CHANCELLOR OF JUSTICE

ANNUAL REPORT 2006 of the Chancellor of Justice

Overview of the conformity of the legislation passed by the state legislative and executive powers and local governments with the Constitution and the laws

Overview of the activities of the Chancellor of Justice in the protection of fundamental rights and freedoms

Tallinn 2007

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Dear reader,

In accordance with section 4 of the Chancellor of Justice Act, every year I submit an annual report of the activities of constitutional and judicial review of legislation of general application and the application of fundamental rights and freedoms. This report covers the main cases pertaining to the constitutional review of legislation as well as the ombudsman's function for the protection of fundamental rights and freedoms in 2006. It is evident that while the society is evolving into more complex and mature one, the legal issues arising become more complex as well.

Informed, transparent civil society together with the freedom and diversity of expression of ideas, opinions, and convictions forms the cornerstone of functional and healthy democracy. In 2006, certain tendencies appeared in the society, implying strives to shift towards increased closeness. The attempts to politicize the National Broadcasting Council and the calls to set restrictions on the freedom of expression tested the strength of our democracy and free press, and demonstrated the malleability and frailty of public sentiment and deliverance in Estonia.

An effective and efficient audit of the fund raising and financing of political parties is one of the premises of the integrity and transparency of the democratic decision making process. A society, where the persistence of private interests over the public interests appears to be more the rule than the exception, is in dire need of openness and transparency. An elector approaching the ballot box should be aware of the harsh truth and not settle for the beautiful lies, although the former might be considerably inconvenient compared to the latter. Unfortunately, the Riigikogu has not turned the promises into action and thus the financial matters of political parties remain hazy.

The markers of the past year are the conditions disgracing human dignity in the detention houses, negligence in the social welfare institutions, and insufficient constitutional awareness. The specialized schools are still to abandon their soviet era disciplinary methods and the children with special needs are imprudently sent off to the institutions that have no tools and conditions for their cure and rehabilitation. A state with any self respect should guarantee the environment required for continued existence worthy of human dignity even for the weakest members of the society.

The state of Estonia has been formed in order to protect both internal and external peace. The scandals associated with the management of the Defence Forces and organization of the military intelligence and the events of April 2007 raise a question whether the legislative base of Estonian national defence and law enforcement is sufficient to ensure the peace in internal and external spheres?

During the past 15 years the five compositions of the Riigikogu, ten Governments of the Republic and ten Ministers of Defence have failed to govern the organisation of the Defence Forces by legislation. The lack of the Defence Forces Administration Act is not just a cosmetic constitutional deficiency. The legislative base that disregards the requirements of constitution and does not comply with the contemporary needs of the Defence Forces can cause irreparable damage to the national security.

The Law Enforcement Act has been presented to the Riigikogu and we can only hope that from numerous prolific debates a proper modern base for law enforcement will emerge at last. Whereas we should not forget that the public law functions associated directly with the state monopoly of power, which execution can cause intensive breach of some of the most significant fundamental rights and freedoms of an individual, generally cannot be transferred from state to the private sector.

In several past years the number of petitions submitted to the Chancellor of Justice has increased the limit of two thousand (2,000), however, in 2006 I received 1858 petitions. The slight decrease in the number of petitions can be accounted to the increased awareness of the people regarding the competence of the Chancellor of Justice. The largest amount of petitions were submitted in relation to the criminal execution proceedings and imprisonment power, social welfare and social law, ownership reform, medical and health law issues, and also regarding the pre-trial criminal procedure.

This report will provide an independent review of the legal order in Estonia as of 2006 for the Riigikogu and the legal community, aiming to assist the Riigikogu in the task of making the Estonian legal order more human-centred and bringing it closer to the European traditions.

Yours faithfully,

Allar Jõks

Tallinn, 1st September 2007

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INTRODUCTION

The Chancellor of Justice is neither a part of legislative, executive or judicial power, nor is he a political or law enforcement authority. Pursuant to the Constitution, the Chancellor of Justice is an individual and independent constitutional institution incorporating the functions of guardian of constitutionality and general authority for receipt of petitions.

According to the Constitution, the Chancellor of Justice is foremostly a body who reviews the legislation of general application of the legislative and executive state authorities and local authorities to verify its conformity with the Constitution and the laws. The execution of this task can climax with the petition filed with the Supreme Court to declare by a decision that particular act or regulation is unconstitutional.

Another important function of the Chancellor of Justice is the function of the ombudsman vested in him by the Chancellor of Justice Act, entered into force on 1st June, 1999, authorising him to verify that the state agencies comply with the fundamental rights and freedoms of individuals and the principles of good governance. With the amendments to the Chancellor of Justice Act, entered into force on 1st January, 2004, the scope of the ombudsman functions has been extended by the Riigikogu: the Chancellor of Justice has now furthermore to verify that the local authorities, legal persons governed by public law and persons governed by private law performing public duties comply with the fundamental rights and freedoms of the individuals and the principles of good governance. From 18 February, 2007, pursuant to the Article 3 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Chancellor of Justice is also considered a national preventive mechanism.

In performing these closely related duties, the Chancellor of Justice focuses on the review of compliance with the fundamental constitutional values like human dignity, democracy, the rule of law and social state. Whether a law or a regulation of the Government, Minister, or local authority is in conformity with the Constitution can to a large extent be assessed on the basis of information that the Chancellor of Justice gains while verifying the guarantee of fundamental rights.

The Chancellor of Justice verifies conformity of legislation with the Constitution and the activities of persons performing public functions either based on the petitions submitted to him or on his own accord.

Due to the Chancellor's competence as an ombudsman, all persons claiming that their rights have been violated or they have been treated contrary to the principles of good governance have a right to file a petition with the Chancellor of Justice asking him to verify whether a state agency or local government body, a legal person in public law, or a natural person or legal person in private law performing public functions complies with the principles of guaranteeing the fundamental rights and freedoms and good governance. The task of the Chancellor of Justice as an ombudsman is to protect individuals against arbitrary treatment of the state authorities.

The number of the investigations of the Chancellor of Justice performed on his own accord has increased yearly. On his own accord, the Chancellor of Justice often verifies the guarantee of the fundamental rights and freedoms of such individuals who by themselves might be unable to sufficiently fend for themselves in protecting their rights or whose freedom might be restricted. Therefore, in 2006, the Chancellor of Justice and his advisers visited Kaagvere Special Boarding School, Children's Safe House of Tallinn, Imaste Residential Educational Institution, the Psychiatry Clinic of the Viljandi Hospital Foundation and the Psychiatry Clinic of the North Estonian Regional Hospital Foundation in order to verify the guarantee of the fundamental rights and freedoms of persons.

The Chancellor of Justice has also publicly raised important issues that concern many people, e.g. the topics associated with the availability of state legal aid, protection of personal data or the planning and building law.

Upon receiving a petition from an individual, the Chancellor of Justice first assesses whether to accept it for further proceedings or not. He will reject the petition if its resolution is not within his competence. In that case, the Chancellor of Justice will advise the petitioner of the appropriate institution for addressing the issue, and, whenever possible, will forward the petition to the competent state or local authority agency for response. The Chancellor of Justice can also reject a petition if it is clearly unfounded or if it is not clear from the petition what constituted the alleged violation of the petitioner's rights or principles of good governance.

The Chancellor of Justice may reject a petition if the person can file an administrative appeal or use other legal remedies or if there are challenge proceedings or other non-compulsory pre-trial proceedings pending or if the petition was filed more than one year after the date on which the person became, or should have become, aware of the violation of his or her rights. In such cases the Chancellor's decision is based on the right of discretion, taking into account the circumstances of each particular case.

The Chancellor of Justice will also reject a petition if a court judgment has been made in the matter of the petition, or the matter is concurrently subject to pre-trial complaint proceedings or judicial proceedings (e.g. when a complaint is being reviewed by an individual labour dispute settlement committee or any other similar pre-judicial body). The Chancellor of Justice can not, and is not allowed to duplicate these proceedings. This principle derives from the premise that the facility of filing a petition with the Chancellor of Justice is not deemed to be a legal remedy. Instead, the Chancellor of Justice is a general authority of receipt of petition, who has no direct option to use any measures of enforcement and who adjudicates cases of violation of individual's rights if the said individual does not have access to any legal remedies or they are unable to use the available remedies for some reason.

If the Chancellor of Justice decides to accept a petition for proceedings, he will inform the petitioner and will mention the measures that he has taken or intends to take to adjudicate the petition.

The proceedings conducted by the Chancellor of Justice are characterised by the freedom of choice of the form, and the principle of purposefulness. The form and other details of the Chancellor's proceedings are determined by the Chancellor himself based on the principles of purposefulness, effectiveness, simplicity, and expedition, trying to avoid excessive cost and inconvenience to persons. The principle of the freedom of form is applied if the matter of whether and how the proceedings must be performed are not prescribed by law.

In addition to afore mentioned, the Chancellor of Justice also proceeds from the principle of investigation when processing a petition. In other words, the Chancellor will ascertain the facts that are essential to the case being processed. The Chancellor of Justice will carry out efficient and impartial investigation, in the course of which he has the right to collect information and documents pertinent to the case. The main procedural acts available to the Chancellor of Justice are the information requests and the hearing and recording of statements and testimonies. If deemed necessary, the Chancellor of Justice can also apply other types of procedural measures, e.g. obtain the opinion of specialists in issues relevant to the adjudication of a matter.

If the Chancellor of Justice finds that a particular legislation of general application is unconstitutional or unlawful, he may propose to the body that passed the legislation (e.g. a Minister, or a council of local authority) to bring the legislation into conformity with the Constitution or the law, setting a deadline thereof that is no less than twenty days. If the issuer of the legislation of general application in question disregards the suggestions made by the Chancellor of Justice, the Chancellor has the right to file a petition with the Constitutional Review Chamber of the Supreme Court that the legislation of general application or a provision thereof be repealed.

The Chancellor of Justice can also make reports to draw the attention of legislators to various problems in legislation. For example, during the time period covered by this report, the Chancellor of Justice notified the Riigikogu of the constitutional problems arising in compensating the difference between

parental benefit and maternity benefit pursuant to the Parental Benefit Act and to the subsection 21 (1) of the Collective Labour Dispute Resolving Act.

Ombudsman proceedings are completed when the Chancellor of Justice formulates his or her position, assessing whether the activities of the agency under supervision are legal and in compliance with the principles of sound administration. The Chancellor of Justice may provide criticism, suggestions and express his or her opinion in other ways or make proposals for the elimination of the violation, change the administrative practice or interpretation of a norm, or to amend the norm itself. The last option is used if, in the course of the proceedings, it appears that the injustice arising from the case is not caused by the application of the law but rather lies with the law itself. The position of the Chancellor of Justice shall be communicated in writing to the petitioner and to the agency under supervision which participated in the proceedings. Although the recommendations of the Chancellor are not legally binding, the proposals made in the Chancellor's memorandum are almost always taken into consideration. The position of the Chancellor of Justice is deemed final and can not be contested in the court of law.

In addition to the constitutional review of legislative acts and the function of the ombudsman, the Chancellor of Justice also performs other tasks prescribed by law. The most important of these are: (a) submitting his opinion to the Supreme Court in constitutional review court proceedings, as prescribed by the Constitutional Review Court Procedure Act, (b) initiating disciplinary proceedings against judges, the relevant right being provided by the Courts Act.

From 2004, the Chancellor of Justice also has a competence to adjudicate discrimination disputes between private individuals. The Chancellor of Justice can adjudicate such disputes only in the form of conciliation procedure.

Everyone has the right of recourse to the Chancellor of Justice for the conduct a conciliation procedure if he or she finds that a natural person or a legal person in private law has discriminated against him or her on the basis of sex, race, nationality, colour, language, origin, religious or other convictions, property or social status, age, disability, sexual orientation or other attributes specified by law. The Chancellor of Justice does not have the right to initiate conciliation procedure on his own accord.

If the Chancellor of Justice decides to initiate conciliatory proceedings to resolve a discrimination dispute based on the petition filed with him, he shall send a copy of the petition to the respondent whose activities are contested in the petition and shall set a term for submission of a written response. In the written response, the respondent may propose to resolve the dispute. If the petitioner consents to the proposal to resolve the dispute and such resolution ensures a fair balance in the rights of the parties, the Chancellor of Justice shall deem the petition to be resolved and shall conclude the proceedings. In the case of disagreement, a petition may be reviewed in a session in the presence of the petitioner and respondent or their representatives. If the petitioner and respondent consent to the proposal of the Chancellor of Justice, the Chancellor of Justice shall approve the agreement and performance of said agreement is mandatory to the parties to conciliation proceedings. If the agreement is not performed within thirty days as of the date on which a copy of the agreement is received or within another term prescribed in the agreement, the petitioner or respondent may submit the agreement approved by the Chancellor of Justice to a bailiff for enforcement. The parties have the right too terminate the conciliation proceedings at any time. If conciliation proceedings are terminated upon the request of the parties, or the Chancellor of Justice has declared the failure of the parties to reach an agreement, the applicant has the right of recourse to a court or to an authority conducting pre-trial proceedings, as provided by law for the protection of his or her rights. If the conciliation proceedings are terminated or the Chancellor of Justice has stated failure to reach an agreement, the petitioner has the right of recourse to a court or to an authority conducting pre-trial proceedings as provided by law for the protection of his or her rights.

The following parts of the report will reflect the activities performed by the Chancellor of Justice and his office in 2006. The annual report of the Chancellor of Justice is divided into four major parts:

The first part of the report, pursuant to the Section 143 of the Constitution and subsection 4 (1) of the Chancellor of Justice Act, provides an overview on the conformity of legislation of general application of the legislative and executive powers and of local governments with the Constitution and the laws.

The second part of the report will provide an overview of the communication and interaction between the Chancellor of Justice and the executive powers and his activities both in constitutional review of the legislation of general application and in reviewing the guarantee of constitutional rights and freedoms and the practices of good governance. Also the ex-ante verification activities of the Chancellor of Justice by participating in the sessions of Government of the Republic is addressed as well as his new responsibility arising from the law in performing the functions of a national preventive mechanism in the activities against torture and other cruel, inhuman or degrading treatment or punishment.

The second part of the report is structured according to the scopes of governance of the Ministries. The aim of such division is to clearly notify the government, parliament and general public which Ministries have areas in which the Chancellor of Justice has spotted problems. However, the issues highlighted are not meant to form an exhaustive list and do not constitute grounds to the claim that other areas of governance are free of any problems. In his annual report the Chancellor of Justice can only describe the cases that have brought to his attention and he has information about.

The annual report communicates an independent bystander opinion to the Government and the Parliament, enabling them to enact measures to raise the legitimacy of their activities. Additionally the Chancellor of Justice shall pay attention to the improvement of the supervisory measures.

In a democratic constitutional country, the main objective of the notification of the general public is to provide feedback to the supreme power of state. The political responsibility lies with a Minister and he or she is the one who has access to the critical instruments required for solving that problem. The public has a right learn of the issues of concern pertaining to the state governance as well as to know whose responsibility it is to find solutions to these problems.

In the light of the above principles, the second part of the report explores the main developments that have occurred in the scopes of responsibility of all the ministries and the proceedings of the Chancellor of Justice thereto. Each chapter begins with a brief description of the particular area of government, followed by the concise summaries of the most substantial proceedings conducted based on petitions or initiated by the Chancellor of Justice on his own accord.

The third part of the report observes the performance of other responsibilities of the Chancellor of Justice that are prescribed by the law. Separate chapters are dedicated to the in-depth overview of the activities of the Chancellor of Justice in initiating disciplinary proceedings against judges and in promoting the principles of equality and equality of treatment. A statistical overview of the proceedings conducted based on petitions or initiated by the Chancellor of Justice on his own accord in 2006 has been provided at the closing of the part three.

The fourth part of the report summarises the activities of the Office of the Chancellor of Justice during the time period covered by the report, including the spheres of organisational development, public relations, and international cooperation.

The ending of the report contains the list of keywords and abbreviated names of the acts and legal documents referred to in the report and also the contact information for the Chancellor of Justice and the staff in his office.

PART 1.

THE CHANCELLOR OF JUSTICE AND THE RIIGIKOGU

I INTRODUCTION

The co-operation between the Chancellor of Justice and the Riigikogu takes many different forms. The Chancellor of Justice is reviewing the legislation passed by the Riigikogu for the conformity with the Constitution. The members of the Riigikogu have the right to submit interpellations and formal inquiries in writing to the Chancellor of Justice. The generally adopted practice is that the task forces of the Riigikogu, predominantly its standing committees, recourse to the Chancellor of Justice seeking his opinion on the draft Acts introduced to the legislative proceeding of the Riigikogu.

In 2006, the Chancellor of Justice made just one proposal to the Riigikogu (one and two proposals in 2004 and 2005, respectively) and two reports (four and seven reports in 2004 and 2005, respectively). This part of the annual report includes the full texts of the proposal and reports submitted within the period covered by this annual report in verbatim as these were presented to the Riigikogu and also an overview of the subsequent course of proceedings in the Parliament. The proposal of the Chancellor of Justice of bringing the Political Parties Act into conformity with the Constitution eventuated in the dispute in the Supreme Court despite of the fact that the Supreme Court had previously assumed the common position. The issues highlighted in both reports remained without substantive resolution and were limited to the acknowledgement of such problems.

During the time period covered by the report, the Chancellor of Justice replied to six interpellations (seven and two interpellations in 2004 and 2005, respectively) and to three formal questions presented in writing (seven questions in 2004 and 2005). The topics addressed in the interpellations were as follows: rejection of the person's nomination due to his or her membership in political parties, use of the printed matter issued by the state and local government for political propaganda, legal basis for the drafting and adopting of the strategy for the use of EU structural funds, adding the religious education to the curricula of upper secondary schools, the legislative proceeding of the Riigikogu regarding the draft act regularising the direct elections of the President, participation of the heads of the local governments at the hearings of the issues pertaining to their economic interests, and the application of the Anti-corruption Act at the local government level. The formal questions in writing submitted to the Chancellor of Justice inquired about the permissibility of financing the political party through the issue of debt instruments and the rights of the Minister of Internal Affairs to establish prohibition on organising a public assembly, and also about the hazardous loads. This report focuses in greater detail on the proposed issue of debt instruments by Estonian Centre Party as a case that managed to attract enormous public interest.

The standing committees of the Riigikogu had recourse to the Chancellor of Justice in sixteen cases during the time period covered by this report in order to obtain his opinion on the draft legislation introduced to the legislative proceeding. The largest number of requests for opinion was submitted by the Constitutional Committee and the Legal Affairs Committee of the Riigikogu. In addition, the Chancellor of Justice presented his position in regards of the right to vote of the persons detained in the custodial institutions – a position that is discussed in more detail further below in this report.

A substantial part of the annual report of the Chancellor of Justice is to address certain legal issues thoroughly, dividing them into the articles according to their respective areas. These issues being addressed have been in the increased focus during the report year. This report contains in-depth overview of six problematic issues pertaining to the legal order, starting from the social situation and ending with the problems associated with the delegation of the administrative duties. In the main part these selected overviews are concise generalisations of the proceedings of the Chancellor of Justice together with the recommendations arising thereof for the improvement of legislative drafting.

II PROPOSALS TO THE RIIGIKOGU

1. Proposal to the Riigikogu on bringing the Political Parties Act into conformity with the Constitution of the Republic of Estonia

On 17 May 2007, the Chancellor of Justice submitted a proposal to the Riigikogu on bringing the Political Parties Act into conformity with the Constitution of the Republic of Estonia.

After analysing the Political Parties Act passed by the Riigikogu pursuant to the subsection 139 (1) of the Constitution and subsection 1 (1) of the Chancellor of Justice Act, I find that the Political Parties Act is in conflict with the principle of democracy provided in the subsection 1 (1) and section 10 of the Constitution and with the fundamental right of a political party pursuant to the second sentence of the subsection 48 (1) of the Constitution in the part pertaining to the failure to provide sufficiently efficient supervision over the funding of the political parties.

Therefore I shall propose to the Riigikogu to bring the Political Parties Act into conformity with the principle of democracy provided in the subsection 1 (1) and section 10 of the Constitution and with the requirements of the fundamental right of a political party pursuant to the second sentence of the subsection 48 (1) of the Constitution.

1.1. The facts and the course of proceedings

1. The Political Parties Act was passed on 11 May 1994 and entered into force on 16 June 1994. Ever since the Act has been subjected to the significant amount of amendments of which several can be considered conceptual. The part of the Act regulating the funding of the political parties has generated widespread discussions and has been subjected to several amendments. The significant amendments regarding the funding of the political parties were made into the Political Parties Act in 2003.

2. The Political Parties Act Amendment Act and pursuant thereof also the amendment acts of other relevant acts were passed on 18 December 2003 and entered into force on 1st January 2004. This Act made significant amendments to the Chapter 2^1 of the Political Parties Act regulating the funds and assets of a political party and the use thereof. Explanatory memorandum to the draft the Political Parties Act Amendment Act declares the purpose of the act to be the "adjustment and organisation of the funding of the political parties and avoidance of the political corruption elements in the activities of the political parties".

The most significant amendments pertaining to the funding of the political parties were as follows:

a) In comparison with the earlier regulation, the major change was prohibiting the donations to the political party by legal entities;
b) Second amendment was a restriction, so a political party is only allowed to take a loan solely from credit institutions. Previous regulation did not prescribe for the regulation pertaining to borrowing;
c) Third consequential amendment related to the donations made in cash. According to the earlier regulation, a political party had a right to accept donations in cash from natural persons in the amount of up to 10,000 Estonian kroons per annum per donor. The new valid regulation does not impose such a limit;
d) Additionally, the rules for financial audit were amended. Previously, a political party was required to submit to the non-profit associations and foundations register a comprehensive statement on the funds and assets received by the political party during the quarter (indicating the exact date received, type, monetary value and source) and also disclose this statement at the official web page of the political party. Everyone had the right to examine this statement at the non-profit associations and foundations register free of charge. The current regulation

requires that a political party has to maintain a register on the donations received and disclose this register and make it available at their official web page;

e) According to the earlier regulation, the political party was required to submit a report regarding all the expenditures made for and during conducting an election campaign by the political party and its candidates to the National Electoral Committee. The current regulation prescribes that the respective report has to be submitted to the Select Committee of the Riigikogu on the Application of the Anti-Corruption Act.

3. In the overview submitted on 30 September 2003 on the conformity of the legislation of general application with the Constitution and laws of the Republic of Estonia and on the guarantee of the constitutional rights and freedoms, I directed the attention of the Riigikogu to the problems associated with the funding of the political parties: "Pursuant to the Constitution, Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. How can we simultaneously guarantee the sufficient funding of the political parties representing the people and the independence of the political parties? The keywords hereto should be the avoidance of political corruption and transparency of the funding. […] I believe that instead of prohibiting the donations, we should shift our focus on the transparency and audit of the funding. Otherwise we may suffer from a painful boomerang effect stemming from the restriction of the donations made by companies, i.e. private economic interests will continue to have an impact on the political will in the future, however, it will be remarkably more concealed."[1]

4. In the overview submitted on 30 September 2004 on the conformity of the legislation of general application with the Constitution and laws of the Republic of Estonia, I found that there are still various problems related to the funding of the political parties, despite of the amendments to the Political Parties Act entering into force in the beginning of 2004. I affirmed: "The amendments made to the Political Parties Act in the last year were argued to be needed in order to avoid political corruption and to ensure the transparency of funding. When analysing and comparing the financing schemes and audit methods allowed by the Political Parties Act, I have come to a conclusion that there have not been any significant breakthroughs towards the set aims. […] From the constitutional perspective, it is important that the valid regulation pertaining to the Political Parties Act that restricts both the rights of the companies to dispose of their assets at their discretion and the fundamental right of a political party to seek their own sources of financing, fails to achieve the goals set in the draft act due to the weak audit procedures and gaps in regulation. The restrictions of the fundamental rights of which performance cannot be monitored due to the lack of efficient measures, are not constitutional."[2]

5. On 9 March 2007, the Select Committee of the Riigikogu on the Application of the Anti-corruption Act had recourse to me. The Committee asked for my help in the interpretation and application of the provisions of the Political Parties Act. In their petition they expressed a regret that the legislator has failed to keep their publicly articulated promise to introduce a method for audit and supervision of the funding of the political parties.

6. The actual funding of the political parties compliance with the requirements of law and the efficiency of the monitoring of the financing has been often questioned. Thus, the press and media has revealed various cases regarding the funding of the political parties, and in some cases the officials have taken measures and initiated investigation procedures in order to ascertain the facts pertaining to the case. The following are some examples of such cases attracting the most attention, and I must draw your attention to the evident derogations from the provisions of the law.

1 Edited copy of verbatim records of the Riigikogu of 30 September 2003, available in Estonian at http://www.riigikogu.ee.

2 Edited copy of verbatim records of the Riigikogu of 30 September 2004, available in Estonian at http://www.riigikogu.ee.

1.1.1. Concealment of the donor

1.1.1.1. Issue of debt instrument

7. Based on the materials issued by the press and media, the Estonian Centre Party issued dept instruments in the volume of 10,000,000 Estonian kroons in March – April of 2003. The issue of dept instrument was organised by investment bank AS Lõhmus, Haavel & Viisemann (LHV). LHV itself did not purchase any of the debt securities; they also did not guarantee the issue. The public has no information on who were the investors of the issue and therefore the public lacks the knowledge of who were financing the Estonian Centre Party. LHV has disclosed neither the number nor the names of the investors.[3] The Estonian Centre Party maintains a position that in the transaction in question, the creditor for the Party was the LHV investment bank and who were the particular buyers of the debt securities of 100,000 Estonian kroons each, the Party denies to have any knowledge of (at least as of April 2003).[4] The 2003 first quarter report of the Estonian Centre Party classifies the funds obtained via the issue as "a loan (issue of debt instrument) and LHV as the source of financing.

1.1.1.2. R-Hooldus

8. In October 1997, the Estonian Reform Party formed a private limited company (Osaühing – OÜ) R-Hooldus which indicated areas of activity were property management services, organisation of seminars etc. Several members of the management board of the company were the leading politicians of the Estonian Reform Party at that time. OÜ R-Hooldus financed the election campaign of the Estonian Reform Party at the Riigikogu election of 1999 in the amount of 2,145,141 Estonian kroons. During that time, the donations from legal entities were not prohibited. However, the company itself, R-Hooldus, did not have an income.

1.1.1.3. Donations from private persons

9. In August 2005, the attention of the press and media was drawn to the persons of two donors, living at Kääriku, who both had made vast donations (100,000 Estonian kroons each) to the Estonian Centre Party. It was attracting the media attention for the reason that according to the information available for the press and media, these individuals were both simple blue collar workers, who in addition were not members of any political party.[5] Furthermore, the Estonian Tax and Customs Board has been sending mixed signals at different times on whether the Board investigates such cases pertaining to the funding of the political parties or not.[6]

1.1.2. Concealment of the donation

1.1.2.1. K-kohuke

10. Just shortly prior to the local government elections of 2005, the Riigikogu, among other things, made amendments to the Local Government Council Election Act, prohibiting political outdoor advertisements for the time of active election campaigning by section 6^1 of the Act. The prohibition period was established from 11 September 2005 to the elections held on 16 October 2005. On the 1st and 2nd October 2005, huge outdoor advertisement posters bearing the image of huge

3 Mr. Rain Tamm, Executive of the LHV, has admitted that Estonian companies were buying the debt securities: The Supervision Authority approves the issue by the Estonian Centre Party. – Postimees Online, 8th April 2003, available at: http://vana.www.postimees.ee/index.html?op=lugu&rubriik=3&id=96247&number=776.

4 The Estonian Centre Party fends off allegations. – Postimees Online, 4th April 2003, available at: http://vana.www.postimees.ee/index.html?op=lugu&rubriik=5&id=95834&number=773; The buyers of the Estonian Centre Party debt securities and their interest rate remain a mystery. – Postimees Online, 5th April 2003, available at: http://vana.www.postimees.ee/index.html?op=lugu&rubriik=3&id=95920&number=774.

5 Blue collar workers to donate 200,000 Estonian kroons to a political party. – Postimees Online, 25th August 2005, available at: http://www.postimees.ee/250805/esileht/175063.php.

6 For comparison: Aivar Sõerd: The Tax Board does not investigate the funding of politicians. – Postimees Online, 30th April 2003, available at: http://vana.www.postimees.ee/index.html?op=lugu&rubriik=3&id=99024&number=794; The Tax Board is able to investigate the background of the donors. – Postimees Online, 26th August 2005, available at: http://www.postimees.ee/260805/esileht/siseuudised/175172.php.

letter K set against green background and with bottom text stating “For everyone!”, “Does care!” appeared on the streets. In the public opinion, the letter K set against the green background was remarkably similar to the logo of the Estonian Centre Party i.e. letter K together with four leaf clover, and “For everyone!” is a slogan used by the Estonian Centre Party. This advertising campaign was commissioned by OÜ Kohuke, carried out by advertising agency AS Idea AD and media company Media Planning Group Eesti OÜ. These posters created an extensive discussion in the society, trying to figure out whether this was in fact a concealed donation to the Estonian Centre Party and a covert advertisement for the Estonian Centre Party during the time period when the electoral advertisements were prohibited. At that time the Estonian Centre Party denied promptly any association with the K-kohuke curd snack advertisement.

11. Based on the ruling by the Supreme Court on 14 November 2005[7], the National Electoral Committee stated in their decision of 18 November 2005 that during the political outdoor advertisement prohibition period, K-kohuke curd snack was advertised in a way that was unambiguously associable with the Estonian Centre Party participating in the elections: “From the objective viewpoint, posters, bearing a combination of characters, words and colours that were very similar to the distinguishing visuals of the Estonian Centre Party, were displayed publicly during the time period where all political outdoor advertising was prohibited pursuant to the section 6^1 of the Local Government Council Election Act. These advertisement posters were directly associated with the Estonian Centre Party also in media. […] Based on afore mentioned, the National Electoral Committee finds that the advertisement under dispute constitutes prohibited political outdoor advertisement for the purposes of the section 6^1 of the Local Government Council Election Act.”[8] Despite of the fact that the National Electoral Committee found that these advertisements amounted to political outdoors advertising, the election results were never declared invalid due to the lack of evidence regarding this advertisement having a significant or probable impact on the results of the election.[9]

12. The Select Committee of the Riigikogu on the Application of the Anti-corruption Act asked the Estonian Centre Party to duly reflect the expenditures associated with the advertisement for the curd snack in their election campaign expenditure statement, however, the party refused to do so. The Committee submitted an inquiry in writing to the AS Idea AD, who was responsible for producing the outdoor advertisements for K-kohuke, expecting to learn the exact cost of the campaign and the entity paying for it.[10] AS Idea AD responded that the campaign was commissioned by OÜ Kohuke, refusing to disclose the information related to the payment for the campaign as according to the agreement concluded between the parties such information was deemed confidential.

13. The Select Committee of the Riigikogu on the Application of the Anti-corruption Act had recourse to the Public Prosecutor’s Office asking for verification whether the advertisement campaign for K-kohuke constituted a concealed receipt of donation by the Estonian Centre Party. The Public Prosecutor’s Office initiated criminal proceedings on 27 December 2005; investigation is carried out by the Security Police Board. The proceedings were initiated pursuant to section 402^2 of the Penal Code: “Violation of prohibition on acceptance of donations to political party.”

14. On 29 December 2005, the Northern Police Prefecture prepared a misdemeanour report against AS Idea AD and Media Planning Group Eesti OÜ and against the heads of the both companies as private persons for the violation of the section 6^1 of the Local Government Council Election Act. The judgment in the misdemeanour matter will be made by Harju County Court by the end of May.

7 Judgment of the Constitutional Review Chamber of the Supreme Court of 14th November 2005, case No. 3-4-1-27-05.
8 Resolution of the National Electoral Committee of 18th November 2005, resolution No. 39, available in Estonian at: http://www.vvk.ee/vvk-otsus-05_39.rtf.
9 The Supreme Court concurred: Judgment of the Constitutional Review Chamber of the Supreme Court of 30th November 2005, case No. 3-4-1-34-05.
10 The Committee demanding the Centre Party to reflect their advertising costs. - – Postimees Online, 13th December 2005, available at: http://www.postimees.ee/141205/online_uudised/186050.php.

15. The Consumer Protection Board imposed a fine in the amount of 25,000 Estonian kroons on AS Idea AD for misleading advertising under the provisions set out in the Advertising Act. On 6 March 2006 the Harju County Court annulled the fine. The Consumer Protection Board has to pay 55,000 Estonian kroons to AS Idea AD for legal costs.

16. The Advertisement Tax Department of the Tallinn City Enterprise Board issued a precept to Clear Channel Estonia OÜ and OÜ Asterix, who were responsible for making the advertising spaces available for the K-kohuke campaign. The intent of the precept was to discontinue the public disclosure of an advertisement that is in conflict with the provisions of the Advertising Act. The Tallinn City Government dismissed a challenge filed on the precept issued by the Tallinn City Enterprise Board.

17. Thus, several institutions with varying competence attempted to resolve the situation related to the K-kohuke advertisements, and instead of finding efficient solution, this evolved into controversial situation. Hence, one of the parties involved, the representative of the Media Planning Group Eesti OÜ, described the situation as follows: “We are being accused in two acts that are mutually exclusive – that there is this advertisement no one can understand clearly and therefore this advertisement is misleading, whereas the police claims that our advertisement is political and it can be clearly understood.”[11]

1.1.2.2. Res Publica Foundation

18. The press and media revealed a case of a major donor (B. Dantchenko) had transferred 300,000 Estonian kroons to the Res Publica Party, yet this donation was not reflected in the register on the donations received. Mr. Juhan Parts, the party chairman and prime minister at the time, rationalised at the session of Riigikogu on 8 March 2004: “…in the response to the relevant interpellation that B. Dantchenko “has supported the affiliated organisations of the party in the amount of 300,000 Estonian kroons.” […] The register on the donations received that is set up as prescribed in the Political Parties Act, only reflects the donation amounts that are transferred to the bank accounts of the political party. However, ever since its foundation, the Res Publica Party has always adhered to the best practises of disclosing the donors who have supported the activities of the party through affiliated organisations. The names of all persons who have supported our party and its affiliates in the fourth quarter, together with the exact donation amounts, have been disclosed in the press release issued on 9 January 2004 and also at the web page of the party.”[12] Clarifying the concept of “an affiliated organisation”, the prime minister continued: “Most of the European-like political parties are employing affiliated organisations in order to keep apart separate activities, the term itself might not be a precise legal term, however, these organisations are used for drawing a clear line between the political party as a political organisation and other activities that are needed for political activities. I can give you an example based on Res Publica: for example, there is the Res Publica Foundation whose main areas of activity are the training of the party members, promoting the world view of the political party, analysing the politics and society and development of such analytical pursuits. All these are activities that in European-like political party practises are usually separated from the party itself, and in principle, each individual has always a freedom of choice whether they are willing to support our party or our worldview, whether they wish to support the party directly or they wish to support this particular worldview though the affiliated organisations; these are wide spread good practises.” In responding to the question on how many of such affiliated organisations the Res Publica Party actually has, the prime minister explained: “Currently the main affiliated organisation is the Res Publica Foundation. […] There have been the economic activities of private limited company Res Publica. This company is currently undergoing liquidation proceedings.”

1.1.3. Annual report and the disclosure thereof

19. An obligation to disclose an annual report of a political party by publishing it in the *Riigi Teataja*

11 The Kohuke Saga will continue in court. – SL Õhtuleht, 29th December 2005, available at: http://www.sloleht.ee/index.aspx?id=188622.
12 Edited copy of verbatim records of the Riigikogu of 8 March 2004, available in Estonian at http://www.riigikogu.ee.

Lisa (Appendix to the State Gazette) was added to the Political Parties Act on 1st July 1999. Several political parties have repeatedly failed to publish such annual economic activity report in the *Riigi Teataja Lisa*. For example, in the electronic version of the Riigi Teataja Lisa only the Estonian Social Democratic Party[13] and the Res Publica Party[14] have published their 2004 annual reports; the annual reports of 2003 have been published by the People's Union of Estonia[15] and the Res Publica Party[16].

20. An obligation to disclose an annual report of a political party on the web page of the political party entered into force on 1st January 2004. Therefore, by present date, the annual reports of 2003 and 2004 should be available at the web sites of the political parties. So far this obligation has been fulfilled by the Estonian Reform Party, the People's Union of Estonia and the Estonian Social Democratic Party. On the web site of the Estonian Centre Party, only the annual report of 2004 is available, the Pro Patria Union has published their 2005 annual report, and no reports at all are available at the web site of the Res Publica Party.

21. In comparing the annual economic activity reports of the political parties, it is evident that these have been drafted with different degree of detail. In addition, it is often quite challenging to locate them.

1.2. Most significant relevant provisions

22. Predominantly are relevant the following provisions of the chapter 2^1 of the Political Parties Act: "Assets and Funds of Political Parties":

"§ 12^1. Assets and funds of political parties
(1) Only membership fees established by the articles of association of a political party, allocations from the state budget received pursuant to this Act, donations of natural persons and income earned on the assets of the political party are the source of the assets and funds of the political party.
(2) Political parties shall not accept anonymous or concealed donations.
(3) The assignment of any goods, services, proprietary or non-proprietary rights to a political party under the conditions which are not available to other persons is deemed to be a concealed donation.
(4) A political party may enter into a loan agreement or credit agreement if the lender or creditor is a credit institution and the agreement is secured by the assets of the political party or by the suretyship of its member.

§ 12^2. Annual report
(1) In order to prepare an annual report, political parties which receive allocations from the state budget shall conduct an audit.
(2) The general meeting of a political party or, pursuant to the articles of association, a substituting body thereof, shall approve the annual economic activity report each year and shall publish the report also on the webpage of the political party. The annual report together with the annexes prescribed by law shall be published in the *Riigi Teataja Lisa.*

§ 12^3. Accessibility of donations
(1) A political party shall maintain a register of donations received by the political party. The political party shall publish the register of donations on its webpage.
(2) The register of donations shall set out the names of the donors, the details thereof and the value of the donations. In the case of a non-monetary donation, the value of the donation shall be determined by the donor.

[13] https://www.riigiteataja.ee/ert/act.jsp?id=920972.
[14] https://www.riigiteataja.ee/ert/act.jsp?id=919192.
[15] https://www.riigiteataja.ee/ert/act.jsp?id=788186.
[16] https://www.riigiteataja.ee/ert/act.jsp?id=788179.

(3) The accuracy of the information in a register of donations shall be ensured by the leadership of the political party.
(4) Political parties shall not accept anonymous donations or donations from legal persons. If possible, political parties shall return such donations to the donor. In the absence of the possibility, political parties shall transfer the donations into the state budget within ten days where it is added to the funds to be allocated to political parties from the state budget in the following budgetary year.

§ 12^4. Accessibility of financing of election campaign
(1) Political parties shall submit, within one month after election day, a report to the committee specified in subsection 14 (2) of the Anti-corruption Act concerning expenses incurred and sources of funds used for the conduct of the election campaign in Riigikogu or local government council elections or elections to the European Parliament by the political party, non-profit associations specified in § 12^6 of this Act or persons who stood as candidates in the list of the political party.
(2) The committee specified in subsection (1) of this section has the right to demand additional documents concerning expenses incurred and sources of funds used by political parties, non-profit associations specified in § 12^6 of this Act or persons who stood as candidates.

1.3. Legal rationale

1.3.1. Principle of democracy (subsection 1(1) and section 10 of the Constitution) and fundamental right of a political party (second sentence of the subsection 48 (1) of the Constitution)

23. The subsection 1 (1) of the Constitution stipulates that Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. By the said provision and by section 10 of the Constitution is expressed the principle of democracy as one of the fundamental principles of the Constitution. Section 10 of the Constitution says that the rights, freedoms and duties set out in the second chapter of the Constitution shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law.

24. The principle of democracy is one of the general principles and fundamental values valid in the European Judicial Area[17]. "Democracy […] means exercise of power with the participation of people and decision making on critical leadership scale on the most extensive and concerted bases possible."[18] The principle of democracy conveys that the supreme power of state is vested in the people. Democracy is people's governance over people for the benefit of people.

25. Democracy of the constitution is representative democracy. In the case of representative democracy, the supreme power of state is vested in the people; however, that power is executed by various state authorities in the name of the people. The principle of democracy is aimed to the legitimacy of the power of state – in order to guarantee legitimacy, all the decisions adopted by and activities of the power of state, have to be back-traceable to the will of the people, and the people shall have an efficient influence over the execution of state authority. "The principle of democracy covers the issues associated with the founding, legitimating, and supervising of the state organs and it has an impact during all the steps of the development of political will."[19]

26. In order to guarantee the legitimacy of the substantive decisions of a legislator, the requirements are derived from the principle of democracy for the procedure and organisational side of the execution of the power of the state. The prerequisite for the legitimacy of the legislative power is the conformity of the elections and the process of developing the free will of the people with the requirements of democracy.

[17] Judgment of the Constitutional Review Chamber of the Supreme Court of 17th February 2003, case No. 3-4-1-1-03, clause 15.
[18] Judgment of the Constitutional Review Chamber of the Supreme Court of 21st December 1994, case No. III-4/1-11/94.
[19] M. Ernits. Comments to section 10. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to clause 10 (3) (3).

27. The principle of democracy incorporates the principle of political party democracy[20] that in turn is related to the representative democracy. A political party has to fulfil a specific role in a representative democracy state. A political party is "a democracy assurance bridge between the society and the state with a function to aggregate political viewpoints and develop these into perceptible entirety that can be executed when exercising official authority in the case of achieving electoral success."[21] The responsibility of a political party is to aggregate, concentrate and polarise political viewpoints and, in the case of achieving electoral success, to formulate the political will of the state. Considering afore mentioned and the need to preclude the weight of finances in the achievement of political power, the probabilities of corruption and organised crime influencing the politics, it is critical to know where the assets and funds of a political party come from, who are the donors for the party and whose interests the political party is representing. "Fighting corruption in the funding of political parties is the foundation of functioning of democratic institutions."[22] Therefore, deriving from the principle of democracy is the concept that funding of a political party has to be clear and its efficient audit guaranteed. "The democracy fulfils its objective only when it is functional."[23]

28. Efficient audit is also important for the functioning of the political responsibility – so that the voter can give a reasoned assessment on the activities of the council members elected and on the fulfilment of their campaign promises and make an enlightened decision proceeding from it at the elections. "Guarantee of the political responsibility is a constitutional value. The principle of political responsibility derives from the principle of democracy expressed in the section 1 of the Constitution."[24]

29. Also we should not forget the importance of an efficient audit of the funding of political parties in ensuring the equality among the political parties that is part of the fundamental rights of a political party (the second sentence of the subsection 48 (1) of the Constitution). The equality of political parties is the expression of the idea of equal opportunities for the political parties, i.e. the process of developing the political will is based on the principles of fair play. The audit system established should be so efficient that all the political parties shall adhere to the rules of the fair play.[25] Since the restrictions on the funding freedom of the political parties by and large are driven by the objective of ensuring equal opportunities for the political parties in achieving the power, the possibility of getting sidetracked easily from and disregard impunibly the funding regulations prescribed by the law, generates a threat for the achievability of the said goal. The (actual) validity of the funding restrictions should not be dependent on the optional willingness of the political parties to comply with these restrictions (without the caution of efficient audit and coercion or sanctions). In addition, for example the effective law prohibits the donations made by legal entities to the political parties, therefore imposing a restriction on their constitutional right to freely possess, use, and dispose of his or her property (the first sentence of the subsection 32 (2) of the Constitution). Yet a situation, where legal entities have an opportunity to make such donations due to the lack of efficient supervision mechanisms, distorts the principle of equality set forth by the Constitution and thus makes debatable the purposefulness of the restriction of the right provided by the subsection 32(2) of the Constitution.

30. Formal audit possibility alone is not sufficient for ensuring efficient supervision – in a sense that revenues and expenditures are public and the public has an opportunity to access this information at any time. It also requires a supervisory body that has the right and obligation to audit pursuant their official capacity. Thereat the efficiency of a supervisory organ in exercising control has to be assessed

20 Judgment of the Constitutional Review Chamber of the Supreme Court of 2nd May 2005, case No. 3-4-1-23-05, clause 30.

21 Judgment of the Constitutional Review Chamber of the Supreme Court of 2nd May 2005, case No. 3-4-1-23-05, clause 31.

22 Recommendation of the Committee of Ministers to member states (Rec(2003)4E) on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies). Available in Estonian at: http://www.coe.ee/?op=body&id=230, in English at https://wcd.coe.int/ViewDoc.jsp?id=2183&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

23 Judgment of the Constitutional Review Chamber of the Supreme Court of 5th February 1998, case No. 3-4-1-1-98.

24 Judgment of the Supreme Court en banc of 19th April 2005, case No. 3-4-1-1-05, clause 26.

25 J. Ipsen. Comments to section 20. – M. Sachs. Grundgesetz. 3rd edition. Munich 2003, art. 27 and subsequent, 32 and subsequent. For further detailed see: M. Ernits. Political Party in Estonian Constitution and Political Parties Act. – Juridica special issue 2003.

proceeding for the most part on the following parameters: the status of the subject being audited, object of the audit, benchmarks, instruments of audit, time component, and intensity.[26]

31. The supervisory body auditing the funding of political parties has to be independent. This fact has been deemed to be most important also at the international level.[27] Meaning that the supervisory body should not be under the influence of a political party, moreover, it would be best to avoid any influence from any political parties entirely. Independence means that the supervisory body operates only in compliance with the interest of the purpose and obligations vested in it by the law. Its activity should not be dependant on the probable agreements between the political parties or on the current political situation. In assessing independence, it is important to establish that the independence does not exists only in practise, but the supervisory body also has to appear independent. The criteria for assessing the independence are the personnel, the bases and procedure for the nomination and removal of members, the term of office of the members, and possible guarantees against the influences. Although afore mentioned requirements put the emphasis on the individual level independence of a supervisory body, we should not forget the independence at the institutional level (e.g. funding of the supervisory body).

32. The supervision of the funding of political parties can only be efficient, if it is substantive and comprehensive – in other words, if it is possible to compare all the revenues and expenditures of a political party. Fragmentation of the audit among various sections (e.g. only election campaign costs, only advertising costs etc.) and/or among various institutions allows for so called grey zones and diffusion of responsibility that in turn creates the danger of abuse.

33. The supervisory body has to be active and also take up auditing on its own initiative, instead of waiting for actual input from outside (e.g. a petition, signal from the press etc.). Additionally, the audit control has to persistent and all the political parties have to be subjected to audit on yearly basis. The audit control can be substantive and efficient only then when the supervisory body is capable of conducting such audit control. Meaning that the supervisory body has to have relevant competence – both legal and material capabilities and instruments for performing such audit. A competent supervisory body cannot be replaced with an option of all private persons having an access to the funding reports of political parties, so they can do some "homebrewn" calculations and thus exercise control. The body must have clear supervisory authority given by laws to demand documents, commission experts, summon witnesses etc. in order to formulate a competent and justified assessment in each particular case.

34. There is no point to stipulate elaborate and strict rules for the funding of political parties, if it is not possible to ensure the performance of these rules through efficient audit. The objective of the supervision is to ensure the compliance of the funding with the laws, not the afterwards sanctioning for the failure to do so. Additionally, it is necessary to deem important the preventive influence of an efficient audit control in order to avoid any chance for abuse altogether.

1.3.2. Regulation of the Political Parties Act

35. Hereby I am going to analyse the regulation of the Political Parties Act with the aim of determining whether the Political Parties Act provides efficient supervision over the funding of political parties.

36. In order to ensure the compliance of the funding of political parties with the requirements prescribed by the Political Parties Act, the Political Parties Act provides two forms of control – an

26 See e.g. for other countries: Report to the Parliamentary Assembly of the Council of Europe, submitted on 4th May 2001, Doc 9077, Financing of political parties, available in English at: http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/documents/workingdocs/doc01/edoc9077.htm.

27 Recommendation of the Committee of Ministers to member states (Rec(2003)4E) on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies). Article 14. Available in Estonian at: http://www.coe.ee/?op=body&id=230, in English at https://wcd.coe.int/ViewDoc.jsp?id=2183&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

audit control and the supervision of the Select Committee of the Riigikogu on the Application of the Anti-corruption Act. Non-compliance with the requirements of the Political Parties Act will allow the police to interfere in the form of offence procedure. In addition, the Political Parties Act proceeds from the idea that all the information pertaining to the economic and financial activities of a political party should be public. For ensuring that public accessibility, the Political Parties Act specifies the obligation of public disclosure of three reporting forms – annual (economic activity) report, register on the donations and election campaign expenditure account.

1.3.2.1. Annual report and audit control

37. Pursuant to the subsection 12^2 (2) of the Political Parties Act he general meeting of a political party or, pursuant to the articles of association, a substituting body thereof, shall approve the annual economic activity report each year. The political party has to publish the report also on the webpage of the political party. The annual report together with the annexes prescribed by law shall be published in the Riigi Teataja Lisa.

38. The requirements for the form and contents of the annual economic activity report are provided by the Accounting Act. Pursuant to the subsection 15 (1) of the Accounting Act, the purpose of the annual accounts is to give a true and fair view of the financial position, economic performance and cash flows of the accounting entity. The annual report should reflect comprehensively all financial activities of the political party during the financial year, listing all the revenues and expenditures. The approved sources of the assets and funds have been exhaustively listed by the subsection 12^1 (1) of the Political Parties Act: only membership fees established by the articles of association of a political party, allocations from the state budget received pursuant to the Political Parties Act, donations of natural persons and income earned on the assets of the political party. According to the subsection 12^1 (4) of the Political Parties Act, a political party may enter into a loan agreement or credit agreement if the lender or creditor is a credit institution and the agreement is secured by the assets of the political party or by the suretyship of its member.

39. All the donations made to the political party should also be reflected in the annual report. The Political Parties Act fails to define clearly the meaning of donation. While substantiating the term, the concept of concealed donations becomes important, set forth in the subsection 12^1 (3) of the Political Parties Act as follows: “The assignment of any goods, services, proprietary or non-proprietary rights to a political party under the conditions which are not available to other persons […]”. Based on the list provided by subsection 12^1 (1) of the Political Parties Act we can conclude that the Political Parties Act does not consider membership fees of a political party and allocations from the state budget to be donations. So, taking into account afore mentioned, we are able to define the meaning of the term “donation” for the purposes of the Political Parties Act as follows: a donation is the assignment of any goods, services, proprietary or non-proprietary rights, except for membership fees and allocations from the state budget, to a political party.

40. The subsection 12^1 (2) of the Political Parties Act prohibits a political party to accept anonymous donations, the same restriction is also included in the subsection 12^3 (4) of the Political Parties Act. The subsection 12^3 (4) of the Political Parties Act prohibits political parties to accept donations from legal persons. According to the second and third sentences of the subsection 12^3 (4) of the Political Parties Act, the anonymous donations or donations from legal persons have to be returned to the donor or transferred into the state budget within ten days. The subsection 12^1 (2) of the Political Parties Act prohibits a political party to accept concealed donations.

41. In accordance with the subsection 12^2 (1) of the Political Parties Act, political parties which receive allocations from the state budget have to conduct an audit of the annual report. An auditor has to give an assessment on the financial statement. According to the subsection 11 (2) of the Auditing Rules approved by the Minister of Finance Regulation No. 50 of 15 June 2000, the auditor has to verify whether the accounting source information and other base data are reliable and sufficient for the preparation of reports. The auditor has to conduct the required control procedures to achieve

sufficient level of security in establishing that the financial statements are reflecting the financial economic status of their audit client in a true and fair manner in all aspects in the context of the laws as well as accounting principles generally accepted (good practices) and accounting policies and procedures. Pursuant to the subsection 11 (5) of the Auditing Rules, a certain risk remains, arising from the testing nature of an audit and relative limitations on the capabilities of an internal audit system, that no significant errors will be discovered during the audit process.

42. Therefore an auditor is verifying whether the annual economic activity report of a political party reflects the financial economic status of the political party in a true and fair manner in all aspects. Additionally, the auditor is verifying thereat whether the annual report of the political party is in compliance with the requirements of the Political Parties Act. The facility of an auditor to verify the compliance of the annual report with the requirements of the Political Parties Act is only formal and not material. An auditor can monitor that the report of the political party reflects only the assets and funds that originate from the legitimate sources provided by the subsection 12^1 (1) of the Political Parties Act. Thus, an auditor is able to monitor in the course of an audit that a political party is not listing, for example, the donations from legal persons or anonymous donations that are prohibited pursuant to the Political Parties Act as its revenues. Auditor is not able to assess or will assess whether a donation from a natural person that is formally in compliance with the requirements of the Political Parties Act, is actually coming from that same natural person who has been listed in the report or whether is a case of concealed donation.

43. Furthermore, an auditor is able to verify whether the loan agreements or credit agreements are formally in compliance with the requirements provided by the subsection 12^1 (4) of the Political Parties Act, i.e. whether the lender or creditor is a credit institution and whether the agreement has been properly secured. However, auditor can not start to assess the fact whether the terms and conditions of the loan are in parity with the valid market conditions or whether the political party has obtained the loan at conditions that are unjustifiably favourable.

44. On principle, it is possible to establish in the course of an audit control whether the political party has received any revenues that are not reflected in the annual report. From the standpoint of an audit, it is considered a violation of the bookkeeping requirements. Nevertheless, the bookkeeping methods used in the audit process do not allow for the auditor to assess whether it is a concealed donation in the purposes of the subsection 12^1 (3) of the Political Parties Act.

45. Besides of the limitations on the object of the audit control, also the status of an auditor is a problem. This concerns an auditor being a person in private law, who has been selected to conduct the audit control and remunerated for it by the political party itself. An auditor conducts an audit control alone. Supervision over the activities of an auditor is exercised by the management board of the Board of Auditors, a professional association of auditors, who has the right to bring disciplinary proceedings against the auditor (subsection 45 (1) of the Authorised Public Accountants Act). Criminal liability of an auditor arises pursuant to the section 379 of the Penal Code when an auditor, who in their report fail to submit or incorrectly submit significant facts which became known to them in the conduct of an audit. On both occasion, the liability of an auditor is applied upon receiving a relevant complaint, there is no continuous supervision over the activities of an auditor (and taking into consideration the nature of auditing, such supervision is impossible).

46. The supervision of an auditor over the compliance of the funding of political party with the requirements of the Political Parties Act is predominantly limited to formal control. An auditor is unable to check upon the concealed funding of a political party as well as to investigate the actual origin of the donations. And as per the status, an auditor does not comply with the requirements provided for the financing supervisory body.

1.3.2.2. Register on the donations received

47. Pursuant to the subsections 12^3 (1) and 12^3 (2) of the Political Parties Act, a political party has to maintain a register of donations received by the political party, setting out the names of the donors, the details thereof and the value of the donations and publish the register of donations on its webpage. An auditor will perform a formal control on the accuracy of the presented information in the course of an audit control; an additional audit over the donations received has not been provided. Therefore, a register on the donations received and its disclosure on the web page of a political party does not increase the efficiency of supervision by itself.

1.3.2.3. Election campaign expenditure report

48. Pursuant to the subsection 12^4 (1) of the Political Parties Act, the political parties have to submit a report concerning expenses incurred and sources of funds used for the conduct of the election campaign in Riigikogu or local government council elections or elections to the European Parliament by the political party, non-profit associations specified in the section 12^6 of the Political Parties Act, or persons who stood as candidates in the list of the political party.

49. Similar obligation is provided by election laws - Local Government Council Election Act, Riigikogu Election Act and European Parliament Election Act. For example, pursuant to the subsection 59 (1) of the Local Government Council Election Act a political party has to submit a report on the expenditure relating to its election campaign and the sources of the funds used to the Select Committee of the Riigikogu on the Application of the Anti-corruption Act within one month after election day. The report has to specify the date of receipt of the funds, the type of funds, the value of the funds in Estonian kroons, and the name and personal identification code or registry code of the person who allocated the funds (subsection 60 (1) of the Local Government Council Election Act). The subsection 60 (2) of the Local Government Council Election Act sets forth the types of funds that may be received by a political party. These are membership fees established by the articles of association of the political party, donations by natural persons, allocations from the state budget, income earned on the assets of the political party, and loans or credit received under the conditions provided in subsection 12^1 (4) of the Political Parties Act. Like provisions can be found in other election laws.

50. The election campaign expenditure report has to be submitted to the Riigikogu committee specified in subsection 14 (2) of the Anti-corruption Act that Riigikogu has appointed to handle the declarations of the economic interests of high ranking officials. The Select Committee of the Riigikogu on the Application of the Anti-corruption Act was established by the decision of Riigikogu of 27 April 1999.

51. The subsection 22 (1) of the Riigikogu Rules of Procedure Act provides the general rights of the Riigikogu committees. A committee of the Riigikogu has the right to demand information necessary for the performance of its functions from the Government of the Republic and agencies of executive power, demand that a member of the Government of the Republic participate in a committee sitting in order to obtain information on matters within the powers of the member of the Government, and invite officials of government agencies and other persons to participate in a committee sitting in order to inform and advise the committee. The subsection 12^4 (2) of the Political Parties Act authorises the Select Committee of the Riigikogu on the Application of the Anti-corruption Act to demand additional documents concerning expenses incurred and sources of funds used by political parties, non-profit associations specified in the section 12^6 of the Political Parties Act or persons who stood as candidates.

52. The object of the control of the Select Committee of the Riigikogu on the Application of the Anti-corruption Act is extremely limited – the committee is allowed to control only the expenditures made for and in the course of election campaign and the sources of funds thereof. The committee cannot supervise the other assets and funds of the political party and revenues and expenditures outside the scope of an election campaign. Therefore the committee lacks the means to assess whether

the political party has received any concealed donations. The competence of the committee is too limited even for being able to verify the actual origin of the donations reflected in the report. Thus, the committee is only able to verify the formal compliance of the assets and funds listed in the report with the requirements of the Political Parties Act and election laws.

53. Also from the standpoint of organisational structure, the Select Committee of the Riigikogu on the Application of the Anti-corruption Act as a supervisor on the funding of the political parties does not comply with the requirements set for the supervisory bodies. The committee is made up of the members of Riigikogu, and it has two permanent officials. Considering the fact that this committee also handles the declarations of the economic interests of high ranking officials, it would not be able due to the work load alone, and even possible that due to the lack of the knowledge related to finance etc., to exercise supervision in consistent and intensive manner.

54. The Select Committee of the Riigikogu on the Application of the Anti-corruption Act is made up of the representatives of political parties represented in Riigikogu. Forming a supervisory body solely of the members of political parties inevitably raises a question regarding the independence of such body in relation to the political interests and creates a danger of reciprocal so-called “fixed game systems”. As I emphasised afore, a supervisory body not only has to actually be, but also has to appear independent.

55. The Select Committee of the Riigikogu on the Application of the Anti-corruption Act as a supervisor on the funding of the political parties is only able to control a very limited part of the financial activities of the political parties. The competence of the committee does not allow verification of the concealed donations or to investigate the actual origin of the donations. The competence of the committee only allows verification of the formal compliance of the information presented in the election campaign expenditure report with the requirements of the Political Parties Act and election laws. Additionally, the committee is not independent, the latter being a basic requirement for efficient supervision.

1.3.2.4. Liability for the non-compliance with requirements of the Political Parties Act

56. Liability for the non-compliance with requirements and restrictions related to the funding of the political parties is provided by the chapter 2^2 “Liability” of the Political Parties Act and by the Division 8 “Offences Relating to Political Parties“ of the Chapter 21 “Economic Offences” of the Penal Code.

57. The Political Parties Act provides two instances of necessary elements of a misdemeanour. Pursuant to the section 12^{14} of the Political Parties Act, a violation of the procedure for the registration and disclosure of donations to a political party is punishable by a fine of up to 300 fine units (subsection 12^{14} (1)). The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons (subsection 12^{14} (2)). Pursuant to the section 12^{15} of the Political Parties Act, a violation of the procedure for the disclosure of the annual economic activity report, a quarterly statement of funds received by a political party and financing of the election campaign of a political party is punishable by a fine of up to 300 fine units (subsection 12^{15} (1)). The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons (subsection 12^{15} (2)). According to the subsection 12^{16} (2) of the Political Parties Act, the extra-judicial body which conducts proceedings in matters of misdemeanours provided for in §§ 12^{14}–12^{15} of the Political Parties Act is a police prefecture.

58. The Penal Code provides two instances of necessary elements of a criminal offence. The section 402^1 of the Penal Code provides a punishment for the violation of the restrictions established on the economic activities or assets of a political party. The section 402^2 of the Penal Code provides a punishment for accepting a donation made to a political party by an anonymous, concealed or legal person. Both natural and legal persons are punished for the both types of violations by a pecuniary punishment. Pursuant to the subsection 212 (1) of the Code of Criminal Procedure, the pre-trial proceedings are conducted by the Police Board, the agencies administered thereby, and the Security Police Board in certain cases.

59. Pursuant to the principle of mandatory criminal proceedings (section 6 of the Code of Criminal Procedure), investigative bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence. The criminal proceedings have to be commenced if there is reason and grounds thereof, a report of a criminal offence or other information indicating that a criminal offence has taken place, ascertaining the presence of criminal elements. Police has to commence criminal proceedings, if the police have received information and is able to ascertain within that information the elements of misdemeanour provided in the sections 12^{14} or 12^{15} of the Political Parties Act or the elements of criminal offence provided in the sections 402^{1} or 402^{2} of the Penal Code being committed. In such a way the police is able to verify in the course of offence proceedings the compliance of the funding of a political parties with the requirements of law.

60. The police are a body that has to interfere actively only in the case of a sufficient probability of the violation. Although the offence proceedings might have preventive influence in the regard of the future violations, the police are not exercising consistent supervision with the aim of preventing the opportunities of abuse arising in general. Secondly, the police institutions are not institutionally independent, but form a part of the executive power.

1.3.2.5. Other supervisory bodies

61. In addition to afore mentioned bodies, many other state institutions might come to contact from various aspects with the issues related to the funding of political parties. None of these institutions is able to verify the compliance of the funding of political parties with the requirements of the Political Parties Act.

62. So, for example, in the case of the issue of debt instrument of the Estonian Centre Party, the Financial Supervision Authority only verified the compliance of the issue to the requirements of the Securities Market Act. The compliance with the requirement of the Political Parties Act was not assessed as the Financial Supervision Authority does not have the relevant competence.

63. The verification of the actual origin of the donations could substantively fall into the competence of the Tax and Customs Board. However, the Director General of the Tax and Customs Board has voiced: "The Tax Board has not been given the task to supervise the legal and moral aspects of the funding of political parties. And in a state based on the rule of law, the Tax Board cannot claim such function on its own initiative."[28]

64. In the case of K-kohuke, the supervision from various aspects was exercised by National Electoral Committee, police institutions, Consumer Protection Board, court, Tallinn City Enterprise Board and Tallinn City Government.

1.3.3. Assessment on the regulation of the Political Parties Act

65. Democracy calls for the funding of political parties to be transparent. The public has to have an overview on who exactly and to what extent has given money and funds to a political party. A political party should not receive material support in a concealed manner or from concealed persons. Therefore, clear rules have to be provided regarding the funding of political parties. Yet, the mere rules are not enough, and additionally, an efficient supervision has to be secured over the performance of such rules. The supervision of the funding has to be extensive (including the entire financial activity of a political party, monitoring all revenues and expenditures of the political party), substantive, consistent, intensive and of expertise. A supervisory body has to be independent from any political interests and be equipped with appropriate legal and actual competence.

[28] Aivar Sõerd: The Tax Board does not investigate the funding of politicians. – Postimees Online, 30th April 2003, available at: http://vana.www.postimees.ee/index.html?op=lugu&rubriik=3&id=99024&number=794.

66. The requirements and restrictions on the funding of the political parties have been provided by the Political Parties Act. Supervision over the requirements provided by the Political Parties Act is performed by an auditor and the Select Committee of the Riigikogu on the Application of the Anti-corruption Act. In a case of violation of the requirements related to the funding, police can interfere in the course of the offence proceedings. These mentioned bodies, both separately and jointly, fail to perform efficient supervision over the funding of political parties that would be in compliance with the requirements of democracy and would guarantee equal treatment of the political parties.

67. Auditor supervision is an extensive accounting supervision over the financial activities of a political party. Regarding the compliance with the requirements of the Political Parties Act, the auditor supervision is limited to the formal control predominantly. An auditor is neither able to verify the concealed funding of a political party nor investigate the source and origin of donations. Also, status wise, an auditor is not conforming to the requirements set for the supervisory bodies auditing funding.

