of everyday family life are concerned, partners living in the consensual union may establish individual partnership agreement and conclude it under the Estonian Law of Obligations contract of partnership. In comparison to the Family Law Act, it has certain limitations. For instance, partnership contract cannot preclude partners from concluding the similar contract with the third parties. Moreover, partnership contract cannot establish joint property regime between partners (it is only the Family Law Act competence). As the contract does not establish genuine spousal relations and does not ensure rights and obligations of the Family Law Act, it may serve as an alternative in avoiding financial, property and contribution related conflicts.

2. Property Relations

This Chapter is dedicated specifically to the analysis of property relations between informally cohabiting partners. Estonian legislation does not provide unregistered cohabitants with regulations of property relations between partners. The issues which are analyzed in this Chapter include:

- shared dwelling;
- joint ownership;
- contribution to the household;
- right to receive maintenance;
- incapacity to act;
- property inheritance.

Based on the analysis of the issues indicated above, this Chapter aims to answer the question if in Estonia the regulation of property rights applicable to the informally cohabiting couples limit individual rights and freedoms during cohabitation period. Comparison with the Estonian Family Law act gives grounds to estimate the limitation of rights in consensual unions and the scope of family life protection in comparison to formal marriages. Building on and developing further the analysis in the First Chapter the present Chapter argues that according to current legal regulations civil unions are subject to additional risks and legal insecurity because according to current legislation in order to protect their rights cohabiting partners must conclude separate contracts for each sector of everyday life.

2.1. Property ownership

In this sub-chapter three issues related to property ownership are analyzed: shared dwelling joint ownership, and contribution to the household.

2.1.1. Shared Dwelling

The shared dwelling refers to joint possession of the place of living and their asset which may be also is in the sole ownership or possession of one of the partners. Joint possession of assets is discussed in the next subsection in terms of Estonian Property Law Act provisions regulating possession and presumption of ownership under the special conditions (Section 2.1.2.). As far as possession of immovable property is concerned – the rules regulating possession of shared

immovable fall under the scope of restrictions and requirements for the right to remain at home, where 'the home' is considered as a place of living. Applicable provisions may refer to the situations, when the relations between couple are tense and the question on the right to remain in the jointly possessed home against the will of one of the partners arises, especially if this partner is the sole owner or tenant of the home.

According to Estonian Law of Property Act, person in an informal relationship does not have any right to remain at the home after the end of the cohabitation if the partner, who is the owner of the dwelling or the person who is entitled to use it, does not consent to this. The restriction was found in two paragraphs of this Act.[125] First, the restriction applies if one of the cohabitants is renting an apartment and is granted (by the lessor) the right to possess this property.[126] Following rules on protection of possession, possession is protected by law against arbitrary action and arbitrary action is the unlawful violation of possession of a thing or the unlawful deprivation of possession without the consent of the possessor – possession obtained in this manner is arbitrary.[127] Second restriction falls under the scope of protection of the owner, pursuant to Estonian Law of Property Act allows an owner of the property (or any other thing) to claim his or her rights to ownership and reclamation of his or her full ownership or possession rights against any person, including for example former cohabitant, who uses or remains in the property without the owner's consent.[128] Presumably, this provision can be referred to one of the cohabitants, as there were no special rights detected in terms of unregistered partnerships. Thus, this provision does not preclude, for example, an owner from imposing restriction on the residence when the domestic physical or psychological violence is detected. Also, this paragraph can be interpreted in defense of the partner who owns or rents the place of living and after the separation does not give his or her consent to the ex-partner to stay at his or her home.

The Estonian Law of Obligations Act states that, the consent of a lessor is not required to enjoy the right to place family members of the lessee, however the law specifically refers to the husband/wife, minors and to the parents who lost their capacity to work.[129] Arguably, this provision does not include informal cohabitant, presumably, because there is no estimation of the duration of the consensual relationships to be concerned as the family like *de facto* marriage and

[125]Asjaõigusseadus (adopted on 9 June 1993, entered into force on 1 December 1993). - RT I 1993, 39, 590; RT I, 25.01.2017, 1, § 40 and § 80. Available in English at: www.riigiteataja.ee/en/eli/526012017002/consolide.
[126] *Ibid*, § 33 (2).
[127] *Ibid*, § 40 (1), (2).
[128] *Ibid*, § 80.
[129] VÕS RT I, 31.12.2016, 7. § 289.

this rule would restrict situations of keeping random people in the household or re-renting it to the third parties.

Observations made in the First Chapter, specifically concerning civil procedures,[130] lead to the conclusion that in many legal acts cohabitant is mentioned in the same lists as the spouses and family members, which, however does not grant the legal right accommodate the unregistered partner at the rented place without requesting the lessor's consent. Legal provisions[131] discussed in the First Chapter, including decision from June 19, 2000, of the Administrative Chamber of the Supreme Court[132] can be used during disputes to protect cohabitants right to remain at home of his or her partner. For instance, partners may conclude the contract of partnership, where rights of each partner on administration of assets will grant the security to remain at home and if the lessor is a third party, including the consent of a lessor. Although, there is no consensus in the legal literature with regard to whether the accommodation of a person who is not included in the list is an infringement of the lease contract is automatically allowed. [133] It may be argued that the right of the lessee to accommodate other people may be inferred from the nature of the lease contract.[134]

§ 321 (1) of Estonian Law of Obligations Act grants the rights to the spouse who lived in the dwelling together with the lessee equal to the rights and obligations of the lessee, which arise from the lease contract. Same provision allows the family members other than the spouse, who also lived with the lessee of that dwelling to remain there enjoying the rights granted to the lessee by the lease agreement. In the same article, the right to remain at home is granted within one month after the death of a lessee if the information notice was provided to the lessor within the reasonable time.[135] The same issue concerning de facto spouse may be referred to these provisions, however it has to be proved that the second cohabitant has the corresponding rights granted to the family members. In addition, provisions of Estonian Law of Succession Act grant similar rights including the right to continue using objects of the shared household and to receive maintenance out of the estate for one month after the death of the bequeather.[136] In addition, the paragraph starts with the

[130] See, for example *supra* nota 37, 38, 39 etc.
[131] *Supra* nota 37-46.
[132] Administrative Chamber of the Supreme Court held that subsection 1 of § 27 of the Estonian Constitution provides protection from an unfounded intervention by the state also to a form of family cohabitation that has not been registered according to the terms prescribed by law.
[133] Varul, P., Kull, I., Kõve, V. and Käerdi, M. Võlaõigusseadus II. Kommenteeritud väljaanne. Juura, Tallinn 2007, p 187.
[134] *Ibid.*
[135] VÕS RT I, 31.12.2016, § 321 (2).
[136] Pärimisseadus (adopted on 17 January 2008, entered into force 20 March 2016). - RT I 2008, 7, 52; RT I, 29.06.2014, 10; § 132. Available in English at: www.riigiteataja.ee/en/eli/510072014002/consolide.

conditions to be fulfilled in order to define the right to remain in the house using the household property: the family members of a bequeather who lived with him or her and received maintenance from him or her until the bequeather's death. Depending on the interpretation of this paragraph, cohabitant may use its provisions especially when it can be proved that the conditions – both or one of them were fulfilled – partially or fully. Even though the partners in the informal relationship can be treated as a family member according to list of Estonian legal acts indicated in the Chapter 1,[137] the process of proving relation to the informal cohabitant when one is absent is rather difficult in comparison to the registered relationship governed under the Estonian Family Law.

In the situation when the dwelling is owned by one of the cohabitants, Estonian legislation, in general, treats the partners in informal relationship as unmarried persons. Provisions of the § 68 (1) of Estonian Law of Property Act, on identifying the owner, apply to the person, who is in a full legal control over a thing and has the right to possess, use and dispose of a thing, and to demand the prevention of violation of these rights and elimination of the consequences of violation from all other persons.[138]

Ownership relations discussed above touched some of the basic issues regarding the rental relations, since some of the legal outcomes remained similar both to the ownership and to the rental relations between informally cohabiting partners. Specific rules regarding rental relationship are regulated with the §§ 288 (providing conditions to the sublease contract) and 289 (granting right to accommodate) of Estonian Law of Obligations Act. As mentioned previously ccording to the general rule of the § 289, the lessee of a dwelling is also entitled without the consent of the lessor to place in the leased place members of his family: spouse, children or parents who lost their capacity to work. This, would is possible unless the lease contract contains special restricting provisions requiring the lessor's consent for that.[139] As discussed above, the text of the cited provisions does not include general term for the 'family member' neither any other specific term for cohabitant. However, title of the paragraph referrers to the 'family members', which gives arguably a right to interpret provisions of this paragraphs in favor of the second cohabitant, who does not lease the house, however this interpretation is uncertain and has not yet been approved or denied by the Estonian courts.