68. The supervision performed by the Select Committee of the Riigikogu on the Application of the Anti-corruption Act is encompassing rather limited part of the funding of the political parties – merely the costs incurred in the course of an election campaign and their origin. Therefore, any supervision by the Committee over the concealed donations is practically excluded as it would call for extensive overview on the revenues and expenditures of the political party. Thus, the Committee is able to verify in the main part whether the costs incurred and expenditures made during the course of an election campaign are in formal compliance with the requirements of the Political Parties Act. The competence of the Committee does not allow for the investigation of the origin of donations. Additionally, regarding the Committee, the independence, being an essential requirement of efficient supervision, is not ensured.

69. Thus the Estonian legislative system lacks a body that is able to exercise independent supervision of the funding of the political parties that is extensive, substantive, consistent, intensive, and of expertise. The fragmentation of the supervision among various bodies is diffusing responsibility and reducing the efficiency of the supervision.

70. I admit that the information relating to the funding of political parties should be publicly disclosed. The public accessibility of such information, would allow the interested parties, including the members of press, to examine the information and if necessary, have recourse to a supervisory body in order to initiate supervisory proceedings. I deem afore mentioned to be extremely important from the democracy viewpoint. Yet I remain at the position that a state cannot subject an efficient supervision to sole dependency on whether the public is willing and capable to supervise the funding of political parties. The public without competent supervisory body is not able to ensure efficient supervision.

1.4. The position of the Chancellor of Justice

Proceeding from afore facts and circumstances, my position is that effective Political Parties Act is not in compliance with the principle of democracy set forth by the subsection 1 (1) of the Constitution and with the fundamental right of a political party pursuant to the second sentence of the subsection 48 (1) of the Constitution as it fails to provide efficient supervision of the funding of political parties, and I am making a proposal to the Riigikogu to bring the Political Parties Act into compliance with the Constitution.

1.5. Course of the proceedings

The Constitutional Committee of the Riigikogu deliberated the proposal of the Chancellor of Justice in the sitting of 29 May 2006 and voted in favour of the proposal. Plenary assembly of the Riigikogu deliberated the proposal in the sitting of 31st May 2006 and also made a decision to

support the proposal. 53 members of the Riigikogu voted in favour of the proposal, no one voted against it or remained undecided.[29] The Vice-President of the Riigikogu made a proposal to the Constitutional Committee of the Riigikogu to initiate a draft act for bringing the Political Parties Act into compliance with the Constitution. For the development of a draft act, the Constitutional Committee formed a task force that for the first time convened on 28 August 2006.

On 6 November 2006, the Chancellor of Justice addressed the President of the Riigikogu with a written notice, requesting that the draft act in question would be initiated no later than on 23rd November 2006, and during the course of the legislative proceedings should be taken into consideration that that the draft legislation has to be passed as a law before the end of the authority of the 10 composition of the Riigikogu in spring 2007. On 22nd November 2006, the Chancellor of Justice submitted his opinion in writing on the draft act project to the Constitutional Committee of the Riigikogu.

On 4 December 2006, the Constitutional Committee of the Riigikogu initiated the draft act 1060 SE "Political Parties Act and other Acts Amendment Act for the alteration of the audit principles of the funding of political parties".[30] The Chairman of the Constitutional Committee of the Riigikogu had recourse to the Government of the Republic and the Chancellor of Justice and requested them to express their opinion on the draft act. The Government of the Republic decided on the government meeting of 4 January 2007 to give the support on principle to the draft act initiated by the Constitutional Committee of the Riigikogu, and presented an opinion in writing on the draft act to the Constitutional Committee of the Riigikogu on 8 January 2007. On 10 January the Chancellor of Justice sent to the Constitutional Committee of the Riigikogu an opinion in writing, expressing support to the draft act and offering their observations. The Chancellor of Justice articulated their hope that the Riigikogu will pass the draft act and there will be no need to elevate the dispute to be resolved by the Supreme Court.

On the sitting of 11 January 2007, the Constitutional Committee of the Riigikogu made a decision to send the draft act to the sitting of the plenary assembly of the Riigikogu for the first reading. The first reading of the draft legislation took place on 16 January 2007, whereat a decision was made to send the draft act on for the second reading. At the sitting of 6 February 2007 of the Constitutional Committee of the Riigikogu, a question was raised, whether to send the draft act to the sitting of the plenary assembly of the Riigikogu for the second reading. The Committee made a decision to continue the legislative proceeding of the draft act in the Committee.[31]

On 16 February, the Chancellor of Justice made a decision to have recourse to the Supreme Court in order to resolve the dispute. The Chancellor of Justice presented the Supreme Court his petition to declare the part of the Political Parties Act that fails to provide efficient control over the funding of the political parties to be in non-compliance with the Constitution and therefore invalid. By that time, more than eight months had passed since the proposition was initially presented to the Riigikogu, and yet the Riigikogu had failed to carry out the proposal. The Chancellor of Justice determined that eight months is ample time to prepare and pass even such legislation that regulates most complicated areas. Besides the elections of Riigikogu were drawing closer, implying the end to the authority of the 10th composition of the Riigikogu. According to the section 96 of the Riigikogu Rules of Procedure Act, upon termination of the term of authority of the Riigikogu, all draft legislation the proceeding of which has not been completed during the term of authority of the composition of the Riigikogu shall be dropped from the legislative proceeding. With the Riigikogu Elections of 4 March 2007, the draft act 1060 SE was dropped from the legislative proceeding of the Riigikogu.

29 Edited copy of verbatim records of the Riigikogu of 31 May 2006, available in Estonian at http://www.riigikogu.ee.

30 Draft Act "Political Parties Act and other Acts Amendment Act for the alteration of the audit principles of the funding of political parties", No.1060 SE, available in Estonian at: http://www.riigikogu.ee.

31 Minutes of the sitting of 6th February 2007 of the Constitutional Committee of the Riigikogu, available in Estonian at: http://www.riigikogu.ee .

The Constitutional Review Chamber of the Supreme Court heard the petition of the Chancellor of Justice on the hearing of 8 May 2007. The Chamber decided to send the petition for hearing to the Supreme Court en banc.

III REPORTS TO THE RIIGIKOGU

1. The constitutionality of the subsection 21 (1) of the Collective Labour Dispute Resolution Act

On 26 January 2006, the Chancellor of Justice presented a report to the Riigikogu on the constitutionality of the subsection 21 (1) of the Collective Labour Dispute Resolution Act.

I did analyse in conformity with the subsections 139 (1) and 139 (2) of the Constitution and the subsection 1 (1) and section 15 of the Chancellor of Justice Act the constitutionality of the restrictions on right to strike set forth in the subsection 21 (1) of the Collective Labour Dispute Resolution Act; especially the conformity with the subsection 29 (5) of the Constitution. I find that the regulation provided in the subsection 21 (1) of the Collective Labour Dispute Resolution Act is unconstitutional. The reasons for such decision are stated in the clause 4.2 of this report "Position of the Chancellor of Justice". I am asking the Riigikogu to discuss the issues associated with the restrictions on right to strike and to bring the subsection 21 (1) of the Collective Labour Dispute Resolution Act into conformity with the Constitution.

1.1. General overview on the right to strike and restrictions thereupon

1. The first sentence of the subsection 29 (5) of the Constitution and several international agreements that are binding to the Republic of Estonia (Article 5 of the amended and revised European Social Charter, article 8 of the UN International Covenant on Economic, Social and Cultural Rights) guarantee the freedom of association pertaining to work for the labour. This freedom entails the right to form trade unions and join the trade unions already active. Trade unions are formed in the purpose of protection of the rights and interests of the associated workers. It is evident that the freedom of association without the right to jointly employ actual measures for the achievement of the rights and interests would be insubstantial. Therefore it has been acknowledged from the creation of the freedom of association that the right of the organised workers to employ necessary collective measures for the protection of their rights and interests is essentially part of the freedom of association.

2. One of the collective measures necessary for the achievement of the objective of the freedom of association that is universally considered to be the most powerful measure and that is explicitly guaranteed by the Constitution in Estonia for all the working persons is the right to strike. Besides the Constitution, the afore mentioned right is explicitly acknowledged in the Article 6 of the European Social Charter and in the Article 8 (1) (d) of the UN International Covenant on Economic, Social and Cultural Rights. And also the International Labour Organisation (ILO) Convention No. 87 (so-called convention concerning freedom of association and right to strike) supervisory body, the ILO Committee on Freedom of Association has stated that the Article 3 of the ILO Convention No. 87 is also protecting the workers' right to strike.

3. The right to strike, like majority of other fundamental rights, is not an absolute right. The permission to restrict the right to strike has been provided by afore mentioned international legislation and by the Constitution. According to the third sentence of the subsection 29 (5) of the Constitution the right to strike is a fundamental right with a simple reservation subject to imposition by a law, meaning that it can be restricted by the legislator only for the aim of public interests which are not contrary to the Constitution if the means employed for the achievement of this aim are proportional. [32]
4. Before the actual analyses of the constitutionality of the restrictions on the right to strike provided

[32] In the judgment 3-3-1-65-03 the Supreme Court has stated that in substantiating the protected area of a fundamental right it is necessary to take into account the international agreements that are binding to the Republic of Estonia. Thus, when substantiating the right to strike and assessing the applicable restrictions it is necessary to take into consideration the provisions of international agreements and the supervisory bodies thereof.

by the subsection 21 (1) of the Collective Labour Dispute Resolution Act, it is necessary to note in the purpose of clarity that the freedom of association and right to employ collective measures provided by the Constitution are not guaranteed solely for the persons working under employment contract, but also for the officials. Therefore, it is necessary to take into consideration the rules for the restriction of the fundamental rights while restricting the right to strike of the persons working under employment contract as well as of the officials.[33] [34]

1.2. The restrictions on right to strike provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act

5. The subsection 21 (1) of the Collective Labour Dispute Resolution Act provides that:
Strikes are prohibited:
1) In government agencies and other state bodies and local governments;
2) In the Defence Forces, other national defence organisations, courts, and fire fighting and rescue services.

Therefore the subsection 21 (1) of the Collective Labour Dispute Resolution Act sets forth an absolute prohibition on strike for the local governments and the state sector, including the explicitly highlighted veto that the prohibition on strike is valid in the government agencies, the Defence Forces, other national defence organisations, courts, and fire fighting and rescue services (hereinafter all the services subject to the prohibition on strike listed in the subsection 21 (1) of the Collective Labour Dispute Resolution Act, named jointly and concurrently as the prohibition on strike in the state sector or in the public sector).[35]

It is possible to conclude from the wording of the subsection 21 (1) of the Collective Labour Dispute Resolution Act that the prohibition on strike applies to all people working the state sector – both to officials and support staff. Therefore the subsection 21 (1) of the Collective Labour Dispute Resolution Act equally prohibits from striking a deputy secretary general of a ministry as well as a cleaner working under employment contract at the local government agency.

The right to strike of the persons working in the government agencies and consequently the right and opportunity of these persons to fight collectively for their rights and interests, has thus been very intensively restricted.

1.3. The permissibility of the restrictions on strike provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act

6. Like stated above, the right to strike is not an absolute right: it can be restricted if there is a legitimate reason to do so and the means selected for that are proportional.

7. The explanatory memorandum of the Collective Labour Dispute Resolution Act does not shed any light on the reasons of the restrictions on the right to strike provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act. Drawing parallels with the international best practices[36] concerning the right to strike, we can assume only that the reason for imposing restrictions on the right to strike of the persons working in the state sector is the broader necessity to guarantee the national security and the general functionality of the local government – if all the persons working in the state sector would be on strike, the functioning of the state and local government would be

[33] Constitution of the Republic of Estonia. Commented edition. Tallinn, 2002. Section 29, comments 10.7-10.8. Same position is assumed for example by the ILO Committee on Freedom of Association: the positions are available at e.g.: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. 4th edition. Geneva 1996, art. 205, 206, 526, 534, 535.
[34] The freedom of association of the officials and the rights thereof are protected by constitution also in other countries: subsection 9 (3) of German constitution, and Höfling. Grundgesetz. Kommentar. 2009, art 9 clauses 111-112.
[35] Further analyses addresses the prohibition to strike of public servants and its constitutionality..
[36] For example, see Novitz, T. International and European Protection of the Right to Strike. Oxford University Press, 2003, p 303-310.

seriously impaired as would be the welfare of the population. And that would be against the public interest.

8. The assurance of the national security and the general functioning of the state and local governments as well as the welfare of the population can be considered without a doubt to be the legitimate aim for the restrictions on right to strike of the persons working in the state sector. At the same time, in the light of the Constitution, permissible should be only these restrictions on the right to strike that are not excessively infringing the right to strike of the persons working in the state sector. So, as follows, we have to evaluate whether the restrictions on right to strike provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act are disproportionably damaging to the right to strike of the persons working in the state sector.

9. Hereby acknowledging that in assessing the permissibility of the restrictions on the right to strike it is necessary to take into consideration also the international agreements that are binding to the Republic of Estonia and the positions stated by the supervisory bodies of such international agreements, it would be appropriate to examine for the starters which restrictions on the right to strike are deemed permissible pursuant to the international agreements that are binding to the Republic of Estonia.

10. ILO, whose positions are taken into consideration by the supervisory bodies of the European Social Charter and the UN International Covenant on Economic, Social and Cultural Rights, has stated that it is permissible to impose restrictions on the right to strike of the persons working in the public sector, however, such restrictions have to be enacted in the minimum necessary limit.[37]

In specific, the supervisory bodies of the European Social Charter and the UN International Covenant on Economic, Social and Cultural Rights have deemed permissible to prohibit from striking the police, members of the Defence Forces and court employees.[38] According to the ILO, the right to strike can be restricted or prohibited in the case of the other persons working in the public sector, however, it is allowed solely in cases when these people are exercising state authority or providing services that are vital. In the case of the persons not exercising state authority or providing services that are vital, imposing restrictions or prohibition on the right to strike is considered impermissible according to the ILO.[39]

Also the supervisory body of the European Social Charter, the European Committee of Social Rights (ECSR) has explicitly stated that they in no way deem justified prohibiting from striking the persons working in the public section. For example, while commenting the report submitted by Estonia based on the European Social Charter, the ECRS held: "In the light of the Article G of the European Social Charter […] it is allowed to restrict the right to strike of the public servants as they are performing duties that might have an impact on the public interest and national security. However, prohibiting all the public servants from striking entirely can not be considered to be in compliance with the European Social Charter.[40]

11. Therefore, a blanket prohibition to strike imposed on all the persons working in the public sector, is impermissible according both to ILO and European Social Charter (ESC). Based on the analyses results of the best practices of ILO and ESC, I find that it is possible to deem permissible the restriction on right to strike of the persons working in the public sector whose activities might have significant impact on the national security, functioning of the state and local governments

37 For example, see ILO case No. 1648 and 1650 (Peru); ILO Committee on Freedom of Association report 291.

38 For example, see the collective petition filed on the basis of the European Social Charter: No. 2/1999 European Federation of Employees in Public Services (EUROFEDOP) v. France.

39 For example, see ILO case No. 1762 (Czech Republic), see also Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. 4th edition. Geneva 1996, Art. 526, 534, 535.

40 Finally the Committee deemed the subsection 21 (1) of the Collective Labour Dispute Resolution Act to be in non-compliance with the European Social Charter.

and welfare of the population, and generally such persons are persons exercising state authority or providing public sector services that are vital.

12. If we take a look at the domestic best practices of various countries, we are able to assert that most of the European countries acknowledge the right to strike of the persons working in the public sector in smaller or greater extent. For example, in France the strikes of the persons working in the state sector are generally permissible. Only a rather limited group of persons working in the state sector are without the right to strike – namely the police, prison guards, members of armed forces, people working in *Companies Republicaines de Securite*, magistrates and court officials, prefects and deputy prefects. The right to strike of the persons working in the state sector is also acknowledged in Belgium and Czech Republic.[41]

13. Taking into consideration that over here in Estonia we have had extensive discussions over the strike regulation valid in Germany, it would be appropriate to talk about it as well. In Germany, while working in the state sector, it is possible to work under the relationship in public law (such employees are called: *Beamte*) or under the relationship in private law (depending on the nature of the job, such employees are called either *Angestellte* or *Arbeiter*). Striking is prohibited only for the employees working under the contract in public law, as so called *Beamte*. At the same time, the striking is allowed for the employees bound by the regulation in private law.[42] There are several reasons for prohibiting *Beamte* from striking. Namely, pursuant to the Article 33 of the German Constitution and the legislation governing the service relationship of *Beamte* (e.g. *Beamtenrechtsrahmengesetz*), the *Beamte* are provided with very strong social guarantees as well as special rights and obligations pertaining to service. On afore mentioned reasons, especially due to the strong social guarantees pursuant to the Constitution, a *Beamte* is prohibited from striking.[43] [44] In conclusion of the above we can say that principally a *Beamte* has "traded off" their right to strike. My opinion is that it is not possible to carry over the *Beamte* prohibition to strike one-for-one to Estonian legislation or the legislation of any other country due to the fact that the social guarantees of a *Beamte* are so high that it might justify the loss of the right to strike.

14. On the basis of international regulation on the right to strike and the best domestic practices of other countries, it is possible to claim that an absolute restriction on the right to strike of the persons working in the state sector is not deemed to be justified. Even in Germany that has a very strict regulation pertaining to the right to strike, the strikes of the public servants that in Estonian context are considered the support staff are totally permissible.

15. I find that also in Estonia it is not justified to absolutely prohibit from striking the persons working in the public sector. Among other things, it is clearly non-compliant with the ILO Convention No. 87 and European Social Charter.

16. Unquestionably the prohibition to strike should not be extended to encumber the support staff. Like stated afore, the aim for enacting the prohibition to strike is to guarantee the national security, functioning of the state and local governments and welfare of the population. Even if a strike of the support staff would affect the functioning of the state and local governments, welfare of the population in certain way, such impact can not, considering the nature of the work functions performed by the support staff, be of such importance as to substantiate fully prohibiting the support staff from striking.

41 The relevant information has been received from Mr. Youcef Ghellab, Senior Specialist, Industrial Relations and Social Dialogue, ILO on 16th November 2005.

42 See Erfurter Kommentar zum Arbeitstecht, Verlag C.H. Beck, München 2006. s 134 rn 148 and s 141 rn 183-185.

43 See reference 9 and article 33 of the German constitution, and Höfking. Grundgesetz. Kommentar. 2003. art. 33.

44 It is important to mention that in Germany also the right of Beamte to enter into collective agreements is not generally recognised. More precisely, the general standpoint in Germany is that Beamte can not to form their terms and conditions of service through collective agreements as their terms and conditions of service are already guaranteed by constitution and legislation. Therefore, the conclusion is that giving them the right to strike is not justified.

17. In addition, I have my doubts regarding the constitutionality of the absolute prohibition on the right to strike of the officials. The latter doubt is based mainly on the fact that in Estonia a deputy secretary general of a ministry as well as a mid-level specialist processing the European Court Reports, an accountant working at the local government agency as well as a specialist engaged in clerical support activities are all equally considered to be officials. It is questionable whether a situation where all these mentioned officials are going on strike would have a significant impact on the functioning of the state and local governments, welfare of the population and national security. According to my assessment, if a specialist engaged in clerical support activities or a mid-level specialist processing the European Court Reports would go on strike, it would not have a significant impact on the national security, functioning of the state and local governments, and welfare of the population. Despite of afore mentioned, there is an absolute prohibition imposed also on them in the regard of their right to strike, and therefore they are deprived from employing the most effective collective means in the protection of their work related rights and interests. Thus I find that for all these officials whose striking would not affect the public interest in a significant way, the enactment of the absolute prohibition on their right to strike could be deemed excessive.

1.4. The position of the Chancellor of Justice

18. As a conclusion of the subject matter discussed above, I find that the absolute prohibition on the strike to strike of the persons working in the state sector and local governments provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act is unconstitutional and in non-compliance with the international agreements that are binding to the Republic of Estonia. I am asking that the Riigikogu would discuss the prohibitions on the right to strike provided by the subsection 21 (1) of the Collective Labour Dispute Resolution Act and bring them into conformity with the Constitution. Additionally, I am requesting that the Riigikogu would analyse with particular attention to detail which groups of officials' right to strike would be considered justified and which groups' not. In analysing the afore mentioned, it is necessary to take into consideration among other things that in reality the people working in public sector in Estonia do have a need to stand up for their rights and interests by themselves.

1.5. Course of the proceedings

The Constitutional Committee and the Social Affairs Committee of the Riigikogu discussed the report at their joint sitting on 14 March 2006.

At the joint sitting, the position of the Chancellor of Justice received support in principle. However, a counterargument was raised against the immediate amendment to the right to strike, maintaining that prior to making any amendments it would be necessary to map the public servant positions that would continue to be subjected to the prohibition on the right to strike and the positions of public servants where the right to strike could be permissible. So, a relevant draft act was not introduced to the legislative proceeding during the authority of the 10 composition of the Riigikogu.

Taking into account that a new composition of the Riigikogu had been elected and the relevant institutions have had more than one year to map the above mentioned public servant positions and to analyse the regulation pertaining to the right to strike, the Chancellor of Justice submitted an inquiry to the President of the Riigikogu on 23rd May 2007, requesting information on the status of the amendments to regulation pertaining to the public servants' right to strike.

IV OPINIONS TO THE RIIGIKOGU

1. The right to vote of imprisoned persons

Case 6-8/1820

(1) Pursuant to the European Court of Human Rights judgment that established a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms by United Kingdom in relation to the right of convicted prisoners to vote[45], the Chancellor of Justice decided to initiate proceedings in order to evaluate the constitutionality of the relevant legislation in Estonia.

(2) The European Court of Human Rights, consequently to the thorough analyses (including the assessment of international documents pertaining to the human rights and best practices of various countries), assumed the position that the total absence of the right to vote in the case of all the imprisoned persons is not in conformity with the Article 3 of Protocol No. 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The referred regulatory provision provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

At first, the Chancellor of Justice brought afore mentioned court judgment to the attention of the Constitutional Committee of the Riigikogu, and subsequently the Constitutional Committee of the Riigikogu asked the Chancellor of Justice to immerse into that topic in depth. In order to familiarise himself with the practises pertaining to the right of imprisoned persons to vote, the Chancellor of Justice demanded information from the Ministry of Justice, Ministry of Internal Affairs and National Electoral Committee.

Section 4 of the Riigikogu Election Act:
"§4. Right to vote and to stand as candidate
[…]
(3) A person who has been convicted of a criminal offence by a court and is imprisoned shall not participate in voting.
[…]
(6) A person who has been convicted of a criminal offence by a court and is imprisoned shall not stand as a candidate for election to the Riigikogu."
Section 5 of the Local Government Council Election Act:
"§5. Right to vote and to stand as candidate
[…]
(4) A person who has been convicted by a court and is serving a sentence in a custodial institution shall not participate in voting.
[…]
(6) A person who has been convicted of a criminal offence by a court and is serving a sentence in a custodial institution shall not stand as a candidate for election to a council."

Section 4 of the European Parliament Election Act:
"§4. Right to vote and stand as candidate
[…]
(3) A person shall not have the right to vote if:
[…]
2) he or she has been convicted by a court and is serving a sentence in a custodial institution.
[…]

[45] European Court of Human Rights judgment - case of Hirst v. United Kingdom (no. 2) (6 October 2005), Application no. 74025/01.

(6) The following shall not stand as candidates in elections to the European Parliament:
[…]
2) persons who have been convicted of a criminal offence by a court and are serving a prison sentence;
[…]."
Section 2 of the Referendum Act:
"§2. Principles of referendum
[…]
(3) A person shall not participate in the voting if he or she:
[…]
2) has been convicted by a court and is serving a sentence in a custodial institution."
The subsections 4 (3) and (6) of the Riigikogu Election Act, subsections 5 (4) and (6) of the Local Government Council Election Act, clauses 4 (3) 2) and (6) 2) of the European Parliament Election Act and clause 2 (3) 2 of the Referendum Act provide that a person who has been convicted by a court and is serving a sentence in a custodial institution ("and is imprisoned" is the wording in the Riigikogu Election Act), is not allowed to participate in the voting or stand as a candidate for election.

The Riigikogu Election Act specifies in further detail both for the right to vote and the right to stand as a candidate that the person subjected to this prohibition must have been convicted of a criminal offence by a court. The Local Government Council Election Act and the European Parliament Election Act state this distinctly only in regard of the right to stand as a candidate for election. Despite of the certain ambiguity of the legislation, the deprivation from the right to vote of the people imprisoned in the detention house for committing a misdemeanour is not justified.[46] Therefore, it is necessary to interpret the legislation in a way that the right to vote would be deprived only from the persons punished pursuant to the criminal procedure with actual imprisonment.[47] Such interpretation is supported by the fact that the subsection 22 (3) of the Riigikogu Election Act, subsection 27 (3) of the Local Government Council Election Act, clause 20 (3) 1) of the European Parliament Election Act and subsection 23 (3) of the Referendum Act all provide that "a person shall not be entered in a polling list if he or she has been convicted of a criminal offence by a court pursuant to information held in the punishment register […]."

The 9th composition of the Riigikogu that adopted these afore mentioned legal acts, upon the initiative of the Government of the Republic, deliberated the possibility to impose different restrictions on the imprisoned persons, taking into account the precise punishment (length of the prison sentence) and the type of crime such person has committed.

The draft Local Government Council Election Act (747 SE) and the draft Riigikogu Election Act (748 SE) initiated by the Government of the Republic on 30 April 2001, as well as the draft European Parliament Election Act (906 SE) initiated on 7 November 2001, and the draft Referendum Act (771 SE) initiated on 15 May 2001 used to provide: "A person shall not be entered in a polling list if he or she has been convicted of a intentionally committed criminal offence by a court and is serving a custodial sentence with a term of over five years." The right to stand as a candidate used to be precluded similarly to the current valid regulation in the case of all persons that had been

46 Same position: O. Kask. Comments to section 58. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition. Tallinn 2002, comment 3; The final report of the Expert Committee on Constitution of the Republic of Estonia, available in Estonian at: http://www.just.ee/10716 .

47 Also Mr. M. Rask emphasised at the second reading of the draft Local Government Council Election Act in the Riigikogu: "I emphasise that we are talking about persons who have been convicted of criminal offence based on the judgment of the court entered into force pursuant to legislation […]."Edited copy of verbatim records of the Riigikogu of 23 January 2002, available in Estonian at http://www.riigikogu.ee. Unfortunately there are still problems in practice; according to the information provided by the Ministry of Internal Affairs, the persons detained for misdemeanour in the detention houses of the Western and Eastern Police Prefectures did not articulate their wish to participate at the local government council elections of 2005, the persons detained for misdemeanour in the detention houses of the Northern Police Prefecture were allowed to vote, however, in the Southern Police Prefecture a position was assumed that such persons do not have the right to vote. (Ministry of Justice communication No. 2-4-2/253 of 28th January 2006).

convicted of a criminal offence by a court and were imprisoned for that offence. The explanatory memorandum stated: "Unlike the valid legislation, the draft legislation gave the right to vote for the persons convicted of an intentionally committed criminal offence by a court and serving a custodial sentence with a term of less than five years, as well as for the imprisoned persons, who were not convicted of an intentionally committed criminal offence. Restricting the right to vote, the principle of proportionality has been considered, according to which a restriction applied on a fundamental right has to be appropriate, necessary and measured for the achievement of the aim pursued. As in valid legislation, the imprisoned persons are not given the right to stand as a candidate."[48]

During the legislative procedure in the Riigikogu, a probable version was considered that the right to vote would be deprived from persons who had been convicted of an intentionally committed criminal offence by a court and serving a custodial sentence (i.e. independent of the term of the sentence).[49] However, afore described initiative of the Government of the Republic did not receive required support.

(3) In this instance, it is important to find an answer to the question whether the deprivation of the right to vote in the case of all imprisoned persons is constitutional and in conformity with the European Convention on the Protection of Human Rights and Fundamental Freedoms.

(4) Upon entering into force of a court judgment of conviction that sentences actual imprisonment, the imprisoned persons lose one of their fundamental rights – their right to liberty (clause 20 (2) 1 of the Constitution). Despite of losing their right to liberty, the imprisoned persons retain all their other fundamental rights, the restriction of which would be possible, however, such restriction should be imposed only in accordance with the Constitution for legitimate purposes (e.g. ensuring of public order, crime prevention etc.), following the principle of proportionality.

The fundamental principle of the constitutional order of the Republic of Estonia pursuant to the subsection 1 (1) of the Constitution, according to which the supreme power of state is vested in the people, has been further specified by the section 56 of the Constitution, providing for the ways the supreme power of the state is to be exercised by the people: through citizens with the right to vote participation at the elections of Riigikogu and referendums.

The concept of a modern democratic state based on the rule of law proceeds from the understanding that the right to vote is not a privilege, but a subjective (fundamental) right that further entails three rights: the right to stand as a candidate, the right to participate at the elections (i.e. polling right, including at referendum) and the right to nominate candidates.[50] All these rights are covered by the general principles of the right to vote pursuant to the subsections 60 (1) and 156 (1) of the Constitution. In this instance, predominantly relevant is the principle of generality pursuant to the second sentence of the subsection 60 (1) and third sentence of the subsection 156 (1). "In accordance with the principle of generality of the elections all the persons with the right to vote must be guaranteed the possibility to participate at the elections. All the means that the state applies in guaranteeing the right to vote for the largest part of the electorate possible are considered to be justified and recommendable."[51]

The right to vote, like every other fundamental right, is not unlimited. In addition to the general requirements regarding age and active legal capacity, citizenship at the elections of Riigikogu and referendums, location at the elections of the local government council, the section 58 of the Constitution provides an option for legislators to restrict by law "[…] the participation in voting

48 Explanatory memorandum to the draft Local Government Council Election Act as of 26th December 2006, No. 747 SE, available in Estonian at: http://www.riigikogu.ee. Similar assertion can be found in the explanatory memorandums to the draft Riigikogu Election Act and draft Referendum Act.

49 Minutes No. 134/202 of the sitting of 18th October 2001 of the Constitutional Committee of the Riigikogu.

50 Judgment of the Constitutional Review Chamber of the Supreme Court of 15th July 2002, case No. 3-4-1-7-02, clause 17.

51 Judgment of the Constitutional Review Chamber of the Supreme Court of 1st September 2005, case No. 3-4-1-13-05, clause 25.

for Estonian citizens who have been convicted by a court and are serving sentences in penal institutions." Similar restriction (not an absolute prohibition) on the right to vote was provided by the Constitutions of 1920, 1933 and 1938.[52]

Regarding the section 58 of the Constitution, it is necessary to keep in mind the fact that the provision contains the right of discretion of the Riigikogu ("Participation in voting may be restricted") – it is an authorising regulatory provision and not an obligating one. In exercising the right of discretion, the legislator naturally has to follow the general principles of the restriction of fundamental rights.

The Supreme Court has affirmed that "[…] Each elector and group of electors must be guaranteed a possibility to influence the formation of the composition of the representative body.[…] The principles of democracy in themselves do not exclude reasonable restrictions on subjective rights to vote. […] The restrictions must not prevent persons and groups who have real supporters from running as candidates." Only that way the realisation of the principle of democracy in forming a representative body is guaranteed that is aimed towards the body having sufficient representative quality.[53] In other words, reasonable restriction on the rights to vote is possible, however, these restrictions imposed must not thwart the free expression of the people in the choice of the legislature – they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage.[54]

Restriction on fundamental rights is permissible if it is formally and substantively legal. The formal constitutionality of the restriction on the fundamental rights presupposes firstly the conformity with the requirements of competence, form and procedure provided by the Constitution, secondly the guarantee of legal clarity pursuant to the subsection 13 (2) of the Constitution, and thirdly adherence to the parliamentary reservation arising from the first sentence of the subsection 3 (1) of the Constitution. The preconditions to the substantive legitimacy of the infringement are the legitimate aim of the law and the compliance with the principle of proportionality arising from the second sentence of the section 11 of the Constitution.

In this instance, the principle according to which a person who has been convicted by a court and is serving a custodial sentence in a custodial institution is not allowed to participate in the voting, has been enacted by the Riigikogu by legal acts following the procedure, therefore being in compliance with the terms and conditions of the above mentioned formal constitutionality. Hence in the following there will be focused solely on the verification of the substantive legitimacy of the restriction.

In order to establish the aim of the restriction on the participation in voting of the persons convicted and serving sentences in custodial institutions, the Chancellor of Justice analysed predominantly the source materials for the development of the Constitution. Also, the aims that the European Court of Human Rights has deemed to be the aims of the restriction. Simultaneously the suitability of the selected measures for the achievement of the goals has been assessed. The Supreme Court has defined as a suitable measure a measure that fosters the achievement of a goal. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is indisputably disproportionate.[55]

The materials of the National Constituent Assembly show that the aim of providing the said restriction on the right to vote in the Constitution was to firstly and foremostly to maintain the

52 Section 28 of the Constitutions of 1920 and 1933: „The right to vote will be barred from certain types of criminals pursuant to the Riigikogu Election Act." Section 37 of the Constitution of 1938: "It is possible to take away the right to vote with a law from certain types of citizens who have been convicted of offence by the court. In the elections shall not participate: 1) citizens, who have been arrested during the time of elections for serving the sentence judged by the court or in order to execute the preventive measures ordered by judicial powers, […].".

53 Judgment of the Constitutional Review Chamber of the Supreme Court of 15th July 2002, case No. 3-4-1-7-02, clauses 20 and 21.

54 European Court of Human Rights judgment - case of Hirst v. United Kingdom (no. 2) (6 October 2005), Application no. 74025/01, clause 62.

55 Judgment of the Constitutional Review Chamber of the Supreme Court of 6th March 2002, case No. 3-4-1-1-02, clause 15.

order as in early 1990ies there was an absence of sufficient readiness to organise elections and the democratic best practices were scarce.[56] This restriction was seen as only temporary one[57] and this was the actual reason why the decision was made to refrain from providing the explicit restriction in the Constitution and the power of decision was delegated to the legislator.[58] Mr. M. Rask emphasised the very same aspect at the second reading of the draft Local Government Council Election Act in the Riigikogu: "When an option for restriction on the right to vote of the persons convicted and sentenced to the custodial institutions was set forth in the Constitution, then the reason for doing so was firstly and foremostly of technical nature, meaning the difficulty of carrying out the election procedures in these institutions." [59]

Universally adopted principle is that merely administrative obstacles can not justify the restriction on the fundamental rights.[60] At the same time we should keep in mind that upon the elections the state has to ensure the conformity with the principles of the right to vote, including the realisation of the uniformity principle. The latter is aimed towards achieving that "[…] all persons with the right to vote must have equal number of votes and that all votes must have equal weight upon deciding the division of seats in a representative body."[61] Also, the state has to employ measures to ensure the principle of free elections and one of its sub-principles – the secrecy of voting: "Pursuant to the principle of free elections both the participation in elections as well as the choice to be made are voluntary. […] Pursuant to this principle the state must create necessary conditions for conducting free voting and protect voters from such influences that prevent the voter to give or not to give his or her vote in the manner he or she wishes."[62]

Thus, if it is not technically possible to ensure that each person will be able to give just one vote according to their free will, the following of the principles of uniformity and freedom of elections is not guaranteed.

Therefore, we have to deem the above mentioned goal for the restriction on the right to participate in the elections to be a legitimate one; also the selected measures as appropriate for the achievement of the set goals.

The 9th compilation of the Riigikogu, having to, upon the initiative of the Government of the Republic, to deliberate the alleviation of the restrictions on the right to vote of the imprisoned persons, did not analyse the particular goals of such restrictions in the course of the deliberation. Instead the main focus was the question whether it is justifiable to make differentials pursuant to the term of the imprisonment. It was briefly mentioned though that the imprisoned persons may be easily manipulated, however, no detailed justification to support such allegation followed.[63]

In connection with the deprivation of the right to vote imposed on the imprisoned persons serving their sentence in custodial institutions, the association between the right to vote and citizen-like conduct, civic responsibility and respect for the principles of the rule of law has been brought up. Person who has committed a crime has ignored these values and that indicates their lack of capacity of responsibility thereof. In that sense the imprisoned persons do not have so-called moral right to vote as they have "violated the Social Contract" and therefore in barring such persons from their

56 For example J. Adams/J.Rätsep. Constitution and National Constituent Assembly. Tallinn 1997, pages 604-605.

57 L. Hänni/P. Kask. Constitution and National Constituent Assembly. Tallinn 1997, page 678.

58 T. Käbin. Constitution and National Constituent Assembly. Tallinn 1997, page 679; L. Hänni. Constitution and National Constituent Assembly. Tallinn 1997, page 763.

59 Edited copy of verbatim records of the Riigikogu of 23 January 2002, available in Estonian at http://www.riigikogu.ee. Also Mr. Jüri Adams referred to the technical (administrative) difficulties ("way too complicated and expensive").

60 Judgment of the Constitutional Review Chamber of the Supreme Court of 21st January 2004, case No. 3-4-1-7-03, clause 39: „Unequal treatment can not be justified by difficulties of mere administrative and technical nature.".

61 Judgment of the Constitutional Review Chamber of the Supreme Court of 1st September 2005, case No. 3-4-1-13-05, clause 16.

62 Judgment of the Constitutional Review Chamber of the Supreme Court of 1st September 2005, case No. 3-4-1-13-05, clause 27.

63 Minutes No. 134/202 of the sitting of 18th October 2001 of the Constitutional Committee of the Riigikogu; Minutes No. 141/209 of the sitting of 12th November 2001 of the Constitutional Committee of the Riigikogu.

right to vote, the society merely expresses their contempt towards them. Additionally, deprivation of the right to vote can be viewed as a supplementary punishment for the crime committed.[64]

The European Court of Human Rights has deemed the latter aims to be legitimate ones and affirmed that there is no reason in the circumstances of such application to exclude these aims as untenable or *per se* incompatible with the right guaranteed under Article 3 of Protocol No. 1.[65]

The necessity criterion of the restriction in the assessment of the proportionality means that this goal cannot be achieved by imposing some other measure which is less burdensome on a person but which is at least as effective as the former. It is also important to consider how much different measures burden third persons as well as differences of expenditure for the state.[66]

An alternative (less burdensome) measure could be a possibility to give the court the right to make a separate decision on each person's case whether to impose the deprivation of the right to vote together with the actual imprisonment or not. Such possibility has been emphasised also by the "Code of Good Practice in Electoral Matters" of the Venice Commission ([…] *the withdrawal of political rights […] may only be imposed by express decision of a court of law*).[67]

At this point, it is firstly necessary to keep in mind that a court administers a penalty – therefore, pursuant to the valid legislation, a court makes a decision regarding the deprivation of the right to vote. Secondly, it is not possible to claim that such measure would be equal or better in efficiency. It would mean additional work load for courts. Also, if such restriction is set forth in the law, it would mean employing similar criteria towards all persons, which in turn is in way better compliance with the principle of equal treatment. In addition, an abstract restriction arising directly from the law would help to avoid possible reprimands towards the judges, accusing them of arbitrarily depriving the right to vote of one or another imprisoned person on the basis of their possible own personal political views and preferences. Therefore the selected measure can be deemed as necessary for the achievement of the listed goals.

Regarding the reasonableness of a measure, the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed: the more intense the interference is, the more weighted have to be the reasons justifying such interference.[68]

The European Court of Human Rights has emphasised repeatedly that there are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision. So, something that is completely legal in one country at particular moment, might not be considered legal in another country.[69]

At the time the Constitution was adopted, the restriction imposed on the right to vote of imprisoned persons might have been perfectly justified with the consideration of security and technical impediments. However, the significance of the afore mentioned contentions has considerably decreased by 2006. Also the materials of the National Constituent Assembly indicate that the

64 Same position: O. Kask. Comments to section 58. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition. Tallinn 2002, comment 3; The final report of the Expert Committee on Constitution of the Republic of Estonia, available in Estonian at: http://www.just.ee/10716.

65 European Court of Human Rights judgment - case of Hirst v. United Kingdom (no. 2) (6 October 2005), Application no. 74025/01, clauses 74-75, dissenting opinion of Judge Caflisch.

66 Judgment of the Constitutional Review Chamber of the Supreme Court of 6th March 2002, case No. 3-4-1-1-02, clause 15.

67 European Commission for Democracy through Law (Venice Commission) "Code of Good Practice in Electoral Matters". Adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), available at: http://www.venice.coe.int/docs/2002/CDL-EL(2002)005-e.asp.

68 Judgment of the Constitutional Review Chamber of the Supreme Court of 6th March 2002, case No. 3-4-1-1-02, clause 15.

69 For example: European Court of Human Rights judgment - case of Hirst v. United Kingdom (no. 2) (6 October 2005), Application no. 74025/01, clause 61.

devised restriction on the right to vote was intended to be temporary. At current date, the state has well developed prison network and elections organisation together with ensuring legal and technical measures thereof in order to guarantee the realisation of the principles of order and uniformity as well as the freedom of election. Besides, the state has functioning systems for registering places of residence (population register) and for maintaining information concerning punishment (punishment register) that guarantee the availability of the information required for organising orderly elections to the public authority.

The election practises to date indicate that the main practical problems surfacing upon organising elections in custodial institutions are the questions related to the registration of the place of residence and identity documentation. No security related problems have ever occurred.[70]

For example, in 2003 three imprisoned persons, from Tallinn, Tartu and Maardu prisons respectively, who could not participate at the referendum, had recourse to the Chancellor of Justice. Back then, the Chancellor of Justice failed to verify any errors from the part of the prisons, however, he adopted a position that it is necessary to apply additional practical measures for guaranteeing the right to vote in relation to the absence of the identity documentation and ascertaining the population register entries. The Ministry of Justice agreed with the problems. The Ministry confirmed that it will send out written instructions to prisons prior to the next elections in order to avoid such problems. The promise was kept. For example, in the petition processed by the Chancellor of Justice in 2005, it became evident that the Tallinn Prison commenced preparations for the elections scheduled for October already in the beginning of September: appropriate handouts were compiled, consultations with inspectors, contact persons and social workers were held, the imprisoned persons were informed of election procedure, flayers were distributed (both in Estonian and Russian), and relevant radio broadcasts were organised. The contact persons in turn informed the imprisoned persons wishing to exercise their right to vote of the requirement to have their identity documentation brought to them from their homes; also it was made clear that in order to vote, one has to have a valid residence permit or has to be entered into the population register.

The National Electoral Committee affirmed in their response to the Chancellor of Justice that even though there had been few petitions in earlier years in regard of the problems discussed above, then at the time of the local government council elections in 2005, they did not receive any petitions at all from the custodial institutions.

Hereby it would be appropriate to point out the fact that all the probable problems associated with the identity documentation should be resolved completely with the amendments to the Imprisonment Act that entered into force on 1st July 2006.[71]

The practises so far have not recorded any incidents in association with security or maintenance of public order while organising voting in the custodial institutions. Thereat it is necessary to emphasise that the elections have to be organised at current date in the custodial institutions (where the people serving custodial sentence are held) anyway. And that is because the persons accused at a trial as well as persons held in custody (arrested), who besides being held in the detention houses might be also held in prisons, do have the right to vote. According to the information of the National Electoral Committee, the voting has been always organised during the past years in the Tallinn Prison (41 voters at 2003 referendum, 76 voters at 2005 elections) and the Tartu Prison (74 voters at 2003 referendum, 34 voters at 2005 elections).

In conclusion, the Chancellor of Justice assumed a position that probable technical and security

70 National Electoral Committee communication No. 14-3/3 of 19th January 2006; Ministry of Justice communication No. 2-1-19/280 of 17th February 2006.

71 Draft Identity Documents Act and Imprisonment Act Amendment Act as of 1st February 2006, No. 749 SE, available in Estonian at: http://www.riigikogu.ee.

related fears and threats do not bear any significant meaning and weight in the legal and social circumstances of the current day.

Presumably the state is able to maintain the order for elections in the custodial institutions and also guarantee the realisation of the principles of the right to vote (uniformity and freedom of election).

Also the National Electoral Committee assured in their response to the Chancellor of Justice that they do not see any organisational problems or probable threats if the right to vote of the imprisoned persons is to be expanded.

Regarding the goal of expressing a negative attitude towards all persons convicted of committing a crime and serving a sentence in custodial institutions by depriving their right to vote or so called contempt towards the acts they have committed (ignoring the collective values), then this is very important. At the same time we are dealing with an abstract category which weight, including the impact on person, is very hard to gauge. It is extremely individual, whether an imprisoned person perceives at all the social contempt towards them expressed through the deprivation of the vote to right and whether they are willing to draw any conclusions from it.

Like mentioned above, the European Court of Human Rights has assumed a position that it is not possible to state unambiguously that through the restrictions imposed on the right to vote of imprisoned persons it is not possible *a priori* to achieve the set goal – i.e. social contempt. However, the abstractness and subjectivity of this category makes us doubt the notable significance of it as well as the question of whether it is able to outweigh interference to major fundamental right such as participation at elections. Instead an opinion[72] is expressed that participation in the democratic process may serve as a first step toward re-socialisation.

The intensiveness of the restriction on the right to vote imposed on all persons convicted of crime is highlighter by a fact that the number of persons without right to vote serving a sentence in a custodial institution is rather large. For example, as of 1st January 2006, 4410 persons were held captive in Estonian prisons, of which 3386 were imprisoned persons and 1024 arrested persons.[73] Understandably, all the persons held in custodial institutions might not have the right to vote (for example, due to the lack of citizenship), however, as in comparison we can bring forth the general figures of people participating at the elections: at the Riigikogu elections of 2003 the polling lists contained total of 859,714 persons; at the European Parliament elections of 2004 respective number was 873,809; and at the local government council elections of October 2005 it was 1,059,292.[74]

In addition, we must note that all the persons who have committed the same prohibited act and sentenced at the same terms, are not treated equally in imposing the restriction on their right to vote upon them. Most illustrative example would be firstly the fact that the deprivation of the right to vote is dependant on the time frame. According to the subsection 45 (1) of the Penal Code, for a criminal offence, the court may impose imprisonment for a term of thirty days to twenty years, or life imprisonment. Therefore persons, who are subjected to the entry into force of a judgment of conviction prescribing actual imprisonment during the time of elections, lose their right to vote at the elections. However, if such judgment enters into force immediately after elections, it might not bring about the loss of the right to vote, depending on the term of the sentence.

Secondly, we can produce that the loss of the right to vote is dependant on whether the court decides to substitute the punishment by community service (section 69 of the Penal Code) or whether a

[72] Dissenting opinion of Judge Caflisch, European Court of Human Rights judgment - case of Hirst v. United Kingdom (no. 2) (6 October 2005), Application no. 74025/01, clause 5.

[73] Report of the Minister of Justice on the implementation of the strategic development trends for criminal policy until 2010. Verbatim records of the Riigikogu of 23 February 2006, available in Estonian at http://www.riigikogu.ee.

[74] Information according to the National Electoral Committee, available at the web page of the National Electoral Committee: http://www.vvk.ee.

decision is made to suspend the sentence on probation (section 73 and subsequent sections of the Penal Code). Deliberating the judgment of imposing imprisonment, the courts do not consider the fact that upon imposing an imprisonment on person, the person is also subjected to the deprivation of the right to vote. Such weighing is also not happening when convicted person is released on parole (section 76 and subsequent sections of the Penal Code).[75] It is true that in sentencing imprisonment or not releasing a person on parole, a certain so called negative attitude towards the imprisoned person is expressed, however, the exact reason why such decision was made in such particular case vary greatly and are not associated with the right to vote whatsoever. Therefore the deprivation of the right to vote is a mere automatic (involuntary) consequence, without deliberated direct causal association between the judgment made by the judge in respect of punishment and the loss of the right to vote.

The deprivation of the right to vote may be associated also with the financial status of the person as in a case of absence of financial means the court may substitute a pecuniary punishment or fine by imprisonment (sections 70 and 71 of the Penal Code).

Possible argument to support the deprivation of right to vote of all imprisoned persons is the fact that while isolated from society, the persons convicted of crime and sentenced to custodial institutions do not get sufficient overview of the election campaigns. Therefore, they would not be able to exercise their right to vote in an adequate way. This claim is not truthful as the imprisoned persons have access to and opportunity to read newspapers, listen to radio, and watch television (sections 30 and 31 of the Imprisonment Act). The imprisoned persons just do not have access to Internet or come into contact with outdoor advertising (which is restricted anyway by valid legislation – section 5^1 of the Riigikogu Election Act, section 6^1 of the Local Government Council Election Act, and section 5^1 of the European Parliament Election Act).

Hereby it is important to emphasise the principle that the deprivation of person of the right to vote should be justified as a violation of the right to vote. In deprivation of the right to vote, only automatic logical connection would be only in the case of offences related to the freedom of election, criminal offences against the state etc. Additionally, the persons convicted for life should not be able to have any impact on the world outside of their custodial institution. Also the "Code of Good Practice in Electoral Matters" of the Venice Commission emphasises the importance of differentiating the grade of offence ("The deprivation must be based on […] criminal conviction for a serious offence").[76]

(5) Based on the afore mentioned, the Chancellor of Justice assumed a position that a restriction, according to which none of the persons convicted of crime and serving their sentence in the custodial institutions are not allowed to participate at the elections, is unconstitutional and therefore requires amending.[77] The Riigikogu Election Act, the Local Government Council Election Act, European Parliament Election Act, and the Referendum Act are in the part that eliminates the right to vote of all the persons that have been convicted of crime by the court and serving their sentence in custodial institutions, not in compliance with the section 58 and subsection 156 (2) and section 11 of the Constitution in their conjunction.

[75] The number of convicted persons released on parole has increased per se (e.g. if in 2004 the number of persons released on parole was 415, then for the first 9 months of 2005 the respective figure is 401), although it still amounts to only 20-25 per cent of the imprisoned persons in total. See "Report on the implementation of the development trends for criminal policy until 2010 in 2005. Overview of the most important measures introduced by the Government of the Republic in 2005 in implementing the development trends for criminal policy approved by the Riigikogu on 21st October 2003 pursuant to the clause 3 of the Riigikogu decision of 21st October 2003 (Approval of the development trends for criminal policy)", page 13, available in Estonian at: http://www.just.ee/17123.

[76] European Commission for Democracy through Law (Venice Commission) "Code of Good Practice in Electoral Matters". Adopted by the Venice Commission at its 51st Plenary Session (Venice, 5–6 July 2002), available at: http://www.venice.coe.int/docs/2002/CDL-EL(2002)005-e.asp .

[77] Same position: The final report of the Expert Committee on Constitution of the Republic of Estonia, available in Estonian at: http://www.just.ee/10716; O. Kask. Comments to section 58. – Ministry of Justice. Constitution of the Republic of Estonia. Commented edition. Tallinn 2002, section 58, comment 6.

The Constitutional Committee of the Riigikogu discussed the analyses prepared by the Chancellor of Justice in their sitting of March 2006, and assumed a position that the issue at focus requires summoning of larger meeting in order to analyse the details of practical aspects. Based on that, it would be possible to form a final position on the right to vote of imprisoned persons. Such meeting, with the participation of the representatives from various institutions was held at the Ministry of Justice in May 2006. The Minster of Justice assumed a position that as he does not have a proper clear overview of all the probable associated problems that may accompany the expansion of the right to vote, there is not going to be political initiative for the amendment of legislation.

V AREAS OF CONCERN OF THE LEGAL ORDER

1. On permissibility and extent of the violation of the fundamental rights of persons in the organisation of involuntary treatment

1.1. Introduction

Section 12 of the Constitution sets forth the fundamental right of equality, explicitly stating that everyone is equal before the law. No one shall be discriminated against on the basis of any circumstances or the status of the person. For each unequal treatment, including also the unequal restriction of fundamental rights, there must be a reasonable cause. Such obligation binds both the legislators and the persons enforcing the law. The Supreme Court has declared repeatedly in its judgments that the prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. An unequal treatment can be regarded arbitrary if there is no reasonable cause therefore.[78] In any case, the restrictions on fundamental rights and freedoms have to be in compliance with the Constitution.

It is evident from the section 20 of the Constitution that everyone has the right to liberty and security of person. Also the article 5.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was ratified and entered into force in Estonia on 16 April 1996, provides that everyone has the right to liberty and security of person. Thus it is one of the most basic fundamental rights in democratic societies, guaranteeing all persons, both citizens and non-citizens, physical security. However, the Constitution itself provides six different grounds on which persons can be deprived of liberty. Pursuant to the clause 20 (2) (5) of the Constitution, it is possible to deprive of liberty in the cases and pursuant to the procedure provided by law a person suffering from an infectious disease, a person of unsound mind, an alcoholic or a drug addict, if such person is dangerous to himself or herself or to others. Such grounds for the restriction on the fundamental right to liberty are not unique in any way – alike the article 5.1.e of the afore mentioned Convention authorises the deprivation of liberty pursuant to the procedure provided by law for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants.

More specific procedure for imposing restrictions on the fundamental right to liberty of a person due to mental disorder is provided by the Mental Health Act that entered into force in 1997. Pursuant to the subsection 11 (1) of the Mental Health Act, a person is admitted to the psychiatric department of a hospital for emergency psychiatric care without the consent of the person or his or her legal representative, or the treatment of a person is continued regardless of his or her wishes only if all of the following circumstances exist: the person has a severe mental disorder which restricts his or her ability to understand or control his or her behaviour; without inpatient treatment, the person endangers the life, health or safety of himself or herself or others due to a mental disorder; and other psychiatric care is not sufficient. As a general rule, the involuntary treatment can only be applied on the basis of court ruling. According to subsection 13 (2) of the Mental Health Act, involuntary treatment of a person in the psychiatric department of a hospital may continue for more than forty-eight hours only with the authorisation of a court.

Therefore the constitutional requirement of restricting the fundamental right to liberty only in the cases and pursuant to the procedure provided by law has been fulfilled in principle, however, in practise an array of problems has arisen in restricting the fundamental rights of persons with special psychic needs based on the clause 20 (2) (5) of the Constitution. The main principle ignored in organising the involuntary treatment is the principle, according to which, the restriction on one fundamental right should not automatically cause the restrictions on other fundamental rights. Also

[78] Judgment of the Constitutional Review Chamber of the Supreme Court of 3rd April 2002, case No. 3-4-1-2-02, clause 17.

the article 3.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder prohibits any form of discrimination on grounds of mental disorder.[79]

Below we shall discuss the main violations of the fundamental rights that can take place when committing a person with mental disorder to involuntary treatment.

1.2. Time of judicial control on deprivation of liberty

According to the subsection 21 (2) of the Constitution, no one shall be held in custody for more than forty-eight hours without the specific authorisation of a court. Despite of the fact that the Constitution is mentioning holding in custody (arrest), this requirement of immediate judicial control should be expanded to cover also other cases of deprivation of liberty against the will of the person. This particular understanding is evident from the subsection 13 (2) of the Mental Health Act, according to which involuntary treatment of a person in the psychiatric department of a hospital may continue for more than forty-eight hours only with the authorisation of a court.

Despite of that simple and extremely precise wording that should leave no room for misinterpretations, an unwavering adherence to the time requirements prescribed for the judicial control on deprivation of liberty has often turned out to be a bit problematic. The delay in the court activities can be caused either by the actions of the health care provider depriving a person of liberty or by the actions of court hearing the matter. When the person is detained during the weekend or national holidays, the forty-eight hour rule is often violated. During mentioned time there is only a limited staff working for the health care provider and also the access to the county courts is limited. Besides, the timely judicial control is often impracticable in cases when the county court conducting a proceeding on the matter is under excessive workload. However, all these are administrative organisational issues that can not and should not justify derogation from the provisions of the constitution and legislation in exercising control over violation of the fundamental right to liberty of a person. Like it is in all other cases of deprivation of liberty, also in the case of subjecting a person to involuntary treatment the judicial control on deprivation of liberty has to be performed within forty-eight hours from the moment of detaining the person. The Chancellor of Justice has called this fact into the attention of the county courts conducting the proceedings on the matters of involuntary treatment as well as some of the psychiatric care providers.[80]

1.3. The right to be tried in his or her presence and the right of appeal

Pursuant to the subsection 24 (2) of the Constitution everyone has the right to be tried in his or her presence. This right guarantees that the person, whose case in under proceeding conducted by court, is not merely an object of the administration of justice, but a subject of law with all the rights thereof. Participation at the court proceedings as a subject also presumes the right to be heard by the court, as well as that in rendering the judgment the court has to take into account the position of the person and provide explanations on reasons for not concurring with it.[81]

Such approach is also in conformity with the provisions of international legislation that is binding to the Republic of Estonia. For example, the UN General Assembly Resolution No. 46/119 on the principles for the protection of persons with mental illness and for the improvement of mental health care[82] provides by the principle 18 the procedural safeguards for persons.

79 The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

80 Proceedings of the Chancellor of Justice No. 7-2/060564 and 7-9/061173.

81 E. Kergandberg. Comments to section 24. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 24, comments 5 and 9.

82 The UN General Assembly Resolution No. 46/119 of 17th December 1991 on the principles for the protection of persons with mental illness and for the improvement of mental health care, available at: http://www.unhchr.ch/html/menu3/b/68.htm.

Pursuant to the article 20.2 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[83] the decision to subject a person to involuntary treatment should be taken by a court or another competent body who should take into account the opinion of the person concerned and act in accordance with procedures provided by law. Both the legislator and law enforcer in the enactment of said procedures, have to perform based on the principle that the person concerned should be seen and consulted.

In Estonia, the ordering of involuntary treatment in court conducted proceedings is regulated by the chapter 54 of the Code of Civil Procedure. Pursuant to the subsection 536 (1) of the Code of Civil Procedure, before placing a person into closed institution, the person must be heard in person by the court and the court shall explain the course of the proceeding to him or her, and furthermore, if necessary, the court shall hear the person in his or her usual environment. Exemption to the afore mentioned is provided by the subsection 534 (2) of the Code of Civil Procedure, according to which a person need not be heard if this would clearly cause significant damage to his or her health or if the person is clearly not able to express his or her will. It is necessary to take into account that application of the subsection 534 (2) of the Code of Civil Procedure is a significant restriction on subsection 24 (2) of the Constitution and as such requires considerable justification from the part of the court. Regrettably, such exemption has often become a rule and the persons sent to involuntary treatment are rather not heard in person and no proper arguments are presented in justification of such major violation of fundamental right. Also, there is a widespread tendency that the person is heard by the court after the court order has been issued at the time that is convenient for the court. Such interpretation of law is extremely formal and it does not help to guarantee the actual aim of the hearing of the person that is to minimise the unjustified violations of fundamental right to liberty.

In addition, the subsection 24 (5) of the Constitution provides that everyone has the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. The judgment stands for all the decisions made by a court, including the court rulings issued for solving individual cases. Also the article 25.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[84] obligates the member states to ensure that persons subject to involuntary placement or involuntary treatment can effectively exercise the right to appeal against a decision, to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals and to be heard in person or through a personal advocate or representative at such reviews or appeals. If the person cannot act for him or herself, the person should have the right to a lawyer and, according to national law, to free legal aid. The same idea is echoed in the principle 18.1 of the UN General Assembly Resolution No. 46/119[85], according to which the patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay. And according to the section 543 of the Code of Civil Procedure, a person whom such measure was applied, has a right to file an appeal against ruling subjecting them to involuntary treatment. Pursuant to the clause 538 (1) (4) of the Code of Civil Procedure, a ruling on placement of a person in a closed institution shall set out an explanation of the possibility to file an appeal against the ruling. In addition, the subsection 535 (1) obligates the court to appoint a representative to the person in a proceeding for placement of the person in a closed institution if this is clearly necessary in the interests of the person and the person is not represented by another person with active civil procedural legal capacity.

83 The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

84 The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

85 The UN General Assembly Resolution No. 46/119 of 17th December 1991 on the principles for the protection of persons with mental illness and for the improvement of mental health care, available at: http://www.unhchr.ch/html/menu3/b/68.htm.

In practice there are two problems associated with the realisation of the right of appeal: the representative does not fulfil their duties to the required extent and the information on the procedure of appeal is limited. Generally the representative appointed by the court does not meet with the person before the issue of the court ruling on involuntary treatment of the person, and likewise, the representative is not introduced to the materials on the person thereof. Therewith, the person's right to adequate representation in the court proceeding for restriction on the fundamental rights has been rendered nonexistent. In addition to the poor representation in the county courts at the court conducted proceedings on the administration of involuntary treatment, the lack of actual representation also worsens the person's right of appeal. The application of the right of appeal is also further complicated by the fact that the court rulings allowing the application of involuntary treatment fail to set out with required clarity the procedure of appeal and other conditions thereof, for example the address of the court where the appeal against court ruling can be submitted, the required information for the payment of state fee, information on the eligibility and opportunity to appeal for the release from the state fee etc.

Therefore, it is necessary to unwaveringly adhere to the requirement to allow the person to be directly present at the hearing of their court case and that before the court ruling is issued. In the course of the hearing the court has the obligation to inform the persons of the grounds and consequences of the restriction on their fundamental freedoms as well as of the procedure of appeal. Besides the court, the representative of the person subjected to the administration of involuntary treatment is having a major role. In the absence of such representative, the court has an obligation to appoint a representative at the expense of the state. The representative is required to have met the person prior to the court hearing and have made sure they know their actual wishes. It is necessary to avoid a situation where in the court conducted proceedings on restriction on the fundamental freedoms the representative of the person is but a mere extension of the court itself and fails to convey the actual opinion of the person they are representing on the deprivation of liberty and the grounds thereof. The Chancellor of Justice has highlighted these problem areas for the courts and Estonian Bar Association, requesting them to guarantee a complete and unwavering defence of the interests of the persons in the future in the court conducted proceedings on administration of involuntary treatment.

1.4. Prohibition of degrading treatment

Pursuant to the subsection 18 (1) of the Constitution, no one shall be subjected to torture or to cruel or degrading treatment or punishment. The protective scope by person concerned of said provision is covering everyone, i.e. all persons under the jurisdiction of the Republic of Estonia, both citizens and non-citizens, both persons with restricted liberty due to being subjected to the legal sanctions (imprisoned) and persons whose ability to understand and control their actions is restricted due to their age or psychic condition (patients) as well as those whose understanding of dignity is deviating from the generally applicable norms. Such right is one of the most fundamental rights of liberty and it involves a negative obligation for the public authority to refrain from any actions that can be considered as torture, cruelty or degradation, and secondly, a positive obligation to take steps in order to avoid any probable cases of violation of fundamental rights.[86]

Same set of ideas is represented also in the article 3 of the Convention for Human Rights and Fundamental Freedoms, according to which no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Pursuant to the principle 1.2 of the UN resolution 46/119[87], all persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.

[86] R. Maruste. Comments to section 18. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 18, comments 2 and 5.

[87] The UN General Assembly Resolution No. 46/119 of 17th December 1991 on the principles for the protection of persons with mental illness and for the improvement of mental health care, available at: http://www.unhchr.ch/html/menu3/b/68.htm.

Degrading treatment in the organisation of involuntary treatment can occur in the course of rendering health care as well as during the course of taking the person to health care provider or to the court for hearing (pursuant to the procedure prescribed by subsections 12 (1) and 13 (6) of the Mental Health Act) by the police. According to the article 11.2 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[88], professional staff involved in mental health services should have appropriate qualifications and training, including training on protecting the dignity, human rights and fundamental freedoms of persons with mental disorder. Pursuant to the article 32.3 of the same Recommendation, members of the police should respect the dignity and human rights of persons with mental disorder and the importance of this duty should be emphasised during training. In addition, according to the article 32.4, members of the police should receive appropriate training in the assessment and management of situations involving persons with mental disorder, which draws attention to the vulnerability of such persons in situations involving the police.

Mental health care providers have a special obligation in regard of guaranteeing the dignity of persons with mental disorders, including the persons placed to involuntary treatment in mental care facilities. It is necessary to presume that the people working with persons with special psychic needs on daily bases are performing their work voluntarily according to their free will and therefore deem important to guarantee the human dignity of their patient and the treatment thereof. In Estonia, the health care providers have organised training courses for their employees on the development of respect for the human dignity of persons with mental disorders. However, there have been problems in police activities involving the taking of a person to involuntary treatment or to court. Persons subjected to involuntary treatment as well as the health care professionals have repeatedly noticed that the police officers have mistreated the persons with mental disorders both verbally and physically (i.e. applied excess force against them). Thus the activities of the police can be degrading to the persons with special psychic needs who are being taken to the health care provider or to the courts. The Chancellor of Justice has brought into the attention of the National Police Commissioner these obvious deficiencies in the training of the police officers and made a suggestion to incorporate the topics described in the article 32.4 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10 to the training programmes of police officers. In addition, there is a need to organise in-service training courses for the police officers on the dignity of persons with mental disorders and respect for human rights. It is an unacceptable situation indeed where the representatives of public authority violate one of the most fundamental rights of liberty, characteristic for democratic statehood.