[137] *Supra* nota 37-46.
[138] VÕS RT I, 31.12.2016, 7.
[139] *Ibid.*

2.1.2. Joint and Common Ownership

Estonian Law of Property Act defines joint ownership as shared ownership by one or several persons.[140] The Family Law Act grants spouses the rights to have the jointness of property applicable to both of them.[141] It means, that pursuant to the § 70 (4) – joint property is a joint ownership in undefined shares. At the same time, in Estonian law there are no special circumstances when the informally cohabiting persons may become joint owners of the property on the basis of consensual family like relationships. The ownership and the rights granted by the law[142] belong to the person who owns certain movable or immovable assets. Without consent the sole proprietorship remains unchanged unless joint property relations were filed in the agreement. It was concluded in the decision the Supreme Court, that if a partnership contract exists, contributions made by the partners and assets acquired for the partnership shall be transferred to the joint property of the partnership according to § 589 (1) of the Estonian Law of Obligations Act.[143] One of the possible solutions to share the solely owned property between partners is, according to the § 921 of the Law of Obligations Act by the transfer of security.[144]

According to A. Olm, the application of the partnership contract principles may limit cohabitants' rights if the contract was not concluded in writing, as it was indicated in the Estonian case law.[145] At first, the Supreme Court stated that concluding an agreement of purchase should have been established by the moment of acquiring the common dwelling.[146] Secondly, when the property purchased requires following formalities prescribed by the law (i.e. notary authentication, partnership contract or any other specific agreement), these requirements had to be followed also by the moment of purchasing the joint property.[147]

If cohabitants do not *de jure* share the property,[148] or if certain property in use does not belong to both partners, right to use the property is general and applies equally to the registered and non-registered partners, following the § 90 (1) of the Estonian Law of Property Act, a possessor of a movable and any earlier possessor shall be deemed the owner of the thing during the possessor's

[140] AÕS RT I, 25.01.2017, 1, § 70 (1).
[141] PKS RT I, 21.12.2016, 12, § 25.
[142] *Supra* nota 140, § 5(1).
[143] Decision of the Civil Chamber of the Supreme Court 3-2-1-109-14, at para. 17.
[144] VÕS RT I, 31.12.2016, 7, § 921.
[145] Olm, A. Non-married Cohabiting Couples and Their Constitutional. Tartu, Juridica interational 2013 XX, pp 104-111.
[146] RKTKo 3-2-1-8-99, p 1.
[147] RKTKo 3-2-1-142-05, para. 14.
[148] *Supra* nota 140, § 70.

possession until the contrary is proved. This provision relates to the situations when the couple lives together and the owner of assets is not present at the place when the second half, who is not direct owner – is in the possession of the other partner's belongings, i.e. – remaining in the solely owned house, using the microwave, telephone, table, etc. Presumption of ownership in its meaning is similar to the presumption of innocence, when in terms of Property Law – possessor will not be deemed illegal possessor of other's assets until it is proved so. The presumption of ownership by the possessor of movable property arising from § 90 of Property Act includes, as a rule, also the presumption of common ownership by the co-possessor, which provides certain protection to a (non-possessor) spouse as well as to the other partner in an informal relationship. In the case of immovable property this presumption is irrelevant.[149]

Even though, the joint or solely owned immovable property in everyday life of an average person is referred to the houses or apartments, the movable property which is used in the everyday life will be referred as the household goods. The Estonian Family Law Act defines the household goods as "the objects of standard furnishings of the housing of the family".[150] This paragraph regulates the household property in cases of divorce and is related only to those household goods which are owned by one or both of the partners, not being applied to the informal cohabitants. According to the aforementioned provision, objects of the common household of the spouses can be described as objects of standard furnishings connected with the housing of the family for use in their shared household.[151] However, the Estonian Law of Property Act § 90 (1) which was mentioned above grants certain protection to the possessor who may not be the real owner in terms of paying for the asset, but remained the equal co-possessor as the party who believes to have the sole ownership rights on that property. The presumption of ownership by the possessor of movable property, arising from § 90, includes, as a rule, also the presumption of common ownership by the co-possessor, which provides certain protection to a (non-possessor) spouse as well as to the other partner in an informal relationship.[152] Presumption of common ownership harmonizes and grants certain security to the both informal cohabitants when using one another's assets on the daily basis. The principle of sharing the burden of proof indirectly proceeds from this, which will always be of significance when there is a dispute over the right of ownership of a movable asset.[153]

[149] Kama, K. and Kullerkupp, K. Vabaabielu versus abielu: varalised suhted muutuvate kooseluvormide kontekstis. Juridica 2002, No. 6, pp 359-368.
[150] PKS RT I, 21.12.2016, 12, § 69 (1).
[151] *Ibid.*
[152] AÕS RT I, 25.01.2017, 1.
[153] Varul, P. Kull, I. Kõve, V. Kärdi, M. Puri, T. Asjaõigusseadus. Kommenteeritud väljaanne, Juura, Tallinn, 2014, at p 415.

When the assets are jointly owned by the cohabitants in the consensual union there are no specific rules which would regulate the administration of this property. § 70(3) and (4) of the Estonian Law of Property Act defines the shared property as:

- common ownership, which is ownership in legal shares of a shared thing belonging to two or more persons concurrently (a common right to the whole asset),
- joint ownership, which is ownership in undefined shares of a shared thing belonging to two or more persons concurrently.[154]

At the same time, the § 70 (5) refers to the shared ownership in terms of common ownership, unless otherwise provided by law.[155] However common ownership provisions apply as well to the joint ownership according to the definitions of ownership provided by § 70 (6).

These provisions bring certain similarity to the concept of the joint property of unregistered cohabitants with the distinction in the legal wording if the Family Law Act compare to the Law of Obligations Act:

- The objects and other proprietary rights of the spouses acquired during the jointness of property shall transfer into the joint ownership of the spouses (hereinafter *joint property*).[156]
- Contributions made by partners and assets acquired for the partnership shall be transferred to the joint property of the partnership (partnership property).[157]

From the legal wording the difference is in the name of the co-owners of the joint property: spouses or partners. Yet, the optional solution for the unregistered cohabitants is to conclude the partnership agreement according to the § 580 (1) of Estonian Law of Obligations Act. § 72 of the Estonian law of Obligations Act regulate the co-ownership and administration of assets: co-owners shall possess and use a shared thing according to an agreement. Issues which remain within the limits of ordinary possession and use of a shared thing may be established by a decision made by the majority of votes of the co-owners.[158] The number of votes upon making the decision depends on the share of ownership.[159] Rationally, it means the respectful possession of the shared property with respectful attitude to the other co-owner. Since informal cohabitation in the family-like

[154] AÕS RT I, 25.01.2017, 1.
[155] *Ibid.*
[156] PKS RT I, 21.12.2016, 12, § 25.
[157] VÕS RT I, 31.12.2016, 7, § 589(1).
[158] AÕS RT I, 25.01.2017, 1, § 72 (1).
[159] *Ibid.*

relationship in Estonia happens in couples, the majority of vote would rather mean the joint decision on the property possession. The decision of the Civil Chamber of Estonian Supreme Court held that:

- A co-owner has the right to perform acts which are necessary for the preservation of an asset without the consent of the other co-owners, but the co-owner may demand a reimbursement of the necessary expenses for the preservation of the asset from the other co-owners in proportion to their shares.
- A co-owner has the right to demand from the other co-owners that the possession and use of an asset in common ownership be effected according to the interests of all the co-owners.
- Co-owners shall act in good faith in their relations with one another and they shall refrain, in particular, from damaging the rights of other co-owners.[160]

The general rules regarding co-ownership relations between unregistered partners are identical to the rights and obligations granted to the spouses in terms of jointly acquired property. That, however relates to the narrow scope of rights and obligations concerning co-ownership property relations, but does not include spouses who have jointness of property. Estonian Property Law Act provides rules on transactions which concern the dwelling of cohabitants – such transactions include disposal, mortgaging, dispossession and others corresponding procedures. If the dwelling is in the joint ownership of the couple:

- A co-owner may transfer, bequeath, pledge or in any other manner dispose of the legal share in a shared thing belonging to the co-owner.[161]
- Upon the sale of a legal share in an immovable to a person who is neither a co-owner nor privileged pursuant to law, the other co-owners have the right of preemption to the legal share being sold.[162]

The analysis of property relations in terms of joint property (or presumption of joint ownership) in this Section discussed joint property in terms of the partnership contract, presumption of ownership of property in possession and co-ownership relations.

According to the provisions of Estonian Law of Obligations Act, all property acquired during the partnership is the joint property of partners.[163] If there is no contract of partnership or the property was acquired before contractual relations, the partner, who does not own possessed property is

[160] See RKTKo 3-2-1-13-14; RKTKo 3-2-1-93-12; RKTKo 3-2-1-45-13.
[161] *Supra* nota 158.
[162] *Ibid.*
[163] VÕS RT I, 31.12.2016, 7.

presumed as the owner and by that is granted legal rights to possess the property.[164] This assumption grants the right to use any property of *de facto* partner without being accused in illegal possession. Additionally, partners have the right to become co-owners of acquired property – in terms of both *de facto* and *de jure* spouses. In this case, the property will be indicated as common ownership in legal shares that, however, must not be confused with the joint ownership.

2.1.3. Contribution to the Household

As discussed above, property relations between unregistered cohabitants are regulated by both Estonian Law of Obligations Act and Estonian Law of Property Act unlike the spousal property relations, which fall under the scope of the Estonian Family Law Act provisions. Obligation to maintain the family union (in terms of matrimonial relations) by making contributions to the household is optional, as this type of maintenance includes other activities related to the mutual support.[165] But as far as the proprietary contributions are concerned, the estimation of belongings are regulated under the rules of separation (divorce) by the Family Law Act and in general in the matrimonial relationship, partners are secured by the provisions guaranteeing the right to share the household contributions on the basis of the principle of equity.[166]

As mentioned above, obligation to maintain the family is applied only to the married couples. Nevertheless, the unregistered cohabitants have the legal alternative solution to reach the similar property regime in terms of household contributions by concluding the contract of partnership. Estonian Law of Obligations Act in this specific case falling under the scope of the § 581 (1) will identify household and other partners' contributions as the support and promotion of a mutual objective, including the transfer of assets to the partnership, grant of the use of assets to the partnership or provision of services of the partnership.[167] Like in the matrimonial relations, the contributions of all partners are presumed to be equal. This is equality does not, however, grant the unregistered cohabitants joint property regime, but rather grants certain rights on administration of assets during and in case of termination of informal relationships. The item 3 of the same paragraph grants the joint responsibility to the partners for the contributions, which parties indicate in the partnership contract. Pursuant to the § 581 (1) this may include grants on permission to use certain assets, contracts of lease and any other provisions concerning transfer of

[164] AÕS RT I, 25.01.2017, 1, § 90 (1).
[165] PKS RT I, 21.12.2016, 12, § 16 (2).
[166] *Ibid*, § 22 (2).
[167] *Supra* nota 163, § 581 (1).

acquired property to the partnership (contracts of sale).[168] Partners do not have to make an extra contributions to increase the material or financial shares, neither they are required to increase their shares. It is presumed, that the contract of partnership may contain the condition on the partnership alternative support by activities in terms of achieving the mutual objectives of the partnership.