1.5. Right to free self-realisation

Pursuant to the subsection 19 (1) of the Constitution, everyone has the right to free self-realisation. The objective scope of protection of this provision is the legal freedom. The legal freedom constitutes the permission to do or not to do what that person wills. However, the scope of protection of the general right to liberty is violated by the obstruction of, damage to or elimination of each position protected by the addressee of fundamental right.[89] Restriction on the said fundamental right can be performed only taking into account the requirements provided by subsection 19 (2) of the Constitution, i.e. in order to honour and consider the rights and freedoms of others and to observe the law.

The application of the right to free self-realisation in full extent towards persons, who are subjected to involuntary treatment in the facilities of health care providers, is in no doubt most complicated. I have to admit that the presence of certain restrictions on the exercise of absolute legal freedom is understandable despite of the fact that at current date there are no legal acts imposing explicit restrictions on the right to certain types of self-realisation of the persons subjected to involuntary

[88] The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[89] M. Ernits. Comments to section 19. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 19, comment 3.1.

treatment, except for the prohibition to leave the health care provider. Pursuant to the principle 13.2 of the UN General Assembly Resolution No. 46/119[90], the environment and living conditions in mental health facilities have to be as close as possible to those of the normal life of persons of similar age. In particular it is necessary to pay attention to the creation of opportunities for pursuits and leisure time activities as well as it is necessary to create opportunities for purchasing or obtaining items or equipment for day to day life and for recreation time. In addition, it is necessary to create systems for encouraging the patients and involving them in lively activities that are appropriate for them in regard of their social and cultural backgrounds. The environment of the persons with mental disorders is approached in a similar manner by the article 9.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[91], according to which facilities designed for the placement of persons with mental disorder should provide each such person vocational rehabilitation measures to promote the integration of those persons in the community.

Meanwhile, in the practise the restriction on the right to free self-realisation occurs frequently at the health service provider. For example, the Chancellor of Justice has received petition complaining that the Psychiatry Clinic of the North Estonia Regional Hospital Foundation does not provide any psychosocial rehabilitation activities for the persons subjected to involuntary treatment.[92] The Clinic retains a position that it provides the persons the fundamental right to free self-realisation in sufficient manner and within the boundaries of the means available for the clinic. The Clinic has made available various activities for the people subjected to treatment, including access to various information channels as well as availability of sporting equipment and games; in addition the Clinic organises entertainment events for the patients. According to the opinion of the Chancellor of Justice, the fundamental rights and freedoms of persons can be guaranteed both in positive and negative sense i.e. whether with activity or inactivity. In the case of persons committed to closed institution, the institution hosting them has to be active with an aim to allow the realisation of the fundamental rights and freedoms of such persons to maximum extent. Certain activities can be excluded from the scope of protection of the realisation of fundamental rights only on the basis provided by subsection 19 (2) of the Constitution, meaning in cases when it is required in order to honour and consider the rights and freedoms of others and to observe the law.

Therefore, the obligation of the health service provider organising involuntary treatment is to guarantee the persons subjected both to involuntary and voluntary treatment the right to free self-realisation in the maximum extent possible. The realisation of the right can be done whether allowing the persons use the equipment required for free self-realisation or ensuring the persons activity possibilities using other means by the health service provider. It is necessary to take into account that in our current judicial area the health service provider has to guarantee the right to free self-realisation of the persons subjected to treatment as an absolute right, as there is no valid legal act to provide basis for or discretion rule for restricting that right. Undoubtedly, mentioned area is one of in need of regulation by legislation. Hopefully the described issues will be considered and taken into account in drafting the new Mental Health Act by the Ministry of Social Affairs.

1.6. Guarantee of the right to ownership

Pursuant to the subsection 32 (1) of the Constitution, the property of every person is inviolable and equally protected. The subsection 32 (2) ibidem grants everyone the right to freely possess, use, and dispose of his or her property, whereas restrictions shall be provided by law. Meaning, that in general such restrictions cannot be prescribed by the legislation below the level of an Act i.e. by the

[90] The UN General Assembly Resolution No. 46/119 of 17th December 1991 on the principles for the protection of persons with mental illness and for the improvement of mental health care, available at: http://www.unhchr.ch/html/menu3/b/68.htm.

[91] The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[92] Proceedings of the Chancellor of Justice No. 7-6/061008 (for internal use only).

local government or Government of the Republic resolution[93]. Also, according to the article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

However, the mental health care providers violate the principle of inviolability of property repeatedly and persistently. The first violation of the inviolability of property takes place upon admitting the person into the facility of the health care provider, when practically all the personal effects are removed from the person. During the course of the in-house treatment, the health care provider has the full control over deciding whether the items brought to the person held in closed institution or obtained by the person in some other way are appropriate and allowed. During the verification visit to the Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation, it became evident that all the parcels sent to the persons undergoing the in-house treatment are opened by the health care professional in the presence of the patient and removes the items that are not allowed in the Clinic. The items with long life will be storied until the person takes a leave from the health care provider, however, the items requiring special storage conditions will be disposed of. Also other mental health care providers have assumed the right to make a decision on which items are allowed in closed institution and which are not.

The case described above is actually a case of imposing restrictions on the right to freely possess, use, and dispose of his or her property. Meanwhile, the legal grounds required by Constitution for imposing such restrictions are missing – neither the Mental Health Act nor any other act are setting forth the list of items allowed or forbidden in psychiatry clinics and authorise the health care provider to remove the items not allowed.

Taking into consideration the speciality of the institutions providing mental health care and the vulnerability of the persons undergoing treatment in these institutions, certain restrictions on the right to freely possess, use, and dispose of his or her property might be deemed necessary. However, such restrictions can be imposed only pursuant to law or pursuant to regulation adopted on the basis of valid legislation. For example, “Internal Rules of the Prison”, approved by the regulation No. 72 of the Minister of Justice of 30 November 2000 on the basis of the subsection 15 (2) of the Imprisonment Act, providing an exhaustive list of the personal belongings allowed to be brought into their confinement cells.

Thus the health care providers do not have any legal grounds to violate the right to property of the persons subjected to treatment (or of the persons visiting them) and that applies even in cases where such violation of the right to property is presumptively needed in the best interests of the person undergoing the treatment. In order to solve the situation, the Chancellor of Justice has presented a proposition to the Minister of Social Affairs to establish the legal grounds for the restriction on the right to property of the persons subjected to treatment at mental health care providers, approving a list of personal belongings allowed or forbidden at the mental health care providers and also prescribing a procedure for the storage of forbidden items that are deposited in storage on a temporary basis.[94]

1.7. Guarantee of the right to education

Pursuant to the subsection 37 (1) of the Constitution, everyone has the right to education. The minors within the age range of compulsory school attendance have an obligation to study pursuant to the extent provided by law. Also the article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms states that no person shall be denied the

[93] P. Roosma. Comments to section 32. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 32, comment 5.2

[94] Proceedings of the Chancellor of Justice No. 7-9/061173.

right to education. The availability and accessibility of education to every child has been emphasises in the UN Convention on the Rights of a Child, which Estonia ratified and joined already in 1991. According to the article 28.1 of the Convention, all the States Parties to the Convention have to recognize the right of the child to education.

For the purposes of the section 37 of the Constitution, education includes both basic and secondary education, as well as higher education and even refresher courses (in-service training) and retraining. Acquisition of knowledge cannot be restricted at any level of education.[95] Persons still in process of acquiring their basic education or who are under 17 years of age, have to have their right to education guaranteed in any case.

However, persons subjected to treatment at mental health care provider often do not have any possibilities to acquire education guaranteed for them. According to the already afore mentioned article 9.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[96], the facilities designed for the placement of persons with mental disorder should provide vocational rehabilitation measures to promote the integration of those persons in the community. Said requirements for guarantee of vocational rehabilitation are practically not fulfilled. The health care providers also do not guarantee access and availability of any other education opportunities for adults.

Pursuant to the article 29.5 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10, minors subject to placement should have the right to a free education and to be reintegrated into the general school system as soon as possible. If possible, the minor should be individually evaluated and receive an individualised educational or training programme. According to the subsection 1 (9) of the "Procedure for Home Schooling" approved by the regulation No. 24 of the Minister of Education of 18 July 2000, the education of the students subject to compulsory school attendance undergoing hospital treatment shall be organised by a school approved by rural municipality or city government upon the request of the hospital. Despite of the direct binding provision, the obligation to obtain education of the persons undergoing hospital treatment is not applied in sufficient extent. Especially great violation of the right to education is taking place in cases where there is just one person subject to compulsory school attendance at health care provider or just few of them. In such case the health care institution lacks the motivation to find an educational institution and to draft an individual study programme.

In conclusion we have to admit that especially in the case of the persons subject to compulsory school attendance, there is a need to guarantee with extreme efficiency the right to education and performance of compulsory school attendance, taking into account the individual needs of each person and putting together appropriate study programme where it is needed. At the same time we cannot neglect the requirement to guarantee the right to education also in the case of adult persons, following the organisation of vocational rehabilitation measures mentioned in the article 9.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10 as a guideline.

1.8. Right to inviolability of private life

According to the section 26 of the Constitution, everyone has the right to the inviolability of private and family life. In addition, the section 43 of the Constitution provides the right to confidentiality of messages sent or received by post, telegraph, telephone or other commonly used means. Same is set forth in the article 8.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which everyone has the right to respect for his private and family life, his

95 T. Annus. Comments to section 37. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 37, comment 2.2.

96 The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

home and his correspondence. The afore mentioned grants everyone the right to presume that state agencies, local governments, and their institutions and officials shall not interfere with the private or family life of any person, except in the cases and pursuant to procedure provided by law for the purposes set out in the Constitution.[97]

According to the principle 13.1 of the UN General Assembly Resolution No. 46/119[98], every patient in a mental health facility shall, in particular, have the right to full respect for his or her recognition everywhere as a person before the law; privacy; freedom of communication, which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television; and freedom of religion or belief. Also the article 23 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[99] is directed towards the guarantee of inviolability of private life prohibiting the unreasonable restrictions on visits received by persons with mental disorder subject to involuntary placement.

Unfortunately, in Estonia there is still no prevalent understanding that persons subjected to restrictions on their fundamental right to liberty still retain their universal right to inviolability of private life. Thus at the department of the Psychiatry Clinic of the North Estonia Regional Hospital Foundation, where persons subjected to involuntary treatment are placed, the hospital rooms have no doors and some of the patients are forced to sleep in the common use areas.[100] And at the Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation the living quarters of the patients have doors with see-through glass panels.[101] Both of the cases described above represent a significant and unreasonable violation of the right to privacy of the persons subjected to treatment.

In addition, patients often have to endure difficulties in maintaining the contacts with the world outside. In most cases the health care providers have prohibited the use of mobile phones by the patients subjected to involuntary treatment. Meanwhile the number of public payphones within the premises of institutions providing psychiatric care is rather limited. In the Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation, the health service provider has resolved the communication issue by allowing the persons subjected to treatment limited access to the hospital phone and that only in the presence of health care professional. Such solution that at the first glance seems to be reasonable in the case of least privileged persons, imposes restrictions on the fundamental right to confidentiality of messages and the right to freedom of communication of these persons. Firstly, the use of the telephone is only allowed in the case when the health care professionals have time and possibility to supervise the patient on the phone. This in fact is a significant violation of the inviolability of private life as the person is not allowed to freely exercise their right to communicate with their family. In addition, the right of the person to contact their representative has been restricted. Secondly, no doubt it is a violation of the right to confidentiality of messages. It is highly probable that the persons placed to closed institutions are not able to talk about everything they would wish to talk over the phone in the situation where the health care professional remains continuously within the hearing distance. In addition to the difficulties of using a phone as a communication device in the closed institution, there have been frequent cases where the letters and parcels sent to the persons subjected to treatment at the closed institution have been opened prior to reaching them and the

97 U. Lõhmus. Comments to section 26. – Ministry of Justice. Constitution of the Republic of Estonia. Commented issue. Tallinn 2002. Comments to section 26, comment 10.

98 The UN General Assembly Resolution No. 46/119 of 17th December 1991 on the principles for the protection of persons with mental illness and for the improvement of mental health care, available at: http://www.unhchr.ch/html/menu3/b/68.htm.

99 The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

100 Situation as it was during the verification visit of the Chancellor of Justice on 31st May 2006 to the Psychiatry Clinic of the North Estonia Regional Hospital Foundation. Proceedings of the Chancellor of Justice No. 7-2/060564.

101 Situation as it was during the verification visit of the Chancellor of Justice on 25th September 2006 to the Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation. Proceedings of the Chancellor of Justice No. 7-9/061173.

contents deemed unsuitable by the health care professionals have been removed. And quite often even the addressee of the parcel is not informed about such occurrence. Besides the violation of the right to confidentiality of correspondence, it can be considered to be also a significant violation of the right to property like this has been discussed above in this report.

The Chancellor of Justice has notified the Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation about the violations of the right to inviolability of private life and the right to confidentiality of correspondence taking place at the Clinic and suggested to resolve the situation where the persons subjected to the treatment at the clinic are not guaranteed the right to confidentiality of messages sent or received by telephone and the right to inviolability of private life.[102] It is a common problem that needs to be resolved by all the psychiatric care providers.

1.9. Summary

Current report lists only the most principal and frequent restrictions on the fundamental rights of the persons subjected to involuntary treatment. Unquestionably in reality there can be other violations of the fundamental rights associated with the deprivation of liberty with an aim of subjecting a person to involuntary treatment. To name a few – violation of the right to the protection of health set forth in the subsection 28 (1) of the Constitution due to inappropriate treatment or violation of the right to exercise the supreme power of state by electing the Riigikogu set out in the clause 56 (1) of the Constitution due to the actual unavailability of polling facilities at the psychiatric care provider.

A principle, according to which the restriction on one fundamental right can not bring about automatic restrictions on other fundamental rights, can be considered a dogmatic one. The grounds for imposing restriction on each and every fundamental right have to be provided by law and the restrictions can be imposed only in the case of dominant interests. Also, the restriction on any fundamental right has to be proportional with the importance of the aim. The deprivation of the liberty of persons subject to involuntary placement is aimed towards set goal – to avoid danger to that person or to others. However, the deprivation of liberty on said grounds can not be automatically associated with the deprivation of the right to property of the person or used as an excuse for degrading treatment of the person.

Upon the application of involuntary treatment, only the restrictions on the freedom of movement are justified. The decision, whether and to what extent to apply concurrently the restrictions on other fundamental rights, can be made by the legislator only. The prevailing tendency of having the health care providers to substantively decide over the application of restrictions on the fundamental rights at the closed institutions is not permissible.

In order to resolve the unconstitutional situation, a new and improved (modern) Mental Health Act it is undoubtedly needed. Together with said act, there is a need to develop a concept for both voluntary and involuntary psychiatric aid. Additionally, it is deemed necessary to improve the knowledge of the mental care providers on the fundamental rights of persons and the admissibility to impose restrictions thereon. Pursuant to the fact that since early 2007, the Chancellor of Justice has been specified as a national preventive mechanism by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whose functions include among other things also the publicity work, the Chancellor of Justice has an opportunity to efficiently work together with the mental health care providers in disseminating the knowledge on the fundamental rights and freedoms of persons.

Despite of the fact that according to the Constitution, the Republic of Estonia guarantees the respect for fundamental rights and freedoms and minimises restrictions, a person is deprived of the majority of the fundamental rights, freedoms and duties specified in the Chapter 2 of the Constitution when

[102] Proceedings of the Chancellor of Justice No. 7-9/061173.

subjected to the involuntary psychiatric treatment. According to the article 17.1 of the Council of Europe Committee of Ministers Recommendation Rec (2004)10[103], in subjecting a person to involuntary placement, also the opinion of the person concerned has to be taken into consideration among other criteria. However, the Mental Health Act valid in Estonia does not provide such condition. Therefore, already the grounds for application of involuntary treatment in Estonia have inherent patriarchal attitude towards the person with mental disorder and their possible lowest involvement in the process of restriction on their fundamental right to liberty. Yet the section 12 of the Constitution prohibits any unequal treatment and discrimination on whichever grounds and on the basis of the state of mental health. Regrettably, at present the unequal treatment in exercising the fundamental rights and freedoms begins already when taking the persons with mental disorders to the health service provider and continues from there on in the ways described in this report during the course of the whole extent of the stay in closed institution. In a democratic state that respects the fundamental rights, a train of events as such is not permissible and we have to hope that the change to the guarantee of fundamental rights and freedoms of the persons subjected to involuntary treatment will arrive soon.

2. The constitutional boundaries of the transfer of public functions to private sector

2.1. Introduction

The possibility and necessity of transferring the public functions to private sector has been acknowledged in the legal literature as well as in practice for quite a few years already.[104] The concept of a 'slim state' (*schlanker Staat*) is mentioned, according to which the public authority retains only the core functions as directly executable by it. The main objective of the transfer of public functions is to gain value for money – less costly public service with higher quality. At the same time it has been agreed that the protection of the rights and public interests of the person in whose interest these functions are performed should not suffer through this arrangement.

Whether and which public functions a state can afford to give up, transferring them to the private sector to perform and maintaining the conformity with the constitutional requirements thereupon, is in no way a new problem in legal theory. Unlike in other countries where there has been multitude of publications discussing this topic and also where the judicial practice[105] has provided much needed guidelines, in Estonia up until now we have not had many relevant theoretical discussions at all. [106]

[103] The Council of Europe Committee of Ministers Recommendation Rec (2004)10 to member states concerning the protection of the human rights and dignity of persons with mental disorder, available at: https://wcd.coe.int/ViewDoc.jsp?id=775685&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[104] See for example regarding Estonia: Approved by the Government of the Republic Regulation of 24th April 2001 "Administrative Reform Programme of the Government of the Republic" clause 6.3 containing the principle of strategy – transfer of the public functions non-essential for the central authority to the private and third sector and local governments, available at: http://www.riigikantselei.ee/?id=831; The Coalition Agreement among the Estonian Reform Party, the Patria Union and the Moderate People's Party (from 25th March 1999 to 28th January 2002) sub-clause 2 to the clause "The State for the People"; The Coalition Agreement between the Centre Party of Estonia and the Estonian Reform Party (from 28th January 2002 to 10th April 2003) sub-clause 6 to the clause "State based on the rule of law, legal order", available at http://www.valitsus.ee/?id=1069.

[105] Hereby as an example the judgment of the Supreme Court (Oberster Gerichtshof) of Austria, so-called Austro Control judgment (14th March 1996, VfSlg 14.373/1996); available at http://www.ris.bka.gv.at/vfgh/. Concisely explaining, the court marks the following criteria as the constitutional boundaries in transferring the public functions to private sector: appropriateness and efficiency, limited to the transfer of only the "select functions", the transfer is in compliance with the structure of the state administration based on the essence of constitution, the subordination to the higher ranking administrative bodies remains, the "core domains" of the state administration cannot be transferred.

[106] See for example: K. Merusk. The boundaries of the transfer of public functions to persons governed by private law. – Juridica 2000, p. 499 and the following; B. Aaviksoo. Contractual delegation of the local government functions and the corruption. – Juridica 2000, p. 508; T. Annus. Delegation of the functions of the state to persons governed by private law, case study on the bailiffs. – Juridica 2002. p. 224 and the following; R. Altnurme. Contractual delegation of the public functions to third sector. Tallinn, Baltic-American Partnership Programme, 2002; A. Ets. Contractual delegation of the public functions at the local governments of Harju County, 2003, Master's thesis; V. Lember. Contracting Out in Public Sector: The Limits and the Case of the Estonian Prison System, 2002, Master's thesis; A. Ümarik. The transfer of the public administration functions to external partner (outsourcing) i.e. the transfer of functions, 2001, available at: http://www.riigikontroll.ee/upload/failid/funktsioonisiire.pdf ; M. Urval. Contractual delegation of public functions. The Manual. Tallinn 1999, available at http://www.siseministeerium.ee/public/Body.htm.

The constitutional boundaries are especially important when making a decision on the transfer to private sector such public functions which performance involves the authority to apply physical force. Or in other words, whether and when a person is allowed to demand that the person detaining him/her or searching him/her in the name of the state, or issuing mandatory commands in traffic or using a firearm in public emergency or danger situation is not just a staff member of some private security company, but a competent public servant who has undergone relevant special training.

In order to create some clarity in the said situation, the following hereby is an analysis on the boundaries arising from the Constitution of the Republic of Estonia in the transfer of public functions vested to the state[107] to private sector that have to be taken into account both by the legislator in the development of legislative drafting and by the executive power acting on the basis and pursuant to the law. The main emphasis lies on such public functions that may involve the application of physical force when acting in the name of the state. Firstly, the main arguments are provided that support the transfer of public functions to the private sector. Then, subsequently, the constitutional background of the transferability is introduced and the criteria determining the decisions thereof is analysed. And finally, the issues pertaining to the provisions delegating authority is brought to the attention.

2.2. The arguments supporting the transfer of public functions to private sector

The economic considerations, the need to involve the knowledge and know-how of the private sector and the scarcity of public resources are presented as the main reasons for adopting a decision in practice to transfer public functions to private sector.[108]

Regarding the economic considerations, the keyword here is the efficiency i.e. paying less for better quality. In the case of private sector, the competence, uncomplicated structure and more flexible and sustainable operations due to better management models are emphasised. Undoubtedly it is an important argument considering the appropriate use of the funds acquired by the state via collection of taxes.[109] Meanwhile, we should not overestimate the importance of economic considerations as the state is not a profit oriented business that is pursuing financial benefit by each and every activity. In performing the public functions, a state has to guarantee for example the protection of human dignity, violation of which can not be measured in currency.

Through the transfer of public functions it is possible to employ the expert knowledge of the private sector that for some reason are absent in the public sector. Depending on the area of activity, such involvement of knowledge and experience is no doubt necessary and well justified. However, hereof it is important to take caution, so this practice will not develop into so to say convenient justification for relinquishment of responsibility in the issues that are not associated with the requirement of expert knowledge.

Thirdly, one of the generally acknowledged issues is the scarcity of public means that manifests itself predominantly through the personnel related problems. The latter may be caused by the working

107 It is emphasised in the theory that the term "state function" has to be clearly distinguished from other similar terms such as "state objective" (i.e. the question about what is justifying the existence of the state as it is; so to say the reason of existence of a state) and "public function" (i.e. all the functions falling within the scope of public interest and that serve the cause of common good/welfare) (see for example A. Mackeben. Grenzen der Privatisierung der Staatsaufgabe Sicherheit. Baden-Baden 2004, S 35 Ff; M. Gamma. Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr. Bern, Stuttgart, Wien 2001, S 9 Ff; C. Gramm. Privatisierung und notwendige Staatsaufgaben. Berlin 2001, S 50 Ff). See also K. Merusk. The boundaries of the transfer of public functions to persons governed by private law. – Juridica 2000, p. 500 and the following; In this report hereinafter the term "public function" is meant to be understood in its precise and narrow meaning of "state function".

108 The reasons referred to are not characteristic only at the domestic (internal) level, but are valid and important also in the European Union. See P. Graig. EU Administrative Law. Oxford 2006, pp 15-16, 32.

109 A completely separate issue is whether the involvement of the private sector is in fact always less costly for the public authority. As an example, the discussion held in the daily newspapers of Estonia in relation to the justifiability of the agreements concluded for the renovation of Tallinn school houses (E.g. T. Tänavsuu / V.Toomet. The companies winning the schools for 30 years were not conforming with the requirements of competition. – Eesti Päevaleht, 3rd November 2006; L. Larin. Roulette with schools of Tallinn. - Eesti Päevaleht, 6th November 2006).

conditions in a particular sector (first and foremost the wages paid) or in a wider scope the scarcity of people in Estonia in general due to the size of the country. For example, considering the understaffing of the police, it seems to be essential to use the possibilities of the private sector to promote the guarantee of public order and national security.[110] Yet, herein we have to take into consideration that the personnel related issues should not constitute the grounds for releasing the police from performing the functions vested in it by transferring these to the private sector. If that is the case, then it is a situation of fighting the consequences instead of eliminating the actual cause and such situation may adversely affect the public sector, including police by demoralising them.

The development of legal regulation facilitating the transfer of public functions to private sector has been also justified with just stating flatly that "that's the way it is". The legislation is firmly based on the existing practices. It is important to keep the "is" and "should" apart. Legalising the existing illegal practices does not render them necessarily constitutional. The only solution for putting an end to the practices that are not prescribed by law and/or are in non-conformity with the legislation is not the legalisation of such activities, but termination of these practices. The latter is required particularly in the cases where such activities cannot be brought into the conformity with the Constitution.

Criticising the arguments supporting the transfer of public functions to private sector does not necessarily mean that such transfer is somehow bad and there are no associated positive impacts. Rather it is a question of whether the probable positive and negative consequences are estimated correctly for each particular case and weighted to make a justified and constitutional decision.

2.3. Constitutional background

According to the preamble of the Constitution, the Estonian state is established to "[…] protect internal and external peace […]". The subsection 1 (1) and section 10 of the Constitution emphasise the principles of democracy and the section 10 of the Constitution emphasises the principle of state based on the rule of law. The subsection 3 (1) of the Constitution obligates the state authority to be exercised solely pursuant to the Constitution and laws which are in conformity therewith, subsection 13 (1) of the Constitution grants everyone the right to the protection of the state and of the law, and according to section 14 of the Constitution, the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. The mentioned constitutional principles are the ones that are imposing boundaries on the transfer of public functions to private sector.

Traditionally the state authority is divided into three parts: legislative, executive and judicial power. Without focusing in depth into the relevant analyses, it is evident that the principles of democracy and of state based on the rule of law presuppose the state monopoly of the administration of justice and legislation. Pursuant to the Constitution, it is unambiguously apparent that the adoption of legal provisions by the parliament that has been elected at the free, general, uniform and confidential elections (and based on the delegation of the parliament, by the executive power) and the administration of justice[111] based on the laws and constitution performed by the independent courts are the areas where the state authority has to remain the sole authority. Therefore, the transfer

110 For example the explanatory memorandum to the Draft Crime and Disorder Act as of 15th November 2006: " […] is in the first and foremost justifiable with the need to secure the maintenance of public order in Estonia in a more flexible way compared to the past, whereas using the public resources in a more sustainable way. It is evident that the Police and the Rescue Board of Estonia, taking into account their current human resources as well as material resources, would consider any help in performing their functions most appropriate.", available at: http://eoigus.just.ee.

111 Imposing punishment for misdemeanour by the body conducting extra-judicial proceedings is in principle the same as performing a function pertaining to jurisdiction and not the issue of administrative legislation. Also see Judgment of the Supreme Court en banc of 28th April 2004, case No. 3-3-1-69-03, clause 24; Court Order of the Criminal Chamber of the Supreme Court of 13th June 2006, case No. 3-1-2-2-06, clause 10. In fact, in Estonia such example of delegation does exist after all – clause 9 (3) of the Code of Misdemeanour Procedure, section 5411 of the Public Transport Act. For cases like this, in theory we cannot talk about a contract under public law as these are not administrative functions that are transferred on the basis of the contract. And as the penal legislation does not have a relevant regulation associated with contracts, then nevertheless the provisions of contracts under public law are applied to the contracts concluded.

of public functions to private sector should be probable predominantly for the branch of executive (administrative power).

In determining the permissibility of the constitutional restrictions on the transfer of public functions to private sector, there are three decisive criteria: the essence of the function, the status of the persons directly performing the function, and the intensity of interference with the fundamental rights of a person. Assessing the mentioned criteria in conjunction for each and every particular case, it is possible to come to a conclusion whether the public function is transferable to private sector in principle and what can be the permissible form of the transfer of function. The latter can be classified by several types:[112] for example, material privatisation (the state relinquishes the public function in total), formal or organisational privatisation (e.g. the state will continue to participate in the legal persons governed by private law), functional privatisation (includes the transfer of public function to private sector on the basis of contract under public law) etc. As the in-depth analyses on the various forms would greatly increase the volume allotted for it in the current report, there can only state that the greater the involvement of the private sector pursuant to the form of privatisation in the performance of public function or the more intensive the violations of fundamental rights allowed by the authorised powers delegated, the more conservative attitude we should assume.

2.4. Criteria for evaluating the permissibility of the transfer of public functions

2.4.1. Core functions of a state

Each state has certain amount of public functions that have to be performed by the state in any case in immediate organisational form and which transfer to private sector is not permissible. These are so-called core functions, without which we should not be able to consider a state as functional.

According to the preamble of the Constitution, the Republic of Estonia has been established to protect internal and external peace. The internal and external peace are legal rights that in encompassing a row of legal rights of individual (e.g. life, health, and honour) and collective (e.g. functional legal order) nature, obligates the state to guarantee the protection thereof. However, the level of achievement of the internal and external peace is very hard to determine as it is dependant on both objective and subjective factors.[113]

The achievement of the internal and external peace of the state and in association with it the realisation of almost any right and duty can be guaranteed by state at the final stage only by application of physical force (including the use of a firearm), although there are more means available for the achievement and guarantee of peace. The theories of the minimal state (a night watchman state) and the ultra minimal state emphasise that although the essential functions of the state are limited, the

[112] See for example: K. Merusk. The boundaries of the transfer of public functions to persons governed by private law. – Juridica 2000, pp. 505-506; ; T. Annus. Delegation of the functions of the state to persons governed by private law, case study on the bailiffs. – Juridica 2002. p. 225.

[113] See for example C. Gramm. Privatisierung und notwendige Staatsaufgaben. Berlin 2001, S 398, 401; K. Jaanimägi. Police as the guarantor of internal peace. – Juridica 2004, p. 453. The balance between the public order and internal and external peace has been provided in the explanatory memorandum to the Draft Public Order Protection Act as follows: "In addition to the concept of public order, the Constitution operates with the concepts of internal and external peace, the protection of which is pursuant to the preamble of the Constitution one of the fundamental functions of the Republic of Estonia. The protection of external peace is the protection of the state against all dangers, originating from outside, firstly and foremostly the dangers of military nature (national defence function). Compared to the public order, the internal peace can be viewed as a wider concept, which protective scope encompasses the protection of public order against all the threats posing danger to it (in the wider sense given to the concept of public order by this draft act) from one side and the proceeding of offences in the criminal and misdemeanour proceedings from the other side. As the third tool for the protection of internal peace would be possible to perceive the activities performed by the security authorities pursuant to the Security Authorities Act [ ], which can be understood as the protection of "national security", the latter being mentioned by the sections 47 and 130 of the Constitution, clearly distinguishing it from the maintenance of public order. The protection of national security can be directed, besides the internal peace, also to the guarantee of external peace." The explanatory memorandum to the Draft Public Order Protection Act as of 10th May 2007, available in Estonian at: http://www.riigikogu.ee.

state nevertheless has to protect its citizens against force, theft and fraud.[114] The protection of citizen is always associated with the use of physical force to lesser or greater extent.

The ability of human community to ensure internal peace and order and to protect themselves against external enemies is exactly that which has been historically associated with the origin and development of a state.[115] In order to control a blood feud violating the peace and order (including the legal order) and to put an end to a feud between rivalling groups, the state assumed social regulation in the medieval times, taking upon itself the right to impose sanctions and therefore indicating that not only moral, but also justice are the valid standards of community (administered retribution and conflict resolution became the exclusive competence of the state).[116] For the first time in history it enabled the guarantee of peace for all members of community.[117] Penalising the offender of peace as a coercion measure certainly presupposes an authorisation to employ physical force, including the right to forcefully penetrate the physical (corporeal) sphere of the person.

Also the third element of the three-criterion approach[118] to the concept of traditional state, according to which a state must possess a population, defined territory and sovereign power, is associated with the use of force as at the final stage the conduct without any internal and external restrictions is directly dependant on it.

The person has to have recourse to public authority to enforce his/her rights and as a rule cannot use physical force by him/her self to that end. The state tolerates the use of physical force by someone else (than state itself) only up to a limited extent and only in extremely exceptional situations.

Using physical force for the enforcement of one's rights at one's own discretion is precluded in principle – a person has to have recourse to public authority (court, investigative body etc.) for that.[119] Yet a state can tolerate the use of physical force by someone else than state itself only up to a limited extent in extremely exceptional situations. For example, in the cases of self-defence, necessity, self help or conflict of obligations (see sections 28-30 of the Penal Code, subsection 214 (4) of the Code of Criminal Procedure, sections 140 and 141 of the General Part of Civil Code Act, section 41 of the Law of Property Act, clauses 1045 (2) 3 and 4 of the Law of Obligations Act), where the state itself is unable to interfere due to some objective reason (generally the speed at which the situation is played out) and provide sufficient protection for the person in question.[120] The exception is also the security services rendered by a licensed security services company on the basis of a contract for the supply of security services: meaning one natural or legal person governed by private law enters into contract with a security services provider as another legal person governed by private law in order to gain protection against the third person governed by private

[114] R. Nozick. Anarcy, State, and Utopia. New York 1974, p. 26.

[115] For example, R. Narits. The Encyclopædia of Justice. Tallinn 2002, pp. 169, 175.

[116] J. Sootak. Criminal Policy. Tallinn 1997, p. 59; J. Sootak. Basics of penal power. Tallinn 2003, pp. 16, 141. Also see W. Gropp. Legal grounds for the application of physical force. – Juridica 2007, p.75. On the historical development of the power monopoly of a state (from the medieval times to present; for example, including the approaches by Bodini, Hobbes and Weber). For example, see also M. Gamma. Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr. Bern, Stuttgart, Wien 2001, S 50 Ff.

[117] C. Gramm. Privatisierung und notwendige Staatsaufgaben. Berlin 2001, S 38.

[118] R. Narits. The Encyclopædia of Justice. Tallinn 2002, p. 179; P. Roosma. Constitutional Law. – Introduction to the Legal Science. Tallinn 2004, p. 62. Same position presented: M. Gamma. Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr. Bern, Stuttgart, Wien 2001, S 138.

[119] Krölls. Privatisierung der öffentlichen Sicherheit in Fußgängerzonen? – NVwZ 1999, Heft 3, S 234; For example, see: Court Order of the Criminal Chamber of the Supreme Court of 4th February 2005, case No. 3-1-1-111-04, clause 13."For example, a failure to act in performing a financial obligation does not create a self-defence status, as the injured party has an opportunity to take recourse for the protection of their rights to the proceedings provided by law (for example civil proceeding). Otherwise the whole state system set in place for the purposes of resolving conflicts would lose its meaning, which in turn would present a serious danger to the legal peace."; 30th October 2006, No. 3-1-1-95-06. Judgment of the Supreme Court en banc of 30th November 2005, case No. 3-2-1-123-05, clause 30: „In the civil society the financial claims are realised firstly and foremostly through the court and not by self-help.".

[120] Also see: C. Gramm. Privatisierung und notwendige Staatsaufgaben. Berlin 2001, S 39; A. Mackeben. Grenzen der Privatisierung der Staatsaufgabe Sicherheit. Baden-Baden 2004, S 95 Ff; S. Schoch. Politzei- und Ordnungsrecht. – Besonderes Verwaltungsrecht. Hrsg. E. Schmidt-Aßmann u.a. Berlin 2003, I 2 Rn 27. W. Gropp. Legal grounds for the application of physical force. – Juridica 2007, issue 2, pp. 76 and the following; A. Krölls. Privatisierung der öffentlichen Sicherheit in Fußgängerzonen? – NVwZ 1999, Heft 3, S 233.

law.[121] Pursuant to the afore mentioned, it is necessary to emphasise the keyword '*governed by private law*' i.e. the use of force does not take place in the name of public authority (a state), but in the name of natural or legal person governed by private law.

Pursuant to the Constitution, the duty to protect and the responsibility for peace rests with the Republic of Estonia, and the alternative to use physical force required for the protection of internal and external peace is one of the core functions of the state authority. This is historically developed monopoly of power of the state authority.

2.4.2. A public servant

The state as such is an abstraction and the authority of the state is exercised directly by the people "of special status" working in the state organisation, who have to guarantee the protection of public interests through their activities. The section 30 of the Constitution emphasises the importance of the public service. Meaning that presumably the executive power is exercised by a public servant working at the government agency which activities are directed and co-ordinated by the Government of Republic (clause 87 (2) of the Constitution) or at the agency governed by the former. A public servant has to be *a priori* the one, who pursuant to section 14 of the Constitution is guaranteeing the fundamental rights, according to the subsection 3 (1) ibidem is exercising the state authority and pursuant to the subsection 13 (1) ibidem is fulfilling the duty of the state to protect everyone.

The service requirements of the public servants who are officials have been formed in such a way that they shall, whether on their own or in conjunction with other requirements, guarantee the achievability of these values and aims that the service relationship of an official is meant to serve, including the ability of a sovereign power to guarantee the peace set forth in the preamble of the Constitution.

For example, the Constitution establishes the requirement of citizenship for the officials, emphasising their citizenship bond supported obligation of loyalty to the state. In addition, the Constitution sets forth a restriction on the freedom to engage in enterprise and the freedom of political beliefs, directing the attention to the need to avoid the conflict of interests of the officials in order to ensure the independence and impartiality. The obligation of loyalty to state and the performance of duties that is independent (also ostensibly) from private, political etc. interests and impartial, is extremely important in the case of the Defence Forces and the police, however, it is also important in other areas where the use of physical force in the purposes of the guarantee of peace can occur and therefore also an intense violation of the fundamental rights and freedoms of the persons. There cannot be agreed with a claim that the obligation of loyalty arising from the citizenship is just a mere abstract declaration, which practical relevance is minimal. Somewhat uneasy feeling was generated by the news in connection with the current topic that an employee of a security services provider who is performing several public functions in the name of the state or local government has joined an anti Estonian campaign.[122]

We should not forget the specialised professional training of the officials and the special requirements established thereof. The state has enacted separate service regulations for the agencies employing force: for the police service; prison service; service in the Defence Forces; and border guard service, and on the basis of such regulations also the requirements for professional qualifications for their

[121] See: subsection 4 (1) of the Security Act (types of security services), also sections 14 (principal functions of security firms) and 32 (rights of security agents) of the Security Act.

[122] R. Poom. Pihl: also a Falck car was caught signalling.- Eesti Päevaleht, 4th May 2007. The first sentence of the subsection 22 (1) of the Security Act: "A person who is an Estonian citizen or a person to whom a permanent residence permit has been issued in Estonia, who is at least 19 years of age, who has completed basic education and who holds the qualifications of a security guard, who is proficient in Estonian at the level established by law or by legislation issued on the basis thereof, and who is capable of performing the duties of a security guard in terms of his or her personal characteristics, moral standards, physical condition and health may work as a security guard.".

physical condition, education and state of health.[123] In the course of the relevant professional training, the officials will acquire the knowledge required for the performance of their functions in the form of in-depth theoretical and practical training that is meant to ensure their ability to make an expert decision taking into account all the material circumstances even in the extreme circumstances and within the legal framework of extensive freedom to exercise will (unspecified legal definitions, discretionary power).

In order to avoid the scarcity of knowledge and skills arising from the deficiencies in the professional training, it is permissible to involve the private sector in the performance of less complicated public functions associated with the guarantee of public order. Thereat it is important to consider that the right to require the performance of some simple act (e.g. command to halt or to present the personal effects) might be valueless in practice if the option to physically force the person to comply with the order is not available. The actual experiences indicate that a situation, originally estimated to be an uncomplicated one by the police, might escalate and the need to employ physical force and special equipment, including the firearms, might arise.[124]

The ability of a state to perform its functions, including the guarantee of peace, presumes a proper overview of the state's own resources that can be used for it. In any case the state has to maintain the minimal resources (regarding legal instruments as well as personnel, technical equipment as well as financial resources) for the performance of public functions in order to uphold their identity as a state and exercise discretion without any internal or external restrictions. The mass riots of April 2007 can be considered a good lesson learned by the state due to the mere size of the law enforcement troops deployed.[125]

Most certainly the state has to avoid the possibility of being kept on the so to say "short leash", a situation where the public authority has to submit themselves to the dictate of the private sector in association with the performance of a public function, including the scenario according to which in a critical situation a state is forced to order a public function from a company with monopoly or in a monopoly like state. A negative example thereto would be the AS Saaremaa Laevakompanii case of 2004, when the company refused the continuation of a public service contract. Unquestionably a materialisation of an independent non-state (competing, dictating) institution with the power of coercion is incompatible with the power monopoly of the state.[126]

Also, it is important to emphasise the fact that the renationalisation of the once transferred public function can turn out to be complicated due to the possible lack of the public servants possessing the knowledge and skills required for the performance of that function as well as the absence of relevant administrative structure. Re-establishment of these will take time and also can prove to be extremely complicated in practice.

[123] However, in the case of the so to say regular officials, who lack the right to violate the fundamental rights of persons in such intense way like it could happen in the course of application of physical force, the legislator has given the right to enact the qualification requirements to the head of the agency (the second sentence of the subsection 17 (2) of the Public Service Act: "The head of an administrative agency, or a person or administrative agency superior to him or her may establish supplementary qualification requirements.".

[124] For example, see the overviews of the activities of the patrol teams of Falck issued in Rae Sõnumid in January 2007: "On the 23rd December police calls and informed that at (the small town of) Jüri, a SUV is driving around, violating traffic regulations. The Falck patrol car spotted the vehicle at Vaskjala village, where it was speeding, heading towards Aruküla, however, the exact make of the car remained undistinguished and the pursuing turned out to be way too dangerous considering the extreme speed. The situation was communicated to the police, who in turn took over that case." On February 2007: "At the evening of 19th January, a call was received from (the small town of) Lagedi requesting help as a gang of youth was assaulting the security services agents near the store. Another 2 patrol teams were dispatched in aid, also the police arrived to the scene. During the fight that took place, a security services agent from one of the patrols was injures when he received a blow to his head hit with a bicycle. The security services agents of the patrols and police continued the search for the assailants and 3 youth under the influence of alcohol were apprehended by the police.".

[125] Compare to the events in Germany on 1st May 2007: A. Lier. 5000 Polizeibeamte schützen Berlin. – Welt Online 29.04.2007, available at: http://www.welt.de/berlin/article841720/5000_Polizeibeamte_schuetzen_Berlin.html.

[126] A. Krölls. Privatisierung der öffentlichen Sicherheit in Fußgängerzonen? – NVwZ 1999, Heft 3, S 234.

In addition, we should not forget the so-called chain of legalisation in the realisation of the responsibility associated with the performance of public functions – a minister leading a ministry and the agencies within the scope of administration of that ministry, can be held politically liable by the parliament as a representative body of the people, elected at democratic elections.

2.4.3. The intensity of interference with the fundamental rights

One of the primary principles of a state based on the rule of law is the protection of the fundamental rights and freedoms of persons. The state has the right to restrict those rights; however, this can be done only in compliance with the Constitution; such restrictions are necessary in the democratic society and they do not distort the original essence of the rights and freedoms being restricted (section 11 of the Constitution). Meanwhile, both the positive obligation of a state to act and a negative obligation to refrain from any action may be needed for the guarantee of fundamental rights.

Although the fundamental rights are not being classified as more important and less important ones, there are certain fundamental rights that are deemed to be more substantial than others, for example, human dignity (section 10 of the Constitution), right to life (section 16 of the Constitution), prohibition to subject a person to torture or to cruel or degrading treatment or punishment (section 18 of the Constitution), and the right to liberty and security of person (section 20 of the Constitution).[127]

The use of physical force and special equipment (including the firearms) can bring about the violation of the corporeal integrity of a person, restriction on and deprivation of liberty and danger to the life i.e. application of physical force against the physical body of a person. At the same time, the monopoly to use force of the state entails the most extensive right to interfere with the corporeal sphere of a person in the name of a state, which upon combating an attack can end with the termination of human life. As these are significant fundamental rights, each and every such violation of fundamental right has to be considered with extreme seriousness, following the principle of saving as much of the fundamental right as possible and establishing efficient legal (procedural) safeguards for the protection against unreasonable violation of the rights of a person.

Without underestimating the retroactive verification and remedial instruments, the so-called proactive measures (for example the special professional training[128] for the persons (officials), who have the right to apply physical force, that minimises misuse of powers) have especially significant role, as the liquidation of the consequences of the application of physical force may not be retroactively possible. Also it is not any less important to what extent the probable offender understands the orders directed to them, including

127 Court Order of the Administrative Chamber of the Supreme Court of 9th June 2006, case No. 3-3-1-20-06, clause 15: "[…] the right of the person that was restricted one of the most important fundamental rights – the right to liberty." The significance of various fundamental rights (right to liberty, right to self realisation etc.) has been discussed also for example in the Court Order of the Criminal Chamber of the Supreme Court of 20th May 2003, case No. 3-1-1-69-03. Regarding the intensity of the violation of the fundamental rights, then based on the practices of the European Court of Human Rights, a difference is made between the deprivation of liberty and restriction on liberty. – See Court Order of the Administrative Chamber of the Supreme Court of 25th November 2005, case No. 3-3-1-61-05, clause 33: "[…] in making the decision in case whether it was the deprivation of liberty in the meaning of the article 5 of the Convention or just a restriction on liberty, all the circumstances relevant to the case have to be taken into consideration, including the type of the instrument applied, duration, consequences and the method it was applied with. The deprivation of liberty and restriction on liberty differ from each other only by the intensity of the violation […].".

128 Legal provisions are abstract. Also the provisions granting the authority for the violation of the corporeal integrity of a person with application of physical force in the name of the state are no exception to that. On the contrary, the room for discretion is remarkably large as the exact description of all the possible and probable circumstances that can happen in the real life is not just possible due to the diversity of the real life. For example, let us look at the subsection 80 (1) of the Draft Public Order Protection Act, according to which the police is allowed to use special equipment, cut-and-thrust and gas weapons against the offender taking into consideration the nature of the offence, the person of the offender and the particular situation, whereas upon using the use special equipment, cut-and-thrust and gas weapons the police has to take care as not to cause any more health damage to the offender as it is absolutely unavoidable in that particular case. Making a decision whether all the conditions set forth in the provision have been fulfilled, requires no doubt an in depth knowledge and often also the capability and courage to made an instant decision. The Draft Crime and Disorder Act as of 10th May 2007, No. 49 SE, available in Estonian at: http://www.riigikogu.ee.

the linguistic aspect.[129] In addition, it is important how the offender perceives the situation, obligation to comply with the order directed at him/her and pursuant to this the avoidance of interference with his or hers rights with the application of physical force. Needless to say, the penetration of the corporeal sphere of the person can be considered *ultima ratio*, however, even the clear and present possibility (danger) of using it is often the factor that compels the offender to proactively comply with the orders issued by the representative of state powers. Thus in the danger situations that are playing out rapidly there is not time for a person to perform analyses (and an average person does not often have necessary knowledge for that) whether the employee of a security services provider issuing an order is performing the functions of a representative of state power or the duties of a security service provider commissioned on the basis of private law and therefore how far 'he/she can go'.[130] The status and uniform of an official is already this factor that creates respect and compels to submission. To prove this claim we can pose a rhetorical question why is that so that almost all persons find their foot moving suddenly towards the brake from the accelerator when they spot a police patrol in the traffic?

The measures applied in the name of the state for the protection of peace, like identification, entering the housing or other premises of persons, halting or stopping vehicles, vehicle pursuit, understandably can and will violate other fundamental rights like the right to inviolability of family and private life, of housing, other premises and work place of a person, right to property protection etc. Depending on the situation, such violation can prove to be rather intense, wherefore an application of such measures presumes a correct estimation of a situation, knowledge of relevant legislation and rules, and ability to make a decision based on it that has been considered from all aspects.

Unfortunately the current practices show that the boundaries of the valid legislation are not precisely understood for the purposes of involving the law enforcement legal persons governed by private law in the performance of public functions and consequently also the rights of the representative of public authority in the interference with fundamental rights of persons are not recognised. Therefore, both to the public and private sector are not unambiguously clear which procedures interfering with fundamental rights of persons can be performed independently by the assistant police officers employed by law enforcement legal persons and which such procedures can be performed only in the presence of a police officer (the exact wording used in the subsection 4 (1) of the Assistant Police Officer Act is "assists" and "participates"). The practices reflected on web pages indicates that entering the housing or other premises of persons without the presence of a police officer may exceed the powers provided by law.[131]

Taking into consideration the intensity of the interference with fundamental rights associated with the right to apply physical force in the name of state and inadequate determination of the administrative activities in the given domain, the training of the persons authorised to directly perform such functions as well as the legal protection against unlawful violation of the fundamental rights can be deemed extremely important. Therefore such competence should generally remain with an official in service relationship with a state.

129 Clause (3) 7 of the Regulation of the Government of the Republic No. 164 of 16th May 2001 "Mandatory Levels of Proficiency in Estonian for Employees of Companies, Non-Profit Associations and Foundations and for Sole Proprietors" provides: security staff whose duties are related to ensuring public order or who carry weapons or use special equipment in connection with the performance of their duties are required to have an intermediate level of language proficiency.

130 The option for the employees of the security services proprietors and the law enforcement non-profit associations to simultaneously perform the public functions as an assistant police officer as well as the duties of the legal person governed by public law was created by the amendments to the Assistant Police Officer Act that were approved on 13th November 2002 and entered into force on 19th December 2002 (State Gazette I, 2002, 99, 578).

131 Excerpt from the most relevant events in the work of the law enforcement patrol service of the Kuusalu Rural Municipality, February 2007: "At 2. 45 am on the 14th February 2007 a call was received from the Police Control Centre, notifying that at the [address] domestic disturbance is in progress. We drove to the scene, where we found that A.R. was in intoxicated state and had a fight with his mother. We took the statement from the injured party and took the intoxicated person to the police station." An overviews of the activities of the patrol teams of Falck issued in Rae Sõnumid in January 2007: "On 11th December a call was received from the police and request was made for us to dispatch to a flat located at [address]. At the scene we found an intoxicated male person raving. The EMS patrol was summoned and the man was given a calming injection. After a brief discussion with him, he finally calmed down and promised to go to sleep." February 2007: "On 6th January we received a call from the police and we were requested to dispatch to the aid to (the little town of) Jüri, where a male person with mental disorder was destroying the furniture and dishes in his home. The man was taken to a psychiatric hospital by the EMS."

2.5. The need for special provision delegating authority

There is a valid principle both in the theory and practice of Estonian constitutional law according to which a legislator can delegate their functions in legislative drafting area also to executive power. However, there are strict rules that have to be followed. Besides the restrictions directly pursuant to Constitution, whereupon certain competences remain with the legislator only, the special provisions delegating authority, and not the general provisions delegating authority, are considered generally permissible, whereas the provision delegating authority has to provide the clear aim, content and scope of application of the authority delegated. Or in other words, as it is provided by subsection 90 (1) of the Administrative Procedure Act, a regulation may be issued only upon existence of a provision delegating authority which is set out in an Act, and in accordance with the limits, concept and objective of the provision delegating authority.[132]

The discussed principles should be applied by analogy also to the transfer of administrative functions from public authority to private sector, as the involvement of the private sector in performing the functions of public administration can most definitely be only an exception to and under no circumstances a general rule. In other words, if a legislator makes a decision to create an opportunity to transfer a public function, a relevant provision delegating authority provided by law can only be a special provision delegating authority that will prescribe with required accuracy whether and which particular functions the public authority is allowed to give up. Such provision delegating authority cannot be a general one, allowing the public authority to waive almost totally the functions in certain domain. An excellent example would be the provision delegating authority found in subsection 50^{1} (3) of the Traffic Act that in a precise way prescribes a set of functions that cannot be deviated from.[133]

In creating a provision delegating authority, a legislator has to keep in mind the objective of the private sector involvement. The actual performance of the functions provided by the Administrative Co-operation Act (section 5 of the Administrative Co-operation Act: the preparation of an analysis; section 13 of the Administrative Co-operation Act: the performance of a public procurement, regardless of the cost of contracting for performance of the administrative duty) prior to entering into contract under public law should generally guarantee a sufficient protection of the public interests for the particular contract under public law (prerequisite being that the provision delegating authority itself is constitutional). It is important to emphasise the keyword '*actual*', as unfortunately the obligation to prepare an analyses is in practice often perceived as a formality, trying to get by with preparing a broad overview only without proper substantive analyses. The legislator should, prior to the creation of a provision delegating authority, analyse the same issues provided by the section 5 of the Administrative Co-operation Act in order to determine whether such provision delegating authority can be carried out in reality and will not remain "empty" due to a reason that the performance of said duties by the state is most optimal solution taking into account the economic considerations and the protection of the public interests and rights of the persons. Such analyses are important for parliamentary supervision over the activities of executive power as well as in more general way for the direction of the national activities by the legislator. Taking a look at the subsection 126 (4) of the valid Courts Act and section 26^{20} of the Obligation to Leave and Prohibition on Entry Act that upon entering into contract under public law permit, among other functions, also the transfer of the use of a firearm; whereupon there is justified to pose a question whether delegating authority in such an extensive scope to the private sector is indeed a conscious choice of the legislator.

[132] Of the practices of the Supreme Court, the following case can be considered to be one of the most relevant ones: Judgment of the Constitutional Review Chamber of the Supreme Court of 12th December 1996, case No. 3-4-1-3-96. Also see the subsection 14 (3) of the "Rules for Draft Legislation in the Legislative Proceedings of the Riigikogu" approved by Resolution No. 59 of the Board of the Riigikogu of 6 March 2001 (amened on 11th May 2006 by Resolution No. 258); the sections 4 and 41 of the "Technical rules for drafts of legislative acts" approved by the Regulation of the Government of the Republic No. 279 of 28th September 1999.

[133] For example, see The Annual Report of the Chancellor of Justice 2004. Tallinn 2005, pp. 33 and the following.

Particularly important are the comprehensive analyses on all economic and quality considerations, factual and legal impacts and public interests in the cases when the legislator decides to transfer the public function directly by a relevant Act. If this is the case, there will be no additional verification (by the public authority) of the prerequisites of the permissibility of the transfer of public functions, also there will not be public procedure for the selection of the person governed by private law to be involved (see for example section 56 and the following sections of the Environmental Fees Act[134]).

It is highly commendable that the legislator, upon the transfer of public functions to private sector, has made an attempt to guarantee the protection of the rights of persons being subjected to possible damage by a natural legal person or legal person governed by private law performing public functions. Pursuant to the subsection 12 (3) of the State Liability Act, the public authority is liable for the damage to the injured party. For ensuring legal clarity, it would be good if the Code of Administrative Court Procedure would be further elaborated, in a sense of within which time period exactly and by whom and how the disputes associated with the contracts under public law can be referred to the administrative court. The jurisdiction of the challenge proceedings has to be unambiguously clear i.e. whether a general principle is applied that the challenge is filed with the body of origin (i.e. the legal person governed by private law performing a public function), who in the case of not accepting the challenge has to refer the challenge to the challenge body (public authority agency or body). Such design can deprive public authority from important information associated with the performance of public functions that is essential for efficient supervision over the private sector performing public functions.

2.6. Summary

The Constitution presupposes that the internal and external peace pursuant to the preamble of the Constitution is guaranteed and the powers for application of physical force (including the use of a firearm) required for the former are vested firstly and foremostly in a person who is legalised in the relationship with the members of society through a state service relationship formulated on the basis of citizenship and requiring heightened public trust. The public functions directly associated with the state monopoly of power, the performance of which can bring about an intensive violation of the most important fundamental rights of a person, cannot be transferred from the state to private section in general. These functions are to be performed in the form of a direct administrative organisation of the state. This is the conclusion that can be drawn after analysing the application of force required for securing the peace as one of the core functions of a state, the essence of the public service provided by section 30 of the Constitution and the intensity of the interference with the fundamental rights of a person.

In the meanwhile we have to emphasise that the non-transferability of the core functions required for the protection of internal and external peace is not a principle in itself. It is necessary for the reason that only when acting in the form of a direct state organisation the state is able to perform (with quality) its duty of protection pursuant to the sections 13 and 14 of the Constitution.

When acting in direct organisational form, the legal clarity is ensured and the persons do not have to worry about the competence and existence of powers of the natural persons using authorised powers against them under the "label" of police: "Besides, it would be interesting to know what are the responsibilities and rights of the law enforcement at Kose. They do not wear the police uniform and the vehicle does not have the flashing lights and does not look like a real emergency vehicle in any way…"[135]

[134] See on the deficient regulation of the Environmental Fees Act the Court Order of the Administrative Chamber of the Supreme Court of 17th November 2005, case No. 3-3-1-54-05 (the rules for allocation of funds are enacted mainly just based on the signature of the head of a foundation).

[135] Home page of the Kose rural municipality, a forum, 21st September 2006, available in Estonian at: http://www.kosevald.ee/?id=3757.

PART 2.

THE CHANCELLOR OF JUSTICE AND THE EXECUTIVE POWER

I INTRODUCTION

The Part Two of the Chancellor of Justice report summarises the last year's activities in reviewing the conformity of the legislation of general application of the executive power with the Constitution and the laws as well as in protecting the fundamental rights of persons and following the principles of good governance. Additionally, the final part of the introduction discusses the constitutional review of the Chancellor of Justice in the form of ex-ante verification at the sessions of the Government of the Republic, and a new responsibility of the Chancellor of Justice arising from the law in performing the functions of a national preventive mechanism in the activities against torture and other cruel, inhuman or degrading treatment or punishment.

1. Constitutional review, protection of the fundamental rights and freedoms of persons and compliance with the principles of good governance

The report has been structured according to the areas of governance of the ministries. Such structure allows for better coverage for the Riigikogu, governors and the general public in indicating which ministries' areas of governance have issues and which violations of law the Chancellor of Justice has addressed. The report reflects only the cases that have reached the Chancellor of Justice in a way of petition or on which the Chancellor of Justice has initiated proceedings on his own accord and therefore is unable to provide exhaustive and comprehensive assessment. The Minister is the person who has the political responsibility and access to the most consequential levers for resolving the issue. The public has to be aware of the problem areas and who is responsible for these.

In the following chapters, the most significant developments in the areas of governance of all the ministries are addressed together with the proceedings of the Chancellor of Justice. The major deficiencies of an area of government as well as the Chancellor of Justice proposals thereof are presented in concise manner. The insufficiencies in the activities of public authorities are highlighted and suggestions made for avoiding the mistakes. In the overviews of the proceedings, the Chancellor of Justice suggests actual solutions or solution possibilities for the problems. Additionally, the way in which the agency, person or body under supervision has taken into account the proposals and recommendations made by the Chancellor of Justice by their previous report, has been indicated.

The approach of the Chancellor of Justice is focused on problems and avoiding excess formalities. The Chancellor of Justice reacts within the limits of his competence when he finds that the activities of a state or local government agency or an official have violated the rights of a person or that a regulation passed by the Government of the Republic, a minister, a local government council or a city or rural municipality government as a legislation of general application is unconstitutional and in conflict with the laws. In addition of solving particular cases, it is important to determine the source of the problem and those who are responsible.

The analyses contains a brief description of the area of government and a summary of the most important proceedings conducted based on the petition or on the own initiative of the Chancellor of Justice. The deficiencies in the activities of the public authority are brought to light and suggestions made for the avoidance of mistakes. In the overview of the proceedings, the Chancellor of Justice suggests actual solutions or solution possibilities for the problems. Additionally, the way in which the agency, person or body under supervision has taken into account the proposals and recommendations made by the Chancellor of Justice by their previous report, has been indicated.

The current part of the report reflects the questions arising on the basis of the supervision proceedings of the Chancellor of Justice regarding the compliance of the legislation of general application with the Constitution as well as the protection of the fundamental rights of persons and the adherence to the principles of good governance. Such combined approach is justified as the general aim of both supervision forms is the guarantee of the fundamental rights of persons. The cases, where during

the proceedings becomes evident that the violation of a fundamental right does not originate from the inappropriate application of the law, but some of the provisions of the law are unconstitutional or some of the provisions of the regulation are not in conflict with the provisions of law, are not seldom. Upon verification of the activities of the agencies under supervision, the gaps in legislation or provisions that are hard to apply in reality may surface.

In 2006, the Chancellor of Justice received 1858 petitions. 467 persons attended consultations of the Chancellor of Justice and his advisers at the Office of the Chancellor of Justice as well as in the counties. The Chancellor of Justice initiated 1594 proceedings of cases on the basis of the problems becoming evident from the petitions and consultations. A proceeding of a case encompasses all the activities and creation of documents for resolving an issue undergoing proceeding. The petitions of several persons in the very same issue will be combined into the same proceeding. The Chancellor of Justice initiates a proceeding whether based on a petition or on his own accord. The year covered by this report has 551 substantive proceedings, of which the number of proceedings initiated on the own accord of the Chancellor of Justice was 35, which is 2.2 per cent of the total number of proceedings, also including 8 verification visits organised.

207 proceedings (13 per cent) addressed the verification of the conformity of legislation with the Constitution and laws. In 129 cases of which the constitutionality of legalisation was reviewed. The conformity of the Government of the Republic regulations with the Constitution and laws was verified in 11 proceedings, regulations of a minister in 10 proceedings, and 45 proceedings dealt with the conformity of the regulations of local government councils, city and rural municipality governments with the Constitution and laws. In total, the Chancellor of Justice reviewed the constitutionality of and conformity with laws for 66 regulations. As a result of the supervision activities, the Chancellor of Justice made nine proposals to the bodies passing the regulations for bringing the regulation into conformity with the Constitution and laws.

The verification of the legality of activities of the state, local government, other legal persons governed by public law, or private persons, bodies or agencies performing public functions i.e. *ombudsman* proceedings were conducted in 258 cases, which forms 16.2 per cent of the total number of proceedings and 46.8 per cent of the total number of substantive proceedings. The Chancellor of Justice criticized and gave recommendations to agencies, bodies and persons aimed at the elimination of the violation or improvement of the governing practices in 65 cases, in 17 cases of which the violation was eliminated during the proceedings.

In 1043 cases, which forms 65.4 per cent of the total number, the Chancellor of Justice did not initiate substantial proceedings for various reasons, and provided an explanation to the petitioner. The main reasons for rejecting a petition were the failure of the petitioner to use other effective legal remedies, the lack of competence of the Chancellor or a pre-trial procedure or court procedure held in the case petitioned, or the petition being clearly unfounded. If the petitioner can use other legal remedies to achieve more efficient result, then the Chancellor of Justice generally does not initiate proceedings.

By the areas of government of the ministries, the majority of the petitions filed with the Chancellor of Justice were regarding the Ministry of Justice (384 proceedings, of which 270 on the basis of the petitions received from imprisoned persons complaining about the activities of prison administrations), the Ministry of Internal Affairs (126 petitions, of which 48 concerning the police authorities and 26 concerning the Citizenship and Migration Board), the Ministry of Social Affairs (95 petitions, of which 34 about the Social Insurance Board). By the areas of law, the highest number of proceedings was initiated in association with criminal executive proceedings and imprisonment law. Second significant area was formed by the issues associated with the social welfare and social insurance and health law. Third topic was the ownership reform. These mentioned areas remain in the top of the list of the issues addressed by the Chancellor of Justice proceedings from year to year.

It is important to emphasise that resolving of the petitions received by the Chancellor of Justice is based on the principles of freedom of choice of the form and purposefulness. The Chancellor of Justice himself chooses procedural acts that are needed for effective and impartial investigation. The addressees complied with almost all the proposals and recommendation made by the Chancellor of Justice.

In the following part of the report, all the above-mentioned areas of government will be analysed in more detail in the form of general outlines and illustrative case studies. General descriptions of the areas of government are followed by concise overviews of cases (proceedings) and verification visits thereof. The cases in which the Chancellor of Justice found serious violations in the course of the supervision proceedings have been highlighted. The cases are presented in uniform structure. The main body of text consists of the following parts: (1) introductory sentence; (2) facts; (3) main legal issue; (4) legal justification, and (5) the result. The description of the verification visits is somewhat different from the above structure and is divided as follows: (1) brief description of the facts; (2) suspicion of a violation; (3) brief description of the violation established, and legal assessment thereof; and (4) the result.