2.2. Right to Receive Maintenance

Unlike the Estonian Family Law Act, unregistered cohabitants have no duty to support each[169] other unless they have common children. § 131 (7) of the Estonian Social Welfare Act Upon the grant of a subsistence benefit, the following persons who live in the same dwelling and have a shared household are deemed to be family members:

1) persons who are married or in a relationship similar to marriage;
2) ascendants and descendants related in the first and second degree;
3) other persons who have a shared household.[170]

The paragraph states that in order to request for a subsistence benefit, not only married persons but also – unregistered cohabitants (have a shared household) can pretend. In clauses 40-41 of its decision of May 5, 2014, 79 the Constitutional Review Chamber of the Supreme Court found that the second sentence of section 2 of § 22 of the Social Welfare Act[171] provides a definition of a family for the purpose of granting subsistence benefits.[172] In the same decision the Supreme Court clearly stressed that no legal prerequisite can be derived from § 22 (2) of the Estonian Social Welfare Act to the effect that people who live together must provide maintenance to each other.[173]

Legal situation changes when there are common children in the couple of informally unregistered cohabitants. According to Estonian Family Law Act,[174] the rules apply on the father of a child who is required to provide maintenance to the mother of the child eight weeks before and twelve weeks after the birth of the child.[175] Here it is not important whether father of a child is a spouse to the mother or not. Moreover, if a mother is unable to maintain herself due to a health disorder caused by pregnancy or childbirth, the father is required to provide maintenance to her until improvement

[168] VÕS RT I, 31.12.2016, 7, § 581 (1).
[169] See Langdell, C. C. Mutual Promises as a Consideration for Each Other. Harvard Law Review 14.7 (1900-1901): 496-508.
[170] SHS RT I, 21.12.2016, 21.
[171] *Ibid.*
[172] RKPJKo 3-4-1-67-13.
[173] Uusen-Nacke (2014) *supra* nota 121, p 16.
[174] PKS RT I, 21.12.2016, 12.
[175] PKS RT I, 21.12.2016, 12, § 111 (1).

of her state of health.[176] The same applies if a mother is unable to receive income due to caring for a child. The obligation to provide maintenance commences not earlier than four months before the birth of a child and terminates after three years have passed from the birth of the child. However, if a father cares for and raises a child, he has the right to file a claim specified in the second sentence of subsection (2) of this section against the mother.[177] In general, all the maintenance provided to the child after birth does not depend on the relations between parents. Childcare and parental rights are settled in the Family Law Act.

In case of having other children in the household, there are no obligations arising from the law, besides cohabitants' consent to conclude the partnership agreement and include provisions on the maintenance of the children.

2.3 Joint liability for debts

Not only the property can be jointly owned but also, partners may have joint liability for debts. Estonian Law of Obligations Act in the § 8 (1) and (2) stipulates the contract as a transaction binding on the parties concluded between two or more persons by which one party undertakes to perform certain obligation.[178] The fact that the parties in an informal relationship are joint obligors, collective obligors or solidary obligors, anticipates the common will of the parties to perform legally binding acts or omissions. Thus, both parties must have concluded a contract with the creditor under the law of obligations within the meaning of the Estonian Law of Obligations Act § 8 (1).[179] Execution proceedings are conducted following the Estonian Code of Enforcement Procedure. If there is a valid relation under the law of obligations between the creditor and both parties in an informal relationship, the creditor shall have the right to demand the performance of the obligation from both parties in an informal relationship, respectively whether they are joint obligors, collective obligors or solidary obligors.[180]

2.4. Incapacity to act

Sometimes it may happen that one of the partners lose his or her capacity to act – it might happen concerning the medical reasons i.e. accident, mental or physical disease when the person loses the

[176] *Ibid,* § 111 (2)).
[177] *Ibid,* § 111 (3).
[178] VÕS RT I, 31.12.2016, 7, § 8 (1), (2).
[179] Uusen-Nacke (2014) *supra* nota 121, p 30.
[180] *Ibid.*

ability to think adequately and act. In these cases, it is to be considered that one of the partners shall be able to act as an agent of another. In regards to the informal relationship there is no law regulating representative rights of partners.

Such representation may be granted on the basis of the contract of partnership, therefore it will be regulated with Estonian Law of Obligations Act. According to § 593 of the Law of Obligations Act a partner is authorized to manage the partnership, it shall be presumed that the partner is also authorized to represent other partners in relations with third parties.[181] In this case, presumably, both are jointly and severally liable to third parties for obligations assumed by the partnership.[182]

To understand circumstances under which one unregistered cohabitant may act as a representative of the other it is necessary to use provisions of the General Part of the Estonian Civil Code Act,[183] under which, right of representation is a collection of rights within the limits of which a representative may act on behalf of the principal,[184] granted by a transaction (authorization) or it may arise from law (right of representation).[185] According to the § 118 (1) of TsÜS, principal grants authorization by making a corresponding declaration of intention to the representative, to the person with whom the transaction requiring authorization is to be entered into, or to the public. The scope of a right of representation arising from law is determined by law,[186] but the scope of authorization shall be determined by the principal. Authorization shall be interpreted according to the meaning given to the declaration of intention or conduct of the principal by the authorized person or a person relying on a declaration of intention directed at the public or on a statement or conduct of the principal.[187]

In regards to the provisions related to health care services providing medical assistance to the patients who lost the capacity to exercise their will, it is defined by the § 767 (1) of the Estonian Law of Obligations Act that in the situations when the possible representative is absent, or if the person deemed to be the representative does not have legal rights for that neither can be reached, the actions of the competent health care service providers are permitted even without an expressed consent of the person who lost his or her capacity to act. The Article indicates two possible

[181] VÕS RT I, 31.12.2016, 7.
[182] *Ibid*, § 595.
[183] Tsiviilseadustiku üldosa seadus (adopted on 27 March 2002, entered into force on 1 July 2002). - RT I 2002, 35, 216; RT I, 12.03.2015, 107. Available in English at: www.riigiteataja.ee/en/eli/528082015004/consolide.
[184] *Ibid*, § 117 (1).
[185] *Ibid*, § 117 (2).
[186] TsÜS RT I, 12.03.2015, § 120 (1).
[187] *Ibid*, § 120 (2).

conditions: either if the patient expressed his intentions earlier; or, if the failure to provide health care services by the immediate actions would put the patient's life or health at risk.[188] In order to identify the earlier expressed intentions of the patient, his or her 'immediate family' has to be questioned, if possible.[189] The 'immediate family' has to be informed about the health condition of the patient, actions of the healthcare services concerning the patient, possible risks and consequences the patient may face.[190] Explanation on the term 'immediate family' given in the § 767 (2) refers to the spouse, parents, children, sisters and brothers of the patient. If there are relative grounds to assume that someone other than the immediate family pretends for the same status, than it shall be concluded from the patient's way of life.[191] This may also refer to cohabitant living with the patient in consensual union; however it has to be proved by the facts or competent witnesses. This may bring additional difficulties to those partners who were living together for the relevantly short period of time, not having any common friends or family members to prove the direct relation to the patient.

2.5. Death of the partner (property inheritance)

This sub-section covers questions related to the death one of the partners in cases of the informal cohabitation.

First aspect to analyze is, in case of unforeseen death – who is the intestate successor and whether the informal cohabitant is included into the list of the successors. According to the 11 Estonian Law of Succession Act, intestate successors are the bequeather's spouse and the relatives specified in the Act. The Act separates intestate successors into the three orders (stages).[192] The first order intestate successors are the descendants,[193] the second order intestate successors are the parents of the bequeather and their descendants (sisters and brothers), the third order intestate successors are the grandparents and their descendants (uncles and aunts). In relation to the life partner with whom the bequeather was living with, the Act regulates only matrimonial relations: If there are no relatives from the first or second orders, the bequeather's spouse succeeds to the entire estate[194] and in addition to his or her share of the estate, the bequeather's spouse may request establishment of real right provided for in § 227 of the Law of Property Act on an immovable which was the

[188] VÕS RT I, 31.12.2016, 7.
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] PärS RT I, 29.06.2014, 10, § 13 (1).
[193] *Ibid.*
[194] *Ibid,* § 16 (2).

matrimonial home of the spouses provided that the standard of life of the bequeather's spouse would deteriorate due to succession.[195]

As seen from the law – the informally cohabiting partners have no intestate rights granted by the Estonian Law.

However, the surviving partner may claim for his rights regarding the assets acquired during the relationship actually belongs to him or her and what portion shall be transferred to the successors as the property of the deceased, i.e. after the death of one partner, it should be possible to evidence the contract of joint operation or the occurrence of shared ownership.[196] As mentioned previously in this research, the § 132 of Estonian Law of Succession act grants rights to the family members of a person who lived with him or her and received maintenance from him or her until that person's death to continue using the objects of the shared household and to receive maintenance from the estate for one month after his or her death. And from the First Chapter of the research, as concluded, the informal cohabitants have opportunity to be treated as the family members to each other. On June 19, 2000, the Administrative Chamber of the Supreme Court held that subsection 1 of § 27 of the Estonian Constitution provides protection from an unfounded intervention by the state also to a form of family cohabitation that has not been registered according to the terms prescribed by law.[197]

The household goods which were in possession of the both parties are administered pursuant the § 90 (1) of the Estonian Law of Property Act,[198] a possessor of a movable asset and any earlier possessor shall be deemed to be the owners of the asset during the possessor's possession until the contrary is proved. The presumption of the possessor of movable property, arising from § 90, includes, as a rule, also the presumption of common ownership by the co-possessor, which provides certain protection to a (non-possessor) spouse as well as to a partner in an informal relationship.[199] Moreover, the § 132 of the Estonian Law of Succession Act grants rights to the family members of a person who lived with him or her and received maintenance from him or her until that person's death to continue using the objects of the shared household and to receive maintenance from the estate for one month after his or her death. Once again the legal provisions

[195] *Ibid*, § 16 (3).
[196] Kama, K. and Kullerkupp, K. Vabaabielu versus abielu: varalised suhted muutuvate kooseluvormide kontekstis. Juridica, 2002, No. 6, pp 359-368.
[197] RKHKo 3-3-1-11-00, at para. 1.
[198] AÕS Asjaõigusseadus RT I, 25.01.2017, 1.
[199] Uusen-Nacke (2014) *supra* nota 121, p 30.

of Estonian law lead to the conclusion that two informally cohabiting partners under certain circumstances (living in a family-like relationship) can be treated (by the law) as a family.