2. The ex-ante verification of the legislation of general application at the sessions of the Government of the Republic

The activity of the Chancellor of Justice in reviewing the conformity of the legislation of general application with the Constitution and the laws substantively constitutes the performance of supervision function in the form of the ex-ante verification. On the basis of the subsection 141 (2) of the Constitution (which in essence is restated by the subsection 2 (1) of the Chancellor of Justice Act), the Chancellor of Justice may participate in sessions of the Riigikogu and of the Government of the Republic with the right to speak. This means the right to deliberate about the issues in the agenda of session of the Riigikogu and the Government of the Republic pursuant to the relevant procedure. The Constitution does not impose any restrictions to the right to speak of the Chancellor of Justice. The communication of the Chancellor of Justice with the Riigikogu, including how the Chancellor of Justice has used their right to speak in the Riigikogu, is provided in the Part One of this report.

The right to speak of the Chancellor of Justice in the sessions of the Government of the Republic is in the purposes of guaranteeing the constitutionality and legality as early as possible i.e. in the form of ex-ante verification. The State Chancellery is preparing the documents for the agenda of the session of the Government of the Republic. Based on the decision of the Prime Minister, the State Chancellery puts together an agenda of a session of the Government of the Republic, which together with all the documents thereof is be made available though the e-Cabinet. The Chancellor of Justice has access to the agenda of a session of the Government of the Republic together with all the draft acts planned to be under debate at that session also via the e-Cabinet.

Thus, the Chancellor of Justice has an opportunity for the ex-ante verification of the legislation of general application. As a result of the ex-ante verification, the Chancellor of Justice is able to give an assessment of the draft acts in the legislative proceedings of the Government in the session of the Government of the Republic the latest. The opinion of the Chancellor of Justice is focused on the provisions of the draft act that are in obvious conflict with the Constitution. Undisputedly, the legal analyses has time limit due to the form of the ex-ante verification of the Chancellor of Justice, and therefore the opinion presented in the session of the Government can be considered as an initial assessment, and it can not be deemed as binding to the extent that would prevent the Chancellor of Justice to change their perspective in a later date when resolving actual legal cases.

In ex-ante verification, the Chancellor of Justice reviewed 160 agenda items of the Government of the Republic and in 40 instances he issued comments. In several cases the comments were about the requirements or obligations that should have been provided by law and not by regulation. The dimensions of the legal provisions delegating authority were exceeded in issuing a regulation

in following cases: in establishing the requirements of pet ownership (draft legislation submitted by the Minister of Agriculture), in establishing the procedure for transfer to the ownership of municipality (draft legislation submitted by the Minister of the Environment), and in establishing the requirements for use of very toxic plant protection products and for the persons using these products (draft legislation submitted by the Minister of Agriculture). It is possible to bring examples from the year subsequent to the year covered in the report on the cases when based on the opinion of the Chancellor of Justice the passing or approval of draft legislation was decided to be postponed and to make significant changes to the draft legislation. Good example would be the Draft Defence Forces Service Act Amendment Act, where the Chancellor of Justice called into question the duration of the validity of the obligation of the reimbursement of expenses associated with the training and in-service training of the regular members of the Defence Forces. Similarly, the opinion of the Chancellor of Justice brought about significant amendments to the draft regulations and consequently also in the laws in the cases of the Draft Government of the Republic Regulations "The requirements for the photographs for the application for the issue of document and the amendments to the Government of the Republic Regulations pertaining to it" and "The procedure for the application, issue and extension of the residence permit of the person placed under temporary protection and his or her family members, the list of the documentation and data submitted upon applying for a residence permit, and the procedure for entering the data on an identity card". Generally speaking, it is possible to state that majority of the comments and suggestions made by the Chancellor of Justice were taken into account or the draft legislation was reviewed once more based on these comments and suggestions.

3. From 2007 the Chancellor of Justice as a national preventive mechanism

From 18 February 2007, pursuant to the Article 3 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the UN Convention against Torture), the Chancellor of Justice is also considered a national preventive mechanism. The Republic of Estonia became a state party of the UN Convention against Torture (UNCAT 10 December 1984) on 26 September 1991 and it entered into force on 20 November 1991. The referred convention is one of the most important UN conventions in regard of the protection of human rights, which objective is to prevent the use of torture and other cruel, inhuman or degrading punishment throughout the world. Pursuant to the Article 1.1 of the Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person. The Article 2 ibidem provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Estonia signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Protocol) (OPCAT 18 December 2002) on 21st September 2004 and the Protocol entered into force on 27 November 2006. Pursuant to the Article 1 of the Protocol, the objective of the Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The Article 4.2 of the Protocol provides: "For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority." Therefore, besides the state penitentiaries, all other institutions restricting the liberty of the persons staying in there fall into the category of being subject to the verification visits. The activity of the national preventive mechanism extends over all the institutions where the freedom of movement of persons is actually restricted.

II AREA OF GOVERNMENT OF THE MINISTRY OF EDUCATION AND RESEARCH

1. General outline

The area of government of the Ministry of Education and Research includes envisaging the education, research, youth and language policies of the state and, in association with the afore mentioned, organisation of pre-school, basic, general secondary, vocational secondary, and higher education, as well as hobby education and adult education, research and development activities, youth work and special youth work, and development of the draft legislation thereof. The Language Inspectorate belongs to the area of government of the Ministry of Education and Research. The state agencies administered by the Ministry of Education and Research include the School Network Bureau of the Ministry of Education and Research, National Examination and Qualification Centre, Estonian Educational and Research Network (EENet), and the Estonian Youth Work Centre (EYWC). Besides the afore mentioned, also the Tiger Leap Foundation, Estonian Science Foundation, Archimedes Foundation, Estonian Information Technology Foundation, Foundation for Lifelong Learning Development Innove, Estonian Sports Training and Information Centre, Estonian Science Centre AHHAA and Estonian Qualification Authority are governed by the Ministry of Education and Research.

Majority of the petitions submitted to the Chancellor of Justice in 2006 pertaining to the area of government of the Ministry of Education and Research were related to the ambiguousness of legislative regulation or the issues associated with the absence of lawfulness.

The first sentence of the subsection 37 (1) of the Constitution provides the right to education as a fundamental right to everyone. According to the second sentence of the subsection 37 (1) of the Constitution, education is compulsory for school-age children to the extent specified by law, and shall be free of charge in state and local government general education schools. The subsection 37 (2) of the Constitution provides the obligation of the State and local governments to maintain the requisite number of educational institutions, in order to make education accessible to everyone. Arising from the afore mentioned provisions, the right to education is a subjective right of all persons, which entails the obligation of the State and the local governments to guarantee that the right to education can be exercised both de jure and de facto. Pursuant to the subsection 37 (5) of the Constitution, the State has an obligation to supervise the provision of education.

As the legal regulation pertaining to the education sector is rather considerable regarding the legal acts as well as legislation with lower authority and making the decisions in various matters assumes the use of discretion, several persons have had recourse to the Chancellor of Justice in relation to the cases whereupon in exercising the discretionary power by the Ministry of Education and Research as well as by local governments and school executives, there has been a failure to take into account the requirements of considering the principles and protecting the fundamental rights arising from the Constitution.

During the time period covered by this report, the Chancellor of Justice repeatedly brought into the attention of the Ministry of Education and Research the need to amend the regulation of the Basic Schools and Upper Secondary Schools Act in order to guarantee the access to education for children with special need and availability of the health services required by them. The guarantee of health services in the schools of the children with special needs is in the competence of the Ministry of Education and Research. This issue has insufficient legal regulation, due to which the children are not guaranteed sufficient medical care. Remarkably large portion of children attending the schools for children with special needs require psychiatric care, which availability is limited for them.

In 2006, the Chancellor of Justice initiated the proceedings on his own accord for the determination of legality of the regulation enacted for the monitoring of the implementation of the Language Act.

In the course of the proceedings the Chancellor of Justice was seeking answer to the question whether the regulation for exercising state supervision that has been established with legislation of lower authority i.e. approved by the Government of the Republic Regulation, is in fact constitutional. As a result of the proceedings, the Chancellor of Justice established that the relevant provision of the Language Act and the regulation issued pursuant to it that regulated the monitoring of the implementation of the Language Act, were not in compliance with the Constitution. On the basis of the memorandum of the Chancellor of Justice, the Government of the Republic submitted a new draft Act to the Riigikogu, which as of present date has already been passed and entered into force.

During the time period covered by this report, the Chancellor of Justice exercised supervision over the Government of the Republic Regulation that without good reason differentiated the wages of the teachers who had obtained their special needs teachers' education in somewhat different ways which all were legally permissible and who pursuant to the legislation were able to be employed at the positions of same status and perform the duties of the equivalent rank. As the result of the Government of the Republic Regulation these teachers were not treated differently in granting them right to work as a teacher, during the course of their work or when assessing the quality of their work, however, the differentiated treatment was deemed necessary to be applied at remunerating them. As there was no good reason for differentiation in remuneration, the Government of the Republic Regulation caused unequal treatment of persons.

During the time period covered by this report, the Chancellor of Justice established by way of supervision that the regulations of the Ministry of Education and Research that prescribed the reference prices for the textbooks were not in compliance with the legal provision delegating authority to the Minister.

On the basis of the petition submitted, the Chancellor of Justice audited the lawfulness of the elections of the Rector of the Estonian Maritime Academy that had been conducted several times and repeatedly failed. By way of proceedings initiated on his own accord the Chancellor of Justice established a violation of the fundamental rights of students by a school where the children who had chosen the humanities course of study in upper secondary school were not guaranteed the free choice regarding the religious studies.

During the time period covered by this report, the Chancellor of Justice paid especial attention to the issues associated with the scarcity of free places available at kindergartens. The Chancellor of Justice received a petition from a person who was concerned about the procedure of accepting the children to the kindergartens practiced at the Saku rural municipality. With a Saku Rural Municipality Regulation an array of supplementary requirements had been set forth for accepting children to the kindergartens, which were not permissible by laws.

As the scarcity of free places in kindergartens was harshly highlighted among the education related issues in the time period covered by this report, the Chancellor of Justice deemed necessary to summon roundtable meeting on his own initiative, in which the representatives of the relevant state bodies, organisations engaging with children and local governments were participating at.

The law has guaranteed for every parent wishing to send his/her child to kindergarten the relevant right, however, according to the data available, about 42 per cent of the local governments failed to guarantee the exercising of this right by the parents during the year covered by this report. The afore mentioned regulation issued by Saku Rural Municipality was a sure sign of the situation that the local governments had started to solve the issues arising from the scarcity of available kindergarten spots with establishing such systems of requirements and conditions, preferences and queues that were not in the conformity with the valid legislation. As a result of the discussions held at the roundtable meeting, the Chancellor of Justice made several suggestions aimed at remedying the situation to the Minister of Education and Research, the Minister of Social Affairs and the Minister Population and Ethnic Affairs.

In 2006 the Chancellor of Justice audited the Vastseliina Boarding School and the Kaagvere Special School on his own initiative. As a result of the inspection visits to these institutions, the Chancellor of Justice submitted several suggestions aimed at rectifying deficiencies to the Minister of Education and Research. Especially disturbing was the situation revealed at the inspection visit to the Kaagvere Special School as the fundamental rights of the students were violated at school and the Chancellor of Justice had already pointed out several deficiencies during his previous visits. As a result of the inspection visit of the Chancellor of Justice, the Ministry of Education and Research voiced an opinion that as the target group of the special school are female children with antisocial tendencies, then the magnification of the complaints of these children through the press and media was inappropriate and wrongful. According to the assessment of the Ministry, publishing such positions does not aid in any way the guarantee of the rights of the children.

The amendments to the Juvenile Sanctions Act, planned by the Ministry of Education and Research in 2006, did not get the approval from the Ministry of Justice due to the legal incompetence of these amendments. The number of children not fulfilling their obligation to attend school is gradually increasing during last years, however, the set of measures provided by the Juvenile Sanctions Act is limited and rigid. During the time period covered by this report no legally competent measures were found for the amendment of the Juvenile Sanctions Act and the Ministry of Education and Research failed to provide a comprehensive vision for future legal regulation of the activities of the special educational institutions.

During the time period covered by this report, the media covered several school abuse cases that attracted widespread attention. It is only possible to hope that the activities of the Ministry of Education and Research in analysing the underlying reasons of school abuse and in the prevention of cases of violence will prove fruitful soon enough.

2. Voluntariness of the religious studies in the schools

Case No. 7-2/051817

(1) A person turned to the Chancellor of Justice with a petition claiming that in one of the schools the religious studies are mandatory. Since this person was neither a student of that school nor someone whose rights could have been violated, the Chancellor of Justice initiated proceedings on his own accord.

(2) The Chancellor of Justice contacted the school, requiring information on the mandatory nature of the religious studies and the legal grounds thereof. The school responded that the activities of the school are based, in addition to other legislation, on the National Curriculum for Basic Schools and Upper Secondary Schools, including its subsection 11 (2). The school explained that a course of study is an integral set of subjects, which goal is to create opportunities for obtaining in-depth knowledge in certain particular subject field. The course of study is compiled from mandatory subjects, school determined elective subjects and the subjects chosen by the pupil him or herself. Pursuant to the statutes of the school approved by the local government council, the objective of the school is to provide an opportunity to choose education whether in science, humanities or nature course of study. According to the subsection 8 (2) of the Education Act and the subsection 17 (1) of the Basic Schools and Upper Secondary Schools Act, education is compulsory for children until they have acquired basic education or attained 17 years of age. The school retained position that a student has a free choice to decide whether to study in that school as well as which courses to choose that introductions are freely available. In the chosen course of study, the student is obligated to complete the mandatory classes as per the national curricula and also the classes of that course of study. Only exceptions to that can be made due to health considerations and other reasons of individual nature. The goal of the humanities course of study is to provide in-depth general cultural knowledge. Among other studies, the course of study also contains the religious studies, which goal is to introduce variety of religions of the world and religion related issues as well as comparative analyses of religions

in order to provide the foundation for understanding the historical issues as well as contemporary problems of global nature in their complexity. The school also referred to the protocol of common interests signed in 2002 between the Estonian Council of Churches and the Government of the Republic. The religious studies have been taught for nine years already and during that time not once have the students or their parents seen any problem in that. Also the School's Board of Trustees discussed afore mentioned topics and deemed the teaching of the religious studies in the humanities course of study to be essential. The Board of Trustees shared the position of the school administration in regard of the difference between the religious studies providing knowledge and teaching the faith that shapes the development of the value systems of an individual. The Board of Trustees did not see the reason for associating the religious studies taught in the school with the religious education mentioned by the subsection 4 (4) of the Education Act and the subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act, and therefore did not see any problems arising thereof in relation to the free choice of religion.

In order to obtain a position in regard of the voluntariness of the religious studies, the Chancellor of Justice had recourse to the Minister of Education and Science. According to the response of the Minister, a national elective subject syllabus for religious studies had been developed. The Ministry retains position that a confessional religious education is based on the teachings of sole particular church or religious order and which objective is to pass on the religious tradition to the next generation and the continuity thereof. However, non-confessional religious education is a mere general education subject that cannot be a faith teaching of any religious sect. According to the Minister, in the case of Estonia, generally religious means being a Christian. The teachings are of informative nature and not of convincing. According to the standpoint of the Minister, the issue is about the level of information obtained, based on which the student will be able to make an educated choice when commencing the studies in upper secondary school. And when being educated about the matter it is a question of making a conscious decision to study that subject.

(3) The main question in this proceeding is whether religious studies can be considered to be a mandatory subject to a student, taking into account also the fact that studying in upper secondary school is by itself not compulsory and the student is able to exercise free will in choosing their course of study.

(4) The subsection 40 (1) of the Constitution prescribes the freedom of religion. In the part pertaining to the schools, the legislator has further specified the freedom of religion by the Education Act and the Basic Schools and Upper Secondary Schools Act. The subsection 4 (4) of the Education Act provides that the study and teaching of religious education shall be voluntary. The subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act prescribes that religious education shall be non-confessional; a school is required to teach religious studies if at least fifteen students in a stage of study so wish; the study of religious education shall be voluntary.

The subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act provides the non-confessional nature of the religious education. Confessional we can consider such religious education which is used to shape the perception of the place of a human in the world and his or her relationship with higher powers or deeper essences therein. It means teaching a certain established and well-defined religious conviction that is not permissible according to the Basic Schools and Upper Secondary Schools Act. Non-confessional or permissible are such religious education that discuss various religions in outline. It could be named religious studies. Teaching of the latter is regulated by the subsection 4 (4) of the Education Act and the subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act. However, the religious studies taught by the school were actually religious education in the purposes of named provisions.

Pursuant to the subsection 3 (2) of the Basic Schools and Upper Secondary Schools Act, the Government of the Republic has approved with Regulation No. 56 of 25 January 2002 the National Curriculum for Basic Schools and Upper Secondary Schools, which subsection 11 (2) provides that

a school forms their courses of study through the elective subjects, elective courses and in-depth studies in some subjects, taking into account the means of the school and the wishes of the students; a school can have several courses of study. According to the first sentence of the subsection 3 (1) of the Constitution, the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Although the schools have the right to form their own study programmes, they do have to adhere to the provisions of law, including the provisions of the Education Act and the Basic Schools and Upper Secondary Schools Act that prescribe that the study of religious education has to be voluntary. The protocol of common interests between the Estonian Council of Churches and the Government of the Republic is not a legislation of general application, creating a basis for the rights or duties of persons. The laws cannot be ignored upon the agreement between or the approval of the school collective, student body, parents and board of trustees.

The school referred to the perception of its administration and board of trustees on the essentiality of the religious studies in the humanities course of study. The Chancellor of Justice brought into the attention of the school that the coverage of religious connections and connotations is also designated for other subjects taught in secondary school (according to the national curriculum: chapter 4 clause 3.5 in the Social Theory "Religious Diversity of the World"; chapter 5 clause 4.1.2 of the Artistic Education "Art and Religion", clause 4.2.2 "Influence of Religion on the Baroque and Rococo Art"). Also, we shouldn't underestimate the youth studying in the secondary schools – if the religious studies are indeed essential for the humanities course of study, then the youth studying humanities, to whom the studies in the humanities course of study was an educated choice, should perceive it as evidently essential as well.

Pursuant to the subsection 8 (2) of the Education Act and the subsection 17 (1) of the Basic Schools and Upper Secondary Schools Act, education is compulsory for children until they have acquired basic education or attained 17 years of age. The student makes the choice to commence the studies in secondary school on his or her own accord; as well as she/he is free in choosing the course of study, the introduction of which is generally available. The student has an obligation to pass the mandatory courses of the national curriculum in the field of study of their choice and also the special courses of that field of study thereof.

The Chancellor of Justice found that the references to the fact that the studies in secondary school are voluntary to the students are not relevant. Both the subsection 4 (4) of the Education Act and the subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act do not prescribe specific regulation for upper secondary schools. Therefore, also for all the students of the grades 10-12, the religious studies should be voluntary. The voluntariness of the religious studies set forth by the subsection 4 (4) of the Education Act and subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act should be understood as the intra-school freedom of choice and not inter-school freedom of choice. If choosing one particular course of study brings along mandatory religious studies, then it can no longer be considered the voluntariness of the religious studies. If the interpretation was the opposite, then it would entail a danger that the humanities course of study of all the schools (i.e. all the schools suitable for the student, whether by their location or some other trait) would include mandatory religious studies. And therefore the students with humanities interests would lose the choice among the schools in regard of the religious studies.

Pursuant to the response received from the school, it was not possible to attend the courses of the humanities course of study of that school without passing the religious study course. Like it was already referred above, the religious studies taught in the school were to be understood as the religious education in the purposes of the subsection 4 (4) of the Education Act and the subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act. Thus the studying of religious studies taught had to be voluntary, independent of the exact name of the course the subject was taught under.

The Chancellor of Justice assumed the position that the mandatory nature of the religious studies taught in the school in question was not in conformity with the subsection 4 (4) of the Education Act and the subsection 3 (4) of the Basic Schools and Upper Secondary Schools Act.

(5) On the basis of afore mentioned, the Chancellor of Justice made a suggestion to the school to eliminate the violation – more precisely, to remove the religious studies as a mandatory course from the study programme and explain to the students that attendance at that course is voluntary. The school informed the Chancellor of Justice that the religious studies were eliminated from the list of courses forming the humanities field of study by the directive of the head of school.

3. The verification visit to the Imastu Residential School

Case 7-9/061147

(1) On 10 October 2006 the Chancellor of Justice made an inspection visit to the Imastu Residential School (hereinafter Residential School) on his own initiative.

The Residential School is a state owned social welfare institution governed by the Lääne-Viru County Government, providing following services: medical rehabilitation services, child welfare services for the orphans and children with special needs (mental and physical disabilities) deprived from parental care, 24-hour care service for adult persons targeted to specific welfare services and 24-hour care services with strengthened support, partly supported assistance services for daily living and working.

On 4 August 2006, the Chancellor of Justice received information on alleged mistreatment taking place in the Residential Home – more precisely information was forwarded that in the Residential Home two of the welfare recipients were subjected to having their hands tied down.

The Chancellor of Justice submitted the request for information to the Residential Home on 17 August 2006. As the Residential Home is an institution governed by the Lääne-Viru County Government and the County Governor has an obligation pursuant to the subsections 7 (2) and 38 (1) of the Social Welfare Act, to supervise the quality of social services and other assistance provided in the county, the Chancellor of Justice informed also the Lääne-Viru County Governor on 17 August 2006 on the alleged mistreatment of the welfare recipients.

(2) The Chancellor of Justice, upon visiting the Residential Home, verified whether the claims about the mistreatment of welfare recipients were true.

(3.1) Upon inspection it became evident that the employees of the Residential Home are indeed tying the hands of two welfare recipients behind their back. Both of the welfare recipients have history of autoagressive (self destructive) behaviour and the employees of the Residential Home are attempting to keep the welfare recipients from harming themselves by tying their hands behind their backs. The central issue hereby is whether the employees of a social welfare institution have the right to use such means of restraint against the welfare recipients and whether these welfare recipients in question have sufficient psychiatric care available and whether the protection of their health is ensured.

The subsection 28 (1) of the Constitution sets forth the subjective right of everyone for the protection of health, i.e. everyone has the right to health care. The procedure and terms for the provision of psychiatric care and the means of restraint thereof are regulated by the Mental Health Act. According to the subsection 14 (1) of the Mental Health Act, the means of restraint are used with regard to persons with mental disorders in concurrent occurrence of the circumstances provided for in subsection 11 (1) of the Mental Health Act if there is an immediate danger of bodily harm to themselves or violence toward other persons and other measures for elimination of danger have been insufficient. The circumstances pursuant to the referred subsection 11 (1) of the Mental Health Act are: 1) the person has a severe mental disorder which restricts his or her ability to understand or control his or her behaviour; 2) without inpatient treatment, the person endangers the life, health

or safety of himself or herself or others due to a mental disorder; and 3) other psychiatric care is not sufficient. According to the subsection 14 (3) of the Mental Health Act, means of restraint are used on the basis of decisions of physicians which are documented in medical files with justifications.

Therefore, a social welfare institution does not have the right to apply the tying of the hands as a mean of restraint against their welfare recipients. In the case where a welfare recipient constitutes a danger to herself, an employee of a social welfare institution has the right, on the basis of the clause 20 (1) (4) of the Social Welfare Act and pursuant to the procedure prescribed by the Regulation No. 82 of the Minister of Social Affairs of 30 May 2002 "The procedure for application of restrictions in the social welfare institutions", to isolate the welfare recipient from other persons staying in the welfare institution in a separate room, whereas the welfare recipient has to remain under the constant supervision of the employees of the social welfare institution, and to summon the police or the EMS. The Chancellor of Justice finds that the regulation mentioned above is appropriate for solving a temporary episode of person being self destructive or dangerous to others, however, it is not applicable in actual situation where the self destructive behaviour of the person in of permanent nature.

If outpatient care is not sufficiently effective due to the state of health of the person or if the person becomes dangerous to himself or herself or others due to a mental disorder, then, pursuant to the subsection 6 (6) of the Mental Health Act, the person is placed in inpatient psychiatric treatment. However, at the same time the subsection 6 (5) of the Mental Health Act provides a principle that if possible, the removal of persons from familiar surroundings is avoided in the provision of psychiatric care.

The documents presented by the Residential Home indicate that one of the welfare recipients in question, was subjected to inpatient psychiatric treatment in a psychiatry clinic back in 2003, where she was prescribed continuous outpatient medical and social care. Other welfare recipient was subjected to inpatient treatment in general paediatric ward also in 2003. According to the psychiatrist treating these welfare recipients, she does not have enough time to give in-depth attention to the welfare recipients and her activities are limited to issuing prescriptions to them. Also, the Residential Home does not have a psychiatric nurse. So, taking into account the provider information as a whole, it is highly doubtful that the welfare recipients have received sufficient and best possible psychiatric care. Yet, the Mental Health Act provides as one of the grounds for tying the patients' arms a circumstance that other psychiatric care is not sufficient. Therefore, before applying means of restraint, it would be necessary to attempt to help the welfare recipients with other means used in psychiatric care.

The welfare recipients have the constitutional right for the protection of health. In this particular case, the welfare recipients have the right to receive sufficient psychiatric care in order to treat their autoagressive behaviour. The Chancellor of Justice finds that tying down of the hands is an extreme measure, which use can be justified only for the cases prescribed by the law as by application of such means of restraint various rights and freedoms of the person are being restricted. As it is clear from the circumstances becoming evident during the course of the proceedings, the welfare recipients have not received sufficient psychiatric care of other type and thus the tying down of their hands is illegal. Therefore the Chancellor of Justice submitted a suggestion to the head of the Residential Home to make the sufficient psychiatric care immediately available for the two welfare recipients in question. As these mentioned welfare recipients are dangerous to themselves and according to the principle provided by the subsection 6 (5) of the Mental Health Act, the removal of persons from familiar surroundings should be avoided in the course of psychiatric care if possible, the Chancellor of Justice asked the head of the Residential Home to seek and apply immediately other, legally permissible methods and means instead of the tying down of hands as an extreme mean of restraint in order to avoid the self harm from the part of the welfare recipients. In doing so, it is absolutely necessary to consult and work closely together with the specialists in the field. And as due to their autoagressive behaviour, these welfare recipients require increased attention and care, it is necessary to take into account the special needs of the welfare recipients, and therefore the Chancellor of Justice made a

recommendation to the Residential Home to reorganise their work and routine in a way that both of these welfare recipients in question would have a dedicated person looking after them around the clock. If outpatient care is not sufficiently effective due to the state of health of the person or if the person becomes dangerous to himself or herself or others due to a mental disorder, then, according to the Chancellor of Justice, the Residential Home has to consider subjecting the welfare recipients to placement in inpatient psychiatric treatment on the basis of the subsection 6 (6) of the Mental Health Act. In addition, the Chancellor of Justice recommended the Lääne-Viru County Governor to provide all the help possible to the Residential Home to guarantee the protection of health of the welfare recipients.

(3.2) During the course of the verification visit, it was discovered that a committee authorised by the Lääne-Viru County Governor had inspected the Residential Home on 22nd August 2006. It becomes evident from the report compiled on the supervision that the hands of the welfare recipients in the Residential Home are still tied down, however, the committee failed to establish this activity as illegal. As far as the valid legislation does not grant a social welfare institution the right to apply tying of the hands as a mean of restraint, it constitutes illegal activity and the County Governor should have been able to establish unlawful situation upon verification and should have applied measures to guarantee the rights of the welfare recipients.

The Chancellor of Justice finds that the supervision of the County Governor, failing to notice significant violations of fundamental rights and freedoms, cannot under no circumstances be considered functional and effective and serving the best interests of the welfare recipients. Thus the Chancellor of Justice made a recommendation to the Lääne-Viru County Governor to exercise extreme responsibility from now on in regards of the supervision activities pursuant to the subsections 7 (2) and 38 (1) of the Social Welfare Act. At the same time the Chancellor of Justice asked the County Governor to bring action against the officials performing supervision activities on the unsatisfactory performance of obligations.

The Chancellor of Justice informed the Minister of Social Affairs about the deficiencies of the supervision activities of the County Governor and emphasised the necessity of functional and effective supervision. The Minister of Social Affairs explained in their correspondence of 30 November 2005 to the Chancellor of Justice that there is a plan to make amendments to the Social Welfare Act in 2006 in order to improve the supervision activities of the County Governors. According to the information available to the Chancellor of Justice the Social Welfare Act has not been amended in the relevant part and therefore the Chancellor of Justice asked the Minister of Social Affairs to inform about the measures applied in 2006 for the improvement of the exercising of the supervision competence of the County Governors pursuant to the Social Welfare Act.

(3.3) During the inspection visit, the management of the Residential Home explained that in the practice the welfare services for people with special psychiatric needs are applied differently than described in the Appendix 2 of the Regulation No. 4 of the Minister of Social Affairs of 3rd January 2002 "The requirements for the social welfare institutions and welfare services". Therefore, it would be necessary to set the precise extent to and describe the limits of the 24-hour care services, 24-hour reinforced care services and 24-hour care services with reinforced supervision. Thus the Chancellor of Justice made a proposition to the Minister of Social Affairs to further specify the descriptions of the services provided in the Appendix 2 of the Regulation No. 4 of the Minister of Social Affairs of 3rd January 2002 "The requirements for the social welfare institutions and welfare services" for the purposes of the uniform application.

(3.4) The management of the Residential Home explained during the inspection visit that the demand for the 24-hour care services meant for the people with mental special needs is greater than the supply of such services. So, in the practice there is a situation where the same amount of money is used to provide services for greater number of people, which in turn endangers the quality of the services. Thus, the Chancellor of Justice made a suggestion to the Minister of Social Affairs to

reassess the supply and demand ratio of the 24-hour care services and to guarantee the availability of the services to all the people who need them. Additionally, in order to ensure the quality of the social welfare services, the Chancellor of Justice recommended the Lääne-Viru County Governor to allocate proper funds to the Residential Home for the provision of services to all the welfare recipients relying on the services.

(3.5) In order to evaluate the state and circumstances of the welfare recipients, the Chancellor of Justice, among other issues, analysed the Regulation No. 4 of the Minister of Social Affairs of 3rd January 2002 "The requirements for the social welfare institutions and welfare services". The Appendix 2 of the referred Regulation provides the requirements for the social welfare services aimed to the persons with special psychiatric needs. In the case of the 24-hour reinforced care services, the requirement states that per every twenty welfare recipients there has to be one psychiatric nurse. In the case of the 24-hour care services with reinforced supervision, the social welfare institution must have one psychiatric nurse per every ten welfare recipients. In the case of the 24-hour care services with strengthened support, the social welfare institutions are not required to have a psychiatric nurse.

Upon inspection, it turned out that one of the mistreated welfare recipients is getting the 24-hour care service with strengthened support in the Residential Home, and in order to ensure the protection of health of such welfare recipients, there might be a need for the knowledge and skills of a psychiatric nurse. Therefore the Chancellor of Justice asked the Minister of Social Affairs to consider amending the Appendix 2 of the Regulation No. 4 of the Minister of Social Affairs of 3rd January 2002 "The requirements for the social welfare institutions and welfare services" in such a manner that the presence of a psychiatric nurse among the staff would be made mandatory in providing the 24-hour care services with strengthened support.

(3.6) In the course of the proceedings, the Chancellor of Justice received information from a psychiatrist of the Psychiatry Clinic of the Tartu University Hospital Foundation that there are only 14 child psychiatrist in Estonia. According to this psychiatrist, a large number of child psychiatrists are retired or about to reach the age of retirement. The psychiatrist considers the state of the child psychiatry field to be rather appalling as it is not possible to specialise in child psychiatry when studying medicine in Estonian universities. The scarcity of child psychiatrists creates a situation where the children's right to the protection of health is not always ensured. Therefore the Chancellor of Justice asked the Minister of Social Affairs to introduce measures for the promotion of the studies in the child psychiatry field.

(3.7) During the inspection visit, the management of the Residential Home raised an issue regarding the equal treatment of activity instructors and hobby leaders. The sections 4 and 6 of the Government of the Republic Regulation No. 353 of 20 November 2001 "The list of positions eligible for extended vacation and the duration of the vacation" are providing a list regarding which employees of children's homes, residential homes, young children's homes, youth homes and mixed type social welfare institutions and medical institutions, children's sanatorium and social welfare institution for adults are eligible for the 42 calendar day vacation. Among other positions named, also the hobby leader features on the list. However, the activity instructors are missing from that list, although according to the claim of the management of the Residential Home, the substantive work duties of activity instructor and hobby leader are practically interchangeable. Now the name of the position of the activity instructor comes from the Regulation No. 4 of the Minister of Social Affairs of 3rd January 2002 "The requirements for the social welfare institutions and welfare services". Therefore it is questionable whether the activity instructors and hobby leaders have been treated equally.

Pursuant to the afore mentioned, the Chancellor of Justice asked the Minister of Social Affairs to analyse whether the activity instructors have been treated unequally compared to the hobby leaders in terms of the length of the vacation. Upon establishing inequality in the treatment, the Chancellor of Justice requested the Minister of Social Affairs to consider making a proposition to

the Government of the Republic to amend the Government of the Republic Regulation No. 353 of 20 November 2001 "The list of positions eligible for extended vacation and the duration of the vacation". If the work description of the activity instructor is different from the duties of hobby leader, then it is necessary to clearly and unambiguously define the difference in the competences of the activity instructor and hobby leader in the legislation.

(3.8) During the confidential reception of the Chancellor of Justice in the Residential Home, it became clear that the employees of the Residential Home are in fact the guardians of several welfare recipients as no one else has accepted the guardianship. Each employee has several welfare recipients under their guardianship. So the situation has been created where the service provider themselves has to protect the personal and proprietary rights and interests of the wards. Hereby one person is fulfilling two contradicting roles and the supervision over the protection of the rights of the wards is substantively missing. Yet, according to the claims of the Residential Home, when a parent of a welfare recipient is a guardian as well, they often lack the interest in the welfare recipients and to contact them and ask for their permission in anything is almost impossible. Such situation in turn may cause the violation of the rights and interests of the welfare recipients.

The valid legislation does not contain a direct prohibition to appoint the employee of the same social welfare institution as a guardian to a welfare recipient receiving the welfare service from the same institution. It is questionable whether the guardianship has set up in the best interests of the welfare recipient, whereupon the interests of the guardian might clash with the interests with the ward in performing different tasks. Pursuant to the subsection 174 (2) of the Draft Family Law Act[136], a requirement is planned to be enacted that the employee of the health care or social welfare institution where the child is staying is not allowed to be appointed as the guardian for them. The same restriction can be found in the subsection 175 (3) of the Draft Family Law Act regarding a legal person and in the subsection 204 (2) regarding the appointment of a guardian who is a natural person for an adult person and subsection 205 (4) of the Draft Act regarding the appointment of a guardian who is a legal person for an adult person.

(4) As the result of the inspection visit, the Chancellor of Justice made proposals and recommendations to the Imastu Residential Home, to the Minister of Social Affairs and to the Lääne-Viru County Governor.

The responses of the Imastu Residential Home and the Lääne-Viru County Governor disclosed that the two welfare recipients in question were placed in inpatient psychiatric treatment in a psychiatric hospital. Also, both the County Governor and the Head of the Residential Home explained in their responses that they will not accept these welfare recipients again in the Residential Home as these welfare recipients suffer from autoagressive behaviour. In order to avoid the probable self harm done by them, the Residential Home would have to apply means of restraint; however, the application of the means of restraint is forbidden by law in the social welfare institutions. Therefore, the Head of the Residential Home and the County Governor made a suggestion to the legal guardians of the welfare recipients to terminate the agreements constituting the legal grounds for the provision of the welfare services. A mother of one welfare recipient contested the termination of the agreement.

The Chancellor of Justice found that in making the suggestion to terminate the agreement on the provision of welfare services, the Residential Home and the County Governor have not duly taken into account the rights and interests of the welfare recipients, and thus the Chancellor of Justice made a suggestion to the Residential Home and to the County Governor to eliminate such violations. The Chancellor of Justice assumed a position that once the inpatient treatment of the welfare recipients in a psychiatric hospital is over and they would require care in social welfare institution, they should have an option to go back to the Imastu Residential Home. And if the welfare recipients continue the

[136] The Draft Family Law Act as of 7th November 2006, available in Estonian at: http://eoigus.just.ee.

permanent self destructive behaviour in the social welfare institution, the Residential Home should make the psychiatric care available for them in the Residential Home; arrange the care based on their special needs; instead of tying their hands or isolating them, find other means and measures that are not forbidden to use in the social welfare institution to prevent their self-harm.

The follow up inspection shall be performed by the Chancellor of Justice after expiry of the term of six months from the date the proposals were made.

4. Inspection visit to the Kaagvere Special School

Case 7-9/061391

(1) Based on the subsection 19 (1) and the sections 27 and 33 of the Chancellor of Justice Act, on 29 November 2006, the Chancellor of Justice made an inspection visit to the Kaagvere Special School on his own initiative.

The Kaargvere Special School is a basic school for the students requiring special education conditions administered by the Ministry of Education and Research.

(2) The Chancellor of Justice inspected whether the development plan, by-laws and internal rules of the Kaagvere Special School are in conformance with the requirements prescribed by the law. Additionally, the Chancellor of Justice inspected whether the fundamental rights of the children in the Kaagvere Special School are restricted in accordance with the Constitution.
(3.1) The Chancellor of Justice inspected whether the teachers' council of the Kaagvere Special School has approved the internal rules of the school complying with the requirements of law and whether these internal rules have been displayed in a visible place for the students.

The obligation of the teachers' council to establish the internal rules of the school arises from the subsection 30 (1) of the Basic Schools and Upper Secondary Schools Act. Pursuant to the subsection 30 (1^1) of the Basic Schools and Upper Secondary Schools Act, the internal rules of a school shall be displayed in a visible place for the students to have access to the rules.

According to the subsection 32 (3) of the Basic Schools and Upper Secondary Schools Act, the schools have to apply measures to prevent mental and physical violence and have to cooperate with the parents (guardians, curators), managers of the schools and, if necessary, the police and other authorities and experts. The procedure for notification of incidents endangering the mental or physical security of teachers or students and the procedure for the resolution of such incidents shall be established by the internal rules of the schools.

Upon inspection it was found that the teachers' council of the Kaagvere Special School had not established the internal rules of the school. The teachers' council had established the internal rules of the boarding school facilities only. As the school does not have valid internal rules at the present, there is also no procedure for notification of incidents endangering the mental or physical security of teachers or students the procedure for the resolution of such incidents. Therefore, the requirement pursuant subsection 32 (3) of the Basic Schools and Upper Secondary Schools Act is not fulfilled. According to the subsection 53^3 (3) of the Basic Schools and Upper Secondary Schools Act, the internal rules of the Kaagvere Special School should have been brought in compliance with the subsection 32 (3) of the Basic Schools and Upper Secondary Schools Act by the 1st September 2004 the latest.

(3.2) The Chancellor of Justice inspected whether the development plan of the Kaagvere Special School has been approved and whether it has been disclosed to public on the web page maintained for the reflection of the activities of the school.

In order to ensure the consistent development of a school, the school shall prepare a development plan in co-operation with the board of trustees (council) and teachers' council as it is set forth in the subsection 3^1 (1) of the Basic Schools and Upper Secondary Schools Act. According to the subsection 3^1 (4) of the Basic Schools and Upper Secondary Schools Act, the manager of the school shall organise the disclosure of the development plan on the basis of the Public Information Act on the web page maintained for the reflection of the activities of the school. Pursuant to the subsection 53^3 (1) of the Basic Schools and Upper Secondary Schools Act, the school development plan specified in § 3^1 of the Basic Schools and Upper Secondary Schools Act shall be approved not later than by 1 September 2001.

Upon inspection it was found that the school did not have an approved development plan and the Chancellor of Justice was presented only the draft version of the development plan. In the meanwhile, the development plan is not available at the school web page.

(3.3) The Chancellor of Justice inspected, whether the "Statutes of the isolation room" approved by the Head of the Kaagvere Special School Directive No. 13 of 25 October 2002 are constitutional and in compliance with the Juvenile Sanctions Act.

According to the subsection 20 (1) of the Constitution, everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty except in the cases and pursuant to procedure provided by law.

The legal grounds for placing a student in isolation room have been provided by the subsection 6^2 (1) of the Juvenile Sanctions Act. Pursuant to the subsection 6^2 (1) of the Juvenile Sanctions Act, a student of a school for students with special educational needs may be placed in an isolation room to calm down, however not for longer than twenty-four hours. The director of a school for students with special educational needs or a person authorised by the director shall immediately prepare a reasoned directive concerning the placing of a student in isolation and the director of a school for students with special educational needs or a person authorised by the director shall notify the student thereof against a signature on the date on which the directive is prepared.

The subsection 6^2 (2) of the Juvenile Sanctions Act provides the grounds on which a student can be placed to an isolation room. A student may be placed to the isolation room if there is an immediate danger of bodily harm to himself or violence toward other persons and verbal appeasing has been insufficient.

Pursuant to the clause 1 of the "Statutes of the isolation room", a student is placed into the isolation room if there has been a serious violation of the by-laws of the school. The placement into the isolation room shall take place no later than 10 days after the day the act was performed or the guilt of the student became known.

The subsection 6^2 (2) of the Juvenile Sanctions Act provides exhaustive list of the circumstances, upon the occurrence of which the student can be placed in the isolation room. As the legislator has not prescribed the option to place a student in the isolation room for the violation of the by-laws of a school, the clause 1 of the "Statutes of the isolation room" is in conflict with the principle of legality.

It can be concluded on the basis of the afore mentioned that the "Statutes of the isolation room" approved by the Head of the Kaagvere Special School Directive No. 13 of 25 October 2002 is not in conformity with the Juvenile Sanctions Act and the Constitution.

(3.4) The Chancellor of Justice inspected whether the Head of the Kaagvere Special School Directive No. 13 of 25 October 2002 "Incentives and sanctions" is in compliance with the Juvenile Sanctions Act.

According to the subsection 6^2 (2) of the Juvenile Sanctions Act, a student may be placed into an isolation room if there is an immediate danger of bodily harm to themselves or violence toward other persons and verbal appeasing has been insufficient.

According to the Directive, a system of pluses and minuses is applied to evaluate the behaviour of a student in school. The Directive indicates that the placement in the isolation room is used as a sanction in the Kaagvere Special School. If a student has accumulated 150 minus points or more, the student is placed in the isolation room, whereas 10 minus points equals one hour of time. Additionally, a student may be placed in the isolation room for one time serious offence.

Like explained above, the use of an isolation room as a sanction is in conflict with the Juvenile Sanctions Act and the Constitution. Therefore, the Head of the Kaagvere Special School Directive No. 13 of 25 October 2002 "Incentives and sanctions" is not compliance with the Juvenile Sanctions Act and is unconstitutional.

The Chancellor of Justice pointed out the unlawfulness of the directives of the head of the Kaagvere Special School already during the inspection visit of December 2003; however, both of the directives have not yet been amended or declared invalid. Although, according to the assurance of the head of the school, the directives are no longer applicable, it does not mean they are legal. The directive is valid until it is amended or declared invalid.

(3.5) The Chancellor of Justice inspected whether the by-laws of the Kaagvere Special School are in compliance with the requirements provided by law.

Upon inspection was found that the Kaagvere Special School does not have the by-laws approved by the head of the school. The Chancellor of Justice was presented the draft version of the by-laws. According to the clause 1 of the chapter 10 of the draft version of the by-laws (hereinafter the by-laws), a student is placed in the isolation room for serious violation of the by-laws. The placement in the isolation room shall take place no later than 10 days after the day the act was performed or the guilt of the student became known. The clause 1 of the chapter 10 of the by-laws is in conflict with the Juvenile Sanctions Act and is unconstitutional.

According to the clause 6^2 (9) (2) of the Juvenile Sanctions Act, the students who are placed in the isolation room have the right to meet with a parent, guardian or caretaker. This right has been unfoundedly restricted by the clause 11 of the chapter 10 of the by-laws. Pursuant to the clause 11 of the chapter 10 of the by-laws, a parent, guardian or caretaker wishing to meet with a student placed in the isolation room, has to have the permission from the head of the school.

Also, the size of the floor area provided by the clause 5 of the chapter 10 of the by-laws is not corresponding with the requirements provided by the Regulation No. 33 of the Minister of Social Affairs of 8 February 2002 "The health protection and safety requirements for the isolation room and its interior".

The clauses 1, 2 and 11 of the chapter 10 of the by-laws are in conflict with the section 6^2 of the Juvenile Sanctions Act, and the clause 5 is in conflict with the Regulation No. 33 of the Minister of Social Affairs of 8 February 2002 "The health protection and safety requirements for the isolation room and its interior".

(3.6) The Chancellor of Justice inspected whether the fundamental rights of the children are restricted in the Kaagvere Special School in conformity with the Constitution.

According to the section 11 of the Constitution, the rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. According to the general verification

scheme of the restrictions on fundamental rights used in the practice of the Supreme Court, the restriction on a fundamental right has to be established in a sufficiently clearly worded law (formal constitutionality), the restriction should have a legitimate aim, the restriction should be appropriate and necessary for achieving the desired aim and the gravity of the restriction should be in conformity with the significance of the desired aim (substantive constitutionality).[137]

The restrictions on the fundamental rights and freedoms in the schools for students with special educational needs have been provided by the Juvenile Sanctions Act. The freedom of movement of the students has been restricted by the subsection 6^1 (7) of the Juvenile Sanctions Act. According to the subsection 6^1 (7) of the Juvenile Sanctions Act, for the exercise of disciplinary supervision, students are prohibited from leaving the territory of a school for students with special educational needs, except in the cases provided for in the statutes of the school. Therefore the school has the right to apply measures to stop students from leaving the territory of the school without relevant permission. However, these measures have to be proportional i.e. appropriate, necessary and moderate.

Pursuant to the subsection 6^2 (1) of the Juvenile Sanctions Act student of a school for students with special educational needs may be placed in an isolation room to calm down, however not for longer than twenty-four hours. And the subsection 6^2 (2) of the Juvenile Sanctions Act establishes the conditions when the student may be placed in an isolation room. A student may be placed in an isolation room if there is an immediate danger of bodily harm to him/herself or violence toward other persons and verbal appeasing has been insufficient.

Pursuant to the subsection 6^2 (7) of the Juvenile Sanctions Act, a student who is placed in the isolation room must be under the constant supervision of an employee of the school. Also, the Minister of Social Affairs, with the Regulation No. 33 of 8 February 2002 "The health protection and safety requirements for the isolation room and its interior", has established the conditions for an isolation room.

Upon inspection it was found that in the Kaagvere Special School, a student who has breached the discipline is placed in the R-section as a sanction. Also all the students arriving to the Kaagvere Special School for the first time, are placed to the R-section. In the mentioned section, the fundamental right to liberty and security of person, provided by the subsection 20 (1) of the Constitution, is significantly restricted. Namely, the students placed in the R-section are being locked into their rooms. The students are allowed to leave their rooms only in the presence of an employee of the school.

Upon inspection it was found that the children remain in the R-section for longer than 24 hours. Furthermore, these children locked in their rooms are not under the constant supervision of an employee of the school. Also, it was discovered that the rooms of the R-section do not have toilet facilities. Therefore, the children who have been received by adviser to the Chancellor of Justice, have complained about the issues associated with the use of toilet facilities as the school employees might not always hear their yelling through the closed doors. The rooms in the R-section are not in conformity with the requirements prescribed by the Regulation No. 33 of the Minister of Social Affairs of 8 February 2002 "The health protection and safety requirements for the isolation room and its interior". Based on the afore mentioned and taking into account that while locking the children in, also the requirements prescribed by the subsection 6^2 (2) of the Juvenile Sanctions Act are not adhered to, locking a child in their room can not be considered as a placement of the student in an isolation room in the purposes of the subsection 6^2 (1) of the Juvenile Sanctions Act. Also the head of the school affirmed that locking a child in their room is not considered as a placement in an isolation room.
Placing a person in a locked room is a very intense restriction on the fundamental rights to liberty and security of person. Besides having legal grounds, also a good reason is required for the application of such restriction.

[137] See for example the Judgment of the Constitutional Review Chamber of the Supreme Court of 6th March 2002, case No. 3-4-1-1-02, State Gazette III 2002, 8, 74.

The right of application of such restrictions has not been given by the legislator to the head of a school for students with special educational needs. Thus the fundamental right to liberty and security of person of the students are violated in the Kaagvere Special School without legal grounds. In addition to the fact that the placement of the children in the locked rooms is unfounded, such practices are degrading to human dignity and are clearly disproportional.

(3.7) The Chancellor of Justice inspected whether the requirements prescribed by the Regulation No. 109 of the Minister of Social Affairs of 29 August 2003 "Health protection requirements for the schools" are followed while the students are asked to work.

According to the subsection 3 (1) of the Regulation, the school rooms are study rooms, ancillary rooms to study rooms, assembly hall, dining hall, health care services rooms, recreation rooms and hallways, ancillary rooms to sports exercise rooms, wardrobe rooms, toilet and shower rooms, support staff rooms and the boarding school facilities.

According to the subsection 10 (4) of the Regulation No. 109 of the Minister of Social Affairs of 29 August 2003 "Health protection requirements for the schools", the students cannot be asked to clean toilet facilities and to wash the floors, light fixtures and windows.

The internal rules for the boarding school facilities approved by the Head of the Kaagvere Special School Directive No. 13 of 25 October 2002, a student has to keep their own room clean. It has been specified that the student has to wash the floor of the room and wipe the dust.

Pursuant to the Minister of Social Affairs Regulation, the employment of students in washing the floors is forbidden and no exceptions have been made in regard of boarding school facilities. Although, the Minister of Social Affairs announced in their correspondence of 26 July 2006 that the Ministry of Social Affairs is considering to amend the said Regulation in a way that would allow the children to wash their floor in the boarding school facilities if their parents have given relevant permission, at present the Regulation is valid in its non-amended way and therefore has to be followed as such.

Thus, at present, the employment of students in washing the floors in the Kaagvere Special School is in conflict with the subsection 10 (4) of the Regulation No. 109 of the Minister of Social Affairs of 29 August 2003 "Health protection requirements for the schools".

(3.8) The Chancellor of Justice inspected whether the students have been informed on the option to file a petition on the misconduct of the administration of the school with the institutions exercising state supervision. Additionally the Chancellor of Justice inspected whether the contact information of the institutions exercising state supervision have been displayed in a visible place for the students.

Pursuant to the section 33 of the Basic Schools and Upper Secondary Schools Act, upon disagreement with a decision of the teachers' council and in the case of points of dispute concerning teaching and education, students and their parents have the right to address the board of trustees of the school and the official exercising state supervision over the school. A school shall display the contact details of the authority exercising state supervision over the school in a visible place for the students to have access to the contact details.

According to the subsection 11 (1) of the "Competence of the teachers' council of a school and its procedure of conduct" approved by the Minister of Education and Research Regulation No. 14 of 29 May 2000, upon disagreeing with the decision made by a teachers' council, a student or a parent (guardian) has a right to apply to the official exercising state supervision over the school for reviewing the decision within five business day from the moment the decision became known.

The subsection 6^3 (1) of the Juvenile Sanctions Act provides that if a student or his or her legal representative believes that his or her rights provided for in an Act or legislation established on the basis thereof have been violated or his or her freedoms restricted, the student or his or her legal representative has the right to file a challenge with the Minister of Education and Research or a county governor.

Upon inspection it was found that the students are informed on the procedure of submitting petitions and complaints only during the initial conversation when admitted to the school. Additionally was found that the contact details of the authority exercising state supervision over the school were not displayed in a visible place for the students to have access to the contact details.

(3.9) The Chancellor of Justice inspected whether a student representative board had been formed in the Kaagvere Special School.

Pursuant to the clause 31 (2) of the Basic Schools and Upper Secondary Schools Act, the students have the right to form a student representative board in the school and form organisations, clubs, activity classes and hobby groups, the goals and activities of which are not in conflict with the educational objectives of the school and the home. According to the subsection 32 (1) of the Basic Schools and Upper Secondary Schools Act, student self-government means the right of students to decide and manage independently, in accordance with law, the issues of student life based on the interests, needs, rights and obligations of students. And according to the subsection 32 (2) of the Basic Schools and Upper Secondary Schools Act, in order to exercise student self-government, a student body has the right to elect a student representative board which shall represent the student body in relations within the school and in relations with national and international organisations, agencies and persons.

Pursuant to the subsection 32 (3) of the Basic Schools and Upper Secondary Schools Act, the functions of a student representative board and the procedure for election thereto shall be provided for in the statutes of the student representative board which shall be approved by the board of trustees of the school (school board) and by the head of the school.

Upon inspection it was found that a student representative board had not been formed in the school. Therefore the students of the Kaagvere Special School do not have guarantee of the right pursuant to the clause 31 (2) of the Basic Schools and Upper Secondary Schools Act, to form a student representative board in the school.

(3.10) The Chancellor of Justice inspected whether the medical care is available to the children studying in the Kaagvere Special School.

"Minimum crew of medical staff for the school for children with special educational needs with boarding school facilities and for the sanatorium school" has been approved by the Minister of Education and Research Regulation No. 48 of 15 September 1999. This regulation provides that in the schools for children with special educational needs with less than 50 students, the number of positions allotted for medical staff are 0.25 positions for physicians and 0.25 positions for nurse.

Upon inspection it was found that the Kaagvere Special School does not have a physician or a nurse. Additionally, there is no medical room in the Kaavere Special School for the school physician. According to the head of the school, the students who have been taken ill will be escorted to the family physician. However, in addition to the treatment of the students who have taken ill, the school physician usually has other obligations that have been set forth in the work instructions of the school physician approved by the Minister of Social Affairs Regulation No. 51 of 24 August 1995 "School Health Organisation". Among other duties, the school physician has to practise disease prevention, health promotion, inpatient treatment and vocational guidance.

In the absence of the school physician, the aforementioned duties may remain unfulfilled, and therefore the students of the Kaagvere Special School may not receive sufficient level of health care.

(3.11) The Chancellor of Justice inspected whether the Kaagvere Special School has a web site complying with the requirements prescribed by the Public Information Act and by the Basic Schools and Upper Secondary Schools Act.

Upon inspection it was established that the Kaagvere Special School does not have a web site complying with the requirements prescribed by the Public Information Act and by the Basic Schools and Upper Secondary Schools Act. Such source documents of the school activities like the development plan, by-laws and internal rules are not available via web site of the school. However, the directives of the head of the school that are in conflict with laws and which according to the words of the head of the school are not applied any longer are available on the web site. Publishing such directives on the web site is misleading and is conveying inaccurate information on the activities of the school.

According to the subsection 31 (3) of the Public Information Act, the State Chancellery, ministries and county governments are required to take measures for the maintenance of web sites by state agencies administered by them. The Ministry of Education and Research has not provided sufficient aid to the Kaagvere Special School in maintaining the school's web site up to the standards.

(4) As a result of the inspection visit, the Chancellor of Justice sent memorandums to the Head of the Kaagvere Special School and to the Minister of Education and Science requesting them to guarantee the elimination of the deficiencies highlighted. A summary of the inspection visit was also sent to the Minister of Justice for information.

The Chancellor of Justice asked the Head of the Kaagvere Special School to develop and present to the teachers' council for approval the internal rules of the school that are in compliance with the requirements provided by the Basic Schools and Upper Secondary Schools Act. Additionally, the Chancellor of Justice requested the head of the school to develop and to approve the by-laws of the school that are in compliance with the requirements provided by the Juvenile Sanctions Act. Thirdly, the Chancellor of Justice asked the head of the school to develop in co-operation with the Ministry of Education and Research, the development plan for the Kaagvere Special School.

The Chancellor of Justice asked the head of the school to immediately bring the directives in conflict with the legislation into conformity with the Juvenile Sanctions Act or declare them invalid.

The Chancellor of Justice requested that the head of school would forego the practise of locking the doors of the rooms of the students. Also the Chancellor of Justice asked to remain within the limits prescribed by the law when imposing restrictions on the fundamental rights and freedoms of the students.

The Chancellor of Justice requested the head of the school to immediately display the contact details of the authority exercising state supervision over the school in a visible place for the students to have access to the contact details.

Additionally, the Chancellor of Justice demanded an explanation from the head of the school on why the Kaagvere Special School does not have the medical room for the school physician and the positions for a school physician and a nurse and to consider establishing a medical room for the school physician and also establishing the positions for a school physician and a nurse.

The Chancellor of Justice asked the Minister of Education and Research to explain why the Ministry of Education and Research has not created development plan for special schools. Additionally, the Chancellor of Justice asked the Minister of Education and Research to respond regarding the national concept of the development of special schools. The Chancellor of Justice requested the Minister

of Education and Research as the body governing and authority exercising state supervision over the school to ensure that the development plan, by-laws and internal rules of the Kaagvere Special School shall be approved.

Additionally the Chancellor of Justice asked the Minister of Education and Research to ensure that the restriction on the fundamental rights and freedoms of the students of the Kaagvere Special School would take place only on legal basis.

The Chancellor of Justice requested the Minister to take necessary steps in order to make the medical care available to the children studying in the Kaagvere Special School in the extent prescribed by the regulations of the Minister of Education and Research and the Minister of Social Affairs, and to apply measures for the Kaagvere Special School to create and maintain a web site that is in compliance with the requirements.

The follow up inspection shall be performed by the Chancellor of Justice after expiry of the term of six months from the date the proposals were made.

III AREA OF GOVERNMENT OF THE MINISTRY OF JUSTICE

1. General outline

The area of government of the Ministry of Justice encompasses the coordination and systematisation of legislation, organisation of the work of courts of first instance, courts of appeal, the Prosecutor's Office, prisons and notaries. The Ministry's authority also extends to matters regarding organisation of the provision of legal services, to deciding legislation within the Ministry's purview and to the extradition to foreign countries of foreign nationals or stateless persons.[138]

The following is an analysis of the activities of the Ministry of Justice in 2006 followed by concise summaries of certain investigations undertaken by the Office of the Chancellor of Justice in relation to petitions regarding the activities of the Ministry's officials and the institutions in the jurisdiction of the Ministry. The area of responsibility of the Ministry includes county courts, administrative courts and courts of appeal, the Prosecutor's Office, prisons, the Registers and Information Systems Centre, the Estonian Legal Language Centre and the Bureau of Forensic Medicine of Estonia.

1.1. Legislation

One of the tasks of the Ministry of Justice is to attend to the legislation concerning matters in his jurisdiction, and also to coordinate legislation across the jurisdictions of other Ministries. The objective is to ensure systematic and harmonised development of the Government's legal policy. This presupposes continual analysis of and adjustments to legislative developments in Estonia. The adjustments must have regard to the need to harmonise Estonian legislation with European Union law and to assure the quality of legal language. The Ministry of Justice must also ensure that legislation in Estonia is in accordance with the Constitution and the relevant statutes as well as with the general principles of public and private law.

One of the priorities of the work of the Ministry of Justice in 2006 was the preparation of the Draft Law and Order Bill. The draft bill contains principles that are extremely important for legal order in Estonia and defines the foundations of a systemic approach to public policy and security issues. The draft proposes a set of basic rules to govern the implementation of measures to protect public policy and to combat threats posed to society. The Chancellor of Justice supported the proposals of the Ministry of Justice for the draft bill, and representatives of the Chancellor participated in its preparation. The Chancellor also presented his own thorough written opinion concerning the draft bill. In his earlier Annual Reports, the Chancellor had already spoken of the need to pass a Law and Order Act. In particular, the topic was considered in the Academic Conference on Police and Law and Order organised by the Chancellor of Justice in 2004. Unfortunately the draft bill in question has not yet reached the Cabinet of Ministers of the Republic of Estonia in order to decide its submission to the Parliament (Riigikogu). The Chancellor of Justice does hope, nevertheless, that work will continue on this extremely important draft, and that it will formally be submitted to the Riigikogu in 2007.[139]

The Draft Law and Order Bill will make it possible to resolve certain problems in the law of public assemblies. The Chancellor of Justice analysed the provisions of the Public Assemblies Act and found that certain provisions disproportionately limited the freedom of assembly prescribed in Article 47 of the Constitution and hence appeared to be unconstitutional. The Chancellor appealed to the Minister of Justice in this matter. Although the latter agreed with the position of the Chancellor, he also found that amending the Public Assemblies Act was not a pressing matter since the problem

138 As of 18 February 2007, the Ministry of Justice also has jurisdiction over issues of data protection, and the Data Protection Inspectorate is accountable to the Minister of Justice.

139 On 16 May 2007 the Cabinet of Ministers of the Republic of Estonia formally submitted the Draft Law and Order Bill to the Riigikogu. It is available on the Internet at http://www.riigikogu.ee as Bill 49 SE (in Estonian—transl.).

would be dealt with in the Draft Law and Order Bill that was already in preparation. For these reasons it is extremely important that the consideration of the draft bill not stall, and that it be enacted without delay.

In the preparation of the Draft Law and Order Bill, the question of the conformity of the current law of surveillance with the requirements of modern rule of law arose once again. The Draft Law and Order Bill touched on the use of surveillance in the context of law enforcement (i.e. in combating threats to law and order), yet the law of surveillance needs to be analysed more broadly, in particular as regards the establishment of effective oversight arrangements. The Chancellor of Justice already drew attention to this problem in his Annual Reports for 2003 and 2004.

Another important area in the work of the Ministry of Justice that should be mentioned is the analysis of rules governing the protection of state secrets and personal data. The Ministry of Justice prepared the State Secrets and Confidential Foreign Intelligence Bill, which was passed by the Riigikogu on 25 January 2007,[140] and the new Personal Data Protection Bill, which was passed by the Riigikogu on 15 February 2007.[141]

On 11 October 2006 the Riigikogu finally passed the Act to Amend the Code of Civil Procedure, the Code of Administrative Court Procedure, the State Liability Act, the Code of Misdemeanour Procedure and the Code of Criminal Procedure. The draft bill of that statute was prepared in the Ministry of Justice and it entered into force on 18 November 2006. Specific new sections were inserted in the codes of judicial procedure in order to make it possible for courts to reopen cases in which final judgment had been entered. This was necessary in order for the Government to be able to give full effect to decisions of the European Court of Human Rights. The State Liability Act was also amended in order to provide for state liability in a situation where an individual has suffered damage by virtue of a generally binding rule or by virtue of a judicial decision or because of the actions of a court. If, in one of the situations mentioned, the European Court of Human Rights finds that the individual's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms have been violated, and it is not possible to make good the violation in another way (for instance by means of reopening the case and correcting the judgment), an award of compensation by way of state liability must be possible. The Chancellor of Justice has earlier also drawn attention to the need for the above-mentioned rules.[142]

One should also mention the elaboration in the Ministry of Justice of the Draft Bill to Amend the Commercial Code and Related Acts. The bill was passed by the Riigikogu on 6 December 2006 and will make it possible for companies to be established by means of fast-track procedure. The amendments entered into force on 1 October 2007.

Another task of the Ministry of Justice is the coordination of matters concerning legal aid. The State Legal Aid Act entered into force on 1 March 2005, yet certain issues involving state legal aid remain unresolved.

In May 2006 the Chancellor of Justice recommended that the Riigikogu bring the rules governing oversight of party funding into conformity with the Constitution.[143] Problems with party financing have long held the attention of the public and of the Chancellor. The Chancellor has repeatedly drawn attention to this in his Annual Reports, and also while answering questions from the public or from members of the Riigikogu.[144] The Ministry of Justice provided earnest assistance in the

140 The State Secrets and Confidential Foreign Intelligence Act will enter into force on 1 January 2008.

141 The Personal Data Protection Act will enter into force on 1 January 2008.

142 See Chancellor of Justice Annual Report for 2003 and 2004, pp. 28ff.

143 See Part 1, II 1. A proposal to the Riigikogu to bring the Political Parties Act into conformity with the Constitution of the Republic of Estonia.

144 For the opinion of the Chancellor in response to the written question regarding the issue of bonds, see Part 1, IV 1. Permissibility of an issue of bonds by a political party.

preparation of the draft bill initiated by the Riigikogu pursuant to the recommendation of the Chancellor. Ministry officials scrutinised the draft and presented a written opinion thereof to the Chairman of the Constitutional Affairs Committee of the Riigikogu.

1.2. Substantive penal law and penal procedure

2006 was a productive year for the Ministry of Justice in terms of draft legislation pertaining to penal law and criminal procedure (as well as to draft criminal enforcement procedure and the law of imprisonment, both mentioned below).

In 2006 the so-called 'Fast-Track Procedure Act'[145] was passed by the Riigikogu and soon entered into force. As a result, less serious offences can now be dealt with in fast-track proceedings, provided the circumstances surrounding the commission of the offence are clear and sufficient evidence has been gathered to bring the case to court within 48 hours following arrest of the suspect. As of the end of 2006, fast-track proceedings had been used in more than 350 cases, although practical experience of the new procedure is still evolving. The implementation of fast-track procedure was selected as the Ministry of Justice's best legislative project in 2006.

One of the most significant draft bills completed in 2006 concerned the confiscation of proceeds of crime. The corresponding statute entered into force on 1 February 2007.[146] It broadened and strengthened the powers of law enforcement agencies to confiscate proceeds of crime, primarily in order to assist the struggle against organised crime. The statute makes it possible to resort to extended confiscation of proceeds of crime in the case of offences appearing on the relevant exhaustive list (in particular, drug-related offences, organised crime offences, money laundering, smuggling, terrorism, etc.). Depending on the circumstances, extended confiscation may apply to the entirety of assets of the person convicted of the listed offences. To avoid confiscation, the convicted person must prove the legal origin of the property concerned (so-called reversal of burden of proof). Confiscation is now also possible when title to proceeds of crime is not vested in the suspect or accused, but in a third party.

In the opinion he gave of the draft, the Chancellor of Justice directed attention to the fact that extended confiscation is a very serious infringement of the right of ownership protected by virtue of Article 32 of the Constitution. In order for confiscation not to infringe fundamental rights and in order to prevent it from being implemented erroneously, an effective procedure must be established. The Chancellor found that the confiscation procedure provided for in the draft takes into consideration the need to protect individuals' rights. Nevertheless, the draft represents a highly significant and fundamental change in existing law that may lead to serious infringements of fundamental rights. As a result, special attention should be accorded to its implementation. It is definitely necessary for specific training to be organised in the agencies empowered to apply confiscation. The Chancellor will monitor the implementation of the new procedure in order to assure himself that the protection of individuals' rights is actually guaranteed.

The Ministry of Justice should also be given credit for preparing the draft bill on conciliation procedure in criminal cases. The corresponding statute entered into force on 18 February 2007.[147] The statute inserted into the Code of Criminal Procedure provisions regarding the conciliation of offender and victim. These authorise the court, and in certain cases also the Prosecutor's Office, to dismiss charges against an accused/suspect in the case of an offence entailing a custodial sentence of not more than five years duration on grounds of conciliation, provided that the victim and the accused/suspect have successfully completed extrajudicial conciliation proceedings and have concluded a conciliation

145 An Act to Amend the Courts Act and the Code of Criminal Procedure, adopted on 15 March 2006, entered into force on 14 April 2006.
146 An Act to Amend the Money Laundering and Terrorism Prevention Act, the Bailiffs Act, the Penal Code, the State Legal Aid Act, and the Code of Enforcement Procedure, passed 13 December 2006, entered into force on 1 February 2007.
147 An Act to Amend the Penal Code, the Code of Criminal Procedure and the Criminal Injuries Compensation Act, passed on 17 January 2007, entered into force on 18 February 2007.

agreement. In the opinion he gave of the draft, the Chancellor of Justice emphasised that the rights of the victim must be taken into consideration in conciliation procedure. The Government is required to protect persons from criminal attacks and to punish criminals. By establishing a conciliation procedure, the Government partly relinquishes its obligation to protect citizens in that it effectively leaves part of the rights of a person injured by an offence unprotected.

On 14 June 2006 the Riigikogu passed the Act to Amend the Electronic Communications Act, the Information Society Services Act, the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanour Procedure, which entered into force on 16 July 2006. The bill of that statute was tabled in the Riigikogu, although it essentially coincided with a draft prepared in the Ministry of Justice, which was rejected by the Riigikogu on 17 May 2006.[148] The statute inserted into the Code of Criminal Procedure a provision that creates a new investigative measure – that of 'one-off query'. On the basis of an opinion that the Chancellor of Justice was asked to provide in the matter, the possibility of performing one-off queries was limited to specific offences in the Special Part of the Penal Code. Otherwise the concept of the one-off query and the possibilities for its use would have been too vague.

On 11 July 2006 the European Court of Human Rights (ECHR) handed down its judgment[149] concerning an application submitted to it by Allar Harkmann. Invoking Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the applicant complained of not being brought before a judge immediately after his arrest effected pursuant to a judicial warrant. The applicant was declared a fugitive, and was taken into custody on 2 October 2002 on the basis of a warrant issued in Tartu County Court. He was held in custody until 17 October 2002, when he was brought before the court for a hearing in the criminal case against him.

In accordance with Article 5(5) of the Convention, everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 must have an enforceable right to compensation. That right also extends to situations in which the arrest that was found to be in contravention of the Convention took place in accordance with national laws. The detention of the applicant was in accordance with valid Estonian legislation (the Code of Criminal Procedure as amended to 1 July 2004). The ECHR concluded from that that it was unlikely for the applicant to obtain compensation under Estonian law for the detention he suffered. No Estonian statute (neither the State Liability Act nor the Compensation for Damage Caused by the State to Persons by Unjust Deprivation of Liberty Act) recognise a finding of violation of Article 5 of the Convention as grounds for payment of compensation. The court thus also found a violation of Article 5(5) of the Convention, and ordered the Estonian Government to pay the applicant 2000 Euros in compensation for the non-pecuniary damage suffered.

Under the current law of the land such situations should be ruled out. Pursuant to section 131(4) of the Code of Criminal Procedure, a pre-trial judge may issue an arrest warrant to detain a fugitive without previously questioning that fugitive. However, the provision in question requires the detained fugitive to be brought before a pre-trial judge for questioning at the latest the day following the next day after the arrest. One may ask whether 'at the latest the day following the next day after the arrest' complies with the requirement of 'immediateness' specified in Article 5(3) of the Convention. Under the terms of Article 21(2) of the Constitution of Estonia, no one may be held in custody for more than forty-eight hours without the specific authorisation of a court.

148 ECHR, judgment of 11 July 2006 in case 2192/03, Harkmann v. Estonia.
149 ECHR, judgment of 11 July 2006 in case 2192/03, Harkmann v. Estonia.

1.3. Law of imprisonment

The area of government of the Ministry of Justice includes prisons, which are charged with the task of administering custodial sentences and remand custody. Thus, prisons are used to hold persons who have been remanded in custody, i.e. suspects and accused persons against whom a criminal investigation is pending or who have been charged with an offence but whose trial is yet pending, as well as sentenced prisoners, i.e. persons convicted of an offence and ordered to serve a custodial sentence of at least three months.

The power vested in the Chancellor of Justice in respect of oversight of prisons acquired a special importance in 2006. On 18 October 2006 the Riigikogu passed the Act to Ratify the Optional Protocol to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The protocol creates a two-tier system for preventing mistreatment of persons deprived of their liberty. On an international level, the prevention of torture and other cruel, inhuman or degrading treatment is entrusted to a sub-committee of the Committee against Torture. To perform the same task on the national level, the States Parties are required to create or appoint a national preventive body. By virtue of the statute by means of which the Riigikogu ratified the protocol, the Chancellor of Justice was appointed the preventive authority in Estonia. The amendments necessary for the performance of that task were inserted into the Chancellor of Justice Act with effect as of 18 February 2007.

Complaints received from persons held in prisons continue to make up a large percentage of the total number of petitions to the Chancellor of Justice. In 2006, 272 of the 1594 cases opened on the basis of petitions received from individuals were connected with criminal enforcement proceedings and the law of imprisonment. Although the great majority of petitions submitted by prisoners do not meet the requirements established in the Chancellor of Justice Act and proceedings end with the issue of a formal statement to that effect, in the period under examination a conclusion to issue recommendations to correct violations or to make suggestions for observing good administrative practice was reached in 17 cases[150].

On two occasions the Chancellor of Justice considered it necessary to recommend to the Minister of Justice, on the basis of the second sentence of paragraph 1 of Article 142 of the Constitution and on the basis of section 17 of the Chancellor of Justice Act, that the Regulation of the Minister of Justice governing the administration of custodial sentences be brought into conformity with the Constitution and relevant statutes. Pursuant to section 60(1) of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 December 2000, prisoners were not permitted basic stationery (for instance paper, pencils, envelopes) in their cells. That provision was in contravention of the Constitution, as had been noted by the Chancellor of Justice in a case from 2005 and in the Annual Report for the same year. The provision in question lacks any statutory basis and violates several fundamental rights (such as the right enshrined in paragraph 1 of Article 15 of the Constitution to seek redress in a court of law in the event of violation of one's rights and freedoms, since the exercise of this right presupposes drawing up a written complaint). The Minister of Justice had also exceeded the authority vested in him by virtue of the relevant enabling provision in the Imprisonment Act when he enacted section 17(2) of Regulation 17 "The Tasks and Rules of Procedure of Prison Escort Guards" of 30 May 2006. The latter provision authorised the use of handcuffs on life-sentenced prisoners who were escorted outside prison grounds, even when there was no evidence to suggest that the particular prisoner would attempt an escape. The Minister of Justice acceded to the recommendations made by the Chancellor, and brought both regulations into conformity with the Constitution and relevant statutes.

The Annual Report of the Chancellor of Justice for 2005 noted that the Chancellor had opened an

[150] Some of these cases were opened already in 2005.

investigation on his own initiative to verify whether Estonia's election laws[151] were in compliance with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In an in-depth analysis prepared by request of the Constitutional Affairs Committee of the Riigikogu, the Chancellor took the position that the rule that barred convicted prisoners serving a custodial sentence from participating in elections conflicted with the Constitution and required an amendment. The Chancellor sent his analysis to the Constitutional Affairs Committee, which decided to convene an authoritative panel to deal with the issue. The panel was convened, but has unfortunately not taken any action directed to resolving the problem of prisoners being denied their right to vote. For this reason the Chancellor is once again considering addressing the Riigikogu to draw the legislature's attention to the need to bring the law of elections into conformity with the Constitution.

In the course of overseeing the work of prisons, in two cases that were both concluded in 2006 the Chancellor of Justice found that more prisoners were being held in one cell than was permitted on the basis of minimum area of floor space required in the cell (2.5m^2). This violation must be seen as partly resulting from the fact that in Estonia the proportion of prisoners to the total population is the highest in the European Union. Thus, at the beginning of 2007, 4310 persons were held in custodial institutions, and the number of prisoners per 100,000 inhabitants stood at 333. Unfortunately the Chancellor does not have the power to provide any direct assistance in reducing overcrowding in prisons. Nevertheless, the Chancellor follows the issue closely, and remains committed to scrutinising any measure proposed to deal with the situation.

Among other things, in the Annual Report of 2005 the Chancellor of Justice noted that the Minister of Justice has expressed an intention to implement a series of measures directed to reducing the prison population. On the positive side, adjustments to rules governing eligibility for early release must be noted. These emanate from the Act to Amend the Probation Supervision Act, the Imprisonment Act, the Penal Code, the Penal Code Implementation Act and the Code of Criminal Procedure that was passed by the Riigikogu on 27 September 2006 and entered into force on 1 January 2007. By virtue of that statute, prison administrations were stripped of their discretion to decide whether or not to transmit a sentenced prisoner's application for early release for consideration to a court. In addition, statutory grounds were created that make it possible to allow sentenced prisoners to be released sooner than would have been possible under the old rules. In order for an early release to be allowed, the releasee must agree to submit to electronic monitoring in respect of compliance with restrictions imposed on his/her freedom of movement. The monitoring consists in keeping track of the releasee's whereabouts by means of an electronic device that is attached to the releasee's body and permits determination of his/her location.

The Strategic Plan of the Ministry of Justice that was approved on 30 January 2007[152] also cites reduction of the prison population as a priority objective in the field of crime policy. That objective sets a goal of reducing the prison population to 3800 by 2011, aiming to confine that number of prisoners in four prisons that meet contemporary requirements. The use of old camp-style prisons is to be gradually discontinued. The opinion of the Chancellor of Justice in this regard is that the creation of progressive prisons is welcome, but that transition must take place smoothly. Furthermore, during transition close attention must be paid to ensuring that prisons that are to be decommissioned remain open until the number of prisoners and the capacity required to accommodate them in remaining prisons truly permits that.

Another significant problem that arose in connection with petitions that were investigated in 2006 involved the matter of how and in what language prison officials should communicate with prisoners who do not speak Estonian. Pursuant to Article 6 of the Constitution, Estonian is the official

[151] The Riigikogu Elections Act, the Local Authorities Elections Act, the European Parliament Elections Act, and the Referendums Act.

[152] Strategic Plan of the Ministry of Justice through 2011, approved by Decree 20 of the Minister of Justice of 30 January 2007, available on the Internet at http:// www.just.ee. (in Estonian—transl.).

language in the Republic of Estonia and the protection and use of Estonian in that capacity is a legal value protected by the Constitution. At the same time, the possibilities of sentenced prisoners to have documents addressed to them translated into a language they understand is considerably more limited than that of persons who are not deprived of their liberty. This risks a situation in which the prisoner does not understand an administrative measure that restricts his/her freedom, and is therefore unable to defend his/her rights. The Chancellor of Justice issued recommendations to the Ministry of Justice concerning the manner in which good administrative practice requires prison administrations to organise written communication with sentenced prisoners.

The Chancellor of Justice also identified a significant violation at Murru Prison, where a sentenced prisoner was unlawfully confined in a segregation cell for six months. The application of the security measure in question was not documented as an administrative act. The Chancellor recommended that the administration of Murru Prison avoid such violations in the future. Since the case concerned a serious violation of the prisoner's rights, and the information gathered during the investigation gave the Chancellor reason to believe that in addition to the prisoner in question, there were many others who had been confined unlawfully in segregation cells in Murru Prison, the Chancellor recommended to the Minister of Justice that the lawfulness of the practice of Murru Prison in confining prisoners in segregation cells be verified in the course of formal service oversight proceedings. During the inspection that was performed a short time after the verdict by the Chancellor of Justice, officials of the Ministry of Justice were able to note that the above-mentioned violations at Murru Prison had ceased.

In addition to investigations opened on the basis of petitions, the Chancellor of Justice is empowered to carry out inspection visits to prisons. In 2006 the Chancellor performed an inspection of Tartu Prison on his own initiative. During the inspection, several violations of applicable rules were discovered in the prison's Medical Department, where sentenced prisoners and remand prisoner also receive in-patient psychiatric treatment.

In 2006 the Chancellor of Justice prepared an opinion concerning the draft bills that proposed to introduce rules concerning the administration of custodial sentences and remand custody. The Chancellor and his advisors took part in the preparation of extensive amendments to the Imprisonment Act. These were considered in the Riigikogu as Bill 964, which was passed on 13 December 2006 as the Act to Amend the Imprisonment Act and the Code of Criminal Procedure. That statute amended several problematic provisions in the Imprisonment Act. For instance, it extended sentenced prisoners' right to unlimited meetings with a minister of religion, the defence lawyers and a notary also to an advocate retained by the prisoner as a representative. Moreover, the statute stated the purpose of the database of sentenced prisoners, remand prisoners and arrestees and provided a list of information to be entered in that database. At an early stage in the preparation of the draft of the statute, the drafters proposed to insert in it a body of clauses that would have made it possible to authorise private individuals to administer open prisons. The Chancellor of Justice was of the opinion that the proposal would fail the test of constitutionality. The corresponding clauses were dropped before the draft was submitted to the Riigikogu. The Legal Affairs Committee of the latter also requested the Chancellor's opinion when considering the above-mentioned Bill to Amend the Probation Supervision Act and other statutes[153]. The Chancellor provided the requested opinion.

It should also be pointed out that in 2006, the Supreme Court handed down a number of rulings of considerable importance in regard to fundamental rights of sentenced prisoners and remand prisoners. Thus, in a judgment the scope of which extends beyond the law of imprisonment, the Administrative Law Chamber of the Supreme Court observed: "…human dignity is the foundation of the fundamental rights of all individuals and the objective of the protection of fundamental rights and freedoms. The requirement to treat individuals with dignity also extends to prisoners. The fact that an individual is serving a sentence for having committed an offence in relation to which limitations have been imposed on his fundamental rights and freedoms in accordance with the law does not justify an

[153] Bill 923.

interference with the fundamental rights of that individual to an extent that goes beyond that which directly emanates from the law."[154] The court thus confirms that principles that are intrinsic to the rule of law and its inherent respect of fundamental rights cannot be neglected when the Government is administering custodial sentences. The Chancellor of Justice has referred to that observation in several cases, and hopes that the statement will become a basic principle to provide guidance to prison administrations in their treatment of sentenced prisoners and remand prisoners.

1.4. Court administration and judicial procedure

Several important statutes governing judicial procedure entered into force in 2006. The corresponding draft bills had already been prepared in the Ministry of Justice in 2005. A new Code of Civil Procedure that was intended to increase the efficiency and transparency of civil procedure and to bring the statute up to date entered into force on 1 January 2006. In parallel with the Code of Civil Procedure, significant changes were introduced in the Code of Administrative Court Procedure, and these entered into force on 1 September 2006. The objective was to make proceedings in administrative courts more flexible and efficient, as well as less costly and therefore more accessible to applicants. A new Code of Enforcement Procedure also entered into force on 1 January 2006. The Chancellor of Justice was approached on several occasions in connection with problems that had arisen in the implementation of the new statutes. These problems were all resolved in that the agencies whose activities were scrutinised agreed to the Chancellor's observations and corrected their practices or introduced amendments to provisions that had caused the petitioners to seek the Chancellor's assistance.

The Chancellor of Justice scrutinised the procedural rules governing applications for an order of involuntary psychiatric treatment, and found that the provisions of the Code of Civil Procedure regarding those orders did not meet the requirements of the Constitution. As a result of the corresponding memorandum by the Chancellor of Justice, the Ministry of Justice prepared a draft statute that amended the Code of Civil Procedure by providing for due consideration of cases in which admission to involuntary psychiatric treatment was sought. The statute entered into force on 6 December 2006. Nevertheless, the Chancellor considered it necessary to analyse the fundamental rights aspects of involuntary psychiatric treatment in more detail and in a wider scope. As a result of the analysis the Chancellor expressed the view that Estonia needs a new and modern Mental Health Act as well as a sound framework regarding admissions to involuntary and to voluntary psychiatric treatment.[155]

In addition to amendments to statutes governing court procedure, the structure of the judiciary was also overhauled in 2006. Amendments to the Courts Act entered into force on 1 January 2006, creating four county courts and two administrative courts in place of the previous system of 16 county and city courts and four administrative courts. A new Courts Information System (CIS) was also introduced in 2006, replacing the Register of Court Judgments (RCJ) that had been in use during 2001–2005. The new information system should provide an effective tool for various investigative agencies as well as individuals who require various types of information about the functioning and rulings of courts. In previous years the Chancellor of Justice had drawn the attention of the Minister of Justice to shortcomings regarding the protection of personal data in RCJ. The Minister had assured the Chancellor that the problems would be resolved with the implementation of CIS. The Chancellor nevertheless discovered certain violations of requirements for the protection of personal data in relation to the publication of court rulings on the Internet side of the CIS. The Chancellor of Justice approached the Minister in this matter, and the problem was resolved as of 1 September 2006.

[154] Administrative Law Chamber of the Supreme Court (ALCSC), judgment of 22 March 2006 in case 3-3-1-2-06 (unofficial translation—transl.), see also ALCSC, judgment of 28 March 2006 in case 3-3-1-14-06 (in Estonian—transl.).

[155] For more details, see Part I, V 1. On acceptability of limitations to fundamental rights and the extent of such limitations in admissions to involuntary treatment.

2. Law of lawyer-client meetings

Case 6-1/051414

(1) The Chancellor of Justice received a petition from the Estonian Bar Association. The petitioners requested that Chancellor scrutinise the constitutionality of rules governing meetings between sentenced prisoner and advocate.

(2) According to the petition, an advocate had submitted an informational letter to the Board of the Bar Association in which that advocate described the actions of officers of Tartu Prison during the advocate's meeting with a sentenced prisoner. The informational letter stated that the advocate had submitted to the administration of Tartu Prison a request to meet a sentenced prisoner whom the advocate was representing in a civil case. The meeting was required in order to determine the client's views in respect of certain issues in the case. It was also necessary for the client to examine extensive materials. Prison officers granted the advocate's request by allowing the prisoner to receive a short-term visit from the advocate. For that, however, they required the advocate to submit to a search. As part of the search, the officers requested the advocate to present for inspection materials covered by lawyer–client privilege. The meeting itself took place by telephone in the presence of third parties. The time of the meeting was limited and it proved impossible to explain the materials of the court case to the client. For the above-mentioned reasons, the advocate found it impossible to provide the client substantial and comprehensive legal assistance corresponding to the client's interests.

The Bar Association concluded in its petition that sections 26, 27(2) and 95 of the Imprisonment Act, which were cited as the legal basis for the prison officers' actions, were incompatible with the Constitution and with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Chancellor of Justice opened an investigation into the matter. The problem was discussed at the meeting between the Chancellor and representatives of the Ministry of Justice on 16 September 2005. The representatives announced that the Ministry was considering amendments to sections 26, 27 and 95 of the Imprisonment Act, and essentially agreed with the recommendation made by the Bar Association.

The following are the relevant provisions of the Imprisonment Act (unofficial translation—transl.):

"Section 26. Meetings with defence lawyers, minister of religion and notary
(1) A sentenced prisoner shall have the right to unlimited meetings with his or her defence lawyers and minister of religion and, for authentication or certification purposes, with a notary. Meetings shall take place without disturbance.
(2) It is prohibited to examine the content of written materials brought by defence lawyers and the documents brought by a notary.

Section 27. Monitoring of sentenced prisoners' meetings
[…]
(2) A sentenced prisoner shall be allowed to receive short-term visits in the presence of a prison officer. Prison officers may visually monitor the visits of defence lawyers, ministers of religion and notaries but shall refrain from auditory monitoring.
[…]

Section 95. Meetings with defence lawyers, minister of religion and notary
(1) A remand prisoner shall have the right to unlimited meetings with his or her defence lawyers and minister of religion and, for authentication or certification purposes, with a notary. Meetings shall take place without disturbance. Prison officers may monitor meetings visually, but audio monitoring is not permitted.

(2) Defence lawyers may pass to a remand prisoner such written materials as are necessary for preparing a defence. Prison officers may not examine the content of written materials brought by defence lawyers. Prison officers may not examine the cotent of the documents brought by a notary."

(3) The main question that had to be answered in the case was whether the above-mentioned provisions of the Imprisonment Act are in conformity with the Constitution.

(4) Pursuant to the first sentence of paragraph 1 of Article 15 of the Constitution, everyone whose rights and freedoms have been violated has the right to seek redress in a court of law. In accordance with paragraph 2 of Article 24 of the Constitution, everyone has the right to be present when his or her case is heard. Under the terms of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, where an individual's civil rights and obligations are being determined, or where the individual has been charged with a criminal offence, that individual must receive a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The right to fair trial is one of the most important rights, since it is the sole guarantee of efficacious protection of other human rights. The right to fair trial also includes the right to be given sufficient time and opportunity to prepare a defence, and the right to defend one's case *pro se* or with the assistance of an advocate. The right to fair trial must be guaranteed substantively. Mere formalities will not do.[156]

In accordance with the principles of legal assistance, everyone is entitled to obtain legal assistance and to be represented by a legal assistant (lawyer or advocate). An advocate is entitled to examine any document that is relevant for preparing an appropriate defence, and to meet with clients freely and without disturbance. The communication between advocate and client is protected by the principle of lawyer–client privilege.[157]

Everyone's right to be present when their case is heard, as provided in paragraph 2 of Article 24 of the Constitution, is an important guarantee in ensuring an administration of justice that becomes a government based on the rule of law. The right to be present when one's case is heard means that the law recognises the individual as a legal entity—in addition to obligations, that entity also possesses rights and must thus be taken seriously. The right to be present also includes the right to participate in court hearings with one's advocate. In the case of complicated legal issues, the right to be present will remain devoid of substance if the individual is not allowed the assistance of an advocate who can explain these issues. An individual can only adequately follow a hearing in his/her case when he/she understands the legal issues involved.[158]

Sections 26, 27 and 95 of the Imprisonment Act provide the right of sentenced prisoners and remand prisoners to meet with their defence lawyers. It should be pointed out that in the Code of Criminal Procedure (CCrP) and the Code of Misdemeanour Procedure (CMP) the term that the legislature has used is *kaitsja* (Estonian for 'defence lawyer'—transl.). Thus, section 42(1) of CCP specifies that for the purposes of criminal procedure, a defence lawyer is an advocate or, subject to permission by the authority conducting the proceedings, any other person (privately retained defence lawyer) who meets the educational requirements established for retained representatives by virtue of CCrP and whose competence in the criminal case is based on an agreement with the suspect/accused, or an advocate (appointed defence lawyer) whose competence in the criminal case the suspect/accused is based on an appointment by the investigative agency, the Prosecutor's Office or the court. Pursuant to section 20(1) of the CMP, the misdemeanant or the accused in a misdemeanour case may be assisted by a defence lawyer who is an advocate or, subject to permission by the authority conducting the proceedings, any other person who meets the educational requirements prescribed by law.

156 U. Lõhmus. Õigus õiglasele kohtulikule arutamisele. – U. Lõhmus. Inimõigused ja nende kaitse Euroopas. [The right to a fair trial, by U. Lõhmus. In "Human rights and their protection in Europe", ed. U. Lõhmus] Tartu 2003, p. 147 (in Estonian—transl.).
157 R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. [Constitutionality and the protection of fundamental rights and freedoms, by R. Maruste] Tallinn 2004, p. 114 (in Estonian—transl.).
158 Final Report of the Committee of Experts on the Constitution of the Repulic of Estonia, available on the Internet at: http://www.just.ee/10725 (in Estonian--transl.).

Section 14(5) of the Code of Administrative Court Procedure (CACP) specifies that in an administrative court, a party to proceedings may act in those proceedings in person or may appoint a representative. Representation is governed by the rules of civil procedure, save where otherwise provided in CACP. In accordance with section 217(1) of the Code of Civil Procedure, a party to proceedings may participate in those proceedings in person or may appoint a representative who must have the capacity necessary to perform the procedural steps required in the proceedings, unless otherwise provided by law. Section 217(2) in the same statute states that personal participation of a party in his/her matter does not prejudice the right of that party to have recourse to representation or assistance in the matter. The participation of a party's representative in proceedings does not prejudice the right of the party to personally participate in those proceedings, provided the party has the capacity necessary to perform the procedural steps required in the proceedings.

This shows that different terms are used to denote providers of legal assistance in the rules governing proceedings before different courts. In criminal and misdemeanour proceedings the provider of legal assistance is referred to as 'defence lawyer', while in civil and administrative court proceedings he/she is termed 'representative'. In criminal proceedings, the victim and the civil defendant may also have a representative (section 41 of the CCrP). Thus a purely linguistic interpretation of sections 26, 27 and 95 of the Imprisonment Act would seem to imply that prisoners are not permitted to meet with their representatives without disturbance.

It is also important to emphasise that in certain cases specialised legal assistance may be required. Thus pursuant to section 51(1) of the CACP, representation before the Supreme Court is restricted to full advocates (the most senior rank at the Bar—transl.) and to senior assistant advocates. Section 218(3) of the Code of Civil Procedure prescribes that in relation to a contentious matter before the Supreme Court parties are allowed to perform procedural steps and file petitions and applications only through a full advocate. In a non-contentious matter before the same court, parties are allowed perform procedural steps and file petitions and applications either personally or through an advocate. A similar rule is contained in section 344(3)(3) of the Code of Criminal Procedure, which requires victims and the defendant in a civil action joined to a criminal matter to retain an advocate in order to exercise their right to petition the Supreme Court to quash the ruling of a lower court. It must thus be concluded that a party to a civil or criminal case can only appeal to the Supreme Court through an advocate, and a party to an administrative case must represented before the Supreme Court by a full advocate or a senior assistant advocate.

As set out above, the relevant provisions of the Imprisonment Act limit the right of recourse to courts enshrined in paragraph 1 of Article 15 of the Constitution, and also partly limit the right to be present when one's case is heard, which is provided in paragraph 2 of Article 24 of the Constitution.

Limitations of fundamental rights can only be accepted when they respect the letter and the spirit of the Constitution. Respect of the letter of the Constitution means that (1) limitations must stem from action by competent authorities and must be established by recourse to proper instruments and procedures; (2) limitations must respect the principle of clarity of laws emanating from paragraph 2 of Article 13 of the Constitution; (3) in establishing a limitation to fundamental rights, regard must be had to the powers reserved to the Riigikogu by virtue of the first sentence of paragraph 1 of Article 3 of the Constitution. Respect of the spirit of the Constitution means that in order for a limitation to be constitutional it must flow from a statute whose objective is legitimate and it must observe the principle of proportionality embedded in the second sentence of Article 11 of the Constitution.

In the case at hand, the Imprisonment Act provided a principle that required prisoners to be allowed to meet without disturbance only with defence lawyers, notaries or ministers of religion. This principle was established by statute in the Riigikogu in accordance with the relevant procedure. The statute in question respects the letter of the Constitution. The Chancellor of Justice therefore concentrated exclusively on the issue whether the limitation enacted in the statute was in conformity with the spirit of the Constitution.

In the case of the provisions referred to above, the objective of the limitation appears to be ensuring prison security. The legislature has considered it necessary to limit the circle of those who are entitled to meet with prisoners without disturbance in order to prevent breaches of prison security, such as would occur, for instance, when a person with whom a prisoner meets brings to the meeting and passes to the prisoner items that are prohibited in prison. The limitation was, however, worded so as to allow individuals in whose case there was no ground to believe that they would pose a threat to prison security (defence lawyers, ministers of religion) undisturbed access to the prisoner. When it passed the Imprisonment Act, the legislature apparently failed to foresee that so many prisoners would seek to assert their rights in administrative courts, and would retain representatives before those courts.

Neither the first sentence of paragraph 1 of Article 15 nor the second sentence of Article 24 of the Constitution contain a reservation according to which the rights enshrined in those provisions may be restricted by statute. Limitations of fundamental rights established free of such qualifications are nevertheless possible when required to protect other legal values enshrined in the Constitution. The Supreme Court has observed that in the case of a right that the Constitution provides unreservedly: "… grounds for limiting that right may only be provided by a legal value of the same caliber. For example, a limitation of such right could be founded in the fundamental rights and freedoms of other individuals, or in Constitutional provisions that protect the general interest."[159]

The Chancellor of Justice holds the view that prison security and the part that it plays in maintaining law and order, in ensuring the safety of members of the public and the public peace in Estonian territory are important constitutional values. Thus, the objective followed by the legislature must be recognised as legitimate.

The Constitutional Review Chamber of the Supreme Court has established a three-step test that must be passed in order for a limitation to be accepted as proportionate. The first step of the test concerns the appropriateness of the limiting measure for achieving the intended objective. The second step looks at whether the measure is necessary. The third step is about proportionality in a narrower sense, i.e. about whether the measure does not go beyond what is necessary to achieve the objective.[160]

By virtue of the above-mentioned provisions in the Imprisonment Act, the legislature has limited the circle of persons who are allowed to meet freely with prisoners. As a result, meetings are allowed with notaries, ministers of religion, and advocates retained or appointed as defence lawyers. All of these are persons concerning whom the Government has established higher ethical requirements, and who are vetted by the Government. By permission of the authority conducting the proceedings, a person who is not an advocate may still be allowed to participate in the proceedings as a defence lawyer (see the provisions of the Code of Criminal Procedure referred to above). This rule provides for the so-called 'quality assurance' with respect to persons who are allowed to assist the prisoner as defence lawyers. As a result of this, it may be presumed that the individuals mentioned above will not bring prohibited items into prison in order to pass these to prisoners. The restrictions imposed by the legislature on the circle of persons allowed meetings with prisoners can thus be considered appropriate.

In the light of considerations of prison security the legislature decided that, as a general rule, limiting the circle of persons allowed access to prisoners appeared to be necessary. The rights of a defence lawyer differ in their scope from those of a representative because the degree and intensity of the infringement of fundamental rights in criminal and misdemeanour cases is considerably greater than in administrative or civil cases. The general requirements of that a representative must fulfill in order to qualify as such are less stringent than those that a defence lawyer must. If each and any representative (i.e., persons who by law are allowed to act as representatives) were allowed access

[159] Constitutional Review Chamber of the Supreme Court, judgment of 5 March 2001 in case 3-4-1-2-01, para. 15. (unofficial translation—transl.)

[160] Constitutional Review Chamber of the Supreme Court, judgment of 6 March 2002 in case 3-4-1-1-02, p 15. (in Estonian—transl.)

to prisoners, this might undermine the legitimate objective of the relevant provisions. It would become complicated to verify whether a person was really a representative or only claimed to be one, and whether or not the veritable purpose of a requested meeting was provision of legal assistance. These complications would amongst other things lead to an increased risk of prohibited items being brought onto prison grounds.

Nevertheless, the above-mentioned limitation is not, however, proportionate (in the narrow sense) regarding advocates who have been retained to represent prisoners. Advocates in this position seek meetings with prisoners on professional grounds, just as defence lawyers do. The requirements and guarantees established by law regarding the work of advocates apply regardless of whether, in a particular case, the advocate performs the role of a defence lawyer or of a representative. Advocates also provide state legal aid. The Chancellor of Justice concluded that advocates should be guaranteed equal opportunities to meet with prisoners, regardless of whether they serve as defence lawyers or representatives.

Pursuant to section 40(1) of the Bar Association Act, legal services are defined as provision of legal advice as part of the practice of legal profession, as representing or defending a person in court or in pre-trial proceedings or elsewhere, as preparing a document for a person or performing other legal acts in the interests of a person. Section 4(1) of the State Legal Aid Act defines state legal aid as provision of legal services to a natural or legal person using state funding on the grounds and pursuant to the procedure provided for in that statute. Section 4(3) of the same distinguishes the following categories of state legal aid: appointed defender in criminal proceedings; representing a person in pre-trial proceedings and in court in relation to a criminal matter; defending a person in extrajudicial proceedings and in court in relation to a misdemeanour matter; representing a person in pre-trial proceedings and in court in relation to a civil matter; representing a person in administrative court proceedings; representing a person in administrative proceedings; representing a person in enforcement proceedings; preparing legal documents; providing other legal advice to a person or representing a person in another manner. Pursuant to section 5(1) of the State Legal Aid Act, state legal aid must be provided by an advocate on the basis of the Bar Association Act, save where otherwise provided in the State Legal Aid Act.

Tartu Administrative Court has found that "…since the right to be present when one's case is heard is a right guaranteed to everyone, it must also be guaranteed to prisoners. In accordance with section 14(5) of the Code of Administrative Court Procedure, a party to proceedings before an administrative court may present his/her case in person or through a representative. There are no limitations on the representation of sentenced prisoners in administrative and civil cases, or on the provision of legal aid to such prisoners in the Imprisonment Act or in other legislation governing matters related to imprisonment."[161]

The right to have one's case heard in a court of law and the right to be present when the case is heard are important fundamental rights. The limitation of fundamental rights in the case at hand is very serious and cannot be regarded as justified in the light of its stated objective.

Under the terms of section 26(1) of the Imprisonment Act sentenced prisoners have the right to unlimited meetings with the defence lawyer and those meetings must not be disturbed. However, this right does not apply to representatives. In the case of the latter, it appears to the Chancellor that they will only be allowed to meet with a sentenced prisoner whom they represent by way of requesting a short-term visit.

Sentenced prisoners are entitled to meet members of their family or other persons once a month for up to three hours (section 24 of the IA). The purpose of these short-term visits is to provide for the prisoners' communication beyond the confines of the prison and for ensuring maintenance of social ties. Hence it is unacceptable to require the prisoner to use short-term visits for meetings with the representative. This cannot have been the purpose of the rules established in regard to short-term visits.

[161] Tartu Administrative Court, judgment of 10 November 2004 in case 3-464/2004 (unofficial translation—transl).

Remand prisoners are allowed to receive short-term visits in relation to the prisoner's personal affairs, or in relation to legal or business matters that the prisoner has an interest in, provided these affairs or matters cannot be attended to through third parties. The right of a remand prisoner to receive short-term visits may be limited by the governor of the prison on the basis of an authorisation by an investigator, prosecutor of judge provided this is necessary in the interests of a criminal investigation pursuant to section 94(1) of the IA.

In addition to the above, under section 24(4) of the IA short-term visits may be denied a sentenced prisoner who has been placed in a disciplinary cell by way of a disciplinary sanction. It is possible that the prisoner wishes to contest the sanction, but is denied meetings with his or her representative. Section 60 of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 (IRP) provides a list of items allowed in a disciplinary cell. The list does not mention any stationery or a payphone card. Thus it may be concluded that a sentenced prisoner who has been placed in a disciplinary cell will be unable to communicate with his or her representative by means of telephone or letter. However, the fact that the prisoner could not meet with the representative because of being placed in a disciplinary cell might not constitute grounds for extending the time-limit established for submitting an appeal or application.[162]

The rules governing short-term visits are provided in Chapter 8 of the IRP. Pursuant to section 31(1), sentenced prisoners must receive a short-term visit in a visiting room or other visiting facility on prison grounds under the supervision of a prison officer. Section 31(2) provides that in the visiting room or other visiting facility, a fence or a glass partition may be installed to prevent direct contact between the prisoner and the visitor.

Under section 32(1) of the IRP, a short-term visit will be arranged on the basis of a written request of the sentenced prisoner or of the visitor if the request is granted by the governor of the prison or by a person authorised by the governor to grant such requests. Section 32(2) provides that a schedule of visits must be drawn up on the basis of the requests submitted and that the requesting prisoners will be notified the time of their visit. A visit will also be entered on the schedule when the request has been made by telephone. Pursuant to section 35(1) of the IA, a request may be denied if the prisoner has already received a visit during the same month and no places are available in the visiting room.

Hence a prisoner will not be entitled to meet with his/her representative for the mere reason that a place is available in the visiting room. This results in an extensive limitation of the possibilities available to a representative to prepare the case for court hearings. It should also be recalled that a representative is not allowed to pass any written materials related to judicial proceedings to the prisoner because this is prohibited by virtue of section 37(5) of the IRP.

Section 28(1) of the IA provides the rules regarding the use of telephone by sentenced prisoners. Similar rules in regard to remand prisoners are contained in section 96(1) of the same statute. Both provisions refer to Internal Rules of Prisons as a source for specific procedures for correspondence and for the use of telephone. Subsection 3 of both sections allows the governor of the prison to limit the relevant rights of the prisoners if the exercise of these rights poses a threat to prison security or to order in the prison, or interferes with the achievement of the aims of administering a custodial sentence. Limitations of correspondence and of the use of telephone are prohibited insofar as that correspondence or use takes place in order to communicate with government agencies, local authorities or the officials of those agencies or authorities, and with defence lawyers. Thus, according to the provisions mentioned, prisoners are allowed correspondence and the use of telephone in order to communicate with defence lawyers, but not with representatives. At the same time, it is conceivable that a prisoner who has been placed in a disciplinary cell by way of disciplinary sanction

[162] See Code of Administrative Court Procedure, sections 10(4) and 12(3). I. Pilving. Riigikohtu 2001. aasta praktika haldusmenetluse valdkonnas [Jurisprudence of the Supreme Court in 2001 in the field of administrative procedure, by I. Pilving] – Juridica 2002, pp. 139–147.

will also be subjected to limitations regarding correspondence and the use of telephone. In such a case the prisoner will find it impossible to communicate with his or her representative in any way.

It must also be recalled that a prisoner's right to the use of telephone is subject to the existence of technical conditions in the prison. Thus, for instance, the time that prisoners are allowed to use the telephone in Tallinn Prison has been reduced to 10 minutes per week.

The above shows that the Imprisonment Act (as amended to 2 May 2006) does not permit an advocate who is serving as a representative of a prisoner to perform his or her duties to their full extent, since the number of visits that he or she can use to meet with the prisoner is limited to one visit per month (the minimum number of visits provided in the statute in question). By choosing to meet with an advocate who is serving as the prisoner's representative, the prisoner may effectively renounce the right to have a meeting with his or her family members. This is incompatible with the aim of enhancing contacts with the prisoner's family and other close persons in order to prevent the prisoner's social ties from being severed during imprisonment. Secondly, there may not be free places available in the visiting room. Hence, for mere technical and administrative difficulties, a prisoner may be deprived of the fundamental right to seek redress in a court of law. The Supreme Court has stressed that for instance limitations on the right to equal treatment may not be justified by mere administrative difficulties.[163] Thirdly, it is impossible to communicate confidentially by telephone (which in principle can be overheard or wiretapped by prison officers) or in the visiting room. During a short-term visit, documents may not be passed to a prisoner. In these conditions, the provision of a legal assistance that is truly relevant may turn out to be substantively impossible.

The Supreme Court has stated that sentenced prisoners must be allowed to meet with their representatives where valid reasons exist for such a meeting. A reasoned request must be submitted by the representative or the principal to the administration of the prison. The administration will scrutinise the information in the request to determine whether it has reason to doubt the reputation of the representative and whether a valid reason exists for a meeting between the representative and the prisoner. On the basis of these considerations, the administration will decide whether to grant the request or not. If the person who requested the meeting disagrees with the decision of the administration, he or she may contest that decision in an administrative court.[164]

The Chancellor of Justice concluded that the rules applicable in the matter left a large margin of discretion to the prison administration and were susceptible to lead to a prisoner being denied legal assistance. For instance, it would be impossible for an administrative court to consider the prisoner's application for judicial review once the time limit established for such applications had expired.

On the basis of the foregoing considerations, the Chancellor found that a limitation such as that emanating from the legislative provisions discussed above, which rules out the possibility for a prisoner to meet freely with a representative that the prisoner has retained for the purposes of proceedings before administrative courts or civil courts, cannot be regarded as constitutional. The aim of the limitation—ensuring prison security—may well be legitimate, yet the limitation itself fails on grounds of lack of proportionality.

(5) The Chancellor of Justice concluded that sections 26, 27(2) and 95 of the Imprisonment Act are incompatible with the requirements emanating from paragraph 1 of Article 15 and paragraph 2 of Article 24 of the Constitution considered in conjunction, since the provisions in those sections do not permit an advocate whom a prisoner has retained as a representative to provide the prisoner effective legal assistance in the case the prisoner wishes to seek redress in a court of law.

[163] See for example judgment of the Constitutional Review Chamber of the Supreme Court of 20 March 2006 in case 3-4-1-33-05, para. 30. (in Estonian—transl.)
[164] Administrative Law Chamber of the Supreme Court, judgment of 26 May 2005 in case 3-3-1-21-05, para. 18. (in Estonian—transl.)

Since the Minister of Justice had arranged for a draft bill proposing to amend the Imprisonment Act, the Code of Criminal Procedure and the Probation Supervision Act to be prepared, which contained amendments of the provisions in question and had been circulated to the other Ministers for endorsement, the Chancellor did not consider it necessary to submit a recommendation to the Supreme Court to open constitutional review proceedings in the case. On 13 December 2006, the Riigikogu passed the Act to Amend the Imprisonment Act and the Code of Criminal Procedure, by virtue of which the provisions in question were amended as follows:

"Section 26. Meetings of sentenced prisoners with the defence lawyers, with advocates retained as representatives, with ministers of religion, with notaries and with consular officers representing their Government
(1) A sentenced prisoner shall have the right to unlimited meetings with his or her defence lawyers, minister of religion and consular officer representing the prisoner's Government, and for authentication or certification purposes, with a notary. The meetings may not be disturbed.
(2) A defence lawyer, an advocate retained as a representative or a consular officer may pass written materials required for preparing a defence to a sentenced prisoner. Examination of the content of any written materials that a defence lawyer, an advocate retained as a representative or a consular officer brings with him or her, or of the documents brought by a notary is prohibited.

Section 27. Monitoring of a sentenced prisoner's meetings
[…]
(2) A sentenced prisoner is allowed to receive short-term visits in the presence of a prison officer. Prison officers may visually monitor a sentenced prisoner's meetings with a defence lawyer, an advocate retained as a representative or a consular officer but they may not monitor those meetings auditorily.

[…]

Section 95. Meetings with the defence lawyers, with advocates retained as representatives, with ministers of religion, with notaries and with consular officers representing the prisoner's Government
(1) A remand prisoner shall have the right to to unlimited meetings with his or her defence lawyers, minister of religion and consular officer representing the prisoner's Government, and for authentication or certification purposes, with a notary. The meetings may not be disturbed.
(2) A defence lawyer, an advocate retained as a representative or a consular officer may pass written materials required for preparing a defence to a sentenced prisoner. Examination of the content of any written materials that a defence lawyer, an advocate retained as a representative or a consular officer brings with him or her, or of the documents brought by a notary is prohibited."

The amendments entered into force on 01.02.2007.

3. Items allowed in a disciplinary cell

Cases 7-1/050670, 7-1/051659, 7-1/060507

(1) Several sentenced prisoners petitioned the Chancellor of Justice. It emerged from their petitions that they had not been allowed correspondence during the period for which they were placed in a disciplinary cell.

(2) The petitioners noted that they had been unable to inform their family of the reasons for which they had been placed in a disciplinary cell because they had not been allowed any stationery. One of the petitioners also noted that he had not been allowed to receive letters that had arrived from his wife when he was in a disciplinary cell. Receipt of letters addressed to him from the European Court of Human Rights was similarly delayed.

The Chancellor of Justice requested information from the administrations of the prisons in which the petitioners were serving their respective sentences.

The administrations replied that they were simply following the requirements emanating from section 60(1) of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 (IRP). Under the terms of that provision sentenced prisoners are not allowed stationery in a disciplinary cell, which rules out the possibility of correspondence while in such a cell. Section 60(1) of the IRP as amended to 15 August 2006 provided:[165]

„§ 60. Items allowed in a disciplinary cell
(1) A sentenced prisoner placed in a disciplinary cell shall be allowed to bring with him or her the following items: a religious scripture, the texts of the Imprisonment Act, Internal Rules of Prisons and Prison Regulations, a reasonable amount of study books, a soap, a toothpaste, a toothbrush, a towel and a roll of toilet paper, and in the case of female prisoners, sanitary napkins.
[…]"

(3) The question that had to be answered in order to resolve the petitions was whether it was lawful to limit the petitioners' correspondence while they were placed in disciplinary cells.

(4) Pursuant to the first sentence of the first paragraph of Article 15 of the Constitution everyone whose rights have been violated is entitled to seek redress in a court of law. Paragraph 5 of Article 24 provides the right to appeal a judgment of a lower court to a higher court. Article 26 proclaims everyone's right to inviolability of their private and family life. According to Article 46, everyone is entitled to submit informational letters and applications to government agencies, local authorities and their officials.

Limiting a sentenced prisoner's correspondence may in certain circumstances impinge on the inviolability of private or family life,[166] for example if the prisoner is using correspondence to communicate with his or her family and to maintain his or her social relationships. The fact that in order to seek legal redress in a court of law, a written application or claim must be submitted to that court, means that a limitation of correspondence may also interfere with the fundamental right protected by virtue of paragraph 1 of Article 15 of the Constitution. The limitation may also interfere with the right to appeal to a higher court (among other things, it may result in failure to observe the time limits established for various appeals) and with the right to petition government agencies and local authorities.

Section 58 of the IRP as amended to 15 February 2007 provided a list of items that sentenced prisoners were allowed in prison. Subsections 4 and 5 of that section listed, among allowed items, the replies the prisoner had received to his or her letters and applications, and a reasonable amount of photographs, postage stamps and postcards, envelopes, writing paper, and pens or pencils. Section 58 of the IRP was applicable to sentenced prisoners who had not been placed in a disciplinary cell.

Section 60(1) of the IRP provided that a sentenced prisoner placed in a disciplinary cell was allowed a religious scripture, the texts of the Imprisonment Act, Internal Rules of Prisons and Prison Regulations, a reasonable amount of study books, a soap, a toothpaste, a toothbrush, a towel and a roll of toilet paper, and in the case of female prisoners, sanitary napkins. This list is an exhaustive one. Thus, a sentenced prisoner who has been placed in a disciplinary cell may not have other items, included items mentioned in sections 58(4) and 58(5) of the IRP.

165 At the same time, the administration of Tallinn Prison, for one, observed that under section 28(3) of the IA, the governor of a prison may not limit a prisoner's correspondence and use of telephone if that correspondence or use serves the purpose of communicating with government agencies, local authorities and their officials, and with the defence lawyers. Pursuant to this provision, prisoners placed in a disciplinary cell must be provided a possibility to communicate with the above-mentioned individuals and authorities.

166 U. Lõhmus. Kommentaarid §-le 26. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Commentary to Article 26, by U. Lõhmus in "Constitution of the Republic of Estonia", annotated edition prepared in the Ministry of Justice]. Tallinn 2002, note 13.2.

In order for a prisoner to be able to correspond with his of her family, relatives and other close persons writing paper, pens or pencils, envelopes and postage stamps must be provided to the prisoner. The same are also required for communicating with the defence lawyer (representative) and with government agencies, among other things for drawing up administrative appeals and applications to administrative courts. If a prisoner who has been placed in a disciplinary cell is not allowed basic stationery, the prisoner will be unable to have correspondence.

Letters, including court judgments and orders, arriving in the name of sentenced prisoners who have been placed in a disciplinary cell are also withheld from them. Under section 46[1] of the IRP, a letter in a prison is defined as a message or photo appearing on paper that is relayed by means of post. Section 50(1) of the IRP requires letters to be transmitted to the sentenced prisoner whom they are addressed to against signed receipt within three days following arrival of the letter in prison. Section 52(1) of the IRP obligates the prison administration to deliver a copy of the judgment or court order addressed to a remand prisoner against signed receipt to the prisoner without delay. Section 60(1) of the IRP does not include replies to letters and applications by the sentenced prisoner as items allowed in a disciplinary cell. Therefore letters arriving in the name of sentenced prisoners who have been placed in a disciplinary cell must be withheld from those prisoners during their stay in a disciplinary cell.

Thus section 60(1) of the IRP limits the right that a sentenced prisoner who has been placed in a disciplinary cell has to correspondence. It also interferes with the right of the prisoner to inviolability of private and family life, the right to seek redress in a court of law, the right to appeal a judgment pronounced in his or her case and the right to address informational letters and requests to government agencies, local authorities and their officials.

Fundamental rights may be limited provided the limitations respect the letter and the spirit of the Constitution. Among other things the letter of the Constitution requires legislation enacted by the Executive to observe the division of competences and the letter of the enabling provision in the relevant statute. When the letter of the Constitution has been respected, there is no need to consider whether the same applies to the spirit of the Constitution.

Formally speaking, a constitutional reservation that qualifies a right as subject to specification or limitation by statute means that the right in question can be specified or limited either by statute or pursuant to a statute. In the latter case, each specification or limitation must be traceable to an enabling provision in the statute.[167]

The right to appeal provided in paragraph 5 of Article 24 of the Constitution represents a right that is subject to a simple constitutional reservation. This means that a statute is only required to specify the procedure for appeals.

The right to inviolability of private and family life provided in Article 26 of the Constitution represents a fundamental right subject to a qualified constitutional reservation. Government agencies, local authorities and their officials may not interfere with the private or family life of an individual, save for the cases provided by statute and in accordance with the procedure provided by statute in order to protect public health or morality, to maintain law and order, to protect the rights and freedoms of other individuals, to prevent a criminal offence or to apprehend an offender. A qualified constitutional reservation means that fundamental rights may only be limited in order to attain the objectives set forth in the corresponding provision of the Constitution.

No constitutional reservation attaches to fundamental rights enshrined in paragraph 1 of Article 15 and in Article 46 of the Constitution. Nevertheless, fundamental rights established without such

167 M. Ernits. II peatüki sissejuhatus. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [Introduction to Chapter II, by M. Ernits in "Constitution of the Republic of Estonia", edited in the Ministry of Justice]. Tallinn 2002, note 8.1.

reservation may also be limited provided this is required in order to protect a constitutional value or another fundamental right. Pursuant to the first sentence of Article 3 and to Article 11 of the Constitution such limitations, too, must be established exclusively by statute.[168]

Under the terms of paragraph 2 of Article 94 of the Constitution, Ministers are empowered to establish binding regulations founded on statutes. An executive authority may only make legislation pursuant to a corresponding delegation or enabling provision in a statute.[169] The Executive may only fill in the details of a limitation of fundamental rights and freedoms that has been established by statute. It may not create additional limitations over and above that which has been provided by statute.[170]

Pursuant to section 28(1) of the IA sentenced prisoners have the right to correspondence. Correspondence takes place according to the procedure established in Internal Rules of Prisons. The section in question authorises the Minister of Justice to establish specific details of the procedures of correspondence but does not allow the Minister to make rules that are related to correspondence and essentially limit fundamental rights. The Supreme Court has reached a similar conclusion, stressing that the term *kord* (Estonian for 'rules of procedure'—transl.) denotes a set of procedural provisions the aim of which is to lead to a decision, i.e. that 'rules of procedure' represent a series of procedural steps that are concerned with establishing the facts that must be known in order to reach a decision and with facilitating decision-making in other ways. The court explained that in such context, rules of procedure may be used to impose various obligations on parties to administrative proceedings, for instance such as participating in the proceedings and submitting evidence. The court added that other obligations the performance of which was necessary in order for a just decision to be reached could be established as well, and requirements of form be laid down in respect of procedural steps.[171] The authority to determine a set of rules of procedure, which may be likened to a set of technical requirements, does not entail authority to establish conditions the presence of which allows fundamental rights to be limited.[172]

The grounds for limiting a sentenced prisoner's right of correspondence are provided in section 28(3) of the IA. According to that provison, the governor may authorise limitations to a sentenced prisoner's correspondence if the correspondence poses a threat to prison security or to maintenance of order in the prison or interferes with the achievement of the aims of administering a custodial sentence. Pursuant to the provision in question, the governor enjoys a discretionary power to authorise limitations on the correspondence of particular sentenced prisoners. No authority is conferred by section 28(3) to make generally binding rules limiting correspondence.

Section 15(2) of the IA (as amended to 1 February 2007) empowered the Minister of Justice to establish a list of items that sentenced prisoners were permitted to have in prison. The section did not authorise the Minister to limit sentenced prisoners' right to correspondence by prohibiting items that were necessary for conducting correspondence. This is so because the legislature had itself laid down an exhaustive list of grounds on which limitations might be imposed on correspondence, and had explicitly prohibited limitations on correspondence that was conducted for the purpose of communicating with government agencies, local authorities and the officials of those agencies and authorities, as well as with the defence lawyers (second sentence of section 28(3) of the IA).

On the basis of the foregoing, the Chancellor of Justice concluded that section 60(1) of the IRP insofar as it imposes, without any statutory foundation, limitations on the fundamental rights

168 See for example judgment of the Supreme Court (plenary formation) of 11 October 2001 in case 3-4-1-7-01.
169 Constitutional Review Chamber of the Supreme Court, judgment of 20 December 1996 in case 3-4-1-3-96.
170 Constitutional Review Chamber of the Supreme Court, judgment of 24 December 2002 in case 3-4-1-10-02.
171 Constitutional Review Chamber of the Supreme Court, judgment of 22 December 2000 in case, nr 3-4-1-10-00.
172 See for example judgment of the Constitutional Review Chamber of the Supreme Court of 24 December 2002 in case 3-4-1-10-02: "If the procedure for releasing payroll information means adding technical specifications to general rules contained in statute, then establishing conditions for releasing the information makes it possible for the Executive to enact new rules that are not provided in law and that limit fundamental rights of individuals."

that sentenced prisoners have under paragraph 1 of Article 15, under paragraph 5 of Article 24, under Article 26 and under Article 46 of the Constitution, must be regarded as contravening the Constitution and the Imprisonment Act. The fact that prison administrations have turned a blind eye to that provision and have on a discretionary basis allowed prisoners placed in a disciplinary cell to have basic stationery and access to certain legislative texts does not affect the constitutionality of section 60(1) of the IRP.

(5) The Chancellor of Justice addressed a memorandum to the Minister of Justice. In the memorandum, the Chancellor asked the Minister to state his position regarding the issue of the constitutionality of section 60(1) of the IRP. The Minister agreed to the views of the Chancellor and informed the latter that he intended in the nearest future to amend the provision in question so as to expand the list of items allowed in a disciplinary cell. For this reason, the Chancellor decided that it was not necessary at this point in time to issue a recommendation to the Minister to amend section 60(1) of the IRP.

Unfortunately, the Minister did not amend the provision within a reasonable period of time and new petitions were submitted to the Chancellor from sentenced prisoners, in which the petitioners complained about the restrictions imposed on them by virtue of section 60(1) of the IRP. The Chancellor therefore issued a recommendation to the Minister of Justice to amend section 60(1) of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 so as to bring it into conformity with the Constitution and the Imprisonment Act.

On 25 July 2006 the Minister of Justice enacted Regulation 22, "A Regulation to amend the Minister of Justice Regulation 72 'Internal Rules of Prisons' of 30 November 2000 and the Minister of Justice Regulation 97 'The Roster of Staff Positions of Pärnu Prison' of 18 December 2002", which contained an amendment of section 60(1) of the IRP to the effect of allowing basic stationery to prisoners placed in a disciplinary cell.[173]

4. Use of handcuffs in escorting life-sentenced prisoners

Case 6-10/060972

(1) The Chancellor of Justice decided to verify on his own initiative whether the rules governing the use of handcuffs in escorting life-sentenced prisoners conformed to the Constitution and the relevant statutes.

(2) In a number of cases that the Chancellor of Justice had investigated on the basis of petitions submitted by sentenced prisoners, violations had been found in relation to the use of handcuffs when escorting prisoners.[174] For this reason the Chancellor decided on his own initiative to perform an analysis of the relevant area of law. The analysis raised doubts concerning the conformity to the Constitution and the relevant statutes of section 17(2) of Minister of Justice Regulation 17, "The Tasks and Rules of Procedure of Prison Escort Guards" of 30 May 2006 (the Tasks and Rules of Procedure).

The provision in question reads as follows: "When escorting a life-sentenced prisoner or in the case of an increased risk of escape, handcuffs may be used during transfer." (unofficial translation—transl.)

173 Section 60(1) of the IRP as amended to date provides: "A sentenced prisoner placed in a disciplinary cell shall be allowed to bring with him or her the following items: a religious scripture, the legislative texts required for the protection of the prisoner's rights (in particular, the Constitution of the Republic of Estonia, the Imprisonment Act, the Internal Rules of Prisons, and Prison Regulations), a reasonable amount of study books, writing paper, writing implements, postage stamps, envelopes, court orders and judgments made in respect of the prisoner, official statements of charges against the prisoner, replies the prisoner has received to his or her letters, a payphone card, a soap, a comb, a toothpaste, a toothbrush, a towel, a roll of toilet paper, and in the case of female prisoners, sanitary napkins." (unofficial translation—transl.).
174 For details, see the Annual Report of the Chancellor of Justice for 2005 (Estonian-language edition), pp. 177–179.

(3) The main question in the matter is whether that provision is in conformity with the Constitution and relevant statutes.

(4) The first paragraph of Article 20 of the Constitution provides everyone's right to liberty and to security of person. It represents a classical *habeas corpus* rule the aim of which is to guarantee the physical liberty of individuals. The rule has historically arisen as a safeguard against unlawful deprivation of liberty. The right to liberty encompasses physical liberty of the individual in the broadest possible sense. The security of person means a prohibition of unlawful detention. Security of person represents a special case of the protection of physical liberty, and because of the breadth of the notion of liberty does not hold an independent significance in defining the object of protection mandated in the first paragraph of Article 20. The use of handcuffs limits the individual's liberty by restricting the movement of the hands and forcing the individual to move in a specific manner.

Pursuant to the first sentence of Article 3 and to Article 11 of the Constitution fundamental rights may only be limited by statute.[175]

Hence, any limiting measure must be founded in statute and must also be proportionate. In certain cases security considerations may dictate the use of measures that are more severe than is usual. Thus, especially dangerous prisoners or prisoners likely to attempt an escape may be subjected to increased limitations of fundamental rights. Employing a restraint in order to ensure an increased degree of security represents an especially invasive limitation that must be justified and the discretionary use of which must be founded on a consideration of all material facts.

Pursuant to section 69(1) of the Imprisonment Act (IA) additional security measures may be used in respect of a sentenced prisoner who systematically violates the requirements emanating from the Imprisonment Act or the Internal Rules of Prisons (approved by Regulation 72 of the Minister of Justice of 30 November 2000 (IRP)) or who intentionally damages his/her health or manifests a tendency to attempt suicide or escape or is violent to others. The use of restraints as a security measure is authorised by virtue of section 69(2)(5) of the IA. The definition of restraints in section 70(1) of the IA includes handcuffs. Under the terms of that provision as amended to 31 January 2007 the use of restraints was also allowed during transfers of prisoners, provided there was an increased threat of escape. A threat should be understood here to mean imminent occurrence of an event entailing adverse consequences (in the case at hand, the escape of a prisoner). The use of handcuffs during the transfer is justified if, for instance, an attempt has previously been made by the prisoner to achieve a result that is adverse to the law, or if proved facts exist that indicate a high likelihood that the prisoner will soon commit an act entailing adverse consequences. A suspicion that is not founded on facts cannot constitute a reason for the use of handcuffs.

Section 17(2) of the Tasks and Rules of Procedure provides that in the case of transfer of a life-sentenced prisoner, or where there exists an increased threat of escape, handcuffs may be used during transfer. Section 70(1) of the IA as amended to 31 January 2007 explicitly stated that the use of handcuffs on a prisoner was only allowed if there was an increased threat of escape of that prisoner. This means that the use handcuffs on any escortees, including escortees who are life-sentenced prisoners, must be justified in each particular case. Thus, in order to use handcuffs on a life-sentenced escortee, it must be shown that that escortee represents an increased threat of escape and that handcuffs must be used to prevent escape. Unlike the rules in the Imprisonment Act, section 17(2) of the Tasks and Rules of Procedure only requires an assessment of the presence of an increased threat of escape in the case of escortees who are not life-sentenced prisoners. This suggests a presumption that a life-sentenced prisoner automatically presents an increased threat of escape, which means that an analysis regarding the escape threat posed by a particular life-sentenced prisoner is not called for when deciding to use handcuffs on that prisoner. This means that consideration of the facts of a particular case is ruled out and life-sentenced escortees should be subjected to the use of handcuffs in any case, without any

[175] See for example judgment of the Supreme Court (plenary formation) of 11 October 2001 in case 3-4-1-7-01.

assessment of whether it was necessary or not in the case of a particular life-sentenced escortee. By establishing such rules, the Minister of Justice has created a ground for interference with the security of person of escortees to a degree that is more severe those provided in the relevant statute.

The Tasks and Rules of Procedure are established on the basis of section 109(2) of the IA. That provision states that the tasks and rules of procedure of prison escort guards shall be established by the Minister of Justice. Thus, the provision only vests in the Minister the power to establish the tasks and the rules of procedure of prison escort guards and does not contain a delegation that would permit the Minister to make rules regarding the use of restraints on escortees that substantively limit the fundamental rights of those escortees. The provision that sets forth the grounds on which restraints may be used is contained in section 70(1) of the IA.

Pursuant to paragraph 1 of Article 3 of the Constitution, public authority must be exercised in accordance with the Constitution and with statutes that are in conformity with the same. Paragraph 2 of Article 94 empowers a Minister to make binding regulations and decrees. As a rule, the authority of the Executive only extends to making *intra legem* regulations, i.e. regulations that provide the details necessary for a statute to be applied in practice.[176] Legal theory postulates that the Executive, if it is to make generally binding rules, must be specifically empowered by a delegation or enabling provision in a statute. The enabling provision specifies which of the administrative authorities is competent make the rules required. It also provides the objective, substance and extent of the authority that the legislature has deemed appropriate to delegate. In addition to that the enabling provision may contain provisos imposing additional duties on the Executive or limiting the extent of the legislative functions conferred on it. The aim of laying down the objective, the substance and the extent of a delegation in a statute is to allow the public to see in what specific matters the Executive has been authorised to make generally binding rules.[177] This means that a narrow interpretation must be favoured in construing an enabling provision. The regulations made in pursuance of enabling provisions in statutes may not extend or restrict the scope of those provisions, i.e. they may not overstep the bounds of relevant delegation.[178] In the case of Executive legislation the provision of paragraph 2 of Article 94 of the Constitution imposes a duty on the Executive to abide within the authority delegated and to respect the limits of the relevant delegation.

The delegation contained in section 109(2) of the IA authorising the Minister of Justice to provide the tasks and rules of procedure of prison escort guards does not include a power to establish additional grounds for use of handcuffs beyond those provided by statute.