The abovementioned legal provision on the right to receive maintenance from the estate for one month after his or her death does is different from the right to receive the survivor's pension.[200] Provisions of the Estonian State Pension Insurance Act[201] do not indicate the cohabitant or *de facto* spouse by any means as the person who is granted the right to receive a survivor's pension. Only the widow or the divorced spouse[202] is granted such right. Although, as the common children are entitled to this right, the survived cohabitant will receive this pension until the children reach full legal age to receive the pension directly. The fact that unregistered spouse cannot receive the survivor's pension on the basis of provisions concerning survivor's pension of a widow, issue could be cross-referenced to the decision of the European Court of Human rights,[203] in which a claimant lived with her husband in a union concluded in accordance with the Roma community rites and was not considered to be legally recognized in Spain. After her husband's death, Spanish authorities refused her to pay bequeather's pension explaining that she has never been his wife. After a long discussion, the court concluded that "civil marriage in Spain, as in force since 1981, is open to everyone, and takes the view that its regulation does not entail any discrimination on religious or other grounds… Accordingly, the Court finds that the fact that a Roma marriage has no civil effects as desired by the applicant does not constitute discrimination prohibited by Article 14".[204] The court's decision may be referenced to the Estonian legislative provisions and therefore explain the absence of unregistered cohabitant's rights to receive survivor's pension. This consequence of a consensual unions represents the state's position which can be both argued or justified but at the moment – only in terms of Estonian Registered Partnership Act agreements.

If the partners have separate property (i.e. – immovable), one of the solutions to ensure the cohabitant financial security with certain property rights will be the right to dispose of property by will which was made in favor of the surviving partner, as a testate successor is a person to whom a testator bequeaths (disposes) by a will all his or her property or a legal share (fraction) thereof.[205]

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[200] Riikliku pensionikindlustuse seadus (adopted on 05 December 2001, entered into force on 01 January 2002). - RT I 2001, 100, 648; RT I, 06.12.2016, 4, § 20. Available in English at: www.riigiteataja.ee/en/eli/516012017008/consolide.

[201] Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.07.2010, pp 1–6). [RT I, 02.07.2012, 8 - entry into force 01.08.2012].

[202] RPKS RT I, 06.12.2016, 4, § 20 (2) item 5.

[203] ECHR 08.03.2010, 49151/07, *Muñoz Díaz v. Spain.*

[204] *Ibid*, at para 79 and 80.

[205] PärS RT I, 29.06.2014, 10, § 39 (1).

Under Estonian law, the testator has a large degree of freedom to dispose of his or her property and a will can be made for the benefit of his or her partner in an informal relationship.[206]

In case where the 'testator' is in a formal relationship with the third person, a will still can be made, a will can be made for the benefit of the partner in an informal relationship even if the testator is married or he or she has a registered partner.[207] If a person has, by means of a will or a contract of succession, disinherited a descendant or his or her parents or spouse who are entitled to succeed in intestacy and with respect to whom the person has a maintenance obligation arising from the Estonian Family Law Act at the time of his or her death or that person has reduced their shares of the estate as compared to their shares according to intestate succession they will have the right to claim a compulsory portion from the successors.[208] It means that it is possible to make a will even if the testator has children. In this case, §105 (1) of Estonian Law of Succession Act wars that even though, the person who is appointed by the testator shall be the successor, the spouse will have a financial claim against the estate to the value of compulsory share of the intestate succession.

In relation to the joint will disposing of property in favor of the surviving partner, the law limits cohabitants as a reciprocal will of spouses is a will made jointly by the spouses in which they reciprocally nominate one another as his or her successor or make other dispositions of the estate in the event of his or her death,[209] however the law does not prohibit the possibility to make a reciprocal will for informal cohabitants or others, related to each other persons. Transactions if they fall under the scope of the General Part of Estonian Civil Code Act § 87, a transaction contrary to a prohibition arising from law is void if the purpose of the prohibition is to render the transaction void upon violation of the prohibition, especially if it is provided by law that a certain legal consequence must not arise.

In the will, a cohabitant has the right to make a legacy in favor of his partner, if in a will a testator does not give all his or her property or a legal share thereof to a person but gives a particular proprietary benefit without regarding the recipient of the benefit as his or her legal successor, the benefit shall be deemed to be a legacy and the recipient of the benefit shall be deemed to be a legatee. A disposition to give a legacy entitles a legatee to demand transfer of an object given as a

[206] *Supra* nota 121, p 42.
[207] *Ibid.*
[208] *Supra* nota 205, § 104 (1).
[209] *Ibid*, § 89 (1).

legacy from the executor of legacy.[210] Pursuant to the § 56 (2) his legacy may be a thing, a sum of money, a right, a claim, exemption from an obligation or any other transferable benefit.

At the same time § 95 (1) of Estonian Law of Succession Act grants partner the right to conclude a succession agreement, which is made between a bequeather and another person whereby the bequeather nominates the other party or another person as his or her successor or gives the party or person a legacy, testamentary obligation or testamentary direction, or an agreement between a bequeather and his or her intestate successor whereby the latter renounces the succession. No restrictions were found in the law regarding the portion of a property which the individual can bring as a gift in the case of death or as a legacy. Even the right to a compulsory portion will not provide protection against legacies.[211]

The Regulation no. 650/2012[212] does not entitle cohabitants in an informal relationship to a reserve share or to any other rights or claims on the estate (i.e. any claim based on dependency, compensation, or maintenance) in the case of a disposition of property upon death (e.g. by will, joint will, or inheritance agreement) in favor of another person. It has been found in the legal literature that the surviving partner of in a free marriage (different from a spouse) has the opportunity to determine which part of the property acquired during the relationship actually belongs to him or her and which part shall be transferred to the successors as the property of the deceased, i.e. after the death of one party it should be possible to ascertain its origin on the basis of the contract of joint operation or any other shared ownership.[213] In addition to that, the family members of a person who lived with the bequeather and received maintenance from him or her until that his death have the right to continue using the objects of the shared household and to receive maintenance from the estate for one month after his or her death.[214]

As for the conclusion, there is no direct limitation for regulating property rights between the partners *per se*. However, in terms of consensual unions who live in the family like relationships the Estonian legislation does not provide special protection for unregistered cohabitants, but rather gives optional instruments to regulate specific areas of life.

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[210] *Ibid*, § 56 (1).
[211] Uusen-Nacke (2014) *supra* nota 121, p 44.
[212] Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession. OJ L 201/107. 2012.
[213] Kama, K. and Kullerkupp, K. Vabaabielu versus abielu: varalised suhted muutuvate kooseluvormide kontekstis. Juridica 2002, No. 6, pp 359-368.
[214] PärS RT I, 29.06.2014, 10, § 132.

For the property ownership regulation, informal cohabitants may use the right of concluding the partnership contract to regulate the contribution to the household and its' consequences. Such contract may help to avoid problems of the accommodation and use of the assets in the common dwelling.

If the common dwelling is rented, following the § 321 (1) of the Estonian Law of Obligations Act it is again up to the contract of partnership agreement to secure the right to remain at home if one of the partners passed away, as only those family members, who shared the same household with the lessee have the rights to take the place of the lease contract pursuant to an agreement between them.[215] This provision brings additional limitation of rights as informal cohabitants are not counted as family members, despite the fact, that they are recognized as *de facto* spouses or close persons in various legal acts indicated in the First Chapter.

Joint ownership is allowed on the basis of general contractual relations, excluding the joint property regime. Immovable obtained under the principle of the co-ownership always require notarial confirmation. In this case, joint liability for debts is applicable under the co-ownership contract. Special cases for the joint ownership arise from the contracts concluded in accordance with the Estonian Law of Obligations Act, but in general, when there is no contract concluded between two unregistered cohabitants – parties have no joint liability for debts obtained during the cohabitation period.

In terms of the right to receive maintenance, the unregistered partners are not obliged to provide maintenance to each other and claim for it, unless there are common children in the household unless there are specific provisions in the contract of partnership concluded between cohabitants. However, as far as the subsistence benefit is concerned – the right to receive maintenance from the state, in this case, is applicable to the unregistered cohabitants under the § 22 of the Social Welfare Act.