It must be concluded from the foregoing that in making the rule contained in section 17(2) of the Tasks and Rules of Procedure and establishing limitations regarding life-sentenced prisoners that are authorised neither by section 70(1) nor by section 109(2) of the IA, the Minister of Justice has exceeded the limits of the delegation granted by the legislature, thereby violating paragraph 1 of Article 3, Article 11, paragraph 1 of Article 20 and paragraph 2 of Article 94 of the Constitution.

(5) On 7 July 2006 the Chancellor of Justice issued a recommendation to the Minister of Justice to amend, within 20 days following receipt of recommendation, section 17(2) of Minister of Justice Regulation 17, "The Tasks and Rules of Procedure of Prison Escort Guards" of 30 May 2006 so as to bring that provision into conformity with the Constitution and the Imprisonment Act. The Minister agreed to the recommendation of the Chancellor but noted that it was impossible to give it effect within the time limit that had been set since new rules in the matter required careful consideration. The provision in question was repealed on 22 October 2006.

[176] Constitutional Review Chamber of the Supreme Court, judgment of 20 December 1996 in case 3-4-1-3-96, para. 2. The same opinion has been expressed by the Chamber in its judgment of 5 November 2002 in case 3-4-1-8-02 to the effect that the Executive is authorised to make intra legem regulations, i.e. regulations that provide the details necessary to apply the statute (in Estonian—transl.).

[177] Ibid., para. 3.

[178] Constitutional Review Chamber of the Supreme Court, judgment of 20 December 1996 in case 3-4-1-3-96, para. 3 (in Estonian—transl.).

5. Conditions in the health care department of Tallinn Prison

Case 7-1/0600096

(1) The Chancellor of Justice received several petitions from a sentenced prisoner who had been placed in the health care department of Tallinn Prison. The petitioner complained about the conditions in the health care department and about the actions of officials.

(2) The petitioner noted that there were no nightstands in the wards of the health care department of Tallinn Prison and that the petitioner's and other patients' hospital clothes were only changed once a month.

The Chancellor of Justice opened an investigation on the basis of the petition and addressed a request for information to Tallinn Prison and to North Estonia Regional Hospital.

In its reply the administration of Tallinn Prison explains that the prison continues to comply with the requirements regarding items that are an obligatory part of the interior of cells. According to the reply, no specific description of nightstand is provided in Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 (IRP). This means that a nightstand may be made of wood, metal, glass or cardboard. A cardboard box fulfills precisely the same functions that a nightstand made of any other material does. The administration explained that when a wooden or metal nightstand is laid on the floor it might also be called a box. Under the terms of section 3(6)(8) of Minister of Social Affairs Regulation 132, "Standards for living conditions in hospitals" of 15 November 2002 (below: the Standards) each patient in a hospital ward must have a small cupboard to store personal items. The administration of Tallinn Prison found that the functions that needed to be provided for by virtue of the Minister's regulation had been fulfilled. The administration further noted that, as a matter of fact, the cardboard boxes used in the prison's health care department were superior for instance to the nightstands in use in the cellblocks in the prison's Magasini Street facility in that the latter held fewer items than the cardboard boxes in the health care department. The administration concluded that the word *karp* (Estonian for 'box'—transl.) that was used in the petition had probably given rise to the wrong impression on the part of the Chancellor of Justice. In its reply the administration assured the Chancellor that cardboard boxes fulfilled all functions expected of a nightstand. They also met the specific requirements of the health care department. Furthermore, cardboard boxes had significantly higher use efficiency than comparable-size cupboards of any other material. They could not be used to create hiding places and could be simply destroyed when the patient was discharged, which was less costly than disinfecting and cleaning the cupboards and which effectively limited the spread of infection. It was also added that before introducing cardboard boxes in place of nightstands the administration of Tallinn Prison had consulted with officials of the Department of Prisons in the Ministry of Justice. As far as the administration is aware there exists a draft amendment regarding section 7(1) of the IRP. The aim of the amendment is to reduce the lack of clarity of that provision for prisoners who are generally apt to attribute literal and self-seeking interpretations to legislative provisions.

The Governor of Tallinn Prison has by Decree 52 of 26 October 2005 approved the "Internal Rules of the Health Care Department of Tallinn Prison in Provision of Health Care Services" (below: the Internal Rules). Under section 4.7 of the Internal Rules of the health care department tuberculosis patients are required after visit by the medical staff to change into a tracksuit provided by the contact officer, while other patients are required to change into pyjamas. Section 7.2 of the Internal Rules provides that hospital clothes are changed once a month or according to the orders of duty nurse. The administration of Tallinn Prison finds that the petitioner has probably forgotten the last part of that sentence. The petitioner who is a patient receiving long-term treatment in the health care department of Tallinn Prison has so far made no requests to the governor of the prison with respect to the problems regarding dirtying of outer clothes (tracksuit). Where necessary, arrangements can be made for washing a set of change clothes more frequently, which ensures observance of hygiene

requirements. The duty nurse will decide whether necessity exists for such arrangements to be implemented.

According to the reply by the administration of the Regional Hospital, the hygiene rules of the hospital do not contain specific requirements regarding hospital furniture. Furniture items for the hospital's tuberculosis department are selected considering the ability of those items to withstand daily cleaning, where necessary also washing and the application of disinfectants to work surfaces. In order to minimize the penetration of microbes into furniture items the surfaces of those items must be smooth, they must be painted a light colour (to facilitate detection of dirtying) using glossy or semi-glossy moisture-proof paint and the work surfaces (tabletops, nightstand tops, etc.) must be finished in smooth durable polythene. Since cardboard boxes are by their nature unable to meet the requirements listed above, they will in a matter of days become a veritable reservoir of hospital infection. In principle, they should be regarded as disposable cardboard tableware that needs to be changed on a daily basis. The hygiene rules of the hospital prescribe changing patients' bedlinen and clothes (underwear, pyjamas, nightgowns) when these become visibly dirty or soiled by bodily fluids, but at least once a week.

(3) The questions that had to be answered in order to resolve the petition were whether the changes made in the interior of the wards in the health care department of Tallinn Prison were lawful and whether the frequency with which patients in the health care department were provided change clothes was justified.

(4) Under section 7(1)(2) of the IRP cells or rooms must have one nightstand per inmate. This is an imperative provision. Similarly, pursuant to section 3(6)(8) of the Standards for living conditions each patient in a ward must have a small cupboard for storing personal items. Pursuant to section 7.7 of the Internal Rules of the health care department approved by the Governor of Tallinn Prison the interior of the ward may differ from that provided in section 7(1) of the IRP if this is necessary in order to provide effective treatment.

The Governor of Tallinn Prison does not have the authority to derogate from the requirements established in respect of the interior of cells by generally binding rules which in the material case are contained in a regulation of the Minister of Justice, even where such derogation is claimed to be the result of consultations with officials of the Ministry of Justice. The concept of a nightstand cannot be stretched to accommodate objects made of cardboard. A piece of furniture such as a cupboard must be made of material that is significantly more durable than cardboard. It is also impossible to agree with the position expressed by the administration of Tallinn Prison that cardboard boxes have higher use efficiency than nightstands made of other materials. The administration stated in its reply that the boxes would be thrown out after use in order to prevent further infection. At the same time, the administration of the Regional Hospital had explained in its reply that cardboard boxes would become sources of infection in a matter of days and should be changed daily. Furniture used in a health care institution should be selected on the basis of its resistance to microbial penetration and the ease of cleaning. It follows from the above that by replacing nightstands with cardboard boxes the Governor of Tallinn Prison has contravened the requirements established in regard to the interior of prison cells.

The Chancellor also disagreed with the position taken by the administration of Tallinn Prison regarding the susceptibility of section 7(1)(2) of the IRP to divergent interpretations.

Under section 4.7 of the IRP tuberculosis patients are required to dress into a tracksuit provided by the contact person after the visit by the medical staff. Under section 7.2 of the IRP, hospital cothes are changed once a month or according to orders of the duty nurse on Mondays from 1:00 p.m. to 4:00 p.m. Dirty linen and hospital clothes are sent to be laundered.

The administration of the Regional Hospital indicated in its reply that patients are provided change clothes and a change of bedlinen when these have become visibly dirty or soiled by bodily fluids, but at least once a week. Under the regulations established in prisons, prisoners are provided a change

of bedlinen once a week (as in Murru Prison) or once every two weeks (as in Tartu Prison). Hence, considering the fact that prisoners are admitted to the health care department to be treated, it is imperative that they be provided a change of bedlinen and of their issue of clothes not less frequently than once a week.

(5) The Chancellor of Justice concluded that the Governor of Tallinn Prison has without authorisation altered the obligation established in section 7(1)(2) of the IRP by replacing nightstands with cardboard boxes. The Chancellor also concluded that provision of change clothes once a month was not justified.

On the basis of the above the Chancellor of Justice issued a recommendation to the Governor of Tallinn Prison to bring the interior of the wards in the prison's health care department into conformity with the requirement of section 7(1)(2) of the IRP and to provide a change of bedlinen and clothes to patients in the tuberculosis unit not less freuqently than once a week in order to coply with hygiene requirements.

In his reply to the recommendation by the Chancellor, the Governor of Tallinn Prison informed the former that he was considering replacing cardboard nightstands with nightstands made of a more durable material. He was also going to submit a request to the Ministry of Justice to consider amending the Internal Rules of Prisons so as to replace the word *öökapp* (Estonian for 'nightstand'—transl.) by the word panipaik (Estonian for 'storing facility, cupboard' —transl.) in particular for the reason that in a functional sense a nightstand does not have a place in the interior of a prison cell. The purpose of a storing facility is to store the personal items that a sentenced prisoner uses on a daily basis, while minimising the possibility of hiding prohibited items. The governor also informed the Chancellor that a change of bedlinen in the prison's health care department was provided once a week and that the nurse-caretaker has not refused requests for more frequent provision of changes of prison clothes.

6. Overcrowding in prisons

Case 7-1//51493

(1) The spouse of a sentenced prisoner serving a term of imprisonment in Murru Prison petitioned the Chancellor of Justice. The petitioner complained that the number of inmates in the cell in which the petitioner's spouse was housed exceeded maximum capacity.

(2) The petitioner claimed that there were ten prisoners in the cell in which the petitioner's spouse was serving a term of imprisonment, that the total floor space of the cell was 14.3m^2 and that there were more prisoners in the cell than there were beds.

In order to verify the claims made by the petitioner the Chancellor of Justice addressed a request for information to the administration of Murru Prison. The reply of the administration stated that there were 113 inmates in the cellblock in which the petitioner's spouse was housed. There had been 107 inmates in the cellblock at the time the petition was drawn up and there were 106 when the administration drew up its reply. Under the requirements laid down in section 6(6) of the Internal Rules of Prisons approved by Regulation 72 of the Minister of Justice of 30 November 2000 (IRP) the cellblock could only be used to house 89 sentenced prisoners. There were only 104 beds on the block, which in a situation of overcrowding meant that there were not enough beds for all prisoners and that some of the prisoners had to sleep on mattresses on the floor.

In several cases that he had investigated earlier, the Chancellor of Justice had already established facts of overcrowding. For this reason the Chancellor decided to write to the Minister of Justice. In the

Minister's 2005 report[179] on the implementation of the strategic plan "Principles of Crime Policy Through 2010" (adopted by Resolution of the Riigikogu on 21 October 2003) the Minister had noted that an action plan to reduce the prison population had been elaborated in the Ministry of Justice. The Chancellor requested a copy of the plan. He also requested to be kept up to date on any measures that were not listed in the plan but dealt with reduction of overcrowding in prisons or with the problems caused by overcrowding.

The Minister of Justice replied that the action plan was part of the Strategic Plan of the Ministry of Justice through 2010.[180] One of the strategic goals in that plan was reduction of prison population. Several measures were envisaged in the plan in this regard. The Minister outlined the measures that were being prepared at the time of the reply. For instance, it was envisaged to change the rules of early release. Under the new system, sentenced prisoners could be released sooner than was the case at the time the facts alleged in the petition were investigated. For that the prisoner would have to agree to electronic monitoring of his/her whereabouts. Ministry officials had already completed work on the text of a corresponding draft bill. The draft bill also proposed to rearrange the early release procedure so as to strip prison administrations of their power to decide whether or not to transmit a prisoner's early release application to a court or not. Under the new rules all applications would be transmitted to a court together with accompanying materials compiled by prison officials. Several other measures were considered as well, for instance, revising the sentences provided for certain offences and introducing rehabilitation as an alternative to custodial sentence in the case of addicts. The problems of overcrowding should also be alleviated in the near future by construction of several new prisons (for instance, Viru Prison, hopefully to be completed in 2007).

(3) The question that had to be answered in the petitioner's case was whether the required area of floor space had been provided to the spouse of the petitioner in the cell in which that spouse was serving a term of imprisonment.

(4) Section 6(6) of the IRP prescribes a floor space of at least 2.5m^2 to sentenced prisoners housed in a cell or a room. As was evident from the reply by Murru Prison more prisoners were being housed in the cellblock and the cell in which the spouse of the petitioner had been placed than that requirement permitted. Murru Prison was overcrowded. The area of floor space that was required by section 6(6) of the IRP was not provided to the petitioner's spouse. The fact that caused particular concern to the Chancellor was that the prison was so overcrowded that each prisoner did not have a bed to sleep in.

The Chancellor of Justice had in earlier cases repeatedly found evidence of prison overcrowding and had drawn the attention of competent authorities to the problem and to the fact that it had to be solved urgently. Unfortunately, the opportunities available to the Chancellor in contributing to resolving the problem were limited since at the time the petition was investigated almost all prisons in Estonia had reached full capacity or even exceeded that. This meant that a recommendation to one prison to the effect that it should avoid overcrowding would have only had a limited impact on the situation.

The Chancellor of Justice concluded that the problem of overcrowding in prisons could not be dealt with by a single measure. Instead, it required a long-term strategy that is supplied with necessary funds. The Chancellor pointed out that the Minister of Justice had prepared an action plan to deal with the problem. The Chancellor announced that he would monitor the implementation of the measures envisaged in the plan, and scrutinise the situation so as to determine whether the measures were sufficient to resolve the problem of overcrowding.[181]

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179 Available on the Internet at: http://www.just.ee/17123 (in Estonian--transl.).
180 Available on the Internet at: http://www.just.ee/6591 (in Estonian--transl.).
181 For a description of measures that have already been implemented in order to reduce the prison population, see General outline of the Chancellor's assessment of the situation in the area of government of the Ministry of Justice (Part 2, III1.3. Law of imprisonment).

(5) On the basis of the above the Chancellor limited his finding in the petitioner's case to denouncing the situation. The finding was communicated to the Minister of Justice and to the administration of Murru Prison.

7. Overcrowding in Ämari Prison

Case 7-1/060047

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained of being provided insufficient floor space in a cell in Ämari Prison.

(2) According to the petitioner, he had not been provided in Ämari Prison the 2.5m^2 of floor space required by applicable legislation. In the view of the petitioner, overcrowded cells in the prison amounted to a violation of the petitioner's rights, the petitioner was forced to live in inhuman conditions, and the petitioner's health was at risk.

In order to establish the facts of the case, the Chancellor of Justice addressed a request for information to the administration of Ämari Prison and to the Minister of Justice.

According to the reply from the administration, the requirement of 2.5m^2 floor space was not met in Cell 10 of Cellblock II of Ämari Prison during the period from July to December 2005 and in January 2006. The administration cited general overcrowding in prisons as justification for overcrowding in the cells of Ämari Prison.

Initial signals of overcrowding in Ämari Prison had reached the Chancellor of Justice almost two years before the petition was received. As a result, the Chancellor's advisors performed inspection visits to Ämari Prison on 28 October 2004 and 3 November 2004. As a result of the visits, the Chancellor drew the attention of the administration of Ämari Prison to the fact that the prison has not been able to provide each prisoner with a floor space of at least 2.5m^2, as required by section 6(6) of Internal Rules of Prisons. On the basis of the above, the Chancellor issued a recommendation to the Governor of Ämari Prison in 2004 to avoid overcrowding in the prison. The Chancellor of Justice also recommended that the Ministry of Justice's Deputy Secretary-General for Prisons make a detailed comparison of the population figures of prisons and implement measures to reach similar population density rates in all prisons.

(3) The question that had to be answered in the petitioner's case was whether sufficient floor space had been provided to the petitioner in Ämari Prison.

(4) Section 6 of the Internal Rules of Prisons[182] (IRP) provides the principles for housing sentenced prisoners in prisons. Under section 6(1) of the IRP, sentenced prisoners are housed in single rooms or cells or in rooms or cells for several inmates. According to section 6(2) of the IRP, a cell is defined as a facility intended for housing sentenced prisoners in a closed prison. Section 6(6) of the IRP requires a sentenced prisoner to be provided at least 2.5m^2 of floor space in the room or cell.

The petitioner was housed in Cell 10 of Cellblock II of Ämari Prison from 7 July 2005 to 26 September 2005 and from 3 October 2005 to 5 December 2005. The reply by the administration of Ämari Prison stated that the total floor space of Cell 10 in Cellblock II was 22.4m^2, and the cell was equipped with sleeping facilities for nine inmates.

Calculations showed that more prisoners were housed in Cell 10 than was permitted, and that the requirement of 2.5m^2 of floor space per prisoner had not been respected during the following periods: 7 July–10 August 2005 (30 days), 12 August–26 October 2005 (76 days, i.e. over two months), 2 November–4 November 2005 (3 days) and 5 December 2005 (1 day). These periods amounted to a total of 110 days.

[182] Approved by Regulation 72 of the Minister of Justice of 30 November 2000.

On the basis of the foregoing, the Chancellor of Justice concluded that in 2005 the petitioner had not been provided in Cell 10 of Ämari Prison the area of floor space required by law (2.5m^2) for a total of 110 days. This amounted to a violation of the rights of the petitioner and of the sentenced prisoners housed in the same cell, since the floor space at their disposal was less than 2.5 m^2 per inmate.

The Chancellor of Justice continues to hold the view that a failure to provide sentenced prisoners the area of floor space required by section 6(6) of the IRP may in certain conditions be regarded as degrading treatment prohibited under the first paragraph of Article 18 of the Constitution.

In the situation where the population of a prison is nearing full capacity, security considerations may require the placement of prisoners in cells without regard to the provisions of section 6(6) of the IRP. In order to prevent this, overcrowding in prisons should be avoided. Among other things, overcrowding in one prison may be caused by variations in population density across prisons.

By virtue of section 5(1) of Regulation 55 "Administration Plan" of the Minister of Justice of 29 November 2000, the Deputy Secretary-General for Prisons of the Ministry of Justice may derogate from the provisions in section 4 of the same if this is necessary for considerations of prison overcrowding or in order to ensure the safety of a sentenced prisoner, or in other exceptional circumstances. Under section 13 of the IRP, the Deputy Secretary-General shall decide the transfer of a sentenced prisoner on the basis of a request submitted by the governor of the prison in which the prisoner is serving his/her sentence. Section 19(3) of the IRP authorises the Deputy Secretary-General to decide a transfer of a sentenced prisoner without observing the procedure established in the Internal Rules of Prisons.

(5) The Chancellor of Justice issued a recommendation to the administration of Ämari Prison to maintain the practice of giving early warning to the Deputy Secretary-General to the effect that the population of Ämari Prison is nearing full capacity, and thereby contributing to avoiding overcrowding in Ämari Prison. A copy of the recommendation was sent to the Deputy Secretary-General for informational purposes.

The Chancellor of Justice requested that he be apprised of measures implemented to avoid overcrowding in Ämari Prison after receipt of his recommendation.

The administration of Ämari Prison acceded to the recommendation of the Chancellor of Justice. Ämari Prison has also continued to give effect the recommendation that the Chancellor issued in 2004, notifying the Ministry of Justice's Deputy Secretary-General for Prisons repeatedly of the population figures in Ämari Prison approaching full capacity.

The Chancellor of Justice wrote to the Minister of Justice on 22 February 2006 in relation to overcrowding in Ämari Prison and in other prisons. The Chancellor requested information concerning measures that the Minister was considering in order to reduce overcrowding in prisons or to alleviate its effects before the completion of the planned Viru Prison. According to the Minister's reply, several measures to reduce overcrowding were being scrutinised. These included the construction of new prisons, the reduction of the prison population and the amendment of sentencing policy.

8. Use of Russian and translation of official prison documents into Russian

Case 7-1/ 060226

(1) A prisoner petitioned the Chancellor of Justice. The petitioner complained that it was impossible to understand the documents that the prison administration presented to the petitioner, because those documents lacked a Russian translation.

(2) The petitioner, who was held in Tallinn Prison, observed that all documents that the petitioner received from the prison administration were in Estonian, which the petitioner did not speak. The petitioner requested to be presented documents in Russian. The petition did not specify which documents the petitioner referred to (those emanating from the prison administration or those drawn up by other persons or authorities and merely transmitted to the petitioner by the administration). Since the petition did not provide any details concerning the content of the documents in question and their importance to the petitioner, the petition remained unclear as to whether a violation of the rights of the petitioner had taken place.

In order to verify the petitioner's account of the facts of the case, the Chancellor of Justice addressed a request for information to the administration of Tallinn Prison.

The administration's response stated that the following replies to the petitioner's informational letters and requests had recently been handed over to the petitioner against signed receipt: a reply to the petitioner's request to be transferred to Pärnu Prison; a reply to the petitioner's request for prison leave; a reply that, in response to an informational letter from the petitioner, explained that upon release from prison the petitioner would be able to pick up the petitioner's identity card kept in the Northern Regional Branch Office of the Citizenship and Migration Board.

The administration of Tallinn Prison explained that a contact officer (senior officer rank) in the prison's imprisonment department distributes the replies to prisoners' letters to the prisoners against signed receipt in a log of letters. If a sentenced prisoner does not understand what the replies say, the contact officer explains the meaning of the reply to the prisoner in Russian. If there is something that the prisoner still fails to grasp, he/she can ask the contact officer about it. Where necessary, the contact officer will provide the prisoner a written or oral translation into Russian of the entire reply. If the prisoner does not have any questions, the contact officer will presume that the prisoner has understood the reply.

Sentenced prisoners who have requested a Russian-language reply from the administration of Tallinn Prison, or a translation into Russian of a response that the administration has draw up in Estonian have been told that Tallinn Prison does not provide replies in Russian. This policy is founded on sections 20 and 21 of the Administrative Procedure Act, which provide that administrative proceedings must be conducted in the Estonian language. It has also been explained to the prisoners that the assistance of an interpreter in the proceedings is permitted but must be paid for by the person requesting that assistance.

(3) The main question that had to be answered in the petitioner's case was whether the administration of Tallinn Prison was under an obligation to translate into other languages the documents that it prepared in Estonian.

(4.1) Pursuant to the preamble to the Constitution of the Republic of Estonia, one of the aims of the Estonian State is the preservation of the Estonian people and their culture throughout the ages. The Estonian language is an essential element, an inalienable part of the existence and culture of the Estonian people. Without the Estonian language, the preservation of the Estonian people and culture would be impossible. In order to ensure the achievement of this aim, the drafters of the Constitution included in the chapter of general provisions an article (Article 6) that provides that Estonian is the official language of Estonia.

On the basis of the above, the second paragraph of Article 52 of the Constitution provides that Estonian is the language of official business in Estonia's government agencies and local authorities. In accordance with paragraph 1 of Article 51 of the Constitution, everyone has the right to petition government agencies and local authorities and the officials of those agencies and authorities in the Estonian language and receive a reply in the same. The articles mentioned above are part of the constitutional order of Estonia. This means that they are binding on Estonian citizens as well as on aliens and stateless persons when those aliens and stateless persons are in Estonia.

The Supreme Court has observed: "[…] the protection and use of the Estonian language is established as a constitutional goal. This means that public authorities must ensure the achievement of that goal. Hence, measures to ensure the use of the Estonian language have a constitutional basis. Article 1 of the Constitution proclaims that Estonia is a democratic republic. Democracy is only true to its purpose when it is functional. One of the preconditions for democracy to be functional is that the persons who wield public power should fully understand what is going on in Estonia and should use a single system of signs for official business. It follows from the above that requiring the use of the Estonian language in Estonian representative democracy and in Estonian government business conforms to the general interest and is justified in the circumstances that history has fashioned in this country."[183]

The Supreme Court has construed Article 14 of the Constitution as giving rise to a right to good administration.[184] The principle of good administration is a so-called umbrella notion that includes a number of important sub-principles that any administrative authority is obligated to follow in its everyday work. These are: appropriateness to the stated objective, straightforwardness, expeditiousness, involvement and hearing out, offering assistance, impartiality, transparency in exercising public authority, etc. These sub-principles also play an important role in deciding in what manner and form to communicate with individuals.

Article 46 of the Constitution provides that everyone is entitled to address informational letters and applications to officials of government institutions, local authorities (to petition the authorities); the procedure for replying to these must be provided by statute. This means that everyone is entitled to present informational letters and applications. In addition to creating the right to present informational letters and applications, the aim of Article 46 of the Constitution must also be to ensure replies to those letters and applications. Only the right to expect a reply gives meaning to the right to petition. The obligation emanating from the second sentence of Article 46 to provide the procedure for replies by statute imposes an indirect duty to respond to petitions from individuals, because what is left open by the provision in question is merely the manner in which replies are to be regulated. The provision does not contain any grounds for limitation of the right to petition (or conditions that must be fulfilled in order to obtain a reply).[185]

(4.2) The Estonian Language Act (ELA) is a special statute dealing with matters pertaining to the use of Estonian. Section 3(1) of that statute provides that Estonian is the language of official business in government agencies, local authorities and their units. Section 8(1) of the ELA provides that if an application, request, or other document that is presented to a government agency or local authority is in a foreign language, the agency or authority is entitled to request that the person who presented the document provide a translation of the same into Estonian. The only exception to that rule is the situation referred to in section 10 of the ELA (in the case the document is in a minority language

183 Constitutional Review Chamber of the Supreme Court, judgment of 5 February 1998 in case 3-4-1-1-98.

184 Constitutional Review Chamber of the Supreme Court, judgment of 17 February 2003 in case 3-4-1-1-03, paras. 12 and 16: "Although the provision of Article 14 of the Constitution is worded objectively, it also gives rise to various rights for individuals, including a general fundamental right to administration and procedures […] An analysis of the principles recognised in the European legal space warrants the conclusion that Article 14 of the Constitution creates a right for individuals to good administration and that this right is a fundamental right."

185 O. Kask. Kommentaarid §-le 46. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Commentary on Article 46, by O. Kask in "The Constitution of the Republic of Estonia", an annotated edition prepared in the Ministry of Justice] Tallinn 2002. Article 46, note 3.

that is accepted as official on the territory of a local authority). Section 8(2) provides that unless the authority immediately requests to be provided with an Estonian translation of a foreign-language application, request or other document, that document must be deemed accepted by the authority.

Under section 5(9)(5) of the Replies to Informational Letters and Requests for Clarification Act (RILRCA), an authority may choose not to reply if an informational letter or request for clarification is submitted in a language other than Estonian and does not entail an obligation to reply under section 8 of the Estonian Language Act. Section 5(11) of the RILRCA provides that in the event the authority decides not to reply on this ground, it must immediately request the person who submitted the informational letter or request for clarification an Estonian translation of the same.

This means that the law leaves administrative authorities a margin of discretion to decide whether **to accept** for consideration a petition that is submitted in a language other than Estonian ('is entitled to request', 'may'). However, the authority must decide without delay ('unless … immediately requests') whether it desires a translation. Otherwise the authority will be deemed to have accepted the document and must provide a reply to that document.

Thus, the Estonian Language Act contains specific rules regarding acceptance of communications from individuals. No such rules are provided regarding the language in which the authority must **reply** to a communication that it has accepted. The statute in question does not contain any specific provisions concerning translations of those replies (save for section 10, which provides for a parallel reply in the language of the minority, which does not apply in the petitioner's case). This means that the general rule that replies must be drafted in Estonian should be respected.

Pursuant to section 20(1) of the Administrative Procedure Act, administrative proceedings must be conducted in Estonian. Section 20(2) of the same statute provides that a foreign language may be used in those proceedings subject to the relevant provisions in the Estonian Language Act (ELA). Thus matters related to the use of any language in administrative proceedings are subject to most of the principles prescribed in the ELA.

In addition to the above, section 21(1) of the Administrative Procedure Act provides that if a party to proceedings does not speak the language in which those proceedings are conducted, an interpreter or translator must be allowed to take part in the proceedings if the party so requests. Section 21(2) of the same statute states that the costs that result from the use of an interpreter or translator must be met by the party that requested the assistance of that interpreter or translator, unless otherwise provided by statute or by Executive regulation or otherwise decided by the administrative authority. Hence the assistance of an interpreter is permitted, but must first be requested by a party to the proceedings, who must be prepared to meet the costs resulting from such assistance. Nevertheless, the authority is not obligated to require that the costs be met by the party (i.e. has discretion in the matter), and may choose to pay for the services of the interpreter or translator.

With respect to oral communications between individuals and officials or employees of government agencies or local authorities, section 8(4) of the Estonian Language Act provides that individuals who do not speak Estonian may request to be allowed to use a foreign language that those officials or employees speak, and that the officials or employees may consent to this. If the relevant consent is not obtained, communication must take place through an interpreter/translator. The costs resulting from the use of an interpreter/translator must be borne by the individual unless otherwise provided by law.

Mention has been made on several occasion of the discretion vested in administrative authorities regarding the choice of the language to be used in communication (both with regard to accepting a document drawn up in a foreign language and to commissioning a translation of the reply drawn up by the authority at the expense of the authority). The exercise of discretion is governed by section 4 of the Administrative Procedure Act. Subsection 2 of that section requires discretion to be exercised

with a view to its limits, its purpose and the general principles of law, having regard to material facts and considering legitimate interests. Pursuant to section 5(1) of the APA, administrative authorities are entitled to exercise discretion in determining the format of particular steps of administrative proceedings and other procedural details, unless otherwise provided by statute or executive regulation. Section 5(2) of the APA requires administrative proceedings to be conducted in a straightforward and expeditious manner, avoiding unnecessary costs and inconvenience to individuals.

Recalling the fact that the principle of good administration emanating from Article 14 of the Constitution imposes what might be termed a general duty of assistance on administrative authorities, and recalling the rules provided in the Administrative Procedure Act regarding the exercise of discretion and the appropriateness of the procedural choices of administrative authorities, the Chancellor of Justice takes the view that an administrative authority is not completely free in its discretion to opt for the use of Estonian and that the authority must have regard to the circumstances of the particular case.

(4.3) The above-mentioned rules specified in the Estonian Language Act and other statutes do not prescribe an explicit obligation for prison administrations or other administrative authorities to accept documents drawn up in a foreign language, to reply to a sentenced prisoner in a language other than Estonian, or to provide a translation of a reply drawn up by those authorities in Estonian. In principle, this is what the administration of Tallinn Prison has explained in its reply, which stated that the administration did not draw up any replies in Russian because of the fact that by law the language to be used in administrative proceedings is Estonian and that the administration is not required to provide translation services to prisoners.

Nevertheless, the rules applicable in the case contain a margin of discretion. Hence the Chancellor of Justice is of the opinion that in seeking an answer to the question raised in relation to the petitioner's case, i.e. whether the administration of Tallinn Prison is obligated to accept for consideration documents that are drawn up in a foreign language, and whether that administration is required to provide (unofficial) translations of its replies into a foreign language, the administration must take into account the following:

It is considerably more difficult for a prisoner to arrange for a translation to be made than it is for persons who are at liberty. Firstly, the prisoner may lack the funds to commission a translation from outside the prison. These funds may be lacking for reasons beyond the immediate control of the prisoner, for instance for the reason that the prison administration has found it impossible to provide work for the prisoner (cf. the wording of section 38(1) of the Imprisonment Act: "Prison administration shall provide work to a sentenced prisoner where possible […]", unofficial translation—transl.). On these grounds the courts, for one, have found that in a situation where it is established (on the basis of a statement of the personal account of a prisoner) that a sentenced prisoner does not possess the funds required in order to pay for translation services, it would not be right for an administrative court to dismiss an application from the prisoner for the sole reason that it is submitted without an Estonian translation.[186]

Secondly, the Chancellor of Justice finds that the possibility for a sentenced prisoner to request the assistance of fellow prisoners in translating a reply received by the prisoner can only be regarded as theoretical.[187] Prisoners are often loath to show the requests they want to submit to the authorities or the replies received from those authorities to other sentenced prisoners. Considering the right to confidentiality of communications (enshrined in Article 43 of the Constitution), the possibly sensitive tenor of a particular reply and the characteristics of the prison population (which includes

[186] For instance, Tallinn Court of Appeal, order of 30 December 2005 in case 2-3/1126/05, para. 5 (in Estonian—transl.).
[187] The same opinion was expressed also in the order of the Tallinn Court of Appeal of 31 January 2006 in case 3-05-1069, para. 7 (in Estonian—transl.).

a large proportion of persons of non-Estonian origin[188]), the proposition that they should do so is in principle untenable. Neither can a prisoner be obligated to request the assistance of a prison officer in the case of each and every reply. For instance, the prisoner may wish to submit an application, or may have received a reply that concerns the prison officer or officers whose assistance he/she would be expected to request. In other words, where a person who is at liberty has at his/her disposal a relatively wide range of options for selecting an individual whom he/she can trust to provide a translation of the application or reply, or to explain its substance, in the case of a person detained in a custodial institution that range of options is significantly narrower. It should also be considered that a prisoner cannot be sure, nor can he/she verify whether a translation provided by a fellow prisoner correctly reflects the content of the document.

The actions of the prison administration have an immediate impact on practically all aspects of a prisoner's existence: the living conditions, health care, work, education, communications with family, etc. This means that those actions have a direct bearing on a number of fundamental rights of the prisoner (such as the right to security of person, to inviolability of private and family life, etc.), and that the rights in question may be subjected to limitations that are severe in terms of both degree and intensity. Therefore it is highly important that the prisoner effectively understand the nature of his/her rights and obligations vis-à-vis the prison administration, fellow prisoners and persons outside the prison. In this connection, regard should also be had to the fact that disciplinary sanctions may be imposed on the prisoner should he/she violate the requirements established by law.

The Recommendation for the European Prison Rules (Rec (2006)2) of 11 January 2006 of the Committee of Ministers of the Council of Europe stresses the need to inform persons admitted to a prison in writing and orally in a language they understand of the regulations governing prison discipline and of their rights and duties in the prison (para. 30.1). The recommendation also highlights the need to use competent interpreters (para. 38.3), and the obligation to ensure in any case that the prisoner understand the details of any disciplinary proceedings against him/her (para. 59).[189]

The Chancellor of Justice emphasised that he holds the protection of the Estonian language as a central part of the Estonian culture to be among the most important values enshrined in the Constitution. The use of Estonian in official communications also provides an incentive to aliens residing in Estonia to learn the language. Nevertheless, the Chancellor considered that by virtue of the principle of good administration emanating from Article 14 of the Constitution, prison administrations must arrange for prisoners to be able to communicate their concerns (through applications, requests or in other form) to those administrations and to understand the replies provided by the administrations. Where necessary, the administration is under obligation to translate its official reply. This is the case despite the fact that there is no specific provision in the law to create such an obligation, and that the Administrative Procedure Act leaves the administration a margin of discretion. The particular circumstances of the case must be considered in order to reach a decision as to whether a translation should be made, whether it should be made of the entire document or of a part thereof, and whether it should be made in writing or orally.

In the opinion of the Chancellor of Justice, the prison administration must assess in each particular case whether the prisoner has at his/her disposal a real and practicable means to submit his/her request in Estonian, and to understand a reply provided in that language, or whether such means remain theoretical. The corresponding determination must depend in particular on the linguistic skills of the prisoner in Estonian, and of the financial means that the prisoner has at his/her disposal.

In addition to the foregoing considerations, the question of whether the administration owes a duty to the prisoner to provide a translation of its reply may turn on the nature of the rights that

188 For instance, see Eesti vanglasüsteemi aastaraamat 2003 [Yearbook of Estonian Prison Service 2003]. Tallinn 2004, p. 44, Figure 21.

189 Recommendation of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

are at stake in the matter. The administration's decision to reject an application submitted in a foreign language or to accept it for consideration should take into account the significance of that application in the context of protecting fundamental rights and freedoms. The same applies to replies by the administration and the decision not to provide a translation of those.

It must also be stressed that limitations of fundamental rights cannot be justified by mere administrative or technical difficulties or by budgetary constraints.[190] Thus, prison administrations may have recourse to a number of measures to reduce the costs incurred in translating prisoners' applications and the particular replies of the administration:

- making available to prisoners Russian-language translations of the relevant legislation (the Imprisonment Act, the Internal Rules of Prisons, the regulations of the prison);
- considering the fact that in various standard situations standard replies are provided, it would suffice to translate the templates of these replies and later only fill in the details of the particular case;
- in the case of extensive replies, providing a written translation of material parts only while using sight translation in the case of straightforward replies;
- establishing a preliminary selection of matters in which translations are required in all cases as opposed to those where this is not the case, etc.

These measures would facilitate the work of contact officers and make a significant contribution to ensuring the protection of prisoners' fundamental rights.

In relation to acceptance for consideration of foreign-language documents and to translating replies by prison administrations, it should be noted that the administrative courts, having regard to the basic principles of administrative procedure, have found that the right to an effective remedy as one of the most important fundamental rights may require an application submitted in a foreign language to be ruled admissible. In view of developments suggesting that in the law of imprisonment extrajudicial administrative appeal proceedings may soon be established as a precondition of access to the courts, such administrative proceedings should on no account prejudice the protection of the rights of prisoners.

It should be underlined that providing a written translation of a document that effects a severe limitation of the fundamental rights of a prisoner is essential to ensuring the right to an effective remedy. Understanding the document permits the prisoner to make an informed decision on whether to seek redress in administrative appeal proceedings or in a court of law. It will also reduce the likelihood of misunderstandings between prisoners and prison administrations, and thus contribute to easing the workload of administrative authorities and courts.

(5) On the basis of the above, the Chancellor of Justice concluded that:

1. the law does not require prison administrations to accept for consideration petitions or other documents drawn up in a foreign language (regardless of whether the document is an informational letter, request or application). Applicable legislation does not require prison administrations to provide a translation of a reply they have drawn up in Estonian into another language;
2. the principles governing exercise of discretion and the principle of good administration require prison administrations who are considering whether to accept for consideration an informational letter, a request for clarification, an application or other document drawn up in a language other than Estonian, and whether to commission a translation of the same, or of a reply they have drawn up thereto to have regard to the facts related to the submission of the letter, request, application or other document as required by the rules governing

190 See for example judgment of the Constitutional Review Chamber of the Supreme Court of 21 January 2004 in case 3-4-1-7-03, para. 39: "Unequal treatment may not be justified by mere difficulties of administrative or technical nature. The argument that ensuring equal treatment will result in an excessive burden on the national budget may fall to be considered in determining the amount of a social welfare grant, but must fail as a justification for unequal treatment of individuals and families who are in need." (unofficial translation—transl.)

discretion. In deciding whether to have recourse to an interpreter's or a translator's assistance, an administrative authority must have regard to the prisoner's knowledge of the Estonian language and the financial means at the disposal of the prisoner. The importance of the fundamental rights and freedoms at stake in the case must play a decisive role.

In the petitioner's case the Chancellor of Justice did not possess sufficient information (regarding the petitioner's comprehension capacity, the financial means at the petitioner's disposal, the circumstances that might have required a transfer of the petitioner, etc.) to determine whether the prison administration should have provided a translation of its replies. For this reason the Chancellor of Justice found it impossible to form a definitive opinion regarding the lawfulness and conformity to good administrative practice of the actions of the prison administration vis-à-vis the petitioner. The Chancellor of Justice asked the administration of Tallinn Prison to evaluate the matter of providing translations of its replies to the petitioner with a view to the principles set out above.

In its reply, the administration of Tallinn Prison stated that it had not received any further complaints from the petitioner regarding the language used in the communications between the petitioner and the administration. Moreover, the petitioner was referred to a course in Estonian. With respect to the petitioner's case, the prison administration repeated the position it had initially expressed.

The Chancellor of Justice also requested the Minister of Justice adopt measures to ensure that future practice in Tallinn Prison and in other prisons conforms to the Chancellor's recommendations regarding the use of foreign languages and the provision of translations.

In his reply, the Minister of Justice gave a detailed account of the measures taken to deal with the linguistic problems in prisons. A series of amendments (effective as of 15 February 2007) were made in the Internal Rules of Prisons enacted by Regulation 72 of the Minister of Justice of 30 November 2000. Thus, a new section 49[1] of the Rules makes provision for arrangements regarding the translations of letters and administrative appeals submitted to the Ministry of Justice.

9. Placing a sentenced prisoner in a segregation cell

Case 7-1/060395

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained about being placed in a segregation cell in Murru Prison.

(2) The petitioner had initially been placed in Cellblock 3 of Murru Prison. The presence of the petitioner there gave rise to problems, for which reason the petitioner was transferred to Cellblock 8 in July 2005. The petitioner stayed there until the end of 2006. Sentenced prisoners housed in cells 1–4 of the block were permitted to move around freely within the cellblock from wake up till lights out. The prisoners in cells 5–11 were not permitted this—their cells were locked at all times. The petitioner was placed in Cell 8 of Cellblock 8 and was not allowed to move around on the floor occupied by the block. According to the routine in Cellblock 8, prisoners kept in locked cells were allowed one hour's exercise per day. No other restrictions (for instance regarding telephone use) were imposed on the petitioner.

In February 2006 the petitioner was transferred from Cellblock 8 to Cellblock 9, to be held there until the beginning of March 2006. Cellblock 9 has locked cells for prisoners serving life sentences, for sentenced prisoners who are being disciplined, for sentenced prisoners placed in segregation pursuant to section 69(2)(4) of the Imprisonment Act and for sentenced prisoners serving their sentences pursuant to the regular prison regime. Apart from certain specific requirements in regard to the locked cells, the block's routine is similar to that of other cellblocks (for instance, the prisoners in the block are also allowed one hour's exercise per day).

In order to obtain the information necessary for the resolution of the petition, the Chancellor of Justice addressed two information requests to the administration of Murru Prison. The governor's reply to the first stated that the petitioner had not been placed in Cellblock 8 or Cellblock 9 for a purpose provided in section 69(1) of the Imprisonment Act (IA). The aim of the petitioner's transfer was to ensure that the petitioner was safe from other prisoners. The transfer was ordered in pursuance of section 66(1) of the IA and of section 4(5) of Minister of Justice Regulation 23, "Supervision of administration of custodial sentences and remand custody" of 1 April 2003.

In the second reply, the administration of Murru Prison noted that the transfer was ordered on the basis of a power vested in prison governors by virtue of section 12(2) of the Imprisonment Act. That section allows the administration to separate different categories of sentenced prisoners from one another and to transfer prisoners from one cell to another. These transfers do not constitute punishment and are effected on the basis of a transfer order, which is notified to the officer in charge of the cellblock and to the officer on duty in the block. The governor took the view that the law did not require the administration to draw up a separate notice of administrative act, since the prisoner would only be transferred from one cellblock to another. Sentenced prisoners do not have the right to decide which cellblock they are placed in.

(3) In the petitioner's case the Chancellor of Justice scrutinised the legality of placing the petitioner in a cell in which inmates were not allowed to freely move around the block from wake up till lights out for the period from July 2005 to March 2006.

(4) Pursuant to section 8(1) of the Imprisonment Act, sentenced prisoners are permitted to move around the grounds of a closed prison, and may do so during the hours established in Minister of Justice Regulation 72 "Internal Rules of Prisons" of 30 November 2000 (IRP) and the prison regulations. Section 8(1) of the IRP specifies that sentenced prisoners have the right to move around their block freely, subject to restrictions provided in the IRP and the prison regulations. The right to move freely does not apply in a disciplinary cell, segregation cell, or the inpatient ward of the medical or health department of a prison.

The cellblock, i.e. the area within which sentenced prisoners are entitled to move freely, is defined in section 5(1) of the IRP. This provision describes a cellblock as a facility that includes a number of cells and consists of one or several buildings or sections of buildings and that is intended to house prisoners. This means that sentenced prisoners must generally be provided an area in which they can move around, and that that area must be larger than a cell (for instance, movement could be allowed in the hallway into which a number of cells open, and in various common rooms).

Paragraph 1 of Article 3 of the Constitution requires limitations of fundamental rights and freedoms or other rights to be provided by statute. It must be observed in this connection that the requirement that a limitation must be provided for in a statute also applies to persons serving a term of imprisonment, and that in the absence of a statutory basis, the prison administration may not arbitrarily limit the rights of a sentenced prisoner even if this is considered necessary. The same has been explicitly confirmed by the Supreme Court: "The fact that an individual is serving a sentence for having committed an offence in relation to which limitations have been imposed on his fundamental rights and freedoms in accordance with the law does not justify interference with the fundamental rights of that individual to an extent that goes beyond that which directly emanates from the law."[191]

The Chancellor of Justice agreed with the position expressed by the Governor of Murru Prison that the administration was entitled to transfer sentenced prisoners within prison grounds, i.e. to determine in which cellblock a particular prisoner would serve his/her sentence, and in which particular cell the prisoner would be housed. In transferring sentenced prisoners, the separation principle provided in

[191] Administrative Law Chamber of the Supreme Court, judgment of 22 March 2006 in case 3-3-1-2-06 (unofficial translation—transl.).

section 12(1) of the IA should be observed. The principle divides sentenced prisoners according to a set of abstract criteria that apply both in regard to the distribution of prisoners between different prisons and in regard to the placement of prisoners within a particular prison.[192] According to section 12(2) of the IA, a prison governor may, by way of exception, also separate sentenced prisoners on the basis of criteria other than those provided in section 12(1) of the IA. That provision effectively authorises the governor to determine abstract criteria on the basis of which to separate sentenced prisoners into different cellblocks and cells. For instance, the governor may designate a block of cells as narcotics-free, or determine that a specific block is to be used by sentenced prisoners who are working.

The provisions in question do not, however, authorise a prison governor to limit the right of free movement that sentenced prisoners have by virtue of section 8(1) of the IA. Neither of the provisions referred to in the first reply provided by the Governor of Murru Prison (section 66(1) of the IA and section 4(5) of Minister of Justice Regulation 23, "Supervision of administration of custodial sentences and remand custody" of 1 April 2003) vests the governor with such a power. Under the terms of section 66(1) of the IA, the supervision of sentenced prisoners must be organised in a manner that ensures observance of the requirements emanating from the Imprisonment Act and from the IRP, and assures general security in the prison. This section contains a generally worded guideline that explains how the measures authorised by law for supervising sentenced prisoners are to be implemented. A limitation of the rights of sentenced prisoners must be founded on an explicitly worded delegation that sets forth the substance, the objective and the extent of the limitation. Pursuant to the same logic, which reflects the principle laid down in paragraph 1 of Article 3 of the Constitution, a provision in a regulation of the Minister of Justice, even if it requires ensuring the safety of all persons in the prison, cannot be regarded as a basis that could support a limitation of the right of free movement provided in section 8(1) of the IA.

The Imprisonment Act authorises extensive limitations of a sentenced prisoner's right of free movement by placement in a disciplinary cell (section 63(1)(4) of the IA) or by the imposition of additional security measures listed in sections 69(2)(1) and 69(2)(4) of the IA. In the petitioner's case, the consequences of the placement of a sentenced prisoner in a segregation cell fell to be scrutinised (section 69(2)(4) of the IA).

Section 7(1) of the IRP provides a list of items and amenities allowed or required as part of the interior of a prison cell. Section 7(2) of the same regulation provides a similar list in respect to a disciplinary cell, and sections 58 and 60 respectively list items that are allowed to sentenced prisoners and to prisoners placed in a disciplinary cell. There are no specific rules regarding the interior of a segregation cell and the items a prisoner placed in one is allowed to have. This means that the matter is governed by the rules that apply to sentenced prisoners placed in regular cells. The right to at least an hour's daily exercise that sentenced prisoners have by virtue of section 55(2) of the IA applies without derogation to prisoners placed in a regular cell, in a segregation cell and in a disciplinary cell.

The specifics of the regime that is applied to prisoners placed in a segregation cell derive primarily from the second sentence of sections 8(1) and 101 of the IRP. These provide that prisoners placed in a segregation cell may not move freely on the grounds of their cellblock; a sentenced prisoner who is enrolled in a course of studies to complete a general or vocational education will not be allowed to attend classes when placed in a segregation cell, but must be permitted to study independently and to consult with teachers.

The foregoing shows that there is only one significant restriction that distinguishes placement in a segregation cell from placement in a regular cell – the limitation of free movement[193] (within the

[192] J. Sootak/P. Pikamäe. Kriminaaltäitevõigus [The law of sentence enforcement. By J. Sootak and P. Pikamäe]. Tallinn 2001, p. 89.

[193] See judgment of Tartu Administrative Court of 8 June 2005 in case 3-156/05. The judgment was appealed to the Court of Appeal, which upheld it by judgment of 9 November 2005 in case 2-3-296/2005. It was then appealed, on a point of law, to the Supreme Court, which upheld it by judgment of 28 March 2006 in case 3-3-1-14-06.

cellblock). The Chancellor of Justice thus found that, because the petitioner was not permitted to move around beyond the confines of the cell (save for one hour's exercise per day), it followed that for the purposes of section 69(2)(4) of the Imprisonment Act, the petitioner had been placed in a segregation cell.

A limitation such as this may only be imposed on the movements of a sentenced prisoner when it is justified on grounds listed in section 69(1) of the IA. Pursuant to the provision in question, as amended to the material time, additional security measures (including placement in a segregation cell) were allowed in respect of sentenced prisoners who systematically violated the requirements of the Imprisonment Act or the Internal Rules of Prisons, or who intentionally damaged their health or manifested a suicide or escape risk and were prone to use violence against others. In the case of a serious violation of prison discipline, the prison governor or, if present, an officer of the Prison Service ranking above governor, was entitled to order the offender's placement in a separate cell pending disciplinary action against him/her (section 63(4) of the IA).

In the replies of the administration of Murru Prison to the requests for information presented by the Chancellor of Justice, the administration of the prison notes that the aim of transferring the petitioner was to ensure the safety of the petitioner from other sentenced prisoners. At the time the Chancellor was investigating the petition, the law did not contain a legal basis that permitted a sentenced prisoner to be placed against his/her will in a segregation cell in order to ensure his/her own safety. If the administration of the prison became aware of a threat to the safety of a sentenced prisoner, the administration was required to resort to other measures. Amongst other things, sentenced prisoners could be transferred within prison grounds (without restricting the prisoners' right to move around within the cellblock), or they could be transferred to other prisons on safety considerations, pursuant to section 19(1) of the Imprisonment Act. Placement in a segregation cell can only be used in the case of sentenced prisoners who pose a threat to the prison or to the safety of other sentenced prisoners.

Since the petitioner did not fall under any criteria set forth by virtue of section 69(1) of the Imprisonment Act (IA), the Chancellor of Justice took the view that the placement of the petitioner in a segregation cell for the period from July 2005 to March 2006 constituted an unlawful limitation of the petitioner's right to move freely around the cellblock from wake up till lights out deriving from section 8(1) of the IA and section 8(1) of the IRP.

In addition, the Chancellor of Justice considered it necessary to draw the attention of the Governor of Murru Prison to the following: pursuant to section 1^1(1) of the Imprisonment Act, any administrative steps prescribed in that statute and in instruments adopted on its basis are subject to the rules in the Administrative Procedure Act (APA), save where specific provision to the contrary emanates from the Imprisonment Act. Section 51(1) of the APA defines an administrative act as a directive, decision, injunction, decree or other instrument that creates, amends or terminates rights or obligations and is issued by an administrative authority in the course of performing administrative functions in order to dispose of a particular question that has arisen between parties whose relationship falls to be regulated under public law.

A prison is an administrative authority whose relationship with a sentenced prisoner is governed by public law. Ensuring prison security is one of the administrative functions of the prison (see section 66(2) of the Imprisonment Act (IA)). Each decision of a prison to place a particular sentenced prisoner in a segregation cell and to limit the right that that prisoner enjoys by virtue of section 8(1) of the IA therefore constitutes an administrative act that must conform to the requirements established for such acts.

Among other things, the first sentence of section 55(2) of the APA requires administrative acts to be in writing, unless otherwise provided in a statute or Executive regulation. According to section 62(2)(1) of the APA, an administrative act must be made known to the person whose rights are limited by the act. Notification must be by delivery of written notice of the measure and must take place according to the procedure provided in Division 7 of Chapter 1 of the statute in question.

In the light of the above, the Chancellor of Justice found it particularly reprehensible that, during the six months the petitioner spent in a segregation cell, the prison administration had failed to draw up a corresponding written notice in conformity with the requirements of the Administrative Procedure Act.

(5) Considering the violations discovered in relation to the petitioner's case and the need to avoid repetition of the same, the Chancellor of Justice issued the following recommendations to the administration of Murru Prison:

1. The placing of sentenced prisoners in segregation cells (i.e. limiting their right to free movement that derives from section 8(1) of the Imprisonment Act (IA) and section 8(1) of Regulation 72 "Internal Rules of Prisons" of the Minister of Justice of 30 November 2000) should be discontinued, unless grounds provided in section 69(1) or section 63(4) of the IA are present.
2. When a sentenced prisoner is placed in a segregation cell, a written notice of this administrative act must be drawn up and delivered to the prisoner.

The Chancellor of Justice also recommended that, after a period of time sufficient for the administration of Murru Prison to implement the Chancellor's recommendations, the Minister of Justice order a service provision oversight inspection to verify whether the practice of the administration in placing sentenced prisoners in segregation cells conformed to the requirements emanating from law.

The administration of Murru Prison agreed to the recommendations of the Chancellor of Justice. The subsequent oversight inspection ordered by the Minister of Justice did not reveal any violations in the practice of the administration of Murru Prison with respect to placing sentenced prisoners in segregation cells.

10. Delivery of notice of an administrative act and destruction of items in a prison

Case 7-1/060057

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained that items permitted in prison were taken from the petitioner during a search in Ämari Prison and destroyed.

(2) According to the petitioner, who was a sentenced prisoner serving a term of imprisonment in Ämari Prison, items that the petitioner had purchased from the prison shop and that were permitted in prison were taken from the petitioner during a search. A seizure report was drawn up regarding the procedure. The petitioner was not provided that report. The petitioner wrote an explanatory note to the prison administration stating that the items in question had been purchased from the prison shop and were thus permitted in prison. Prison officers destroyed the items and drew up a report regarding the procedure. When the items had been destroyed, the petitioner signed that report.

To establish the facts of the case, the Chancellor of Justice addressed a request for information to the administration of Ämari Prison.

According to the reply, a search of the petitioner, who was a sentenced prisoner placed in Cellblock II of Ämari Prison, was conducted at the internal fence separating that cellblock and Cellblock III. The search was performed because prison officers noticed that the petitioner had received a sack from

a sentenced prisoner housed in Cellblock III. According to section 2.5 of the Regulations of Ämari Prison, sentenced prisoners are forbidden to pass items to one another without authorisation, or to sell or exchange items without the same. As a result of the search, prison officers discovered that the sack contained foodstuffs. This was duly noted in the report drawn up concerning the search. An internal investigation conducted by the prison administration established that the petitioner had not purchased the foodstuffs as required by section 6.1 of the Regulations of Ämari Prison. The foodstuffs had been purchased by another sentenced prisoner and were to be passed to a third sentenced prisoner. The items that had been taken from the petitioner were destroyed, and a report was drawn up regarding the procedure. In order to draw up that report, a committee was convened that in addition to other persons included the two sentenced prisoners who were present when the items were destroyed. The petitioner was not provided a copy of the report.

(3) The question that had to be answered in the petitioner's case was whether the seizure and destruction of the items found during the search was lawful.

(4) Searches of sentenced prisoners are governed by section 68 of the Imprisonment Act (IA). Subsection 1 of that section empowers prison officers to search sentenced prisoners, to inspect their personal belongings, their cells, and the common rooms used by sentenced prisoners, as well as any other rooms and grounds of the prison, in order to discover prohibited items and substances. Under section 68(2) of the IA, any prohibited items and substances discovered during a search must be seized and either sold or destroyed.

On the basis of section 15(2) of the IA, the Minister of Justice established a list of items that are permitted to sentenced prisoners in a prison. That list is contained in section 58 of the Internal Rules of Prisons[194] (IRP). Section 57(1) of the IRP states that sentenced prisoners are permitted items that they had with them upon arrival in the prison and personal items that they obtain with the assistance of the prison administration. Sentenced prisoners may keep authorised items either with them or in a storage facility for personal belongings. Items that were not listed in section 58 of the IRP were regarded as items prohibited to sentenced prisoners. It should be noted that an item that was listed in section 58 of the IRP could still be regarded as prohibited pursuant to section 57 of the same, i.e. if the item was not with the prisoner upon the prisoner's arrival in the prison, or had not been acquired with the assistance of the prison administration.

Pursuant to sections 74(1) and 74(2) of the IA, sentenced prisoners must effect their purchases through the intermediation of the prison administration and must pay for these purchases from their personal account. According to the meaning and the purpose of the Imprisonment Act, and pursuant to section 74 of the same, sentenced prisoners are only allowed to purchase items with the funds in their personal account and for their own use. According to section 2.5 of "Regulations of Ämari Prison" established by Governor of Ämari Prison Decree 163 of 8 June 2004[195], sentenced prisoners are prohibited to pass items to one another without authorisation, or to sell or exchange items without the same.

According to the reply of the administration of Ämari Prison, the items that were seized as a result of the search of the petitioner were items that had not been purchased in the prison shop. The petitioner acquired those items as a result of the said items being passed, in violation of section 2.5 of the Regulations of Ämari Prison, to the petitioner by another sentenced prisoner, with the intention that the items be passed on to a third sentenced prisoner. In the petition submitted to the Chancellor of Justice, the petitioner admitted the fact of receiving the seized items from another sentenced prisoner placed in Cellblock III. The explanatory note submitted by the petitioner in respect of the search also states that the petitioner received the seized foodstuffs from another sentenced prisoner and that those foodstuffs were to be passed to a third sentenced prisoner. In addition, in the explanatory

[194] Approved by Regulation 72 of the Minister of Justice of 30 November 2000.
[195] As amended by Decree 203 of the Governor of Ämari Prison of 14 July 2004.

note submitted to the administration, the prisoner who passed the items to the petitioner confirmed having purchased seized items from the shop.

As a result of the search, items were seized from the petitioner that were permitted in prison according to Internal Rules of Prisons, but that had not been purchased in the shop and did not belong to the petitioner. The items found on the petitioner were prohibited by virtue of violation of section 2.5 of the Regulations of Ämari Prison, since the petitioner had received those items from another prisoner in order to pass them to a third prisoner. On the basis of the foregoing, the Chancellor of Justice concluded that prison officers had a right to seize the items found during the search of the petitioner as prohibited items.

Under section 68(2) of the Imprisonment Act, any prohibited items and substances discovered during a search must be seized and either sold or destroyed. By virtue of section 71 of the Internal Rules of Prisons, the officer in charge of the search detail is required to draw up a report regarding the items discovered. Points 2–4 of subsection 1 of that section require the report to contain the following information: the time of discovery of the prohibited items, the name of the sentenced prisoner (including the first name) and the recommendation regarding return, sale or destruction of the items.

The report drawn up by the officers of Ämari Prison regarding the items found on the petitioner as a result of the search does not provide the time of discovery of the items, the first name of the petitioner or a recommendation regarding the return, sale or destruction of the items. On the basis of the above, the Chancellor of Justice therefore held that the report did not conform to the requirements stated in sections 71(1)(2), 71(1)(3) and 71(1)(4) of the IRP.

Under section 71(2) of the IRP, the above report must be approved by the prison governor or a person whom the governor has authorised to give the approval. The person approving the report must also decide whether the item should be turned over to the police, whether a disposition should be made of the item, or whether it should be destroyed or returned to the sentenced prisoner, or whether it should be sold and the proceeds of the sale paid into the national treasury. This means that the governor of the prison or a person appointed by the governor must, when considering whether to approve a report of this type, decide what is to be done with the items in accordance with section 68(2) of the Imprisonment Act. Amongst other things, the governor or the person appointed by the governor must have regard to the recommendation made by the person who drew up the report regarding return, sale or destruction of the items found.

Pursuant to section 1^1(1) of the Imprisonment Act, any administrative steps prescribed in that statute and in instruments adopted on its basis are subject to the rules in the Administrative Procedure Act (APA), save where a specific provision to the contrary emanates from the Imprisonment Act. Section 51(1) of the APA defines an administrative act as a directive, decision, injunction, decree or other instrument that creates, amends or terminates rights or obligations and is issued by an administrative authority in the course of performing administrative functions in order to dispose of a particular question that has arisen between parties whose relationship falls to be regulated under public law.

A prison is an administrative authority whose relationship with a sentenced prisoner is governed by public law. Any searches of sentenced prisoners, seizures of prohibited items and destruction or sale of the same must be carried out first and foremost with a view to ensuring prison security, which is one of the administrative functions of a prison. The report required under section 71 of the IRP is intended to determine how the items found on a particular sentenced prisoner are to be dealt with.

The Chancellor of Justice took the view that if the governor of a prison or a person appointed by the governor for this purpose decides to destroy or sell an item that has been seized from the possession of a sentenced prisoner, that decision effectively terminates the title of the prisoner to the item. On the basis of the above, the Chancellor held that, in the case that the governor, in approving the

report required under section 71 of the IRP, decides that the items found on the sentenced prisoner must be destroyed, that decision, although contained in a report described in section 71 of the IRP, constitutes an administrative act as defined in section 51(1) of the APA. Where a report described in section 71 of the IRP contains an administrative act such as the decision mentioned above, that report must conform to the requirements that administrative acts must comply with in order to be lawful.

Section 54 of the APA provides that an administrative act is lawful if it is issued by a competent administrative authority and is founded on a law that is valid at the time the measure was issued, provided the measure is in conformity with the law, proportionate, untainted by discretion errors and respects due form. Administrative acts must be issued in writing unless a statute or an Executive regulation provides otherwise (section 55(2) of the APA). Pursuant to section 55(1) of the APA, an administrative act must be clear and unambiguous. An administrative act issued on the basis of section 71 of the IRP must therefore be clear as to which of the decisions authorised by section 71(2) of the IRP has been selected by the governor or the person appointed by the governor regarding the items listed in the report. Section 55(4) of the APA requires an administrative act issued in writing to contain the name of the issuing administrative authority, the name and signature of the head of that authority or a person authorised by him/her, the time of issue of the act and other information required by law. Pursuant to section 57(1) of the APA, the administrative act described in section 71 of the IRP must provide information regarding the possibility, place, time limit and procedure for contesting that act (the contestation information).

Section 56(1) of the APA requires administrative acts issued in writing to contain a written statement of reasons. The statement of reasons must appear in the administrative act or in another document that is referred to in the act and is accessible to the individual whom the act concerns. Section 56(2) of the APA requires the factual and legal considerations that informed the issue of the administrative act to be cited in the statement of reasons. An administrative act provided in section 71 of the IRP must therefore state the facts on the strength of which the issuing authority reached the determination that the items seized from the petitioner were prohibited items. Furthermore, the act must state its legal basis.

The report concerning items found as a result of a search of the petitioner, approved by the Governor of Ämari Prison, does not contain a decision to destroy the seized items, nor does it state its legal basis. It also lacks the contestation information. It is true that the decision in question may in principle be drawn up as a separate document. However, the Chancellor of Juctice did not receive any information suggesting the existence of such a document. The administration of Ämari Prison did not enclose the decision to destroy items seized from the petitioner with its reply to the Chancellor's request for information.

Pursuant to section 62(2)(1) of the APA, notice of an administrative act must be served on the person whose rights the act affects, in accordance with the procedure provided in Division 7 of Chapter 1 of that statute. If the governor or a person appointed by the governor decides to destroy an item that belongs to a sentenced prisoner, such a decision amounts to an interference with the right to property of the sentenced prisoner. In this case a report provided for in section 71 of the Internal Rules of Prisons, and the decision of the governor or of a person appointed by the governor, whether stated in the report or drawn up as a separate document, must be served on the sentenced prisoner.

According to section 25(1) of the Administrative Procedure Act (APA), the persons affected by an administrative act must be served with the act by mail, by officials of the issuing administrative authority or by electronic means. Having regard to the specific situation of a prison, the Chancellor of Justice recommends effecting service of the report described in section 71 of the Internal Rules of Prisons, or of the decision of the governor (or a person appointed by the governor) on the sentenced prisoner by prison officers, as provided in sections 28 and 29 of the APA.