The right to act on behalf of the partner may be granted to his or her unregistered partner under the several legal provisions. One of the options is to indicate this right in the contract of partnership. Estonian Law of Obligations Act in its § 593 gives the right to each partner to be authorized to manage the partnership, if it is possible to presume that the partner is also authorized to represent other partners in relations with third parties.[216] From this provision, however, it is not

[215] VÕS RT I, 31.12.2016, 7, § 321 (1).
[216] *Ibid.*

clear if such right refers to the health related problems, for instance, taking decisions which may affect health condition of the partner. In this case, Estonian Law of Obligations Act by its § 767 (1) specifies that the intentions expressed earlier by a patient or intentions presumed shall, if possible, be ascertained using assistance of his or her 'immediate family',[217] where the definitions of the 'immediate family' allow presuming that informal cohabitant may is a family-member in these terms if it can be concluded from the way of life of the patient.[218]

At last, but not the least, the analysis of the legal relations of informal cohabitants in terms of the Estonian Law of Succession Act lead to the conclusion, that the unregistered partners, including partners, concluded partnership contracts, are not counted as intestate successors. That, however, does not preclude parties from making a will where real rights on immovable and movable objects are transferred. The general rule on the administration of the household goods lays down in the § 90 (1) of the Estonian Law of Property Act, a possessor of a movable asset and any earlier possessor shall be deemed to be the owners of the asset during the possessor's possession until the contrary is proved.[219] This clause is supported by the § 132 of the Estonian Law of Succession Act granting rights to the family members of a person who lived with him or her and received maintenance from him or her until that person's death to continue using the objects of the shared household and to receive maintenance from the estate for one month after his or her death.[220] The right to receive maintenance under this article may be arguable in terms of informal cohabitants together with provisions of Estonia State Pension Insurance Act which do not include informal cohabitant into the list of receivers of the survivor's pension.[221]

[217] *Ibid,* § 767 (1).
[218] *Ibid,* § 767 (2).
[219] AÕS RT I, 25.01.2017, 1.
[220] PärS RT I, 29.06.2014, 10.
[221] See RPKS RT I, 06.12.2016, 4 and ECHR 08.03.2010, 49151/07, *Muñoz Díaz v. Spain.*

3. Separation

This Chapter consists of the legal analysis of the consequences of separation in consensual unions. The majority of the available case law concerns this stage of a relationship when people in conflict request the court to make a decision on their questions.

Issues relate to the separation include the following aspects:

(1) first, applicable jurisdiction to settle the dispute. Jurisdiction of the court may depend on several factors and at each stage, it shall be examined whether the certain court is competent – otherwise, the court may decline the petition.
(2) Second, when the court to refer was correctly identified, claimant has to decide on his own the nature of the claim – whether it will be the maintenance request,
(3) property division, or
(4) compensation of the contribution to the household made during the years of living in a consensual union.

In this Chapter, Estonian Family Law Act is used to examine the maintenance prerequisites referred to the child and parent protection. Other property related issues are tested in accordance with the Estonian Law of Obligations Act and Law of Property Act provisions.

3.1. Jurisdiction of the court

Before filing a claim, the claimant or his legal representative should decide, which court he or she are going to address. Chapter XIII of Estonian Constitution[222] settles the Judicial System in Estonia, where the courts of the first instance are – county, city and administrative courts. At the first stage, these courts are to be addressed. If the decision did not satisfy the claimant or the respondent, the appeal shall be turned to one of the circuit courts, which are the higher courts which reviews rulings of the courts of the first instance on appeal. If the parties are still not satisfied with the decision, the case goes to the Supreme Court (Tartu), which is the highest court of Estonia which reviews rulings of other courts pursuant to a quashing procedure. The Supreme Court is also the court of constitutional review.

[222] PS Eesti Vabariigi Põhiseadus RT I, 15.05.2015, 2.

Since Jurisdiction of the court is provided by the law,[223] the civil cases including the informal cohabitants' issues, are heard by the county court – Harju County Court; Viru County Court; Pärnu County Court; Tartu County Court.[224] Nowadays the case can be filed both on paper and via e-toimik.[225]

Further procedure on appeal is settled in Chapter 3 of the Estonian Courts Act.[226]

3.2. Maintenance of the partner

Estonian Family Law Act does not include provisions regarding maintenance of the informal cohabitants after separation. The only type of obligation on providing the maintenance to the parent applies if there is the common child. It does not play a role if the parents are separated, married, divorced or cohabiting, the father of a child is required to provide maintenance to the mother of the child eight weeks before and twelve weeks after the birth of that child.[227] Also, if a mother is unable to maintain herself due to a health disorder caused by pregnancy or childbirth, the father is required to provide her with maintenance until her state of health improves. The same applies if a mother is unable to receive an income due to having to care for a child.[228] As mentioned in the Second Chapter, if a father cares for and raises a child and he is unable to receive an income due to having to care for that child, he has the right to file a claim against the mother.[229] The obligation to provide maintenance commences no earlier than four months before the birth of a child and terminates after three years have passed from the birth of the child.[230]

Nevertheless, the financial situation of the parents is to be taken into account, when the court deciding on the amount of the maintenance to be paid. As the scope of the maintenance obligation and the way in which maintenance should be paid, as well as other issues regarding the maintenance obligation and its fulfillment, have not been directly prescribed in the maintenance obligation stipulated in § 111 of the Estonian Family Law Act, the non-regulation of these questions does not correspond to the meaning and objective of the Estonian Family Law Act,

[223] Kohtute seadus (adopted on 19 June 2002, entered into force on 29 July 2002). - RT I 2002, 64, 390; RT I, 28.12.2016, 18, § 4. Available in English at: www.riigiteataja.ee/en/eli/505012017005/consolide.
[224] *Ibid*, § 9 (2).
[225] The e-Toimik is an online information system which allows procedural parties and their representatives to electronically submit procedural documents to courts and to observe the progress of the proceedings related to them. Source: www.rik.ee/en/e-file.
[226] See Kergandberg, E. jt. Kohtumenetlus. Juura, 2008
[227] PKS RT I, 21.12.2016, 12, § 111 (1).
[228] *Ibid*, § 111 (2).
[229] *Ibid*, § 111 (3).
[230] *Ibid*, § 111 (2).

according to the position of the Supreme Court.[231] If the financial resources available to the mother of the child are sufficient to cover the usual expenses, the mother of the child does not require assistance and she has no right to receive maintenance from the father of the child on the basis of § 111 (1) of the Estonian Family Law Act.[232] If the partner in an informal relationship is entitled to receive maintenance in the case of the birth of a child, the scope of the maintenance shall be determined on the basis of the needs and usual lifestyle of the person entitled to receive maintenance (§ 99 (1) Estonian Family Law Act).[233] It is also possible according to the § 103 (1) of the Estonian Family Law Act that the court releases parent from the maintenance obligation, if:

- the need for maintenance of the person entitled to receive maintenance has been caused by his or her unreasonable conduct;
- the entitled person has severely violated his or her maintenance obligation against the person obliged to provide maintenance;
- the entitled person is convicted of an intentionally committed criminal offense against the person obliged to provide maintenance or a person connected with him or her.[234]

The post-birth maintenance obligation when a child has been born will exist irrespective of whether the parties have lived together or separately during the period referred to in § 111 (1) of the Estonian Family Law Act, thus, in the case of the aforementioned obligation, the duration of as well as the end of the cohabitation is of no importance.[235]

Following provisions of the Estonian Family Law Act, the obligation to provide maintenance terminates upon remarriage of the entitled person and also upon the death of the entitled or obligated person,[236] which means that once the mother or a child got married, the father may be no longer obliged to pay the maintenance. At this paragraph, the maintenance refers to the mother, not to the child. However, it is still arguable, whether provisions of the § 76 of Estonian Family Law Act can be used for the informally cohabiting couples. When arguing on the father's obligation to provide maintenance to the mother of a common child up to three years after the child's birth under the certain conditions like reasonable inability to maintain herself or health damage caused by the pregnancy or birth of a child,[237] it is undefined, if a court may release ex-

[231] Uusen-Nacke (2014) *supra* nota 121, p 32.
[232] RKTKo 3-2-1-198-13, at para. 16, 17.
[233] *Ibid*, at para. 16, 17.
[234] PKS RT I, 21.12.2016, 12, § 103 (1).
[235] *Supra* nota 232, at para. 20.
[236] *Supra* nota 234, § 79.
[237] *Ibid*, § 111 (2).

cohabitant, who is also the father of a child, from the obligation to provide maintenance, limit the obligation in time or reduce the amount of support if payment of support would be extremely unfair considering, inter alia, the interests of the common child left to be cared for and raised by the entitled person, if:

- The marriage has lasted for a short period of time;
- The entitled person is convicted of a criminal offense against the person obliged to provide maintenance or a person connected with him or her;
- The need for maintenance has been caused by unreasonable conduct of the entitled person;
- The entitled person violated severely his or her obligation to contribute to the maintenance of the family for a longer period of time before the divorce;
- There is another good reason for that.

Also, the provision of the maintenance shall be made by the obligated person after the spouse and before the relatives of the person in need of assistance,[238] which means that in case the mother married, the father of the child is the second one after the spouse who may be obliged to provide maintenance for her. Provisions of this paragraph address the father of the child and the new spouse. There was no case law detected in Estonia regarding the informal cohabitation in terms of the new matrimonial union which the law refers to, but it will be one of the main arguments in the situation when the informal cohabitation wears the family-like character and it can be easily made obvious to the court.

It is also unclear, when the unregistered cohabitant after the separation is suffering financial difficulties in maintaining himself or herself due to the taking care of the common child or children, whether the person can rely on the paragraphs of the Family Law Act, which describe two situations, when the divorced spouse may request the maintenance:

- If, after divorce, a divorced spouse is unable to maintain him or herself due to caring for the common children of the spouses, he or she may request provision of maintenance from the other divorced spouse until the child attains three years of age.[239]
- If, after divorce, a divorced spouse is unable to maintain himself or herself due to his or her age or state of health and the need for assistance arising from age or state of health existed at the time of the divorce, he or she may request provision of maintenance from the other divorced spouse. Provision of maintenance due to age or state of health may be requested from the other

[238] *Ibid*, § 111 (5).
[239] *Ibid*, § 72.

divorced spouse also in case the need for assistance arising from age or state of health existed at the time when the right to receive maintenance from the other divorced spouse on another basis provided by law terminated.[240]

Informal cohabitant, which wants to request for the maintenance on the basis of the § 72 and § 73 of Estonian Family Law act, should state his relation to the family of the ex-cohabitant and use the rationale of the First Chapter of the current research. However, Estonian Family Law does not guarantee any protection in such cases to the informally cohabiting couples; therefore, there are higher chances to reach the Supreme Court and claim for the rights there.

If there are two or more common children in the family and the parent obliged to provide maintenance is suffering financial difficulties or by other reasons not capable of providing it entitles amount of the maintenance, from the § 103 (2) it can be concluded, that the minor child has first.

3.3. Property division

As discussed in the Second Chapter property relationship between the two informal cohabitants, rights between them remain similar and even when there is no partnership contract with points concerning the property of their common household, the ownership rights do not change in relation to the parties – each one remains the owner of his or her own assets.

Pursuant the paragraph § 90 (1) of the Estonian Law of Property Act, a possessor of a movable and any earlier possessor shall be deemed the owner of the thing during the possessor's possession until the contrary is proved.[241] This provision brings difficulties if the issues regarding the division of property between informally cohabiting couples reach the court – the household goods which were in possession of the both cohabitants may be difficult to divide, when the one cohabitant paid for it, and another were in more often possession of the asset (i.e. the washing-machine).

Assets acquired during the relationship shall be acquired according to the general rules of the Estonian Law of Property Act, i.e. either under the sole ownership of a party or common ownership.[242] The presumption of the possession of the possessor of a movable, proceeding from § 90, includes, as a rule, also the presumption of the common ownership of the co-owner, which

[240] PKS RT I, 21.12.2016, 12, § 73 (1).
[241] AÕS RT I, 25.01.2017, 1.
[242] RKTKo 3-2-1-109-14, at para. 17.

provides certain protection to the (non-owner) spouse, as well as to another partner in an informal relationship. In the case of immovable property, this presumption is not valid, but it concerns mostly the household goods and other items used in daily living.[243]

3.4. Compensation of contribution

As for an alternative for the property division, ex-cohabitant may file a claim for the compensation of contribution to the household. According to the court precedence, assets acquired during an informal relationship shall be acquired according to the general rules of the Estonian Law of Property Act, i.e. either under the sole ownership of a party or common ownership.[244] From the Property Law Act, it can serve as a signification of separation, when a co-owner uses his the right to demand the termination of common ownership at any time.[245] Moreover, upon the termination of common ownership, an asset shall be divided according to the agreement of the co-owners.[246] Pursuant to the § 77 (2) of the Property Act, in the absence of special agreement between co-owners regarding the division of property, the court is entitled to make a decision upon the request of a plaintiff concerning the division of material property (physical shares). Decision will concern options either to impose an obligation to one or both co-owners to pay the estimated share of the property in money, or to sell the property by the public auction first, and then divide this money among the co-owners based on the estimated size of the shares. The court shall have no right to decide upon the division of the asset in common ownership in any other way that requested by the plaintiff..[247] The Supreme Court has found that partnership relations between the partners in an informal relationship are possible; at the same time, it has been of the opinion that an informal relationship does not meet the requirements of a partnership.[248] Therefore, it is possible to conclude, that there are no binding obligations which could arise from this, according to the commentaries regarding the § 2 of Estonian Law of the Obligations Act: according to § 2 of the Estonian Law of Obligations Act an obligation is a legal relationship which gives rise to the obligation of one person (the obligated person or obligor) to perform an obligation for the benefit of another person (the entitled person or obligee), and to the right of the obligee to demand that the obligor performs that obligation.[249] The nature of an obligation may oblige the parties involved

[243] Kama, K. and Kullerkupp, K. Vabaabielu versus abielu: varalised suhted muutuvate kooseluvormide kontekstis. Juridica 2002, No. 6, pp 359-368.
[244] RKTKo 3-2-1-109-14, at para 17.
[245] AÕS RT I, 25.01.2017, 1, § 76 (1).
[246] AÕS RT I, 25.01.2017, 1, § 77 (1).
[247] RKTKo 3-2-1-143-04, at para 16.
[248] *Supra* nota 244, at para. 16.
[249] VÕS RT I, 31.12.2016, 7.

to take the other party's rights and interests into account in a certain manner. An obligation may also be confined thereto.[250]

An extension of the partnership provisions or by analogy under the Estonian Family Law Act should not result in consequences where there are situations that have not been agreed upon by the parties and which cannot be presumed to represent their actual common will.[251] Here the situation turns against informal cohabitants, as there is the line dividing non-registered from the registered, married couples which regulate spousal relationship and contribution of each spouse to the household. As far as the compensation is concerned, there have to be concluded (before the separation/filing the claim) a partnership contract, which, following the § 589 (1) of the Estonian Law of Obligations Act transfer all the contributions made by partners and assets acquired for the partnership to the joint property of the partnership. Thus, it is presumed, that the request for the compensation for the contribution will proceed following the circumstances of the partnership agreement, the claim of ex-partner weighted with the response of the other party.

According to the Civil Chamber of the Supreme Court, from the liquidation provisions of a partnership, the second sentence of the Estonian Law of Obligations Act § 600 section 1 can be applied, according to which the provisions on the distribution of common ownership will presumably be applied (primarily concerning the types of division relating to an asset, as prescribed by § 77 of the Estonian Law of Property Act.[252]

To sum up, the conflicts related to the property and financial issues between informal cohabitants are filed in one of the Estonian Country Courts, depending on the region. In terms of jurisdiction of the court, unregistered couples have the same right to refer to the court as the spouses do. Civil conflicts are solved by the same procedure except for the legislation applied – informal ex-cohabitants cannot rely on the Estonian Family Law act provisions.

Former partners cannot claim for maintenance from one another unless they have common children. In this case, the obligation to provide maintenance will be on the party who is not taking care of the child or children. For instance, if a child is raised by the father who is not able to receive sufficient income, due to taking care of the child, may claim the maintenance from the mother of this child and *vice versa*. At the same time, father is obliged to maintain mother of a child in general, of the child eight weeks before and twelve weeks after the birth of the child and if the

[250] Varul, P., Kull, I., Kõve, V., Käerdi, M., Võlaõigusseadus, Kommenteeritud Väljaanne I, Juura, Tallinn, 2007.
[251] Uusen-Nacke (2014) *supra* nota 121, p 39.
[252] *Ibid,* p 41.

mother is unable to maintain herself due to the health related issues caused by the pregnancy or childbirth, or if a mother is not able to receive income due to taking care of a child.[253] However, this obligation to provide maintenance commences not earlier than four months before the birth of a child and terminates after three years have passed from the birth of the child.[254] When there are two or more children in the family and one of the parents file a request to receive maintenance from another parent, the minor child is the first one entitled to receive maintenance if the parent obliged to provide it is suffering financial difficulties.

According to the Law of Obligations Act and Estonian Property Law Act provisions discussed in the Second Chapter, property rights do not change during and after the cohabitation period, unless parties entered into the partnership contract. Subsections related to the Property Division and Compensation of Contribution to the household is similar in terms of division of property. Even though, the partnership contract regulates contribution made by the partners, the division of property will primarily process under the rules of the ownership or common ownership and of the assets. Upon the termination of common ownership, assets shall be divided according to the agreement of the co-owners.[255] These provisions do not apply to the joint ownership of immovable, which would fall under the rules of the transaction of property.[256]

[253] PKS RT I, 21.12.2016, 12, § 111 (1).
[254] *Ibid*, § 111 (2).
[255] AÕS RT I, 25.01.2017, 1, § 77 (1).
[256] *Ibid*, § 19.

Conclusions

Based on the analysis of Estonian legislation and comparison of the legal status of informal cohabitants in Estonia with the other EU Member States hypothesis is confirmed. The author came to the conclusion, that in Estonia property rights of informally cohabiting partners are limited in terms of family life protection. The hypothesis is confirmed based on the following X main reasons: first, consensual unions are not directly recognized in Estonian law; secondly, as it was shown from Eurostat data – over than 16% of couples in Estonia live in consensual unions, which ranks the second state by the highest number of unregistered partnerships in Estonia; thirdly, protection of property rights can be ensured by conclusion of additional contracts and agreements; and finally, these agreements often require notarial authorization. As a result, protection of limited property rights is possible to reach by the legal burdens in terms of contractual agreements.

Consensual unions are not directly recognized in Estonian legislation. This, indeed, limits individual rights of those cohabitants, who live in a family like consensual unions. For the purpose of identifying the limitation two approaches were combined in the Chapter 1: evaluation of the scope of indirect recognition in Estonian legal acts – this recognition was analyzed in terms of *de facto* spouses,[257] 'persons permanently living together',[258] 'persons who live in a shared household',[259] as well as 'persons with equivalent economic interest'.[260]

However, each legal Act sets its own independent requirements and some of them may not necessarily identify consensual unions – as, i.e., it is settled in the Code of Civil Procedure, where 'a person, permanently living together' is placed next to the 'spouse'. Such provisions, concerning only the shared household are not recognizing consensual unions *per se*, but rather help to avoid the conflict of interest between two people, who can be either *de facto* spouses or simply cohabiting together as roommates.

At the same time, from legal acts, referring to the marriage-like relationships, i.e. Military Service Act,[261] it can be concluded, that in general, the indirectly Estonian legislation does recognize the

[257] KAS RT I, 23.03.2017, 7, § 84 (2).
[258] Kriminaalmenetluse seadustik (adopted on 12 February 2003, entered into force 01 July 2004). - RT I 2003, 27, 166; RT I, 31.12.2016, 46, § 71 (1) Available in English at: www.riigiteataja.ee/en/eli/530012017002/consolide.
[259] Pankrotiseadus (adopted on 22 January 2003, entered into force on 01 January 2004). - RT I 2003, 17, 95; RT I, 22.06.2016, 25, § 117 (1). Available in English at: www.riigiteataja.ee/en/eli/504072016002/consolide.
[260] KAS RT I, 23.03.2017, 7, § 84 (2).
[261] Kaitseväeteenistuse seadus (adopted on 13 June 2012, entered into force on 01 April 2013). - RT I, 10.07.2012, 1; RT I, 01.03.2017, 3, § 92 (3) – 'a person in a relationship similar to marriage'. Available in English at: www.riigiteataja.ee/en/eli/513032017006/consolide.

informal relationship as a form of family relationship similar to marriage in certain limited situations. However, such recognition is very narrow and does not apply in many spheres of the everyday life, including property related issues.