If the governor (or a person appointed by the governor) decides to destroy items seized from a sentenced prisoner, the report required by virtue of section 71 of the Internal Rules of Prisons or the decision that the governor (or a person appointed by the governor) has drawn up as a separate document must be served on the person whose rights it affects, in accordance with the procedure provided in Division 7 of Chapter 1 of the APA.

In the view of the Chancellor of Justice, the report provided in section 71 of the Internal Rules of Prisons regarding seizure of items found as a result of a search (containing a decision of the governor or a person appointed by the governor) or the decision of the governor (or a person appointed by the governor) regarding the destruction of the items should have been served first and foremost on the owner of the items, i.e. the sentenced prisoner from Cellblock III. The purpose of serving an administrative act on the person whom it concerns consists in making the act accessible to that person and informing the person of the rights and obligations that ensue from the act.[196] An administrative act must be served on all parties to the case and also on persons who were not involved in the proceedings but whose interests the act may affect. This is an important constitutional principle in the field of administrative law.[197] Since items belonging to another sentenced prisoner were seized directly from the petitioner, and had been intended to pass to a third sentenced prisoner, the foregoing considerations should have directed the administration of Ämari Prison to serve the report or the decision of the governor regarding the destruction of the items also on the petitioner and the third sentenced prisoner. The report provided for in section 71 of the Internal Rules of Prisons (report concerning items found during a search) does not need to be served on the persons concerned, where the decision of the governor (or of a person appointed by the governor) regarding how to proceed with those items has been drawn up as a separate document. The reason for this is that although exclusion of the petitioner from the number of those on whom the report is served does not as such infringe the rights of the petitioner, good administrative practice suggests that a report regarding the seizure of items should be notified to the prisoner from whom those items were seized. A measure of an authority or an official is only susceptible to infringe the rights of the complainant when that measure, in addition to being unlawful, entails an extinguishment or limitation of the rights that the complainant enjoys.[198]

Before an item that was found during a search of a prisoner may be destroyed, the prison governor (or a person appointed by the governor) must decide that that item should be destroyed, and state this decision in the report prescribed in section 71 of the Internal Rules of Prisons, or draw up a separate administrative act to the same effect, and arrange for service of the report or act to be effected on the prisoner concerned.

Under the terms of section 68(1) of the IRP, the item should be destroyed by a committee convened by the governor. A report must be drawn up regarding the procedure. The report should contain a description of the item, the time, place and manner of destruction, the names and signatures of officers arranging the destruction and the date of destruction. The report must be approved by the governor or a person appointed by the governor. The report that the administration of Ämari Prison drew up regarding the destruction of the items seized from the petitioner indicates that the members of the committee that was convened to destroy those items included the petitioner and the prisoner who had passed the items to the petitioner. Pursuant to section 68(3) of the IRP, a committee entrusted with the task of destroying items (and also responsible for arranging destruction in a lawful manner) should not include sentenced prisoners in its membership. Only prison officers subordinate to the governor are acceptable as members of the committee. Since the committee that supervised the destruction of items found on the petitioner included prisoners, the report regarding destruction fails to conform to the requirements established by law.

[196] Administrative Law Chamber of the Supreme Court (ALCSC), judgment of 18 December 2001 in case 3-3-1-60-01, para. 2.
[197] ALCSC, judgment of 21 February 2000 in case 3-3-1-52-99, para. 3; ALCSC, judgment of 20 June 2003 in case 3-3-1-49-03, para. 14.
[198] ALCSC, order of 12 February 1999 in case 3-3-1-3-99, para. 3.

A report regarding destruction of items must reflect the performance of the act of destruction. The obligation to destroy items ensues from the above-mentioned decision taken by the governor to destroy those items. Since the act itself does not interfere with the rights of a sentenced prisoner, the law does not require a report that bears witness to that act to be served on the sentenced prisoner. Nevertheless, good administrative practice suggests that the prison administration should inform the sentenced prisoner to whom the items belonged of the content of the report.

(5) The Chancellor of Justice recommended that the Governor of Ämari Prison amend the administrative practice in Ämari Prison and that in future special attention be given to observing the following requirements provided by law regarding seizure and destruction of prohibited items from sentenced prisoners and regarding seizure of items permitted by the Governor:

1. A decision to destroy or sell items seized from a sentenced prisoner must be drawn up as an administrative act and be served on the sentenced prisoner;
2. Reports regarding the seizure of items found during the search of a sentenced prisoner and regarding destruction of items must be drawn up in compliance with the requirements established in the Internal Rules of Prisons. Care should be taken to observe the requirements of form.

The Chancellor of Justice requested that the Governor of Ämari Prison inform him of specific measures adopted by the administration of Ämari Prison with a view to give practical effect to the Chancellor's recommendations.

In the reply to that request, the Governor of Ämari Prison expressed full agreement with the position taken by the Chancellor of Justice and informed the Chancellor that the prison administration intended to organise an additional information day to explain to officers of the prison the principles of administrative procedure and the drafting of documents.

11. Unlawful forwarding of a sentenced prisoner's request

Case 7-1/050907

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained that a request that he had addressed to the Ministry of Justice had been forwarded by the Ministry to the administration of Tallinn Prison for reply.

(2) The petitioner had submitted a complaint to the Governor of Tallinn Prison alleging that an officer of that prison had insulted him. In his reply to the complaint, the Governor stated that he had been unable to ascertain any unlawful conduct on the part of the officer in question. The petitioner then wrote to the Ministry of Justice, giving an account of the alleged incident and asking for advice on how a prisoner could assert his rights in such a situation. The Ministry of Justice informed the petitioner that the petitioner's letter had been forwarded to Tallinn Prison for reply.

To obtain the information necessary to resolve the complaint, the Chancellor of Justice wrote to the Ministry of Justice. In its reply, the Ministry explained that, in considering the petitioner's request for clarification of rights, although the request described the actions of a prison officer and referred to a reply that had already been provided by the administration of Tallinn Prison, the Ministry had decided to deal with the matter on the basis of the substantive content of the request, which expressed a desire to be informed of the possibilities open to the petitioner for the assertion of the petitioner's rights. The part of the request that described the actions of a prison officer was interpreted by Ministry officials as a statement of reasons that made the petitioner seek the information in question.

The Ministry of Justice found that the request did not manifest an unequivocal desire on the part of the petitioner to be informed of the Ministry's view regarding the reply that had been given to the petitioner by Tallinn Prison. According to the Ministry's reading, the petitioner's request was directed to obtaining information regarding the possibilities for the assertion of the petitioner's rights.

In its reply to the request, the Ministry of Justice adopted the position that both the Ministry and the prison administration were competent to provide a reply to the petitioner's request. Provision of information to a prisoner is one of the principal responsibilities of prisons. Among other things, section 14(2) of the Imprisonment Act (IA) also imposes on prisons the obligation to provide written information to their prisoners regarding the possibilities for submitting complaints while in prison. Had the petitioner's request for clarification sought the view of the Ministry concerning the reply provided by the prison, it would have been incumbent on the Ministry to reply to that request. Since, however, the substance of the request was oriented to obtaining information of a general nature regarding the possibilities for the assertion of the prisoner's rights, the Ministry took the view that that request could and in fact should be replied to by the prison administration.

(3) The case raised the question of whether it was permissible for the Ministry of Justice to forward a letter that had been addressed to the Ministry to be dealt with by the administration of Tallinn Prisonfor reply.

(4) According to the interpretation of the Ministry of Justice, the petitioner's letter constituted a request for clarification of rights. For this reason, the Ministry only attached importance to the question part of the request. The description of the prison officer's actions contained in the letter was regarded as a statement of reasons for the petitioner's questions.

The general procedure for replying to communications received by the authorities is governed by the Replies to Informational Letters and Requests for Clarification Act (RILRCA). Sections 2(2) and 2(3) of the RILRCA provide a distinction between informational letters and requests for clarification. The statute in question defines an informational letter as a communication in which an individual makes a suggestion to the addressee regarding the organisation of work in a government institution or body, or regarding the developments in a particular sphere of activities. A communication in which the individual supplies information to the addressee also constitutes an informational letter. A request for clarification is defined as a communication in which an individual seeks to obtain from the addressee information whose provision requires the analysis of, an extrapolation from or the gathering of supplementary data to information that the addressee possesses. A communication that seeks to obtain an explanation of the law as defined in section 3 of the RILRCA also constitutes a request for clarification.

It is often the case that individuals do not explicitly state in their communications which particular type of communication they intend to make. Neither has any specific format been established for informational letters and requests for clarification. A strict classification of individuals' communications in accordance with the distinction in section 2 of the RILRCA is not always possible, nor is it required by law. The mere fact that a communication contains questions does not mean that the individual only seeks answers to these questions from the authority. Questions are often preceded by a description of events or a statement of personal opinion. Only providing answers to the questions formulated at the end of a communication may not be sufficient in order to provide a substantive reply to the communication as a whole. For this reason, in replying to the communication of an individual, the authority may need to approach one part of the communication as a request for clarification and another part as an informational letter.

The communication addressed by the petitioner to the Ministry of Justice was entitled 'ходатайство' (Russian for petition, request[199]). This does not provide a clear indication of whether

[199] Source for English translation: http://get-translation.com/dictionary.php--transl.

the communication was to be regarded as a request for clarification or an informational letter. The communication contained a detailed description of what was alleged to be unlawful conduct on the part of a prison officer. In the communication, the petitioner also expressed his dissatisfaction with the reactions of the prison administration to a complaint that the petitioner had submitted regarding the incident. For these reasons, the Chancellor of Justice held that in establishing the purpose of the communication, the Ministry had ascribed excessive importance to the questions set out at the end of the petitioner's request.

Pursuant to section 3(2)(2) of the RILRCA, an informational letter may be used, among other things, to provide information to the addressee. Under section 5(1) of the same statute, a letter providing information must be replied to, even if the letter does not contain an explicitly stated request to that effect. The statute does not provide an obligation to give reasons for a request for clarification. Thus the observations that precede the questions contained in an individual's communication should not be approached as mere reasons for a request for clarification, to which the obligation to reply does not apply (except in the case specified in section 5(9)(4) of the RILRCA). Hence such an approach cannot be regarded as justified.

If a request communicated by an individual is unclear as to what it is precisely that the individual seeks by including certain information in that request, the addressee of the request must have recourse to the investigative principle provided in section 6 of the Administrative Procedure Act (APA). This means that, where necessary, the addressee must contact the individual in order to clarify what it is that the individual seeks to obtain by submitting the information.

Prisons are institutions that fall into the sphere of authority of the Ministry of Justice. Under section 105(1) of the IA and section 95(1) of the Cabinet of Ministers of the Republic Act, it is the duty of the Minister of Justice to exercise oversight of service provision in prisons. The power to impose disciplinary sanctions on any prison officer is also vested in the Minister of Justice (section 148 of the IA). This means that the Ministry of Justice was the authority competent to reply to the questions formulated in the prisoner's communication.

In view of the above, the Chancellor of Justice held that a duty to reply was incumbent on the Ministry of Justice, not only in respect of the questions formulated by the petitioner in his request, but also in respect of information concerning the alleged misconduct on the part of the prison officer, and in respect of the reply provided by the prison to the petitioner's complaint. If the request was unclear as to the purpose of submitting the corresponding information, the Ministry of Justice was obligated by virtue of section 6 of the APA to clarify the matter.

Section 5(5) of the RILRCA provides that an institution or body that has received an informational letter or a request for clarification may forward that letter or request to an institution or body of the provision of service in which it exercises oversight, provided that such forwarding is not incompatible with the substance of the letter or request. It is quite clear that that provision also encompasses the prohibition, previously contained in section 5 of the RILRCA as amended to 9 December 2004, to forward informational letters containing a complaint for reply to the body or the official whose actions are the subject of that complaint.

The Chancellor of Justice concluded that the forwarding of the petitioner's the request to Tallinn Prison for reply was incompatible with the substance of that request and hence unacceptable, since the request contained information concerning an instance of alleged misconduct by an officer of that prison. Furthermore, it should have been taken into account that the petitioner had already approached the administration of Tallinn Prison in the matter and had, in the relevant request, also expressed his dissatisfaction with the reply provided by the prison.

(5) In the case, the Chancellor of Justice issued the following recommendations to the Ministry of Justice regarding the provision of replies to communications by individuals under the procedure

established in the Replies to Informational Letters and Requests for Clarification Act:

1. If, in addition to specific questions, the individual's communication also contains information regarding an event, the Ministry of Justice should verify whether merely replying to the questions constitutes an adequate response to that information.
2. If replying to the questions does not constitute an adequate response to the information, the reply must also deal with the part of the individual's communication that contains information regarding the event.
3. If the individual's communication is unclear as to the purpose of submitting the information, the Chancellor of Justice recommends that the individual be contacted at the earliest convenience of the Ministry in order to clarify his/her aim in submitting that information.
4. If the individual's communication contains information regarding the actions of an institution that falls within the sphere of authority of the Ministry of Justice, and in that communication the individual expresses his/her dissatisfaction with those actions, the communication must not be forwarded to that institution for reply.

The Chancellor also recommended that the written guidelines of the Department of Prisons of the Ministry of Justice be amended to give effect to Recommendations 1–4.

The Ministry acceded to the first three recommendations. Regarding the recommendation according to which an individual's request must not be forwarded for reply to the institution with whose actions the individual has expressed dissatisfaction in the request, the Ministry expressed the view that such a request would have to be replied to by the Ministry only if that individual had already addressed a request in the same matter to a subordinate institution of the Ministry. For instance, dealing with various issues relating to prison amenities and overseeing the everyday work of prison officers is first and foremost the duty of the prison administration, since the relevant immediate supervisors can discharge that duty directly and with the greatest efficacy. It is significantly simpler and faster for problems pointed out in the request to be dealt with by the prison administration. The Ministry should only interfere where the prison has failed to deal with the question or problem raised in the prisoner's communication. The Chancellor of Justice accepted the Ministry's view as constructive since it was in accordance with the principle of good administration and at the same time made provision for the efficient work arrangement of government agencies. For these reasons, the Chancellor considered that no further steps were required in the case.

12. Placement of a sentenced prisoner during a large-scale search

Case 7-1/050545

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained about a search conducted in Murru Prison.

(2) A special armed unit of prison officers conducted a large-scale search in Murru Prison. During the search of the cellblock in which the petitioner's cell was located, the petitioner and other sentenced prisoners who were inmates of the same block were ordered to leave the block. After this, they were taken to outdoor exercise enclosures and kept there for an hour and a half (from 10:00 a.m. to 11:30 a.m.). The outside temperatures on that day in Estonia ranged[200] from –3.4°C to +1.5°C. The petitioner had already communicated requests in the matter to Murru Prison and to the Ministry of Justice.

According to the petitioner, before they were escorted away from their cells the prisoners were not informed of the fact that they would have to spend the following 90 minutes in exercise enclosures. The prisoners were therefore allegedly unable to select clothes appropriate for the occasion.

[200] According to information available on the site www.ilm.ee (the weather in Estonia—transl.).

In order to obtain information necessary for the resolution of the petition, the Chancellor of Justice wrote to the Minister of Justice. In his reply the Minister referred to sections 68(1) and 67(2) of the Imprisonment Act (IA) and section 5(2) of the Administrative Procedure Act (APA) as grounds for directing the petitioner to leave the cellblock and for placing the petitioner in an exercise enclosure. The reply also pointed out that neither the Imprisonment Act nor the Administrative Procedure Act could be construed as creating a right for the petitioner to be present when his belongings were searched. In order for the search to be conducted in an efficient manner and to save time, prisoners are directed to leave their cells for the duration of the search. The aim of directing prisoners to leave the cell consists in avoiding situations in which they would directly interfere with the search and to reduce possibilities for concealing or hiding prohibited items.

According to the reply of the Minister of Justice, there was no suitable facility that could be used to hold the prisoners separately in the vicinity of Cellblock 9 of Murru Prison, the facility in which the petitioner was serving his sentence when the search was conducted. For security reasons and in order to ensure the efficiency of the search it was deemed inexpedient to move the prisoners to a more distant facility. The prisoners were not informed that they would be taken to exercise enclosures and held there for over an hour. They were, however, directed to dress warmly, and were given 10 minutes' time to get ready. The search by the armed unit was prepared pursuant to section 6(2) of Minister of Justice Regulation 81, "Regulations for the Activities of the Armed Unit" of 12 December 2002 ('Regulations of the armed unit').

(3) The question raised in the case was whether the order issued to the petitioner to leave the cellblock was lawful. The issue of whether it was lawful to take the petitioner to the exercise enclosure was considered separately.

(4.1) Since under section 1^1(1) of the IA any administrative actions prescribed in the Imprisonment Act and in the instruments adopted on its basis are subject to the provisions of the Administrative Procedure Act (APA), the Chancellor of Justice took the view that for the purposes of the second sentence of section 55(1) of the APA, an order directing the petitioner to leave his cellblock for an urgent arrangement to be made constituted an administrative act issued orally.

In the case at hand, the Chancellor did not deem it necessary to verify the formal legality of the order (i.e. whether it came from a competent official, whether the procedural requirements were met and whether it was issued in due form). Hence, the first thing that had to be verified was the legal basis that empowers prison officers to issue orders such as the one complained about by the petitioner. The next step of the analysis focussed on whether the requirements provided by law for the issue of the order had been complied with.

Under paragraph 1 of Article 3 of the Constitution, the fundamental rights and freedoms and other rights of individuals may only be circumscribed by statute. It should be pointed out that this principle also applies to sentenced prisoners. This means that, in the absence of a proper legal basis, prison officers cannot issue arbitrary orders restricting a sentenced prisoner's rights, even where they deem such orders necessary. The Supreme Court has also observed that "[t]he fact that an individual is serving a sentence for having committed an offence in relation to which limitations have been imposed on his fundamental rights and freedoms in accordance with the law does not justify interference with the fundamental rights of that individual to an extent that goes beyond that which directly emanates from the law."[201]

Section 8(1) of the IA provides that from the morning wake-up call to the lights out call, sentenced prisoners are allowed to move freely within the grounds of a closed prison subject to the provisions of Minister of Justice Regulation 72 "Internal Rules of Prisons" of 30 November 2000 (IRP). Under section 8(1) of the IRP, sentenced prisoners are entitled to move freely within their cellblock. That right does not apply in a disciplinary cell, segregation cell or inpatient medical or health ward.

[201] Administrative Law Chamber of the Supreme Court, judgment of 22 March 2006 in case 3-3-1-2-06 (unofficial translation—transl.).

An order to leave, for the time of a search, the cellblock that the petitioner was housed in limited the right that the petitioner had under section 8(1) of the IA. First, the Chancellor considered whether the provisions referred to in the reply by the Minister of Justice constituted a sufficient basis for issuing an order such as was issued to the petitioner in the case.

Section 68(1) of the IA empowers prison officers to search sentenced prisoners, including sentenced prisoners' personal belongings, cells and other facilities used by those prisoners in order to discover prohibited items and substances. During a personal search of a sentenced prisoner that prisoner is, understandably, required to stay put, and his/her right to free movement is restricted. A distinction must, however, be made between a personal search of a prisoner and a search of that prisoner's cell or belongings. In the latter case, the provision in question does not appear to constitute a sufficient basis for ordering the prisoner to leave the cell while his belongings are searched. The obligation imposed by section 67(2) of the IA on sentenced prisoners not to interfere with prison officers who are performing their duties will be fulfilled when there is no interference from the prisoner with the search conducted by prison officers. Hence the section in question does not require that prisoners leave their cells for the duration of the search.

The requirements of suitability to purpose and efficiency provided in section 5(2) of the APA should be regarded as guidelines addressed to government agencies. These guidelines describe the way that, in an administrative matter, government agencies should exercise powers vested in them by law. The guidelines in question do not authorise any derogation from the requirement of a legal basis. Hence, in order to ensure the efficiency and suitability to purpose, government agencies may not have recourse to measures for which no legal basis exists.

In addition to the foregoing, the reply provided by the administration of Murru Prison to the petitioner's request stated that under section 55(2) of the IA, prisoners' outdoor stays of over one hour do not constitute an infringement of the law. However, any compulsory placement of prisoners out of doors (especially during winter) is clearly unacceptable under the provision in question. Section 55(1) of the IA provides that prisoners must be proposed exercise out of doors lasting at least one hour per day. To propose, however, means to offer an opportunity to engage in an activity, as opposed to compelled performance of that activity.

The above shows that the provisions of the Imprisonment Act and of the Administrative Procedure Act referred to in the reply of the Minister of Justice do not constitute grounds for limiting, in the manner that was done in the case at hand, the right of sentenced prisoners to move freely within their block.

The Imprisonment Act authorises limitations of the right that a sentenced prisoner enjoys by virtue of section 8(1) of the IA if such limitations are imposed by way of disciplinary sanctions (placement in a disciplinary cell) or by way of establishing additional security measures, provided the conditions laid down in section 69(1) of the IA are met. Thus limitations on a prisoner's right of free movement cannot be ruled out for the time that it takes to search his/her cell and belongings. Such limitations may be imposed pursuant to section 71(3) of the IA, which authorises a prison officer acting in the line of duty, if required by security considerations, to designate an area surrounding him/herself or other persons or objects as a no-go zone that the officer will then be entitled to enforce by means of physical force, special equipment and cold and gas weapons.

Conducting searches of prisoners or their cells is part of the duties of a prison officer. This means that during searches, the preconditions for applying section 71(3) of the IA exist, and prison officers are entitled to designate no-go zones. Hence they are also entitled to issue directives to prisoners to keep out of such zones. In order to verify whether the directive issued to the petitioner was lawful, the Chancellor of Justice proceeded to check whether, on the basis of information gathered in the case, the restrictions imposed on the petitioner's right of free movement could be deemed compatible with section 71(3) of the IA.

Since it is not mandatory for a prison officer to designate a no-go zone, the officer must use discretion in deciding whether or not to establish such a zone. Under section 4(2) of the APA, in taking a discretionary decision regard must be had to the purpose of the discretion. In exercising discretion, government agencies and officials may not contravene the purpose and substance of the statute that they are applying, or more specifically, the purpose of the rule authorising that particular instance of discretion.[202]

The purpose of establishing a no-go zone is explicitly provided in section 71(3) of the IA. This purpose is restricted to ensuring the safety of the person or object around which the zone is established. The Imprisonment Act contains no legal basis for limiting prisoners' right of free movement in order to ensure the efficiency of a search of the cells, i.e. to reduce the possibilities *inter alia* for direct interference with the search, for hiding prohibited items, to save time, etc.

In view of the above, the Chancellor of Justice concluded that establishing a no-go zone for the purpose set out in the reply of the Minister of Justice would constitute an erroneous exercise of the discretion provided in section 71(3) of the IA. At the same time, the Chancellor observed that, as a rule, the establishment of a no-go zone during the searching of cells also serves the purpose of ensuring the safety of prison officers, regardless of the purpose subsequently cited in the reasons for the relevant decision. This means that the discretionary decision to establish a no-go zone in the petitioner's case, and the order issued to the petitioner may still have been lawful. Since the Chancellor was not in a position *ex post facto* to assess the situation in which the prison officers had acted, it was impossible for him to give a clear verdict in the matter.

The Chancellor did not rule out the possibility that the efficiency of a search may constitute a legitimate purpose that might require limiting a prisoner's right of free movement deriving from section 8(1) of the IA by means of establishing a no-go zone or otherwise. However, the Chancellor reiterated that rights could only be limited by statute. If practice should reveal that the current legal framework falls short of providing for the efficient supervision of prisoners, the law must be amended.

In addition to the above, in order to assist in the further elaboration of practices in the field of prisoner supervision, the Chancellor deemed it necessary to draw the attention of the Minister of Justice to the following:

When a special armed unit of prison officers is conducting a planned operation as defined in section 6(2) of the Regulations of the armed unit, there is no specific and immediate threat to the security of the prison concerned or to other legal values. This means that the investigative principle enshrined in section 6 of the APA imposes a duty on the planners of the operation to establish in advance all significant facts that are relevant from the point of view of ensuring the security of prison officers during the search (e.g., the number of prisoners in a block, the area of the block, its configuration and structural/layout particularities, the attitudes prevailing among the prisoners of the block). Only in this way will all preconditions be fulfilled for adopting a correct discretionary decision that substantively considers all of the relevant facts of the case.

Under the second sentence of Article 11 of the Constitution and section 3(2) of the APA, the establishment of a no-go zone as well as the area of that zone and its duration must be proportionate to the purpose served by the zone. The legitimate purpose by reference to which the proportionality of a no-go zone must be assessed under the current legal framework consists in ensuring the safety of prison officers who are conducting a search or of other persons. In principle, it would be possible to establish a no-go zone that covered an entire cellblock (in particular when other measures that are less stringent in terms of their impact on the prisoners are inadequate for ensuring the safety of prison officers or of other persons). Due to the intensity of the restriction imposed on the prisoners'

[202] K. Pikamäe. Kaalutlusvigadest [Of Errors in Exercising Discretion, by K. Pikamäe] – the Law Review "Juridica" 2006, p. 80.

right of free movement, the establishment of no-go zones on such a scale should be confined to exceptional cases.

(4.2) In the case at hand, on a winter day prisoners were placed for over an hour in outdoor exercise enclosures that only provided limited protection against the weather. Thus prisoners were forcibly put in a situation that, regardless of the order to 'dress warmly', presented a significantly higher risk to health than the conditions in the cellblock.

There is no specific provision in applicable legislation as to where sentenced prisoners may be held for the time of a search. This does not mean, however, that they may be arbitrarily taken out of doors, compelled to sit on a cold floor, etc. When directed to leave the cellblock, the prisoner is deprived of his right to free movement deriving from section 8(1) of the IA. The freedom of movement and the location of the prisoner in such a case is determined on a discretionary basis by the prison officer overseeing the prisoner. In exercising his/her discretion, the officer must take guidance from section 66(1) of the IA, which requires that the supervision of sentenced prisoners be organised in a manner that ensures compliance with the Imprisonment Act, the internal rules of the prison and the general security arrangements of the prison.

If, in the course of a search a sentenced prisoner is ordered to leave his/her cellblock, the decision as to his/her whereabouts upon leaving those premises must be informed by the principle of proportionality, i.e. only such limitations may be imposed on the prisoner as are unavoidably necessary for compliance with section 66(1) of the IA.

At the same time, it should be taken into account that Article 18 of the Constitution bars the placement of prisoners, for the time of a search, in any place where they would be subject to degrading treatment. Another provision of the Constitution that must be reckoned with is parragraph 1 of Article 28, which proclaims that everyone has a right to the protection of his/her health. This means that, in discharging their duties, prison officers must seek to ensure the protection of prisoners' health as best possible under the circumstances and abstain from placing prisoners in conditions that present a health risk.

In view of the fact that the reply by the Minister of Justice to the Chancellor's request for information was extremely laconic in its statement of the reasons for placing prisoners in exercise enclosures, it remained unclear why security considerations had made it inexpedient to place prisoners in a facility that was not in the vicinity of Cellblock 9. Mere reference to unspecified and abstract categories does not make the imposition of a restrictive measure lawful.

The case at hand involved a pre-planned operation as defined in section 6(2) of the Regulations for the activities of the armed unit. The preparation stage of the operation left the planners sufficient time to consider other, less restrictive ways of holding prisoners, as well as other locations or facilities where prisoners could be held so as to protect their health as best possible, even if this was complicated because of the specific situation in the particular prison.

The Chancellor took the generality of the reasons given by the Minister of Justice in the case at hand as an indication that the options for holding prisoners during the search had not been analyzed in sufficient detail. As a result, on a winter day prisoners were inconsiderately placed in a facility that did not provide any protection against the weather. For this reason the Chancellor held that placing the petitioner in the exercise enclosure violated the petitioner's right to the protection of his health.

In addition to the above, the Chancellor found that in a situation where the prison administration has no information suggesting a specific threat to the security of the prison or to another important legal value, the extent of the planned search should be reduced or the search should be abandoned altogether if it unavoidably entails the placement of prisoners in conditions that present an increased risk to their health.

(5) In accordance with section 7(2) of the Regulations for the activities of the armed unit, the commanding officer of the unit is subordinated to the Minister of Justice through the Ministry's Deputy Secretary General for Prisons. Hence it was to the Minister of Justice that the Chancellor addressed the following recommendations for organising future activities of the armed unit of prison officers:

1. During searches, the establishment under section 71(3) of the IA of no-go zones that limit prisoners' right of free movement should only be employed when necessary to ensure the security of prison officers or other persons. The extent of a no-go zone and the duration for which such a zone is established should also be informed exclusively by security considerations.
2. When security considerations dictate a need to establish a no-go zone covering an entire cellblock, the placement of prisoners in conditions that constitute a health risk must be avoided.
3. Where the special armed unit of prison officers is preparing a pre-planned operation, the intended no-go zones and the reasons for their designation should be noted in the operation plan required under section 45 of Minister of Justice Regulation 23, "Supervision of administration of custodial sentences and remand custody" of 1 April 2003. Among other things, this will make it possible to review the legality of the no-go zones established.
4. Where, in order to ensure security, it is unavoidably necessary to establish a no-go zone covering an entire cellblock, the plan of the search operation must designate the facility where prisoners will be held during the search, and reasons must be given for selecting that particular facility.
5. The legislation governing searches and the activities of the special armed unit should be amended so as to give effect to Recommendations 3 and 4.

The opinion of the Minister of Justice was that the hitherto search practices of the special armed unit of prison officers are lawful in the context of the current system of prison facilities and the layout particularities of prisons. These practices are also necessary in the light of the purpose of custodial sentences, and they do not unjustifiably infringe the rights of prisoners. The freedom of the petitioner has been limited in order for a sentence imposed by a court judgment to be carried out. This means that the petitioner has been deprived of his right to free movement pursuant to the law. For this reason, the provisions of Article 20 of the Constitution do not apply in his case. The Minister conceded that sentenced prisoners' rights under section 8 of the IA cannot be limited in an unjustifiable and disproportionate manner. Still, barring a sentenced prisoner access to the premises searched for a short period of time constitutes a measure that should be regarded as proportionate. The Minister also conceded that the placement of sentenced prisoners during a search must be organised so as not to endanger their lives or health. In the Minister's view, however, this requirement will be satisfied if prisoners are informed at the start of the search that they will be taken out of doors and advised to dress warmly. The Chancellor decided not to take any further steps in the case at hand. At the same time, the Chancellor stated that in 2007 he intends to perform a detailed analysis of preconditions that must exist for lawful limitations to be imposed on prisoners' right of free movement in the course of large-scale searches. The Chancellor's opinion and his eventual recommendations regarding the modification of current practice will be communicated to the Minister of Justice in due course.

13. Destruction of a prisoner's personal belongings and payment of a release allowance to a releasee

Case 7-1/051596

(1) A sentenced prisoner from Tartu Prison petitioned the Chancellor of Justice, seeking the Chancellor's opinion of the regulations established for payment of release allowances and of the destruction of personal belongings of prisoners.
(2) The petitioner had been a remand prisoner (defendant in a criminal case), who had been placed

in Tartu Prison as of 23 November 2004. On 4 August 2005 the petitioner was transferred to Narva Police Detention Centre of the East Estonia Police Force for trial in Narva City Court. The petitioner's personal belongings were kept in the storage facility of Tartu Prison. The petitioner was convicted in Narva City Court and ordered to serve a 10-month custodial sentence. The time that the petitioner had spent in pre-trial detention (over 9 months) was considered part of that sentence. Narva Police Detention Centre was designated as the place where the remainder of the sentence was to be served. The ten months expired on 29 August 2005 and the petitioner was duly released from the police detention centre. However, no release allowance was paid to the petitioner since the convicting judgment entered in his case had not been received in the police detention centre by the day of release. Thus, the petitioner was released before the police detention centre had received the relevant judgment.

On 21 September 2005 a trial took place in another criminal matter concerning the petitioner, who was remanded in custody in the courtroom. His personal belongings, which had remained in the storage facility of Tartu Prison from his last stay in that prison were destroyed on 4 October 2005, i.e. at the time when the petitioner had been remanded in custody.

The petitioner notes that upon release the petitioner did not have any money and thus could not afford to travel to Tartu to collect the belongings kept at the prison there. When in Tartu Prison, on 10 October 2005 the petitioner addressed a request to the prison administration, seeking return of the belongings in question. The administration replied that the belongings were no longer in the storage facility.

The Chancellor of Justice addressed a request for information to Tartu Prison and to the East Estonia Police Force.

According to the Governor of Tartu Prison, the petitioner's belongings were kept at the prison because it was unclear how long the petitioner would be held in the police detention centre. This was so because the petitioner's personal file had been sent to the police detention centre together with the petitioner.

The reply of the Chief Officer of the East Estonia Police Force stated that the petitioner was released from Narva Police detention centre on 29 August 2005 at 10:35 a.m. on the grounds of having served the sentence imposed. A copy of the judgment, which had become final, was sent from the Office of Narva City Court to Narva Police detention centre on 30 August 2005.

The administration of Narva Police Detention Centre did not inform Tartu Prison of the release of the petitioner. It was not considered necessary to inform the prison since the final date of a sentenced prisoner's sentence and the date of that prisoner's release appear in the single national register of sentenced prisoners, remand prisoners and arrested persons (the register of prisoners). Information of a general nature entered in that register is accessible to officers of prisons and police detention centres.

According to the Chief Officer of the East Estonia Police Force the petitioner did not receive a release allowance. At the time of the petitioner's release, the administration of the police detention centre did not know whether the judgment in the petitioner's case had become final or whether an interlocutory appeal had been filed in a higher court. According to the information available to the East Estonia Police Force the final judgment that contained the petitioner's sentence was received in Narva Police detention centre by post on 1 September 2005, i.e. after the petitioner's release.

(3) The principal question in this case was whether the destruction of the petitioner's personal belongings and the refusal to pay the petitioner a release allowance was compatible with good administrative practice.
(4) The procedure for dealing with the personal belongings of released prisoners is provided in

section 64 of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000. A systematic interpretation of that provision suggests a distinction between prisoners who are (hopefully) permanently released and prisoners who are removed from the prison but whose sentences continue to run and whose freedom continues to be restricted. The provision clearly states that, when a prisoner is released from prison, his/her personal belongings must be returned to him/her (subsection 1). Prisoners who have been released must themselves make arrangements to retrieve their belongings. Hence, if a prisoner, after being released from a prison, leaves his personal belongings there and does not return to claim them later, the belongings will be destroyed after a period of one month following the prisoner's departure from the prison (subsection 4).

The so-called temporary absences of prisoners (for instance due to being transferred to another prison or police detention centre, or for other reasons causing the prisoner to be temporarily absent from the prison) are governed by subsections 2 and 5. Thus, subsection 5 provides that if a prisoner leaves a prison temporarily his belongings will be kept in storage in the prison. In the latter case it is clear that since the prisoner does not have full control of his/her movements, the prison must continue to store his/her belongings beyond the deadline provided in subsection 4 of section 64.

In view of the above it is clear that the destruction of the petitioner's belongings essentially took place in accordance with the deadline provided in the internal rules—the petitioner was released on 29 August 2005 and the belongings were destroyed on 4 October 2005. The dates of the release and of the destruction of belongings were separated by a period longer than one month.

Nevertheless, the Chancellor held such an approach to be excessively formalistic. In order to resolve a matter in accordance with good administrative practice, all of the relevant facts of the case must be evaluated as a whole. A fact of particular importance in the case at hand was that the personal belongings of the petitioner were destroyed when, following his release, the petitioner had been remanded in custody in another matter. This meant that the petitioner's freedom and ability to retrieve the belongings were severely restricted. The administration of the prison could, and indeed should have taken that into account. In principle, an individual who fails to promptly retrieve his/her belongings upon release from custody can be faulted for that failure. However, in this particular case a fact that should be taken into account in this regard is that the petitioner did not receive a release allowance, which among other things would have permitted the petitioner to pay transport fares. A further fact to be considered in the case is that, where a time limit has been established for performing an act, a person is entitled to perform that act during the entire time limit, and cannot be expected to perform the act immediately.

The reply by the East Estonia Police Force indicates that the petitioner was released from the police detention centre on 29 August 2005. The final judgment convicting the petitioner was only received in the police detention centre on 1 September 2005, i.e. after the petitioner had been released. This was presented as the reason for which the police detention centre refused to pay the petitioner a release allowance. In fact, it was unclear on what grounds the petitioner was released in the first place.

Under section 75(3) of the Imprisonment Act (IA), the objects, documents and personal clothing kept in the prison's storage facility must be returned to the releasee. Subsection 4 of the same section provides that at the time of release a release allowance must be paid to the releasee from the sums deposited in his personal account. In the event that the total of sums deposited towards the release allowance is less than the monthly unemployment benefit, a one-off grant must be paid to the releasee in an amount equivalent to the difference between those sums and the monthly unemployment benefit. Since a judgment that had been entered in the petitioner's case became final on 20 August 2005, the provision in question mandated that the petitioner be returned his belongings and be paid a release allowance.

The investigation of the petitioner's case demonstrated a lack of communication between the court,

the prison and the police detention centre. The Chancellor of Justice concluded that that lack of communication was the result of inadequate cooperation between the institutions involved. Institutions discharging duties that arise from the same legislative instrument and are substantively similar must organise their cooperation so as to rule out encroachment on the rights of the individuals concerned by their actions.

(5) In the petitioner's case, the Chancellor of Justice made the following suggestions to the Minister of Justice, the Minister of Internal Affairs, the Governor of Tartu Prison and the Chief Officer of the East Estonia Police Force:

1. to elaborate, within existing means, a common policy for cases in which a remand prisoner is transferred for trial to a police detention centre and is then left there to serve out his sentence (procedures concerning the personal belongings of that prisoner, the payment of a release allowance to the prisoner, etc.);
2. to answer the question why Tartu Prison proceeded to destroy the personal belongings of the petitioner in a situation when the petitioner had been remanded in custody in another matter (even if the prison administration did not have any information regarding the decision to remand the petitioner, it could still have verified whether or not the petitioner was currently in custody);
3. to consider, in cooperation between all institutions involved in the matter, finding a solution to the problem that arises when the document effecting release of a prisoner (a court judgment) fails to reach the place of custody prior to the release of that prisoner. It should be possible for successful cooperation in this field to lead to a state of affairs in which releasees will not be denied their release allowance for the mere reason that a copy of the relevant judgment fails to reach the place of custody in time for the release;
4. to examine and modify arrangements for information exchange between the institutions subordinated to the relevant Ministries, in order to avoid a lack of clarity in the case of transfers and make provision for turning over the personal file of a prisoner transferred from one prison or police detention centre to another.

In his reply, the Minister of Justice noted that he considers it necessary to amend Regulation 72 concerning the IRP by inserting a rule that would require the prison administration to verify, before proceeding to destroy any objects in its storage facility, whether or not the owner of those objects is in custody. Both the Minister of Justice and the Minister of Internal Affairs noted that they were considering a joint memorandum to prisons and police detention centres, which would provide guidelines for any exceptional situations encountered in releasing prisoners to be resolved in a manner that does not infringe the rights of the releasees. The memorandum has to date been prepared and communicated to custodial institutions subordinated to various ministries.

14. Discretionary decision to grant or deny a sentenced prisoner prison leave

Case 7-1/051574

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained that he was denied prison leave, which he had sought for a series of appointments with a notary.

(2) For the first time, the petitioner had requested prison leave (as defined in section 32 of the Imprisonment Act (IA)) in May 2005 in relation to the death of the petitioner's mother (in order to accept the inheritance). The petitioner was only granted supervised leave under section 33 of the IA. Although the plan of intended appointments annexed to the request for prison leave also included an appointment with a notary to accept the inheritance, the petitioner was denied this appointment. The petitioner submitted another request for prison leave in September 2005. The petitioner was once again offered supervised leave under section 33 of the IA.

In order to gather information required to resolve the petition, the Chancellor of Justice wrote to

the administration of Murru Prison. In its reply, the administration stated that the petitioner was denied the prison leave described in section 32 of the IA in application of section 83(3[1]) of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 (IRP) due to the fact that the petitioner had four active disciplinary sanctions. The petitioner's second request was also denied because of the existence of an active disciplinary sanction.

(3) In the petitioner's case, the decisions of the Governor of Murru Prison to deny prison leave to the petitioner had to be scrutinised for compliance with the relevant legislation.

(4) The Governor of Murru Prison had granted the petitioner short-term supervised leave (section 33 of the IA) on the basis of the request that the petitioner had submitted in May 2005, but denied the petitioner prison leave (section 32 of the IA). From the point of view of a sentenced prisoner, short-term supervised leave is significantly less favourable than prison leave since it entails constant supervision and leaves the prisoner very little freedom of action. It is also significant that, in the case of short-term supervised leave, the prisoner is required to bear at least part of the cost of supervision (see section 33(2) of the IA). This means that short-term supervised leave is financially more onerous to the prisoner than prison leave, which by and large entails only those costs that arise from the prisoner's acts.

Under section 32(1) of the IA the governor of a prison is empowered to authorise prison leave[203] of up to a total of 21 calendar days per year to sentenced prisoners who have served at least one year of their sentence. The governor may also authorise prison leave for a period of up to seven days in the case of a family event of extraordinary importance (section 32(5) of the IA).

Authorizing prison leave is a discretionary power of the governor. This means that the relevant legislation does not provide unconditional directions to the governor as to what he or she must do when faced with a particular set of facts. Instead, the governor is allowed a choice of several courses of action. With the exception of a limited number of extraordinary situations, the requesting individuals in such situations are not entitled to require that the relevant official act in a specific way. However, individuals will still be entitled to expect that their case is considered in accordance with the requirements arising from law and that the decision is untainted by errors of discretion.

On the basis of the above, the Chancellor proceeded to a verification of whether the governor's exercise of discretion had been tainted by errors of form or of procedure that may have substantively influenced his decision. The Chancellor also verified whether the governor's decision was in conformity with the applicable rules and the general principles of law, whether there was a legal basis for the decision, whether the decision did not go beyond the limits of the discretion, and whether the decision was tainted by any other substantive errors of discretion.

Under section 1[1](1) of the IA, any administrative steps prescribed in the Imprisonment Act and in the instruments adopted on its basis are subject to the provisions of the Administrative Procedure Act (APA). According to section 4(2) of the APA, the official or body exercising discretion must do so with due consideration to the limits of the discretionary power, the purpose of discretion and the general principles of law, having regard to all important facts and considering the legitimate interests at stake.

The Administrative Law Chamber of the Supreme Court has noted that "[…] recourse to discretion in the cases provided by law is not merely a right but also a duty of the administration."[204] Should the exercise of discretion be renounced in a particular case, an error of discretion will have been committed. In the court's opinion, in such a case one would be dealing with "[…] a situation in which the government agency competent to exercise discretion fails to consider all of the facts of the

[203] A note concerning a parallel Estonian expression, irrelevant for the English translation—transl.
[204] Administrative Law Chamber of the Supreme Court (ALCSC), judgment of 11 November 2002 in case 3-3-1-49-02, para. 11.

situation and all options open to it in resolving the matter."[205]

Under section 32(4) of the IA, in ruling on a request for the authorisation of prison leave the governor of a prison must have regard to the circumstances surrounding the commission of the offence of which the prisoner was convicted, the prisoner's progress in fulfilling his/her individual sentence plan and the suitability of prison leave in the context of achieving the aims of the custodial sentence imposed on the prisoner.

Both the reply to the request for information addressed to the administration of Murru Prison and the relevant decrees of the governor indicated that in considering the requests submitted by the petitioner, the circumstances surrounding the commission of the offence of which the petitioner was convicted and the petitioner's progress in fulfilling the individual sentence plan were not taken into account. The suitability of prison leave in the context of achieving the aims of the petitioner's custodial sentence was evaluated exclusively by reference to active disciplinary sanctions. This evaluation was deemed to warrant the position that the active sanctions in question dictated denying the petitioner's request for prison leave as incompatible with the aims of the petitioner's custodial sentence.

Indeed, section 83(3[1]) of the IRP provides that a prison governor may refuse to authorise prison leave if the requesting prisoner has an active disciplinary sanction. The provision in question, however, is not couched in imperative terms, which means that prisoners with an active disciplinary sanction are not automatically excluded from being granted prison leave. Having an active disciplinary sanction, of course, remains an important consideration in resolving a request for prison leave[206] but does not relieve the governor of his duty to consider other facts as well (in particular, those listed in section 32(4) of the IA).

It follows from the above that the presence of an active disciplinary sanction cannot be considered a decisive factor that determines the conformity or lack of conformity of requested prison leave to the aims of the custodial sentence imposed on the prisoner. The decision of what facts should be taken into consideration in a particular case depends on the nature of the case. In the petitioner's case the Chancellor pointed out the following considerations, all of which were in his opinion either known to the prison administration or could have been established in a very short time.

By the time of the submission of the first request for prison leave the petitioner had served a significant part of his custodial sentence, of which less than a year remained. The petitioner had requested a period of prison leave in order to make arrangements to receive an inheritance. Being provided for upon release from prison constitutes an important guarantee that supports the achievement of one of the aims of a custodial sentence—transforming the convicted prisoner into a law-abiding member of society (section 6(1) of the IA). Although it is possible for a notary to make a prison visit, this tends to be more complicated and is more expensive for the prisoner than a walk-in visit to the notary's offices (in the case of notarial acts performed outside the notary's offices or outside the notary's normal working hours, a supplementary charge of 60 *kroon* per hour will be added to the notary's fee). The requesting prisoner must also make the transport arrangements necessary in order to perform the notarial act. If the notary's personal vehicle is used for transport, an additional charge of 60 *kroon* per hour of vehicle use will apply (sections 36(2) and 36(3) of the Notaries' Fees Act). In addition to these, there may well have been other facts in the petitioner's case that should have been considered as relevant in the context of ruling on the request for prison leave.

Pursuant to section 6 of the APA the prison administration is under a duty to establish the facts that are important in the case and must, where necessary, collect supplementary evidence required in

[205] ALCSC, judgment of 6 November 2002 in case 3-3-1-62-02, para. 18.

[206] In this connection it should also be stressed that merely establishing the existence or absence of an active disciplinary sanction is not enough, since section 63(1) of the IA allows a number of disciplinary sanctions of varying severity to be imposed on prisoners. Thus, a reprimand issued for a minor infraction of prison discipline cannot be attributed the same weight in resolving the prisoner's request for prison leave as several weeks of placement in a segregation cell, imposed for a serious offence.

order to establish such facts. Hence, the administration may not justify its failure to consider facts other than the existence of an active disciplinary sanction by the absence of an explicitly stated desire to that effect in the petitioner's request.

In the case at hand the Chancellor took the view that the Governor of Murru Prison had not exercised his discretion in accordance with section 4(2) of the APA, since he had not considered all material facts that were relevant to ruling on the petitioner's request for prison leave, and thus had failed to make full use of the discretion vested in him.

Nevertheless, the Chancellor did not rule out the possibility that the proper exercise of discretion in the petitioner's case could have resulted in the petitioner's request being denied. Under sections 56(1) and 56(3) of the APA, however, this does not relieve the prison administration from the duty to list, in the reasons part of its decision, the considerations that informed the administration's refusal to issue an administrative act granting the petitioner's request.

(5) In connection with the petitioner's case, the Chancellor of Justice issued the following recommendations to the Governor of Murru Prison, to be observed in deciding sentenced prisoners' requests for prison leave:

1. Sentenced prisoners must not be denied prison leave merely because they have an active disciplinary sanction.
2. Where the requesting sentenced prisoner has an active disciplinary sanction, other facts relevant to deciding the request must still be established and taken into consideration.
3. In the event the prisoner's request is denied, the decision to that effect must state all facts and considerations on which it is based.

In his reply to the Chancellor's recommendations, the Governor of Murru Prison assured the Chancellor that in future the prison leave board of Murru Prison would also consider other facts in addition to the existence of active disciplinary sanctions in the case of the requesting prisoner.

15. Limiting a prisoner's right to use the telephone in Tartu Prison

Case 7-4/060144

(1) Several remand prisoners from Tartu Prison petitioned the Chancellor. The petitioners complained that the prison administration was interfering with their right to call officials and defence lawyers at the time of their choosing.

(2) The petitioners maintained that the officers of Tartu Prison did not permit prisoners held in the remand prisoners' block (the so-called Block E) to make calls to defence lawyers or to officials at the time of their choosing. The petitions suggested that the administration of Tartu Prison considered section 16.2.2 of the Regulations of Tartu Prison to apply to prisoners held in the remand prisoners' block. The section in question regulates pay phone use in the block as follows: prisoners in sections 1, 3, 5, 7, 9 and 11 and in the medical quarantine section of the block are allowed to use the phones on Thursdays; prisoners in sections 2, 4, 6 and 10 of the block are allowed to use the phones on Fridays; and open section prisoners in sections 4, 8, and 12 of the block are allowed to use the phones on Wednesdays and Fridays. Prisoners who have been allowed to make calls and who have submitted the corresponding request in time are permitted one period of phone use of up to 10 minutes duration on the relevant day. No restrictions apply to the number of calls that the prisoner may make during that period. Subject to the above and to the daily routine of the prison, prisoners are allowed access to the phones between the hours of 9:00 a.m. and 12:00 noon and between 2:00 p.m. and 7:45 p.m.

In order to verify the petitioners' account of the facts, the Chancellor addressed a request for

information to the Minister of Justice and to the Governor of Tartu Prison.

In his reply to the request, the Governor of Tartu Prison confirmed that restrictions regarding access to the phones apply to prisoners held in the cellblock of remand prisoners. The governor cited inadequate number of officers as the reason for restricting phone use to specific days of week. According to him, the number of officers in Tartu Prison is insufficient to grant all prisoners' requests for phone use at the time of the requesting prisoner's choosing.

(3) The main question in the case was whether it is lawful for Tartu Prison to restrict the frequency with which and the time during which prisoners are allowed to make calls to officials of government agencies and local authorities, and to defence lawyers.

(4) According to Chapter XVI of the Regulations of Tartu Prison prisoners are allowed to use the phones during restricted hours and for a limited period of time. Such restrictions must have a legal basis.

Under section 96 of the IA prisoners have the right to correspondence and to the use of a telephone (except for cellular phones), provided technical conditions for this exist. Correspondence and the use of a telephone are subject to the Internal Rules of Prisons and must be paid for by the remand prisoner. Remand prisoners' entitlement to correspondence and to phone calls may be restricted by the governor pursuant to the relevant decision of the investigator, prosecutor or judge, provided this is necessary in the interests of a criminal investigation. It is prohibited to restrict a remand prisoner's correspondence to government agencies, local authorities and their officials, and to defence lawyers.[207]

Section 51 of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000 (IRP) provides that prisoners may use a phone that is intended for calls by prisoners. Prisoners must be allowed phone calls at least once a week. Specific times and durations are to be specified in prison regulations. Remand prisoners, and sentenced prisoners placed in a segregation cell or in a segregation cell must submit a request to make a phone call. Calls may be made by means of a portable phone or a landline phone. Prisoners who are allowed to use the phone must be guaranteed confidentiality of communication.

Pursuant to section 52 of the IRP the arrangements regarding the use of a telephone must rule out the possibility of communications and encounters between remand prisoners held in different cells. Should the governor of the prison have reason to believe that allowing a remand prisoner to correspond or to use the telephone would interfere with a criminal investigation, he must inform the investigator, prosecutor or judge of this in writing. Requests by an investigator, a prosecutor or a judge to restrict a remand prisoner's correspondence or telephone use must be annexed to the personal file of the remand prisoner together with the corresponding decision by the governor. The governor's decision restricting a remand prisoner's correspondence or telephone use must be communicated to the relevant prison officers.

In interpreting these provisions, it is essential that the right of the remand prisoner (suspect) to the assistance of a defence lawyer be taken into account. The Supreme Court has stated that in criminal and misdemeanour cases the degree and intensity of limitations that may be imposed on an individual's fundamental rights considerably exceed the degree and intensity of any restrictions that may be contested in judicial review proceedings.[208] This means that an elevated degree of attention by the Government is required in order to guarantee the rights of the suspect (remand prisoner).

[207] On 13 December 2006, the Riigikogu enacted Bill 964 entitled "An Act to Amend the Imprisonment Act and the Code of Criminal Procedure", which entered into force on 1 February 2007. The Act repealed section 96(3) of the IA, but inserted identical rules concerning restrictions of prisoners' correspondence, visits and use of telephone in the Code of Criminal Procedure.

[208] Administrative Law Chamber of the Supreme Court, judgment of 26 May 2005 in case 3-3-1-21-05, para. 16 (in Estonian--transl.).

An institutional guarantee in this regard arises from Article 151 of the Constitution, which requires matters of representation, defence, prosecution and supervision of legality in judicial proceedings to be prescribed by statute.

Article 6(3)c of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) provides that everyone charged with a criminal offence must be given the possibility to defend himself in person or through legal assistance of his own choosing. The purpose of this rule is to ensure that the accused has a fair trial. This is achieved by putting the parties on an equal footing and affording the defence equal opportunity. The right to legal assistance assures the protection of the rights of the accused. It guarantees the fairness and impartiality of proceedings and ensures observance of the rules of judicial procedure. The right to legal assistance applies in all stages of a case, starting from pre-trial investigation through the initial substantive hearing to any eventual appeals.[209]

As a means to ensuring fairness and equality of opportunity in certain proceedings, the Code of Criminal Procedure (CCrP) mandates the participation in those proceedings of a lawyer assisting the suspect/accused. The lawyer has a public duty to ensure that the presumption of innocence is upheld (i.e. all facts favourable to the suspect are established) and that the law is observed in the proceedings. In a state based on the rule of law such a duty is imposed in the interests of the Government and of the public. The public dimension of defence lawyers' actions is especially clear in those proceedings and cases in which their participation is mandatory. The fact that the defence lawyers must also participate in judicial proceedings (section 45(4) of the CCrP) is a further reflection of the public dimension of their function. By mandating the participation of defence lawyers in criminal proceedings the legislature has conceded that, without their participation, the investigative agencies, the prosecutor's office, the courts or the suspect/accused would be unable to give full effect to the right of defence.[210]

Under Article 6(3)b of the CPHRFF the accused must at least have adequate time and facilities to prepare his defence. In its Recommendation to member states on prison rules[211], the Committee of Ministers of the Council of Europe also provides, in clause 23.1, that all prisoners are entitled to legal advice, and the prison authorities must provide them with reasonable facilities for gaining access to such advice. Section 98.2 of the recommendation requires remand prisoners to be provided with every facility that is required for preparing their defence and for meeting with their lawful representatives.

Restricting the right to telephone use may adversely affect the opportunities of a prisoner to speedily contact the Ministry of Justice or the Chancellor of Justice. Of particular importance in this respect to guarantee remand prisoners an opportunity to prepare their defence with the assistance of a lawyer, or to take other measures that are permitted to remand prisoners in order to ensure that criminal proceedings in their case are conducted fairly.

The right of remand prisoners to the use of telephone is governed by section 96 of the IA. Subsection 1 of that section provides that remand prisoners have a right to use the telephone (except a cellular phone) if technical conditions for this exist. The use of the telephone must be in accordance with the Internal Rules of Prisons. Subsection 3 of the same section lays down the following restriction on the use of telephone by remand prisoners. The first sentence of the subsection provides that the right of a remand prisoner to use the phone may only be restricted by the governor of the prison provided this has been authorised by the investigator, prosecutor or judge in the interests of a criminal investigation. The second sentence adds that the right of a remand prisoner to use the

[209] R. Maruste. Konstitutsionalism ning põhiõiguste ja vabaduste kaitse. [Constitutionality and the protection of fundamental rights and freedoms. By R. Maruste] Tallinn 2004, pp. 315–316.

[210] E. Kergandberg/M. Sillaots. Kriminaalmenetlus. [Criminal procedure. By E. Kergandberg and M. Sillaots] Tallinn 2006, p. 142.

[211] An Estonian translation of the recommendation REC(2006)2 of the Committee of Ministers of the Council of Europe on prison rules is available at: http://www.coe.ee/?op=body&id=452.

telephone may not be restricted if it serves the purpose of communicating with a defence lawyer. The right in question is further protected by the prohibition to restrict the right to use the telephone for the purpose of communicating with government agencies, local authorities and their officials.

Section 96 of the IA and the restrictions contained therein must be interpreted so as not to prejudice the remand prisoner's right of defence. Hence, the second sentence of subsection 3 may not be interpreted as only applying to the first sentence of the subsection, i.e. to restrictions that may be imposed by the governor on the use of a telephone. In view of the importance of communication with officials of government agencies and local authorities, and with defence lawyers, the prison regulations established on the basis of a delegation in the law may not lead to a situation in which prisoners' communication with the agencies and individuals mentioned above is effectively restricted. This means that the prohibition of such restrictions applies to the section as a whole. Thus, remand prisoners correspondence with the agencies and officials referred to in the second sentence of section 96(3) may not be restricted, for instance, by limiting their possibility of making phone calls to those agencies or officials to certain dates, days of the week or hours. Restrictions are justified only when imposed along the lines of generally known facts—the business days and working hours of the agencies or officials concerned.

The Chancellor of Justice concluded that the prohibition imposed in Tartu Prison on calling defence lawyers and officials at the time of remand prisoners' choosing is unlawful.

In addition, the Chancellor briefly considered the statement by the governor to the effect that the prison did not have a sufficient number of officers to ensure remand prisoners the exercise of their right to use the telephone when necessary.[212] The Chancellor held that it was improbable that a situation would arise in which all six telephones would be occupied at the same time, which would also mean that six guards would be occupied. Nevertheless, the Chancellor conceded that, should a situation like that arise, the prisoner must accept that he/she will be allowed to exercise his/her right to use the telephone at the earliest opportunity.

(5) The Chancellor recommended that the administration of Tartu Prison ensure prisoners unlimited use of telephone for communicating with the individuals referred to in the second sentence of section 96(3) of the IA (officials of government agencies and local authorities, and defence lawyers).

In his reply, the Governor of Tartu Prison noted that the prison administration, having considered the full range of possible consequences, both positive and negative, did not see a possibility to amend the regulations governing the use of telephones in Tartu Prison. The governor affirmed that the current regulations provided the one and only solution known to the administration that made it possible to assure that all prisoners were guaranteed their right to the use of a telephone on an equal footing and at least once a week.

The Chancellor advisors performed an unannounced inspection in Tartu Prison on 21 January 2007. During the inspection, they also checked the arrangements regarding the use of telephones in the cellblock of remand prisoners. The results showed that efforts were being made by the prison administration to ensure that detainees held in the cellblock of remand prisoners had the opportunity to call defence lawyers and officials at the time of their choosing.

[212] See judgment of 21 January 2004 by the Constitutional Review Chamber of the Supreme Court (CRCSC) in case 3-4-1-7-03 (in Estonian—transl.).

16. Relieving a sentenced prisoner of work duties

Case 7-1/051647

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained of being relieved of work duties in a workshop in the grounds of Ämari Prison.

(2) According to the petitioner's account, the petitioner was working in a workshop located in the grounds of the prison pursuant to a directive of the prison governor. Following a drug test that was administered to the petitioner, and that returned a positive result, the governor ordered the petitioner to be relieved of work duties. The petitioner took the view that the measure was unlawful. Being denied work would make it impossible for the petitioner to pay off the awards made against him in civil actions and to purchase items from the prison shop.

In order to establish the facts of the case, the Chancellor addressed a request for information to the administration of Ämari Prison.

According to the reply of the administration, the petitioner had worked in a workshop located in the grounds of the prison. On 1 June 2005 a drug test had been administered to the petitioner. That test returned a positive result, which led to a criminal investigation being opened in respect of the petitioner pursuant to section 331 of the Penal Code (PC). On 13 July 2005 the Governor of Ämari Prison issued a decree that ordered the name of the petitioner removed from the list of workers of the workshop starting 14 July 2005 on security considerations. The decree was based on section 3(2)(7) of the Constitutive Regulations of Ämari Prison, on sections 66 and 67 of the IA and on the report submitted on 7 July 2005 by the specialist officer of the prison's security department. According to the security officer's report of 7 July 2005 a criminal investigation had been opened in respect of the petitioner in relation to the use of narcotic substances. In the report, the specialist officer recommended to the governor that the petitioner be disallowed from working on the grounds that this presented an increased security risk. That risk was seen to consist in the fact that the use of narcotic substances induced in the petitioner a state of inebriation that was likely to result in a slowing of the petitioner's reflexes and in an impairment of the petitioner's coordination, and thus likely to give rise to an accident at work.

(3) The question that had to be answered in the case was whether the removal of the petitioner from the list of workers was in conformity with the law.

(4) The work of sentenced prisoners in the grounds of the prison is governed by sections 37–44 of the IA. Under section 37(1) of the IA prisoners are under an obligation to work unless provided otherwise in that statute. Section 37(2) of the IA states that the obligation to work does not apply to prisoners who are older than 63 years of age, to prisoners who are engaged in a course of studies aimed at completing a general secondary or vocational secondary education, or to prisoners participating in a professional training event. The obligation does not apply either to prisoners who are unable to work for health reasons, and to prisoners who are raising a child under three years of age.

Section 38 of the IA lays down the principles governing provision of work to sentenced prisoners. According to section 38(1) of the IA, prison administration must provide a sentenced prisoner work where possible, taking into account the prisoner's physical and mental ability and skills. If a sentenced prisoner cannot be provided work, where possible he/she may be assigned cleaning and maintenance jobs in prison grounds or in prison facilities. Section 38(2) of the IA permits prison administrations to establish workshops in prison grounds or outside these, to allow sentenced prisoners to work outside the prison or to assign them cleaning and maintenance jobs in prison grounds or in prison facilities. Section 38(3) of the IA empowers the prison administration to authorise natural persons or businesses to set up workshops in prison grounds, provided that the person or business has concluded an agreement in that respect with the relevant government agency

or the private corporation discharging relevant duties on behalf of the government. The requirements applicable to such agreements must be enacted by the Minister of Justice.

Working conditions in prisons are provided for in section 39 of the IA. Under subsection 1 of that section, the working conditions of sentenced prisoners must meet the requirements emanating from occupational health and safety legislation, save where mandated otherwise by the Imprisonment Act. The prison administration is under a duty to ensure that working conditions do not present a risk to the life or health of sentenced prisoners.

Under section 7(12) of the Employment Contracts Act (ECA), the provisions of that statute do not apply to work performed while serving a custodial sentence. An exception to this rule is contained in section 41(2) of the IA, which provides that sentenced prisoners who work outside prison grounds are subject to provisions of employment legislation, including the provisions governing conclusion of employment contracts, remuneration for work, and leave entitlements.

The employment relationship with a sentenced prisoner does not arise by virtue of a contract between private persons but emanates from the obligation to work imposed on the prisoner by law. Pursuant to section 38(1) of the IA, the prison administration is authorised to determine matters related to the rights and duties of a sentenced prisoner's work. Prison officials are also entitled to issue orders to the prisoner that the prisoner must obey (section 67(1) of the IA). The prison administration may compel the prisoner to perform the obligation to work. Where necessary, section 63(1) of the IA authorises the imposition of disciplinary sanctions that consist in relieving the prisoner of work duties for a period of up to one month. In view of the foregoing, the Chancellor adopted the position that the employment relationship between the prison and the prisoner falls in the domain of public law and that assigning work to the prisoner is an administrative duty of the prison administration and that that duty may entail the exercise of executive authority.

The only grounds that permit a sentenced prisoner to be relieved of the obligation to work is contained in section 42 of the IA. Subsection 1 of that section entitles the prisoner to request that he be relieved of the obligation to work for a period of up to twenty-eight calendar days, provided that the prisoner has worked for a period of one year or has been assigned cleaning and maintenance jobs in prison grounds or in prison facilities during one year (in addition to being relieved of work duties as a disciplinary sanction under section 63(1)(3) of the IA).

Hence, the Imprisonment Act does not make provision, in respect of sentenced prisoners who work in prison grounds, for relieving those prisoners of work duties, of the obligation work or for removing the prisoners from the list of workers. Nor does the statute in question provide any specific grounds that might justify such measures, or any enabling provisions authorising establishment of any such grounds or measures.

By virtue of section 105(1) of the IA, prisons are placed in the jurisdiction of the Ministry of Justice. It is the duty of prisons to administer custodial sentences, misdemeanour detention sentences and remand custody in accordance with the Imprisonment Act. Under section 105(3) of the IA, the governor of a prison is authorised to adopt the regulations of that prison in coordination with the Ministry of Justice. The Regulations of Ämari Prison were adopted by Governor of Ämari Prison Decree 163 of 8 June 2004. Section 16.19 of the Regulations provides that a sentenced prisoner may be relieved of work duties if the activities of the prisoner in the work zone of the prison endanger the security of the prison, the prisoner him/herself and the persons surrounding the prisoner, or where those activities are illegal on other grounds or pose a threat to prison discipline or order in the prison. Section 16.21 of the Regulations requires the prisoner to be relieved of work duty by decree of the governor, which must be notified to the prisoner against signed receipt.