Based on the analysis of Estonian legal provisions, the following basic criteria were outlined to identify consensual unions:

- Cohabitation
- Similarity to marriage
- Long-term relationship
- Equivalent economic interest

As concluded in the comparative analysis of the EU MSs, the countries which have directly recognized informal relationships by special acts and legal provisions impose prerequisites similar to those, which were outlined after summarizing Estonian legislation with its indirect recognition. In addition to the abovementioned factors, some of the foreign legal acts refer to the durable sexual relationship as criteria that establish informal relationships which would fall under the protection of certain provisions.[262]

As it was established, that there is no direct and reliable recognition of informal relationship in Estonian law, it is useful to estimate, whether there is a necessity to research and develop the scope of cohabitants' protection. From statistical data from 2011, presented by Eurostat, the table shows that Estonia is ranked next to Sweden[263] by the number of informally cohabiting partners.

Comparing a number of Estonian unregistered couples with the married ones, in 2011, the number of consensual unions constituted 31% from the total number of couples.[264] That gives reasonable grounds to assume, that certain legal amendments may require additional interpretation and development in Estonian laws. The right to the family is protected both by Estonian Constitution and International and European instruments. The Estonian Partnership Act, when fully implemented and correctly applied may decrease the number of unregistered partnerships, however, it would not fully solve issues identified in this thesis as limiting rights of cohabiting partners. For instance, as analyzed in the Section on Shared Dwelling, according to Estonian Law

[262] See Chapter 1.1, pp 15-17.
[263] Sweden is the first country in European Union by the number of informally cohabiting couples. Chapter 1.2, Eurostat.
[264] See Chapter 1.2. Table Couples in informal relationship in Estonia in 2000[264] and 2011.[264]

of Obligations Act, if one of the partners is renting an apartment, only close relatives including the spouse may be accommodated without the lessor's consent.[265] The provision does not refer to any other person in terms of the unregistered partner, *de facto* spouse etc. Moreover, the Law of Property Act restricts access to the property without the owner's consent,[266] which gives legal grounds to 'kick out' the unregistered partner at any time, in the situations of personal conflicts.

Thus, those informally cohabiting couples who need additional rights which could draw a parallel with provisions of Estonian Family Law Act ensuring additional security may already use legal instruments, while the legislation does not grant full scope of protection to the families constituting of consensual unions. One of these instruments is a conclusion of the contract of partnership under Estonian Law of Obligations Act.[267] It is also an optional remedy for those couples who decide to remain in unregistered unions. The negative side of such contract is that it is not allowed to add a restriction on the conclusion of such type of contracts with the other possible partners.[268] In addition to that, the parties shall control the general principles of good faith, party autonomy and reasonableness are followed and otherwise, the contract will be void.

The main reason to conclude a contract of partnership is the legal regulation of joint property and contribution to the partnership. Another parallel discovered with Estonian Family Law act is the jointness of property[269] and recognition of the joint property of the partners. These terms, however, shall not be confused with each other, as in the case of partnership contract, the property acquired for the union, shall be transferred (requires the special procedure of the transfer of property with notarial authentication) to the joint property.[270] Transactions on the transfer of property mostly refer to the expensive assets and immovable of the partners.

Second option to ensure certain property rights between unregistered partners is to conclude a will according to the general provisions of Estonian Law of Succession Act. The act does not identify informal cohabitants, irrespective common children, and duration of the relationship, as intestate successors. This means that cohabitants have no rights on a succession of the property, which used to belong to bequeather. However, the survived partner may claim for his or her rights to the assets

[265] VÕS RT I, 31.12.2016, 7, § 289.
[266] AÕS RT I, 25.01.2017, 1, § 40 (1) and (2).
[267] VÕS RT I, 31.12.2016, 7, § 289.
[268] Note: here the term "partner" is used in a wide sense, referring to the third parties in relation to one of the *de facto* spouses.
[269] PKS RT I, 21.12.2016, 12, § 26 (principle of unity of joint property).
[270] See, for example, VÕS RT I, 31.12.2016, 7, § 581.

acquired during the relationship.[271] This claim may be supported by the Decision of the Administrative Chamber of the Supreme Court, which provided protection from the unfounded intervention by the state also to a form of family cohabitation that has not been registered according to the terms prescribed by law.[272]

If one of the partners is alive but loses his capacity to act and make his or her own decisions, the second partner may claim the right to act as an agent of the *de facto* spouse, even though there is no special representative right for the unregistered partners. The general rule to represent and take certain decisions on behalf of the partner is, in terms of the partnership agreement, the authorization to manage the partnership. This limits cohabitants' rights in terms of the health related issues. If the person as a patient is not capable of exercising his will, his immediate family may act on his behalf. The term of 'immediate family' does not include the unregistered partners, but allows to treat him or her as an immediate family, when the conclusion is based on the life circumstances of the patient.[273] This, however, can be argued, as the provision presumes that the immediate family like close relatives, siblings, parents or grown-up children may have legal priority before the cohabitant, even if *de facto* marriage can be proved. It brings the legal uncertainty to the couples who want to have the mutual representative rights on the basis of informal cohabitation. These provisions impose additional contractual burdens on the non-married couples.

As far as the shared property is concerned, the consensual unions do not have any special regulation, unless there are common children in the household. In general, children's rights do not depend on the civil status of parents. In this thesis right to receive maintenance was discussed in terms of the child and parent support regulated by the Estonian Family Law Act. The rules on period and amount of the maintenance apply both to mother and to the father of the child regarding special and individual conditions. Additionally, the consensual union can be the subject of receiving subsistence benefit from the state. Pursuant to the SHS, there are two separate conditions that match the concept of informal cohabitation, and it is sufficient if the couple meet one of them:

- persons who are in a relationship similar to marriage, or
- persons who have a shared household.[274]

[271] Based on the research of Kama, K. and Kullerkupp, K. Vabaabielu versus abielu: varalised suhted muutuvate kooseluvormide kontekstis. Juridica 2002, No. 6, pp 359-368.
[272] RKHKo 3-3-1-11-00, at para. 1.
[273] VÕS RT I, 31.12.2016, 7, § 767 (2).
[274] SHS RT I, 21.12.2016, 21, § 131 (7).

According to the first condition, the criteria of cohabitation are not necessary to request for subsistence benefit, however, it is again not clear from the law – how and by whom the nature of relationship similar to marriage will be estimated.

The criterion of a shared household was met in the procedural provisions of Estonian legal acts as discussed above. The author divided the shared household by the two means: shared property and jointly owned property.

The concept of a shared property refers to the immovable either rented or owned by one of the partners. In terms of family-like relationship, only spouses have special rights to reside in the rented[275] or owned[276] by one of the spouses' immovable property. Meanwhile, cohabitants are not granted similar rights as in these questions Estonian law do not identify unregistered partners as a single family unit. The optional solution would be the contract of partnership, which could interpret the property renting as a contribution to the partnership made by one of the partners. It is arguable, if it enables lessee to accommodate his or her *de facto* spouse without the consent of the owner, but there is a reasonable legal basis to claim for this right. If one of the partners owns the place of a shared household, the contract of partnership may contain provisions ensuring second party the right to remain at home for the certain time after separation or the conflict after which the owner of apartment expresses his or her prohibition for the second party to remain at this place.[277] As mentioned before, that should not be in the conflict with the principle of good faith and party autonomy.

Despite the fact that many European Union Member States recognize *de facto* marriages on the legislative level, Estonia has reasonable grounds to distinguish rights, obligations and privileges of non-registered unions from official relationships. These reasonable grounds are based on the European Court of Human Rights proceedings in *Muñoz Díaz v. Spain* case, where the court admitted that State's position in recognition of only legally registered conjugal relationship does not conflict with the basic principles of protection of family. Neither does it conflict with supplementary instruments.[278] Neither Estonian State Pension Insurance Act recognizes any other than *de jure* marriage relationships in the context of right to receive the survivor's pension.[279]

[275] VÕS RT I, 31.12.2016, 7, § 289.
[276] This conclusion is based on the mutual obligation of both spouses to provide maintenance to each other. See PKS RT I, 21.12.2016, 12, § 16.
[277] AÕS RT I, 25.01.2017, 1, § 40 (1), (2).
[278] See Protocol 1 of Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950.
[279] RPKS RT I, 06.12.2016, 4, § 20.

Thus, the ECHR precedent may also impede to the possible reforms on recognition of civil statuses other than the marriage.

The second type of property relationships in terms of immovable is the property joint and common ownership. Again, it should not be confused with the terminology used in the Family Law Act as the unity of joint property/jointness of property is a special optional regime for spouses. In the context of the contract of partnership, this regime is partially explained in Estonian Law of Obligations Act as a joint ownership of identified shares.[280] Although it is applicable to the both – partnership agreement parties and the spouses, there are a number of procedural distinctions between two groups. As discussed in the Second Chapter, the property contributed to the partnership as a joint property must be transferred following procedural requirements. The pre-requisites may depend on the value and the nature of the property. Thus, if the transferred property is of a substantial value, notarial authentication may be required.

If unregistered cohabitants do not have the contract of partnership, but will to acquire, i.e. certain immovable jointly, the co-ownership relations may arise in this case. Unlike the joint ownership, common ownership will apply only in relation to the legal shares of a shared thing.[281] Co-ownership relations grant package of rights,[282] but only concerning the jointly acquired property. The rights of co-ownership are equally applicable to the matrimonial unions with the separate property regime.

Same principles of contractual relationship are applied in respect to the joint responsibility for debts.

As concluded in the Third Chapter, the rights on separation do not change property relations between informally cohabiting persons, unless the couple concluded a contract of partnership or entered into other agreements concerning either joint or common property.

To sum up, individual rights of the persons cohabiting in consensual unions are limited to the general rights of the individuals with separate provisions supporting these unions in terms of the subsistence benefits, civil and criminal procedure (including financial matters). Most of the rights aim to avoid conflict of interest but do not, in general, grant any certain package of rights and obligations for the partners. Taking into consideration currently still missing implementing

[280] *Supra* nota 275, § 70 (4).
[281] AÕS RT I, 25.01.2017, 1, § 70 (3).
[282] As analyzed from RKTKo 3-2-1-13-14; RKTKo 3-2-1-93-12; RKTKo 3-2-1-45-13.

legislation of the Estonian Partnership Act, the State does limit individual rights in unregistered unions. In addition, as it was seen from the First Chapter, unregistered partners are indirectly recognized but are not given mutual property rights and obligations.

As individual property rights in terms of civil partnerships are limited, persons who seek additional protection may use contract of partnership and conclude a will. But the question, whether these instruments are the legal burdens imposed by Estonian law or it is an additional opportunity for the people granted by the law remains an open research field for further additional research from legal, sociological, psychological, philosophical approaches.

Based on the analysis of this thesis, the author suggests introducing legal amendments to Estonian Partnership Act and in addition to improve recognition of informal unions. Even if position of the state protects matrimonial[283] values which include the consent of taking material and moral responsibility for each other, it is necessary to develop knowledge and consciousness in the society in regards to the purposes of conclusion of marriage, partnership act agreements or deliberately choosing the informal type of relationship with its consequences and optional solutions for property issues.

Taking into consideration the other side of problem mentioned in the *Muñoz* case and its effect may nowadays become ever more relevant not only in perspective of the Estonian Partnership Act implementing amendments but also for the purposes of protection of those cultures, which conclude their marriages by traditional rites. Even if the State's position does not change in relation to the consensual unions, property rights shall be more secured to ensure protection for the refugees and immigrants in terms of the time given to go through all procedural steps and conclude the marriage, that would be acceptable in Estonia.

Additional suggestion based on the analysis of the tables in Chapter 1 of the thesis is to provide an updated statistical data on the number of people living in consensual unions as by the time of conducting the research now the only available statistics on the population and dwelling census is from the years 2000 and 2011.[284] The data on the civil unions with the shared household and children[285] illustrated an increasing trend of living in *de facto* marriage in Estonia. Together with the updated data on the age of *de facto* spouses, in order to make a better regulation for the families not only in the legal, but also in the social sense – to decrease the level of non-recognized families,

[283] In this context, matrimonial values include protection of couples concluded Estonian Partnership Act agreement.
[284] See Table 'Couples in informal relationship in Estonia in 2000 and 2011'.
[285] See Table 'Live births by duration of cohabitation, Indicator and Year'.

author suggests for the competent authorities to follow the increasing or decreasing trends of the civil unions and provide residents of Estonia with the information on the legal outcomes for the various types of the family unions.

Registreerimata elukaaslaste omandiõigused: Eesti eraõiguse analüüs

Resümee

Eurostat viimaste andmete kohaselt on Eesti üks riikidest kõige suurema vabaabielu paaride arvuga. Samal ajal ei oma riiklik seadusandlus vabaabielude otsest määratlust ja reguleerimist. Samasooliste kooselu küsimuste reguleerimiseks ettenähtud Kooseluseadus ei anna veel stabiilsust ja alternatiivsete liitude peredena täielikku tunnustamist. Seoses sellega tekib küsimus seadusega reguleerimata elukaaslaste materiaalsete õiguste ja kohustuste võimaliku piiramise kohta.

Analüüsina kahe elukaaslase tsiviilõigusi on võrreldatud abikaasade õigustega, mis on reguleeritud eelkõige Perekonnaseadusega. Tsiviilabielu terminoloogia on käsitletud võrreldes nende Euroopa riikide seadusandlusega, kus ebaformaalsed suhted on reguleeritud ja tunnustatud riigi tasemel. Registreerimata liitude tuunustamise erinevuse mõistmine annab ka Eesti Vabariigi seadusandlusega kogumis alust teha järeldust, et laienevad varaliste õiguste piirangud enamikus elukaastastele. Perekonnaseaduses määratletud õiguste kontekstis on vanemate õigused ja kohustused teineteise ja lapse suhtes kohaldatud sõltumata vanemate seaduslikkust staatusest.

Varaliste küsimuste osas on tsiviiabielu partnerite õigused suuremal määral võrdväärsed kahe isikute õigustega, kes on sõltumatud teineteisest ning ei ole mingisugustes suhetes. Erandiks on toimetulekutoetuse saamise õigus. Antud juhul tunnistab seadus tsiviilabielu sotsiaalkindlustuse saamise subjektina paari jaoks, kes seisneb nii ametlikus, kui ka faktilises abielus. Kuna ülajäänud osas jäävad kahe elukaaslase õigused ja kohustused endisteks sõltumatult suhete saatusest ja üheskoos äraelatud aastatest, saavad abikaasad faktiliselt kasutada täiendavaid meetmeid enda eraõiguste ja ühiste varaliste õiguste kaitseks. Sellist võimalust annab seltsingulepingu sõlmimine (Võlaõigusseaduse § 580 tähenduses). Vaatamata sellele, et sõlmida antud kokkulepet võivad seltsinglased teiste kolmandate isikutega juba omades üks, kaks (või rohkem) taolisi kokkuleppeid, annab seltsinguleping võimalust reguleerida ühisvara, samuti antud varasse panusega seotud küsimusi.

Lepingu eripära laieneb partnerite selliste elu sfääride reguleerimisele, millistes võib igaüks esindada teineteise huve küsimustes, mis kuuluvad antud kokkuleppe esemesse.

Vaatamata sellele, et paljud Euroopa Liidu riigid tunnistavad faktiliste abikaasade õigusi seadusandlikul tasemel, Eestil on olemas alused eristada formaalseid ja mitteformaalseid suhteid õiguste, kohustuste ja riigi poolt antud eeliste tasemel. Selliseks näiteks rahvusvahelises praktikas

on EIK otsus – Muñoz Diaz v. Spain, milles ei tuvastanud kohus diksrimineerimist Hispaania haldusorgani poolt hageja suhtes ning seetõttu jättis kohus hageja avaldust surnud abikaasa lese staatuses pensioni väljamaksmise nõudes täielikult rahuldamata ning tegi otsuse Hispaania haldusorgani kasuks. Eestis Riigi Pensionikindlustuse seadus samuti ei tunnistata *de facto* lese staatust toitjakaotuspensioni saamiseks. Seega võib käesoleval ajal eksisteeriv kohtupraktika takistada kooselu mitte ainult varaliste, kui ka sotsiaalsete aspektide seaduslikku reguleerimist.

Kokkuvõttes, saab antud teema analüüsist teha järeldust, et elukaaslaste varaliste õiguste piiramine ei välista vallasvarale ja kinnisvarale ühisõiguste tekkimist täiendavate seaduslike meetmete abil. Edaspidised uuringud võivad olla pühendatud nii seltsingulepingu võimaliku eseme käsitlemisele registreerimata paaride suhtes, kui ka seadusandlikul tasemel kooselavate paaride tunnustamise ja põhjaliku reguleerimise võimaluste otsimisele.

Teema aktuaalsus perspektiivis võib puudutada mitte ainult LGTB, kes veel vajavad täiendavate rakendusaktide vastuvõtmist, õiguste edasiliikumist, kui ka nende kultuuride, kus abielu sõlmimine on tavaks, mis mitte alati tunnustatakse teise riikide seadustega, õiguste kaitset. Antud töö alusel võib läbi viia uuringut nende immigrantide, kes ei ole teadlikud riigi poliitikas, mis ei tunnista teisi liite peale matrimoniaalset või nende analoogiat nagu registreeritud kooselupartnerlus, kaitsmise vajaduse osas.

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Appendices

Appendix 1

Levels of recognition of different-sex and same-sex couples

Level of Recognition	**Different-Sex Couples Only**	**Same-Sex Couples Only (or Mainly)**	**Different-Sex and Same-Sex Couples**
(1) Alternative Registration System (a) package of rights/duties equal or almost equal to civil marriage	**A.** - rare (if any examples exist)	**B.** - Denmark (RP)[286] - Finland (RP) - Norway (RP) - Sweden (RP) subject to referendum: - Switzerland (federal)(RP) pending government bills: - United Kingdom (civil partnership)	**C.** - Iceland (confirmed cohabitation) - Netherlands (RP)
(b) package of rights/duties substantially inferior to civil marriage[287]	- rare (if any examples exist)	- Germany (almost equal package blocked by *Bundesrat*) (registered life partnership) - Switzerland (Zürich)* (beneficiaries) (mainly same-sex)	- Belgium - France - Luxembourg - Spain (11 of 17 non-African regions) (* but limited federal recognition of unregistered cohabitation) - Switzerland (Geneva, Neuchâtel)*
(2) Unregistered Cohabitation (package of rights/duties varies greatly, but is often substantially inferior to civil marriage) (no registration required, but minimum cohabitation period must be satisfied)	**D.** exclusion of same-sex partners requires a strong justification: - ***Karner* v. *Austria*** (Eur. Ct. of Human Rights 2003)	**E.** eg (not comprehensive): - UK (former rule: immigration for partners legally unable to marry) (mainly same-sex)	**F.** eg. (not comprehensive): - Croatia - France - Hungary - Netherlands - Portugal - Sweden - United Kingdom

[286] RP – registered partnership.
[287] * – no federal recognition yet.