In view of the above, the Chancellor concluded that the legal basis for removing the name of the prisoner from the list of workers appeared to be section 16.19 of the Regulations of Ämari Prison.

Although the Regulations do not provide for removing the name of the prisoner from the list of workers, they may be construed as substantively relieving the prisoner of work duties (the obligation to work) since the employment relationship is terminated in either case and the prisoner is relieved of the obligation to work.

The petitioner was relieved of work duties by Governor of Ämari Prison Decree of 13 July 2005, which ordered the petitioner's name removed from the list of workers of the workshop located in the grounds of the prison pursuant to section 3(2)(7) of the Constitutive Regulations of Ämari Prison, pursuant to sections 66 and 67 of the IA and pursuant to the report by the specialist security officer of 7 July 2005 on grounds of security considerations with effect as of 14 July 2005.

Under section 1^1(1) of the IA, any administrative steps prescribed in the Imprisonment Act and in the instruments adopted on its basis are subject to the provisions of the APA, unless otherwise provided in the Imprisonment Act. This means that in removing the name of the petitioner from the list of workers the administration must observe all principles applicable in administrative proceedings, unless the Imprisonment Act provides otherwise. The resulting administrative act (in the case at hand, the governor's decree of 13 July 2005) must meet the requirements established for such acts.

According to section 54 of the APA, in order to be lawful, an administrative act must be issued by a duly empowered authority, must be founded on legislation that is valid at the time of the act is issued and conform to that legislation, must be proportionate, untainted by discretion errors and must respect due forms. Section 56(1) of the APA requires written administrative act to include a statement of reasons. The statement of reasons must be contained in the ct itself or in a document that has been referred to in that act and is accessible to the individual concerned by the act. Mere reference to a provision in a statute does not constitute a statement of reasons. Under the terms of sections 56(2) and 56(3) of the APA, the statement of reasons must set out the factual and legal basis of the administrative act. In the case of an administrative act issued as a result of an exercise of discretion, the statement of reasons must also set out the considerations that informed the authority's decision. An act that orders the name of a sentenced prisoner to be removed from the list of workers, i.e. a decision to relieve the prisoner of work duties constitutes a restrictive measure (which may subsequently lead to the prisoner being denied certain benefits). The statement of reasons for a restrictive administrative act must deal with both the facts and the law of the case. The section dealing with facts must set out those facts that entail the application of the legal rule on which the act is founded. It is also important that the facts and the law of the case be linked in a logical manner. The aim of such a link is to convince the person to whom the administrative act is addressed, and any other person reading the act, that the application of relevant legislation to the facts of the case mandates the determination that is contained in the act.[213] If the information at the disposal of the prison administration is insufficient for a lawful and just discretionary determination to be made, the administration must proceed to establish additional facts in the case.[214]

On the basis of the above the Chancellor concluded that the Governor of Ämari Prison Decree of 13 July 2005 failed to state, with sufficient precision, the legal basis on which it was founded. The bases listed in the decree do not authorise the prison governor to order the removal of a sentenced prisoner from the list of workers on grounds of security considerations, nor to relieve him/her of work duties. The governor should have cited in his decree, in particular, sections 16.19 and 16.21 of the Regulations of Ämari Prison. Furthermore, the decree in question failed to set out the considerations that informed the governor's decision to remove the petitioner from the list of workers of the workshop for security considerations with effect of 14 July 205.

The governor's decree referred to the report by the specialist security officer. Section 56(1) of the APA permits the statement of reasons for an administrative act to be contained in a separate document

[213] Administrative Law Chamber of the Supreme Court (ALCSC), judgment of 19 March 2002 in case 3-3-1-13-02, para. 14.
[214] ALCSC, judgment of 6 November 2002 in case 3-3-1-62-02, para. 18.

that is accessible to the person concerned, provided that that document has been referred to in the measure. However, settled jurisprudence allows the use of this option only where the statement of reasons in disproportionately long. Even in such cases, the measure must set out a brief summary of the statement of reasons.

Since each discretionary decision must take into account the facts of the particular case, the failure to set out the considerations that informed the particular decree gives rise to a doubt regarding whether the governor had duly exercised the discretion vested in him in the first place, i.e. whether the governor had effectively considered all circumstances, both positive and negative, that were significant to the person concerned in the particular case.

The Chancellor took the view that removing the petitioner from the list of workers on security grounds begged a number of questions. The drug test that was administered returned a positive result on 1 June 2005, which is also the date on which a criminal case was opened regarding the petitioner. The case was referred to the West Harju Police Department on 21 June 2005. The report that recommended that the petitioner be relieved of work duties on grounds that this presented an increased security risk was submitted by the prison on 7 July 2005. The petitioner was only relieved of work duties as of 14 July 2005. The governor's decree does not mention, and fails to explain why the security risk during the period from 1 June 2005 to 14 July 2005 was insufficient to warrant relieving the petitioner, as a drug user, of work duties on the grounds of security considerations.

In the situation where a drug test has returned a positive result in respect of a sentenced prisoner, that prisoner may be relieved of work duties starting the following day already by virtue of the Occupational Health and Safety Act (OHSA). Section 13(1)(15) of the OHSA obliges an employer to relieve an employee of work duties if the employee is in a state of intoxication induced by narcotic or toxic substances, or manifests a marked influence of psychotropic substances.

According to a certificate provided from the workshop the petitioner was relieved of work duties until the resolution of the criminal case pending against the petitioner. The same is stated in the reply of 6 January 2006 of the administration of Ämari Prison to the Chancellor of Justice. The decree should have mentioned this circumstance.

The requirement to provide a statement of reasons for an administrative act represents a general principle the purpose of which is to ensure an effective exercise of the right that individuals have to contest the decisions of authorities. A statement of reasons is required in order to permit the person to whom the administrative act is addressed to assess whether his/her rights have been limited lawfully, and in order to permit that person to seek legal redress where appropriate. The statement of reasons will also permit the authority reviewing the administrative act to determine whether the measure has been issued lawfully. Hence, a statement of reasons ensures the reviewability of an administrative act. An administrative act that does not state its reasons is unlawful already because it is impossible to establish the rationale of its issue and the legal basis that it is founded on.[215]

Based on the above the Chancellor concluded that in the case at hand a sentenced prisoner has been relieved of work duties and of the obligation to work, and removed from the list of workers, in the absence of relevant legal rules. Relieving a sentenced prisoner who is working of his/her work duties, and striking or removing the name of that prisoner from the list of workers takes places without an explicit legal basis. Relieving a prisoner of work duties, however, may constitute encroachment on the fundamental rights of the prisoner, which must be founded on an authorising provision in a statute (although the point must be conceded that section 38 of the IA does not create an explicit right to work for sentenced prisoners). For instance, relieving a prisoner of work duties may interfere with the right of the prisoner to free self-realization. Pursuant to section 43(1) of the IA, sentenced prisoners are entitled to receive remuneration for the work performed, which they can lawfully use,

[215] Administrative Law Chamber of the Supreme Court, judgment of 22 May 2000 in case 3-3-1-14-00, para. 5 (in Estonian).

for instance, to pay off awards made against them in civil actions for compensation of damage caused by the offence they were convicted of. The remuneration resulting from the work of a sentenced prisoner will be deposited towards a release allowance provided in section 44 of the IA. The release allowance can be used by a releasee to meet his/her living expenses and, for instance, for securing accommodation.

It is obvious that the legislature cannot be expected to regulate the details of work arrangements of sentenced prisoners. Nevertheless, this is not a justification for neglecting to provide basic rules on important issues (such as, for instance, relieving sentenced prisoners of work duties).

Paragraph 1 of Article 3 and Article 11 of the Constitution only authorise limitations on the fundamental rights and freedoms of individuals insofar as those limitations, and the manner of their imposition are provided by statute enacted either by the Parliament or by a referendum. The legislature must itself determine matters that are important from the point of view of fundamental rights and may not delegate that power to the Executive. The latter may only fill in the details of limitations that have been imposed on individuals' fundamental rights and freedoms by statute. The Executive may not establish limitations going beyond those laid down by statute.[216]

The above-mentioned absence of relevant rules, arising from the fact that the relevant statutes do not provide specific grounds on which sentenced prisoners may be relieved of work duties (the obligation to work), also amounts to an infringement of the principle of clarity of laws. The principle emanates from paragraph 2 of Article 13 of the Constitution and is founded on the requirement that individuals must be able to foresee the legal consequences that follow from their actions. Hence, laws must be drafted so as to make it possible for individuals to be able to foresee the actions of public authorities applying those laws. The principle means that legal rules must be sufficiently clear and understandable.[217]

In determining the extent of the clarity of laws required and mandated by the Constitution, courts can draw guidance, among other things, from the jurisprudence of the European Court of Human Rights (ECHR).[218] In its judgment in the case *Sunday Times v. the United Kingdom*[219] the ECHR stated: "…a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

The Chancellor took the view that the hitherto practice of prison administrations shows that there is a need for rules such as those referred to above, because in certain cases it may be necessary to relieve sentenced prisoners of work duties, or remove them from the list of workers. Thus, in Tartu Prison and in Ämari Prison, prisoners working in the grounds of those prisons have been relieved of work duties and removed from the relevant lists of workers, in particular, on grounds of having violated work rules and for security reasons, which mostly consist in smuggling prohibited items from the work zone into the cellblock, and in being suspected of drug use.

The regulations established in various prisons in coordination with the Ministry of Justice differ in their provision for assignment of work to sentenced prisoners, and for relieving those prisoners of work duties. For example, the Regulations of Tallinn Prison do not contain any provisions regarding the work of sentenced prisoners. The Regulations of Harku Prison make no mention of removing

[216] Constitutional Review Chamber of the Supreme Court, judgment of 24 December 2002 in case 3-4-1-10-02, para. 24.
[217] Constitutional Review Chamber of the Supreme Court (CRCSC), judgment of 27 June 2005 in case 3-4-1-2-05, para. 31.
[218] CRCSC, judgment of 15 December 2005 in case 3-4-1-16-05, paras. 21–22.
[219] ECHR, judgment of 26 April 1979 in case 6538/74 Sunday Times v. the United Kingdom, para. 49.

sentenced prisoners from workers' lists, or of relieving them of work duties, but provide for assigning the job to another sentenced prisoner in case circumstances are revealed that prevent work from being accomplished in accordance with the relevant requirements (for instance, where the work regime is repeatedly violated). However, these regulations fail to specify the conditions that must be fulfilled in order for the job to be reassigned. The Regulations of Murru Prison, the Regulations of Pärnu Prison, the Regulations of Tartu Prison and the Regulations of Viljandi Prison do not contain any provisions authorising the administration to relieve sentenced prisoners of work duties and remove them from workers' lists. Nor do the regulations of these prisons provide any procedures regarding the relieving or removal. Yet, they contain rules that govern assignment of work to sentenced prisoners.

In view of the above the Chancellor concluded that prison regulations vary considerably in their treatment of the work of sentenced prisoners in prison grounds, including relieving those prisoners of work duties and removing them from the list of workers. In conjunction with the practice of prison administrations, this testifies to the need for establishing uniform rules that would be applied consistently across all prisons, in particular concerning the assignment of work to sentenced prisoners and relieving those prisoners of work duties and removing them from the list of workers. In order to provide for consistent practice in these matters across all prisons, first and foremost an enabling provision should be inserted in the relevant statute, authorising prison administrations to relieve sentenced prisoners who work in prison grounds of their work duties and to remove those prisoners from the list of workers.

At the time when the Chancellor was investigating the petitioner's complaint, a draft bill to amend the Imprisonment Act[220] was being prepared in the Ministry of Justice. Its aim was to expand the scope of section 41 of the IA by inserting in it a provision empowering the Minister of Justice to make regulations governing the work of sentenced prisoners outside the prison, as well as the conditions that must be fulfilled for such work to be authorised and the procedure for authorising it. The explanatory note of the draft stated that work outside the prison is currently only regulated in section 41 of the IA, which in view of the differences of the practice in different prisons is clearly insufficient.

The amendments in question are concerned with work outside the prison. Yet, in view of the above, even in this regard the applicable rules are by and large insufficient and the practice in different prisons varies considerably. For this reason, the Ministry of Justice found that more detailed rules were needed in the matter, and that an enabling provision was required in the Imprisonment Act to allow such rules to be enacted. The Chancellor finds that the situation of sentenced prisoners working in prison grounds is fraught with analogous problems and must be clarified.

(5) The Chancellor suggested that the Governor of Ämari Prison amend the practice of the prison so as to ensure that in future relieving sentenced prisoners of work duties would be dealt with strictly in accordance with the law. The governor agreed to the Chancellor's suggestion.

The Chancellor recommended that the Ministry of Justice introduce a bill to amend the provisions in the Imprisonment Act that govern relieving sentenced prisoners who work in prison grounds of their work duties (the obligation to work), in particular by providing specific grounds and procedure to be observed in this regard. The amendment would give directions and provide consistency in the practice of prison administrations in the Republic of Estonia. The Ministry replied that he would consider giving effect to the Chancellor's recommendation and amending the Imprisonment Act accordingly.

The relevant amendment was introduced by virtue of the Act to Amend the Imprisonment Act and the Code of Criminal Procedure that was enacted by the Riigikogu on 13 December 2006 and entered into force on 1 February 2007. The new provision (section 38(2^2) of the IA) is worded as

[220] The Act to Amend the Imprisonment Act and the Code of Criminal Procedure was passed by the Riigikogu on 13 December 2006 and entered into force on 1 February 2007. The new provision that was inserted in the Imprisonment Act (section 41(11)) provides: "The Minister of Justice shall by regulation establish specific conditions and procedures for authorising a sentenced prisoner to work outside the prison, and the rules governing the work of sentenced prisoners outside the prison" (unofficial translation—transl.).

follows: "A sentenced prisoner may be relieved of work duties or of the obligation to work if the prisoner is unable to perform the obligation or if the prisoner's work constitutes a threat to the security of the prisoner himself or herself or of the prison, or if the prisoner's work constitutes a threat to prison discipline. The Minister of Justice shall by regulation lay down the rules governing the assignment of work to sentenced prisoners, the removal of sentenced prisoners from the list of workers and relieving sentenced prisoners of work duties."

17. Providing meals to a prisoner on the day of transfer

Case 7-1/051113

(1) A number of prisoners repeatedly petitioned the Chancellor of Justice. The petitioners complained that they were not provided lunch on the day of transfer.

(2) The petitioners noted that they were not provided lunch on 1 July 2005, when they were transferred from Pärnu Prison to Tallinn Prison, and on 24 November 2005, when they were transferred from Tallinn Prison to Ämari Prison. It has been noted on multiple occasions that individuals have been deprived of lunch on the day of transfer from the Police Detention Centre of Pärnu Police Department of the West Estonia Police Force to Tallinn Prison (1 July 2005, 9 September 2005, 14 October 2005, 11 November 2005 and 13 January 2006). The petitioners took the view that the relevant actions of the police and the relevant prison administrations constituted an infringement of the law.

On the basis of the petitions, the Chancellor opened an investigation and addressed requests for information in the matter to Pärnu Prison, Tallinn Prison, the Ministry of Internal Affairs and the Ministry of Justice.

According to the reply of the administration of Pärnu Prison, prisoners who are due to be transferred to another prison or to a court are provided meals in accordance with the transfer plan. If the departure time of a planned transfer coincides with the time of lunch in Pärnu Prison, the prisoners concerned will be provided lunch in that prison. Lunchtime in Pärnu Prison is 1:00 p.m. When the actual time of departure of a transfer escort is after 12 noon, prisoners in that transfer will be provided lunch by Pärnu Prison. In the case of an earlier time of departure, the canteen will not take the prisoners concerned into account in preparing the lunch and those prisoners will have to be provided the meal by the receiving prison. According to the transfer schedule for 1 July 2005, the transfer escort was due to arrive in Pärnu Prison at 11:10 a.m., to leave at 11:30 a.m., and to arrive in Tallinn Prison at 1:00 p.m. For this reason, Pärnu Prison did not provide lunch to the remand prisoners due to be transferred to Tallinn Prison. Those prisoners should have received their meal in Tallinn Prison. The escort, however, was late for reasons beyond the control of Pärnu Prison and only departed from the prison between 12:45–1:00 p.m. Since the canteen had prepared lunch for the number of prisoners that was specified in the transfer schedule, and the preparation of lunch was already finished at the material time, it was not possible to provide a lunch to the departing prisoners.

According to the reply of the administration of Tallinn Prison, breakfast is served to prisoners held in the block of remand prisoners of the imprisonment department of Tallinn Prison during 6:10–7:20 a.m. After the meal, prisoners who are due to be escorted to courts and other prisons are taken to dedicated transfer cells. Prisoners who are due to be transferred to a court and who will stay there over lunch are provided a cold meal to take with them. No such meals are provided to prisoners departing on inter-prison transfers. The petitioners arrived from Pärnu Prison to Tallinn Prison on 1 July 2005 at 3 p.m. All prisoners arriving in the prison are first of all taken to the remand prisoners' block, where lunch is provided during 11:45 a.m. – 1:00 p.m. The assistant duty officer (senior officer rank) will inform the canteen of the prisoners who must be provided a meal approximately one hour before the beginning of mealtime. Since the remand prisoners transferred from Pärnu Prison arrived in Tallinn Prison at 3:00 p.m., a lunch meal had not been prepared for them in the receiving prison.

According to the reply of the Ministry of Internal Affairs, prisoners held in the detention centres of police forces receive three meals a day: breakfast, lunch and supper. The provision of meals is organised through catering companies on contract basis. Prisoners who are escorted out to a courthouse will normally be returned for lunch at lunchtime. Where this is not possible, the prisoner's meals are stored until the detainee is returned from the courthouse to the police detention centre. As a rule, the administration of a police detention centre is informed of the number of escortees due to arrive during the day and will take that number into account in its instructions to the catering company regarding the quantity of meals to be supplied. Where a prisoner who has not been provided lunch arrives in a police detention centre after the centre's lunchtime, that prisoner will still be provided the relevant meal. One of the possibilities for avoiding irregularities in the provision of meals to escortees lies in reaching a general agreement among the custodial institutions. The agreement should state that the meal that an escortee is entitled to must be provided to the escortee in the receiving custodial institution. The agreement should also stipulate that transfer escorts must be organised at hours that do not coincide with mealtimes, and that transfers should take place directly after breakfast or lunchtime. Generally, the administrations of police detention centres are informed about the number of arriving and departing escortees, and of releasees. Such information is necessary for determining the quantity of meals to be ordered from caterers. Should a police detention centre receive a prisoner who in his/her previous place of custody did not receive a meal that was due, that prisoner will be provided food in accordance with the rations from the internal reserves of the police detention centre.

According to the reply of the Ministry of Justice, in the morning of the day of transfer the custodial institutions holding departing escortees will notify receiving custodial institutions of the number of those escortees. The receiving institutions will add arriving escortees to the list of prisoners due to receive lunch and supper. Escortees who are taken to a courthouse are issued a cold meal. As a rule, meals have been provided to all escortees on transfer days. There have been certain cases in which transferees have missed lunch due to late arrival of the escort vehicle. If the escort vehicle is late, the receiving prison may be unable to provide lunch to the transferees due to the fact that under the terms of sections 8(2) and 8(3) of Minister of Social Affairs Regulation 131, "Health protection requirements for food provision in health care institutions and care institutions" of 14 November 2002, meals may not be stored for more than two hours. This means that a new lunch would need to be prepared to the transferees, which would interfere with the preparation of supper. To avoid irregular mealtimes on transfer days the receiving prison must issue arriving escortees with a cold meal. Prison administrations have been notified of this requirement.

(3) The question that had to be answered in order to resolve the petition was whether a detainee's being denied a meal on the day of transfer is in conformity with valid legislation.

(4) Pursuant to section 47(1) of the IA sentenced prisoners must be provided food in accordance with the general eating customs of the population and taking into account recommended dietary allowances. Sentenced prisoners must receive food regularly. The provision of food must conform to requirements of food hygiene. By virtue of section 93(2) of the IA the rules in question also apply to the provision of food to remand prisoners. In any case, situations in which the prisoner is denied a meal are unacceptable.

Section 3(6) of Minister of Social Affairs Regulation 150, "Recommended dietary allowances in custodial institutions" of 14 November 2002 requires sentenced prisoners to be provided food in conformity with the recommended dietary allowances at least in three parts, three times a day and at regular times. By virtue of sections 8(2) and 8(3) of Minister of Social Affairs Regulation 131, "Health protection requirements for food provision in health care institutions and care institutions" of 14 November 2002 it is prohibited to store hot meals for more than two hours.

The legislation outlined above requires sentenced prisoners to be provided food at least three times a day, which means that they must receive a breakfast, a lunch and a supper. Moreover, it is not permitted to serve hot meals more than two hours after they have been prepared.

In their replies the prison administrations concerned stated that the petitioners had missed lunch due to delays in transfer schedules and delays in the arrival of escort vehicles to the relevant prisons.

The Chancellor of Justice agreed with the position expressed by the Minister of Justice to the effect that the preparation of a separate lunch for transferees who have not been provided one represents problems since it is likely to interfere with the preparation of the next meal. In his reply, the Minister indicated that inter-prison transferees must be provided food in the receiving prison. At the same time, prisons are prohibited to serve hot meals that have been stored for more than two hours after they were prepared. In such cases, cold meals can be substituted for hot meals. The Minister's reply states that this information has been relayed to prison administrations.

On the basis of the above, the Chancellor concluded that basic arrangements are in place to prevent inter-prison transferees from being denied food. Hence, if in a particular case the directives of the Minister of Justice have not been respected, the corresponding acts or omissions of the relevant prison administration must be regarded as unlawful.

The Chancellor also concluded, however, that the situation regarding the provision of food to detainees transferred between a prison and a police detention centre presents a more serious problem. The Minister of Internal Affairs expressed the view that a possible solution would consist in arranging for transfers to take place directly after a mealtime, so as to allow transferees to reach the receiving custodial institution before the next mealtime. The Chancellor supported the Minister's proposal. Where this principle cannot be observed, cold meals must be substituted for hot meals, similarly to the case of inter-prison transfers.

The Chancellor took the view that in planning inter-prison transfers as well as transfers between a prison and a police detention centre and vice versa, regard should be had in the first place to the time of the transfer, which must be set so as to minimize the risk that the transferees would miss a meal. If an established time cannot be kept, the receiving custodial institution must ensure the provision of food to the prisoners designated for transfer. Where possible, a hot meal should be provided. If necessary, a cold meal may be substituted instead.

The Chancellor found that being denied lunch constituted a violation of the rights of the petitioners.

(5) The Chancellor recommended that the Minister of Justice and to the Minister of Internal Affairs cooperate to organise transfers of prisoners so as to exclude the denial of food to transferees, i.e. to arrange transfers to take place between mealtimes. When a person arrives in a custodial institution after a mealtime and he/she has not been provided food in the previous place of custody, the receiving institution must ensure that the person is given a meal. The meal provided may be either a hot meal or, if necessary, a cold meal. Situations in which the person would be denied food must not be allowed.

The Minister of Justice informed the Chancellor that inter-prison transfer schedules or those of transfers between a prison and a police detention centre are planned so as to ensure that transferees are provided food on a regular basis. One consideration that informs the drafting of transfer schedules is avoiding unnecessary transfer costs. The prison administrations have also been notified of their obligation to ensure provision of food to prisoners by means of three hot meals per day or, where this is not possible, by means of cold meals.

The Minister of Internal Affairs informed the Chancellor of his support of the Chancellor's proposal. The Minister also informed the Chancellor that in the morning of the day of transfer, information regarding the number of transferees and their time of arrival is exchanged between prisons and police detention centres. Provision of food is planned in accordance with that information. Prisoners who are at a courthouse during mealtime are issued a cold meal. In the opinion of the Minister, these matters pertain to everyday work arrangements of the institutions concerned and can be substantively

dealt with by cooperation and efficacious information exchange between police detention centres and prisons. The Minister has instructed the Commissioner of Police to issue a corresponding memorandum to the administrations of police detention centres.

18. Transferring a prisoner sentenced abroad to Estonia for serving the sentence imposed

Case 7-1/060403

(1) A sentenced prisoner from Murru Prison petitioned the Chancellor of Justice, seeking a legal opinion regarding the transfer to Estonia of persons sentenced abroad for a criminal offence, and the manner in which their sentences are to be administered in Estonia.

(2) The petitioner was involved in a drug-related offence in 1999 in Finland. The petitioner was convicted of the offence in Tampere City Court on 3 October 2000. The court ordered the petitioner to serve a nine-year custodial sentence.

On 25 May 2005 the petitioner was transferred to the Republic of Estonia to serve out the sentence imposed. The petitioner was taken to Murru Prison.

As of 15 May 2006, the petitioner did not know whether the sentence imposed would continue to be administered as a custodial sentence, or whether it would be converted by means of a judicial proceeding to conform to the sentences prescribed in Estonia for similar offences. For this reason, the petitioner sought the assistance of the Chancellor of Justice.

The Chancellor addressed a request for information to the Minister of Justice.

According to the reply of the Minister, in order for a custodial sentence imposed in a foreign jurisdiction to be enforced in Estonia, the offence in relation to which the sentence was imposed must also be recognized as a criminal offence in Estonia. This means that the offence in question must be punishable by imprisonment under the Penal Code and the sentenced person must have at least six months of the sentence to serve at the time that the request for transfer is received. Where the offence that the sentenced person was convicted of in the foreign jurisdiction is punishable under the terms of the Penal Code by imprisonment of a duration that is equal to or exceeds the duration of the sentence imposed in the foreign jurisdiction, that sentence will continue to be administered immediately upon transfer of the sentenced person into the charge of Estonian authorities.

According to the Minister, upon transfer from the Republic of Finland the petitioner had been ordered to serve out the sentence pursuant to the Convention on the Transfer of Sentenced Persons (the Convention) and the Additional Protocol annexed thereto. The Minister took the view that such an order could not be deemed to aggravate the penal position of the petitioner since the sentence imposed on the petitioner, i.e. the nine-year custodial sentence, was not adapted upon transfer.

(3) The main question that had to be answered in the petitioner's case was whether the transfer of the petitioner from the Republic of Finland to the Republic of Estonia had taken place in conformity with the Convention and with Article 10 of the Additional Protocol annexed to it.

(4) Pursuant to the Convention and to the Additional Protocol annexed thereto a prisoner transferred to continue serving a custodial sentence will be ordered to do so in one of two possible ways: (1) the enforcement of the sentence will continue immediately in keeping with the terms of Article 10 of the Convention (as provided in Article 9(1)(a) of the same); or (2) the sentence imposed in the foreign jurisdiction will be converted, in keeping with the terms of Article 11 of the Convention (as provided in Article 9(1)(b) of the same) by means of a judicial proceeding to a sentence prescribed for a similar offence in Estonia. The domestic provisions governing the latter option are contained in sections 478(3) and 478(4) of Code of Criminal Procedure.

Article 10 of the Additional Protocol annexed to the Convention provides that in continuing the enforcement of the sentence imposed in the sentencing State, the administering State must respect the legal nature and duration of the sentence as determined in the sentencing state. If the sentence in question is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

The petitioner's request indicated that the petitioner had committed an offence for which he had been sentenced in the Republic of Finland at a time when the Criminal Code of the Estonian SSR was yet in force in the Republic of Estonia. The sanctions prescribed in that code for offences related to narcotic and psychotropic substances were considerably more lenient than those provided in the Penal Code currently in force.

In application of valid legislation, a Finnish court ordered the petitioner to serve a nine-year custodial sentence. When the petitioner was transferred to Estonia, the enforcement of that sentence continued since the sanction prescribed in the Penal Code for the corresponding offence was similar. This means that the duration of the sentence remained unadapted.

The Chancellor took the view that in transferring the petitioner, the Estonian authorities should have taken into account the fact that the Criminal Code was yet in force in Estonia at the time the offence was committed. The sentence imposed on the petitioner in Finland should therefore have been converted by judicial proceeding to a sentence mandated by Estonian laws. At the relevant time, the operative statute in Estonia was the Criminal Code.

Provisions governing the conversions of foreign sentences to domestic sentences meeting the requirements applicable in Estonia are contained in the Code of Criminal Procedure (CCrP). Section 482 of the CCrP provides that the recognition of a sentence imposed in a foreign jurisdiction is determined by a single judge. A hearing regarding recognition of a foreign judgment must take place within thirty days following receipt of the relevant request. Where necessary, additional information may be requested through the Ministry of Justice from the State in which the judgment was issued. In the case of such a request, the judge must establish a time limit for the reply. Persons who are not parties to the proceeding but have a legitimate interest in the matter may be invited to attend the hearing. The attendance of the sentenced person and a state prosecutor is mandatory.

(5) In order to resolve the request, the Chancellor's advisor contacted the Head of the International Legal Cooperation Service of the Ministry of Justice and informed that person of the legal facts that should have been taken into account in the petitioner's case. The Head of the service assured the advisor that the position of the Chancellor would be taken into account. The Head also said that the case of the petitioner would be taken up with the state prosecutor and, subject to the prosecutor's endorsement, referred to the competent court in order for the petitioner's sentence to be converted to a domestic sentence meeting the requirements of Estonian law (i.e., those of the sanction prescribed in the Criminal Code).

The Minister of Justice informed the Chancellor that the documents concerning the recognition of the sentence imposed on the petitioner had been referred to the competent court. On the basis of the foregoing, the Chancellor decided to close the investigation in the petitioner's case on the grounds that the petitioner's complaint had been resolved in the course of that investigation.

19. Inspection of Tartu Prison

Case 7-2/060237

(1) During 27–28 March 2006, the Chancellor of Justice and his advisors performed an unannounced inspection visit to Tartu Prison.

Tartu Prison is a custodial institution in the jurisdiction of the Minister of Justice. It is used to hold remand prisoners and sentenced prisoners of the male sex and remand prisoners of the female sex. On 27 March 2006, there were 930 prisoners in Tartu Prison, 555 of them sentenced prisoners and 375 remand prisoners. 64 of the prisoners were juveniles, 8 were life-sentenced prisoners and 25 were women.

Tartu Prison was opened on 16 October 2002. The Medical Department of Tartu Prison was opened at the same time. On 11 April 2005, a Prisons' Psychiatry Unit was opened within the medical department, which means that inpatient psychiatric care is provided in the department.

(2) The Chancellor's intention was to verify whether the administrative acts adopted by the Governor of Tartu Prison were lawful and conformed to good administrative practice. The Chancellor also verified whether limitations on fundamental rights of the prisoners held in the prison had been imposed in conformity with the Constitution.

(3.1) An inspection of the relevant decrees of the governor revealed that in certain cases sentenced prisoners had been denied their requests for prison leave[221] merely by virtue of the fact that those prisoners were subject to active disciplinary sanctions.

Under the terms of section 32(1) of the IA, the governor of the prison is empowered to authorise prison leave of a total duration of 21 calendar days per year in the case of sentenced prisoners who are serving their sentences in a closed prison and who have served at least one year of the sentence. Authorising prison leave is a discretionary power of the governor. This means that the relevant legislation does not contain unconditional directions to the governor as to what he must do when faced with a particular set of facts. Instead, the governor is allowed a choice of several possible decisions. With the exception of a limited number of extraordinary situations, in such cases requesting individuals are not entitled to require that the relevant official act in a specific way. However, individuals will still be entitled to expect that their case be considered in accordance with the requirements emanating from the law and that the decision be free of discretion errors.

According to section 4(2) of the APA, the official or body exercising discretion must do so with due consideration to the limits of the discretionary power, the purpose of discretion and the general principles of law, having regard to all important facts and considering the legitimate interests at stake. Under section 32(4) of the IA, in resolving a request for the authorisation of prison leave the governor of a prison must have regard to the circumstances surrounding the commission of the offence of which the prisoner was convicted, the prisoner's progress in fulfilling his/her individual sentence plan and the suitability of prison leave in the context of achieving the aims of the custodial sentence imposed on the prisoner.

In addition to the Administrative Procedure Act and the Imprisonment Act, authorising prison leave is governed by Minister of Justice Regulation 72, "Internal Rules of Prisons" (IRP) of 30 November 2000. Section 83(3[1]) of the IRP provides that a prison governor may refuse to authorise prison leave if the requesting prisoner has an active disciplinary sanction. The provision in question is not couched in imperative terms, which means that prisoners with an active disciplinary sanction are not automatically excluded from being granted prison leave.

[221] A note concerning a parallel Estonian expression, irrelevant for the English translation—transl.

Having an active disciplinary sanction, of course, remains an important consideration in resolving a request for prison leave, but does not relieve the governor of his duty to consider other facts as well (in particular, those listed in section 32(4) of the IA). Merely establishing the existence or absence of an active disciplinary sanction is not enough, since section 63(1) of the IA allows a number of disciplinary sanctions of varying severity to be imposed on prisoners. Thus, a reprimand issued for a minor infraction of prison discipline cannot be attributed the same weight in resolving the prisoner's request for prison leave as several weeks of placement in a segregation cell, imposed for a serious offence.

(3.2) An inspection of the relevant documents revealed that remand prisoners who had attempted suicide had been subjected to placement in a segregation cell and to prohibitions to wear personal clothing or to use objects belonging to them. In one case, a remand prisoner was prohibited to engage in physical exercise and restrictions were imposed on his right of movement and of communication in prison grounds.

Pursuant to section 69(1) of the IA, additional security measures may be imposed, amongst others, on sentenced prisoners who are endangering their own health or who manifest suicidal tendencies. In critical situations, for instance where a sentenced prisoner has just attempted suicide, security measures may for a certain time make it more difficult for the prisoner to attempt suicide again. Nevertheless, measures listed in section 69(2) of the IA are ill suited to resolving the underlying problem that led to the suicide attempt and that, for the most part, is of psychological nature. In the long term, security measures must not be used as a means of eliminating the prisoner's tendency to self-harm or to attempt suicide.

(3.3) The inspection revealed that in the Medical Department of Tartu Prison the medical records of sentenced prisoners and remand prisoners were kept in an unlocked wooden cabinet.

Section 9[1](1) of the IRP requires a medical record to be created in respect of each prisoner. Under the terms of section 4(3)(3) of the Personal Data Protection Act (PDPA) information concerning the state of a person's health or the person's disability constitutes sensitive personal data. Section 6(6) of the same statute requires the person processing personal data to observe among other things the principle of security. That principle requires security measures to be implemented in order to protect personal data against the inadvertent or unauthorised alteration, disclosure or destruction. Similarly, section 9[1](2) of the IRP requires medical records to be stored in conditions that ensure the integrity, accessibility and confidentiality of the personal data contained in those records. The principle cannot be deemed observed if documents containing sensitive personal data are stored in a cabinet that does not have a lock, and cannot even be shut properly.[222]

In addition to that, any person processing personal data is required by virtue of section 19(1)(2) of the PDPA to implement organisational, physical and technological security measures to ensure that access to personal data is protected. These measures will also ensure that the data are protected against accidental or deliberate destruction. In this connection, storing paper documents in a wooden cabinet does not ensure their protection, for instance, in case of fire.

(3.4) A tour that was conducted of the medical department facilities as part of the inspection revealed that medicines were stored in two locked rooms and in locked cabinets in the Chief Nurse's Office. At the time of the tour, all medicines cabinets in that office were open and a ring of keys had been left in the door of one cabinet. The chief nurse was not in the office.

Under section 2(4) of Minister of Social Affairs Regulation 19, "Principles and Procedure for Storing and Transporting Medicines" (the Regulation) of 17 February 2005, unauthorised persons must not be able to gain access to medicines. By virtue of section 4(1) of the Regulation, medicines must

[222] At the time of the inspection, section 91(2) of the IRP, as amended to the material time, explicitly required medical records to be kept in a locked cabinet or locked room.

be stored in a segregation room or a locked cabinet. In addition to that, measures must be taken to exclude access by unauthorised persons to medicines. The notion of unauthorised persons is not restricted to prisoners but also encompasses other persons passing through the medical department, such as prison employees, etc.

(3.5) The inspection revealed that sentenced prisoners who wished to make an initial appointment to see a psychiatrist were referred to the general practitioner or a psychologist in order to determine whether they needed psychiatric treatment.

Under the terms of section 70(3) of the Health Insurance Act (HIA) individuals are entitled to receive psychiatric assistance also without a previous referral or other previous medical examination. The rationale of the provision in question lies in the fact that public opinion tends to be highly sensitive to certain illnesses. For instance, patients with psychiatric disorders tend to be more vulnerable than usual and the problems related to those disorders are of highly personal nature. Allowing appointments without referral in the case of psychiatric disorders reduces the stress related to making the appointment and avoids stigmatization. This means that it is important to encourage early diagnosis and treatment of mental health problems. No obstacles should be placed in the way of those who seek specialist assistance.

(3.6) The inspection revealed that all patients in the Psychiatry Unit of the Medical Department of Tartu Prison had been placed in separate cells during the visit of the inspectors. Five of the cells were equipped with CCTV cameras the feed from which can be monitored round-the-clock by the nurse. The video feed of the cameras is not recorded. The cells are analogous with those used to hold prisoners, except for the fact that the partitioned-off hygiene facilities in the cells of the psychiatry unit lacked the door. The purpose of this was to make it possible to monitor the activities of psychologically disturbed prisoners also when they were using those facilities.

Monitoring the activities of a prisoner by means of CCTV interferes with his/her right to privacy (Article 26 of the Constitution). A statutory basis for such interference is provided in section 7(2) of the IA which provides that the cells intended to hold prisoners must make it possible to monitor the prisoners on a constant basis either visually or by electronic means.

Under Article 11 of the Constitution any limitation of fundamental rights must be proportionate to the aim of the limitation. According to the principle of proportionality, one of the preconditions that must exist for a limitation to be lawful is the necessity of that limitation. "A measure is necessary if its aim cannot be achieved by means of another measure that is less restrictive of the rights of individuals but at least as effective as the first."[223] The Head of the medical department justified monitoring the use of hygiene facilities by prisoners held in the psychiatry unit by referring to the fact that statistically, partitioned-off hygiene facilities are a frequent setting for suicide attempts.

The monitoring of individuals when they perform private bodily functions constitutes an extremely serious invasion on their privacy. Hence, the principle of proportionality requires that, in seeking to prevent suicides, other measures that are less intense in terms of invading the privacy of the prisoner should be preferred. When there is a possibility that an unstable prisoner can self-harm or attempt to commit suicide specifically in the partitioned-off area that contains the hygiene facilities of the cell, the prisoner should be temporarily deprived of all items that he/she might endanger him/herself with. Recording a person's performance of private bodily functions can only be justified in extreme cases, when the likelihood is high that the person will attempt suicide in the near future and there is no other way that the attempt can be prevented.

In addition to that it must be pointed out that in reality the CCTV feed is not monitored round the clock. During the time of the visit, there were no nurses in the monitoring room. It also turned

[223] Constitutional Review Chamber of the Supreme Court, judgment of 6 March 2002 in case 3-4-1-1-2 (in Estonian—transl.).

out that the duty nurse was out to lunch. Thus, psychologically disturbed prisoners may endanger themselves without anybody interfering. This reinforces the proposition that other means should be preferred in order to ensure the safety of prisoners (temporary removal from the cell of potentially dangerous items, the installation of a partial door (3/4 height), etc.).

(4) As a result of the inspection, the Chancellor issued the following recommendations and suggestions to the Governor of Tartu Prison:

- The following principles should be observed in resolving the requests for prison leave of sentenced prisoners held in Tartu Prison: the prisoner may not be denied prison leave exclusively on grounds of his/her having an active disciplinary sanction. Even where the prisoner has an active sanction, his/her request must be resolved in accordance with the investigative principle provided in section 6 of the APA, which mandates that other considerations relevant to the case should also be established and taken into account in the decision to grant or deny the leave requested. Where the prisoner's request is denied, the decision must state all facts and considerations that it was based on.

- Prisoners who are likely to self-harm or to attempt suicide must not merely be subjected to additional security measures, but should also be provided the assistance of a psychiatrist, or at least allowed to see a psychologist.

- The requirements provided in relevant legislation should be observed when storing the medical records of prisoners.

- The Medical Departmentof the prison should respect the requirements established in legislation in regard to handling medicines.

- In cooperation with the officials of the Ministry of Justice, the administration of Tartu Prison should consider creating additional positions of psychiatrist in the prison's medical department in order to make it possible for prisoners in need of specialist assistance to see a psychiatrist without being subjected to an unnecessary preliminary examination.

- In all cells in the Medical Department of Tartu Prison, doors should be installed in the partitions separating the hygiene facilities from the rest of the cell. In order to prevent suicide attempts, all items that the prisoner can harm him/herself with should be removed from the cell. The door of the partition separating the hygiene facilities from the rest of the cell may only be removed if a high likelihood exists that a prisoner will attempt suicide in the near future, and measures other than monitoring the prisoner on a constant basis are inadequate to prevent the attempt.

In addition to the foregoing, in order to improve the protection of prisoners' fundamental rights and freedoms, the Chancellor recommended the following adaptations in the work of the medical department:

- The administration of Tartu Prison should ascertain the prison's need for psychiatrists and, if that figure exceeds the current number of positions, recruit more of them.

- In attempting to recruit health workers, in particular psychologists and psychiatrists, the administration should consider collaborating with the relevant training institutions.

In its reply to the Chancellor, the Governor of Tartu Prison admitted that discretion errors had previously been made in considering sentenced prisoners' requests for prison leave. He assured the Chancellor that the prison administration was correcting its previous practice and that the administrative acts decided by the administration would from then on state all relevant factual and legal considerations pertaining to the case.

Whenever additional security measures are imposed on prisoners who are likely to self-harm or to attempt suicide, the staff of the medical and the social department will be informed. In urgent cases the prisoner will be allowed to see a psychologist, psychiatrist or chaplain.

The administration has procured lockable metal cabinets for storing medical records of prisoners in accordance with the applicable requirements. The metal cabinets will be placed in a locked room in the medical department.

The governor also explained that the medicines included in the list of narcotic and psychotropic drugs are stored in a numeric code safe placed in the office of the Head of the medical department. The Head of the department only releases those medicines against signed receipt. The other medicines are kept in a special locked room in cabinets that are also locked. The Chief Nurse is responsible for locking the cabinets and the rooms.

The work arrangements of the psychiatrist of Tartu Prison have been amended. The psychiatrist now receives walk-in patients on the basis of a referral list prepared by the general practitioner or the psychologist. Prisoners who wish to see the psychiatrist without referral can make an appointment through their contact officer, or wait until the psychiatrist sees them as part of a regular visit.

As regards the monitoring of prisoners who are likely to self-harm or to attempt suicide, the governor disagreed with the solutions proposed by the Chancellor. However, it is a practice of the prison to turn off monitors showing CCTV feed from a prisoner's cell where necessary. This guarantees a certain privacy to the prisoner monitored.

The governor also disagreed regarding the creation of an additional position of psychiatrist. He pointed out that recruiting psychiatrists to fill the existing positions had proved unexpectedly difficult in view of the situation in the labour market. The governor acceded to the Chancellor's position that individuals held in a prison require more psychiatric assistance than usual. With the help of the psychiatrists who have been employed, the prison officials have succeeded in screening out a considerable number prisoners in need of forensic treatment, and obtain forensic treatment orders in respect of those prisoners.

IV AREA OF GOVERNMENT OF THE MINISTRY OF DEFENCE

1. General outline

The area of government of the Ministry of Defence encompasses the organisation of national defence and the preparation of related policy proposals, the implementation of national defence policies, the coordination of Estonia's international defence cooperation, the preparation and carrying out of call-ups of reservists to active duty, the preparation and carrying out of conscriptions for obligatory service, the management of registration and records of reservists and the training of reservists, the funding and equipping of the Defence Forces and the Defence League, the development of defence industries, the overseeing of the activities of the Defence Forces and the Defence League and the preparation of drafts of corresponding legislation. The institutions under the authority of the Ministry are the Defence Forces, the Defence League, the Intelligence Agency and the Defence Resources Agency.

In 2006, the Chancellor of Justice opened 17 cases to review the legality of the administrative measures of the Ministry of Defence and of its subordinate agencies, or to scrutinise legislation governing national defence matters for conformity with the Constitution and relevant statutes. Some of the cases were opened to investigate petitions submitted to the Chancellor, whereas others were opened by the Chancellor of his own initiative.

The cases opened by the Chancellor in relation to national defence may be divided into three categories.

The first category relates to differences in views on the principles governing leadership in matters of national defence and in the practical organisation of the Defence Forces between the Minister of Defence and the Commander of the Defence Forces and, respectively, between the Ministry of Defence and the General Staff of the Defence Forces. Ill-fitting legal rules governing the organisation of the Defence Forces caused the Commander of the Defence Forces to submit several requests to the Chancellor of Justice. In those requests, the Commander asked the Chancellor to give an authoritative and unambiguous interpretation of the inadequate legal basis of national defence.

The second group of problems consisted of issues related to service in the Defence Forces. Petitions on these issues were received from conscripts who were serving their tour of duty as well as from regular members who had enlisted on a voluntary basis. The petitions focussed on a number of areas, in which the petitioners took issue with the application of or failure to apply relevant legislation. These areas included the calculation of the length of service, the compensation payable to members of the Defence Forces for dental treatment and specialist medical treatment, work and rest time, night work, and release from service.

The third category of cases was concerned with constitutional scrutiny of several draft bills prepared in the Ministry of Defence. Constructive cooperation between the Office of the Chancellor of Justice and the Ministry allowed the rules proposed in these to be brought into conformity with the Constitution.

1.1. Organisation and leadership of Defence Forces

In several previous Annual Reports, the Chancellor of Justice pointed out the fact that a statute required by paragraph 2 of Article 126 of the Constitution, which is to make provision for the organisation of Estonia's Defence Forces, has yet to be adopted.

The absence of a law providing the organisation of Defence Forces has resulted in a number of legal and practical conflicts both within the Defence Forces and in the relations between those forces and the Ministry of Defence. The year 2006 will for some time be remembered for the conflicts that it

brought to the fore in relation to the leadership of Estonia's mission unit in Afghanistan. These were crowned by the Minister of Defence opening service oversight proceedings in respect of the actions of the Commander of the Defence Forces, and by the annulment of decrees that the Commander had issued in contravention of higher-ranking legal rules. The Chancellor regards the initiative of the Minister of Defence to exercise civilian control of the Defence Forces by using service oversight procedures prescribed in the Peacetime National Defence Act as the only possible and laudable solution. However, subsequent analysis of the situation by the Chancellor showed that on a deeper level the problems had partly been caused by the failure of the Ministry of Defence to provide a sufficient legislative base in the matter, and by the Ministry's poor exercise of civilian control.

During 2006, the Chancellor received a petition from the Commander of the Defence Forces, who requested that the Chancellor provide an opinion of how a legal basis that was necessary for the leading of the Defence Forces might be established without endangering Estonia's cooperation with NATO. The Chancellor performed an analysis of the law governing the Defence Forces' mission units and found extensive and material shortcomings in the legislation concerning national defence. The absence of a statute providing for the organisation of the Defence Forces has resulted in a situation where national defence is often conducted arbitrarily, or on the basis of ill-fitting and contradictory Executive regulations, ambivalent sets of rules, and the so-called self-made law of the Commander of the Defence Forces. Estonia's Defence Forces need a comprehensive legal basis that is unambiguous and compatible with the practice of national defence. The principles and foundations of such a basis must be laid down in a statute providing for the organisation of the Defence Forces. The requirement established in the Constitution to lay down the organisation of the Defence Forces in a statute means that the legal status, structure and leadership of the Defence Forces must be set forth in an Act of Parliament that respects the principle of clarity of laws and deals with the matter exhaustively and unambiguously. All questions material to the organisation of the Defence Forces must be resolved by statute.

The Chancellor of Justice finds it utterly unacceptable that a statute such as that described above has not yet been passed in Estonia. In fact, it is the only one of those required by the Constitution that has not been enacted during the 15 years that the Constitution has been in force. A large part of the work required to prepare the statute in question should have been done in the Ministry of Defence, whose first priority must be to submit a draft of the relevant bill to the Cabinet of Ministers. Responsibility for the absence of the statute in question also lies with the Cabinet of Ministers and the Riigikogu.

Unfortunately, the absent statute regarding the organisation of the Defence Forces is not the only sign of the unconstitutional and inadequate legal basis in the field of national defence. Thus, the Supreme Court[1] has held that sections 71 and 275 of the Regulations of the Defence League (RDL) are unconstitutional and must be regarded as void as of 5 March 1999, i.e. the date on which the Defence League Act entered into force. In their substance, the RDL represent pre World War II law—they were established by Decree 86 of the Chief of the Defence League of 14 December 1934. When Estonia regained its independence, the Cabinet of Ministers of the Republic re-established the RDL by its Regulation 128. Pursuant to section 6(2) of the Defence League Act, the Cabinet should have made another Regulation establishing the RDL but has not yet done so. The Supreme Court pointed out that the RDL have not been established pursuant to the requirements of the Defence League Act, which means that the provisions of the RDL are in formal contravention of the principle of separation of powers emanating from Article 4 and of the principle of democratic rule of law arising from Article 10 of the Constitution. The Supreme Court also scrutinised the substantive constitutionality of the rules in the RDL and found that matters such as removal of members from the roll of League membership and restrictions on members' freedom of speech must be provided by statute instead of Cabinet of Ministers regulation. The Chancellor finds that although the re-establishment of pre-war rules holds a certain legal-historical appeal, the need to ensure formal and substantive conformity of the RDL with the Constitution must take priority. Similarly to the RDL, the Cabinet has used pre-war law as a model for establishing the Internal Regulations of the Defence Forces, the Garrison Regulations and the Defence Forces Service Regulations, the rules of

which are also formally and substantively incompatible with the Constitution. The foregoing suggests that the Ministry of Defence must prepare and formally introduce proposals for relevant legislative amendments in order to ensure the formal and substantive constitutionality of the relevant Cabinet of Ministers Regulations.

The year 2006 also saw the stepping down of previous Commander of the Defence Forces Tarmo Kõuts, who went on to run in the parliamentary election, and the appointment of Major General Ants Laaneots as the new Commander. On 23 November 2006, the Riigikogu passed the Act to Amend the Defence Forces Service Act, introducing a five-year term of service for appointees to the office of Commander of the Defence Forces (previously appointments were made for an unspecified duration).

1.2. Service in the Defence Forces

During an inspection visit to the Kuperjanov Single Infantry Battalion, the Chancellor was approached by a regular member of the Defence Forces who claimed that, although he was raising a child who was below 12 years of age, he had repeatedly been assigned to night duty without his consent. Having analysed the applicable rules and weighed on the one hand the interests of national defence and on the other the interests of the child and the need to protect the child, the Chancellor concluded that situations in which care for the child must take precedence over service requirements were impossible to foresee beyond a relatively short timespan. For this reason, the superior officer organising the service of a regular member of Defence Forces who is raising a child below 12 years of age must, in each case of assigning night duty to the member, establish whether the assignment of night duty at that particular time does not harm the interests of the member's child. The consent to perform the duties of service also by way of night assignments that a regular member of the Defence Forces gives in the service agreement is not sufficient. The Chancellor recommended that the Commander of the Defence Forces issue guidelines to armed units and other units of Defence Forces directing those units to apply valid legislation in respect of regular members of the Defence Forces who are raising a child under 12 years of age in a manner such as to ensure that in each case of assigning night duty to a member, that member could give his or her consent to that assignment, regardless of whether such consent has in principle been stipulated in the agreement for active service or not.

In 2006, the Chancellor of Justice scrutinised the issue of paid annual leave of civil servants who served as teaching staff members at the Estonian National Defence College. The Defence College has several types of teaching positions: involving members of the defence forces, public servants and teachers working on the basis of employment contracts. The principal question in the case was whether public servants working as teachers were subject to the rules contained in section 45 of the Public Service Act and in section 9(2)(3) of the Holidays Act, which in conjunction established a leave entitlement of 35 days, or to the rule in section 9(2)(4) of the Holidays Act, which provided an entitlement of up to 56 calendar days for teachers and researchers employed on the basis of employment contracts. Equal treatment of teaching staff is an important consideration (equal pay for equal work), yet specific requirements emanating from the particular employment or service relationship must also be taken into account. The Chancellor concluded that since teachers who are public servants are subject to a number of more stringent requirements and limitations and benefit from additional social guarantees that do not apply to teachers working on the basis of regular employment contracts, a comparison of the two categories is not entirely relevant. In the case at hand it was important, however, to consider also the specific nature of the teaching work and the need for a 56-day leave entitlement that is important in the context of that work. The Chancellor wrote to the Minister of Justice and recommended that the Minister resolve the issue in cooperation with the Minister of Defence and the Minister of Internal Affairs. The Chancellor will continue to follow developments in this matter in 2007.

In 2006 the Chancellor received a petition that raised the issue of compensation of dental treatment to members of the Border Guard. The petitioner stated that the regulations of the West Border

Guard District provide for a total compensation of 750 Estonian *kroon* per year for dental treatment and specialist medical treatment. The Defence Forces Service Act and a Regulation that the Minister of Defence has enacted pursuant to that statute contain a principle according to which members of the Defence Forces serving under the authority of the Ministry of Internal Affairs are entitled to full compensation for specialist medical treatment (which under the terms of the Health Care Services Organisation Act also includes dental treatment). The Minister of Internal Affairs explained that the relevant Regulation of the Minister of Defence was enacted before the end of 2006. It established an obligation on the Border Guard that could not be fulfilled and that was not covered by available funds. The Chancellor pointed out that the rights that individuals are granted by statute are important rights and that, where the granting statute did not make provision for limitations to be imposed on a right by lower-ranking rules, such limitations could not be imposed. The Government and its agencies must find the resources to comply with the requirements established by statute. The Chancellor will continue to follow developments in this matter in 2007.

1.3. Legislation

The Office of the Chancellor of Justice carried out constitutional scrutiny analyses with respect to two draft bills prepared in the Ministry of Defence. Both analyses led to the respective draft bills being brought into conformity with the Constitution even before their submission to the Riigikogu, which in turn ensured their smooth and efficient passage through debates in Committee stage and in the plenary assembly.

The Chancellor scrutinised the Draft Name and Emblem of Red Cross Bill for constitutionality. Protection of the name 'Red Cross' and the emblem of the Red Cross stems from the Geneva Conventions of 12 August 1949 and the 1977 Additional Protocols to those conventions, to which Estonia acceded in 1993. The name 'Red Cross' and the corresponding emblem represent symbols used by the medical staff and ministers of religion of parties to an armed conflict. The aim of the draft bill was to bring the law into conformity with the requirements emanating from the conventions. For that purpose, domestic rules governing the use of the name and the emblem of Red Cross must be established, as well as sanctions provided for cases of misuse. The draft bill proposed establishing extensive limitations on the use of the name and the symbols of Red Cross and providing penal sanctions for the violation of those limitations.

The Chancellor pointed out that the impact of the proposed rules was very broad: all natural and legal persons who have so far used the name or emblem of the Red Cross, and those who would wish to do so in future would have to consider the prohibitions and restrictions that the draft bill envisaged. Among other things, these would apply to children's toy medical kits, automotive first-aid kits, theatrical performances, etc. At the same time, it should be recalled that the Red Cross is a symbol that is among the widest known in Estonia, and the majority of the country's inhabitants have developed an understanding of its meaning.

Legally speaking, the draft bill proposed establishing rules that would have meant extensive limitations on the right to free self-realization protected under Article 19 of the Constitution. The explanatory memorandum to the draft bill was silent on the issue of whether such extensive prohibitions and limitations could be regarded as appropriate, necessary and remaining within the limits of what was required to achieve the legitimate objective that the draft bill sought to achieve. The note did not contain any analysis of how the limitations would reduce the risk of misuse in practice. Nor did the note deal with the question of whether the objective could have been achieved by less restrictive means (such as allowing the use of the sign in peacetime to persons not active in the health care sector).

The Chancellor concluded that the proposed rules regarding the right to use the emblem of Red Cross during peacetime must be revised. Extensive limitations and sanctions are not justified, in particular, when the explanatory memorandum of the relevant draft bill states that the monitoring of

compliance with the prohibitions would be unreasonable. The Chancellor recommended that the list of grounds for using the emblem of Red Cross and the list of persons entitled to use it be expanded. It was also suggested that penal sanctions in the draft be rolled back to exclude cases in which misuse of the name or emblem of Red Cross, the name or emblem of Red Crescent, the name or emblem of Red Lion and Sun, or of a name or emblem similar to any of these cannot be linked to the use of any of these for a protective purpose.

In a meeting of representatives of the Chancellor of Justice and of the Ministry of Defence, agreement was reached according to which the Ministry would bring the draft into conformity with the principle of the proportionality of limitations on fundamental rights that emanates from the Constitution, considering the widespread use of the emblem of Red Cross in Estonia, while also respecting the requirements imposed by international law.

The relevant insertions were made in the text of the draft bill and the explanatory memorandum, following which the Cabinet of Ministers submitted the bill to the Riigikogu. The main changes that were introduced consisted in establishing a model written agreement for using the name or emblem of Red Cross for reference purposes, and in the prohibition of accepting payment for the use of the same in the sphere of culture. Penal sanctions were ruled out in cases in which misuse of the name or emblem of Red Cross, the name or emblem of Red Crescent, the name or emblem of Red Lion and Sun, or of a name or emblem similar to any of these has taken place but that misuse cannot be linked to the use of any of these for a protective purpose.

The Riigikogu adopted the Name and Emblem of Red Cross Act on 5 April 2006, and the act entered into force on 1 June 2006.

The other draft bill in respect of which the Chancellor was asked to provide an opinion was the Draft Bill to Amend the Peacetime National Defence Act and the State Secrets Act. The draft bill proposed to make provision for use of armed force in repulsing a threat posed by a civilian aircraft in the case the flight of that aircraft had been unlawfully interfered with and likelihood existed that the aircraft might be used to inflict injury on individuals or property, or to perpetrate an armed attack against the Republic of Estonia with intent to cause the death of persons outside the aircraft.

The need to use force to repel threats posed by renegades stems from the requirements of NATO and from those of Estonia's national defence and national security. At the same time, such use of armed force constitutes a severe limitation of the right to life of the persons on board the aircraft, protected by virtue of Article 16 of the Constitution. Nevertheless, the Constitution does not provide an absolute ban on the taking of life. Taking a life may be lawful when it occurs in the course of protecting another important legal value. The Chancellor concluded that the use of armed force by the Government to repel an attack conducted by means of a renegade aircraft would only be justified if there were sufficient grounds to believe that the aircraft would be used to perpetrate an armed attack as a result of which those on board would perish in any case. The use of armed force may constitute a necessary means to attain a desired objective only in the case that all other means that either do not limit fundamental rights or limit them to a lesser extent have proved ineffectual. Since it is impossible to predict the occurrence of an armed attack with 100% certainty, an additional test must be introduced. According to that test, the damage caused by the use of force against a renegade aircraft must be substantially less than the damage that would attend an eventual attack. The damage must be assessed by reference to the values protected in Article 16 of the Constitution. In addition, the bill should provide a set of conditions that must be fulfilled in order for civilian aircraft to be regarded as renegade.

It must also be stressed that the decision to use armed force or to forgo such use must leave room for political accountability. It is important that a good balance be found between the need for rapid reaction and the adequacy and sufficiency of the information gathered in the case.

As a result of the analysis carried out in the Office of the Chancellor of Justice, the following requirements were inserted in the draft bill:

– the use of force against a civilian aircraft is only permitted if no other means exist to prevent an armed attack from being perpetrated by the aircraft against the Republic of Estonia;

– armed force may only be used if the injury attending such use is significantly inferior to the injury that may attend a possible attack;

– when armed force is used, it must be used in a manner that can be expected to result in the least possible injury.

The draft bill also proposed that the use of armed force should be decided by the Minister of Defence or the Minister authorised to act in the stead of that Minister.

The Riigikogu passed the Act to Amend the Peacetime National Defence Act and the State Secrets Act on 9 November 2006. The statute entered into force on 15 November 2006. The Chancellor takes the view that the pertinent and thoroughly considered rules of the statute in question will provide a guarantee that no one will arbitrarily be deprived of his or her life. The provisions in the statute will also make it possible for the Government to protect the right to life of those who would perish if a renegade aircraft were allowed to perpetrate an armed attack. The measures provided by the statute have been thoroughly scrutinised. They are proportionate to the desired objective and are compatible with Article 16 of the Constitution.

V AREA OF GOVERNMENT OF THE MINISTRY OF ECONOMIC AFFAIRS AND COMMUNICATIONS

1. General outline

The area of government of the Ministry of Economic Affairs and Communications encompasses the Government's economic policy and the development and implementation of strategic plans for the economy in the areas of industry, commerce, energy, housing, construction, transport (including transport infrastructure, transport services, transit, logistics and public transport), traffic management (including rail, road, street and air traffic as well as navigation on waterways), improvements in traffic safety and the reduction of emissions and other environmental damage caused by transport vehicles, information technology, telecommunications, postal services and tourism. In addition to the above, the Ministry's authority extends to coordination of development of the Government's information systems, to technological development activities and innovation, to organisation of measures for the protection of metrology, standardisation, certification, accreditation, operating licences, registers and industrial property, and also to competition oversight, consumer protection, export promotion, the protection of trade, as well as to issues involving regional economic development and investments, the management of minimum stocks of liquid fuel, and the preparation of corresponding draft legislation.

Petitions submitted to the Chancellor of Justice in the area of government of the Ministry of Economic Affairs and Communications in 2006 involved diverse areas of the law, including construction and planning law, traffic control law, the law of oversight of universal services provision, electronic communications law, public water supply and sewerage law, energy law, economic management, trade management and competition law, company law and the law of credit institutions, as well as matters of industrial property.

Some of the petitions submitted concerned the implementation of legislation and the oversight of service provision in the work of agencies and inspectorates in the Ministry's area of government and in the corresponding activities of local authorities. A second group of petitions requested the Chancellor of Justice to scrutinise specific legislation for compliance with the Constitution and the relevant statutes.

As in previous years, no violations of the law were established in the majority of cases, and the response provided was limited to clarification of the law. It should, however, be noted that even petitions that were declined or referred to other agencies contributed to revealing and solving a number of problems. Generalisations made on the basis of such petitions by the Chancellor of Justice can be used to map discrepancies in legislation and point out problems in the area of government of the Ministry. The Chancellor's analysis will provide a broader overall understanding of the problems in that area and will highlight society's expectations concerning the activities of public authorities. It will also prepare the ground for future action by the Chancellor. Such action can take the form of cases of constitutional scrutiny opened on the Chancellor's own initiative, of a recommendation or a memorandum addressed to a Minister, or of a report to the Riigikogu on an issue of current interest.

The following is a brief examination of two areas in which the Ministry and the Riigikogu should take a more active approach in order to guarantee fundamental rights. The areas in which the legal environment is in dire need of review are housing provision and the transit of hazardous goods by rail.

1.1. Housing provision

In 2006 the Ministry of Economic Affairs and Communications prepared a strategic plan to develop housing provision in Estonia. The plan charted the existing situation in the housing market and

provided an overview of ownership relations in the area of housing, as well as of the availability of housing and problems in the housing market.[224] The second part of the plan outlined the Government's objectives and activities in the field for the years 2007–2013. The objectives include the following: to make housing available to all residents of Estonia; to raise the quality and make provision for the sustainability of housing facilities; to ensure diversity in and balanced and sustainable development of housing areas. It should be noted that the plan only provides a general outline of envisaged developments, and that the outline is often silent as regards specific measures to achieve the objectives of the plan and realise the developments. For instance, the plan does not answer the question of how to increase the supply of affordable lease housing. The overview provided in the plan shows that there is hardly any local authority that possesses a reserve of housing facilities. The need for municipal and social housing is felt the most in the bigger cities of Estonia.

In 2005, 96% of total housing facilities in the country were held by private owners, while 4% belonged to the public sector (1.2% to the Government and 2.8% to local authorities). Nearly 85% of households owned the accommodation that they lived in (mainly apartment associations); residential tenants occupied the remaining 15% of the total.[225] Since a large share of privately held lease housing in Estonia belongs to small property holders, the sector is difficult to control for taxation purposes, and the Government lacks an adequate overview of the situation.[226]

In the area of measures envisaged to provide for the sustainability of housing facilities and to raise the energy efficiency of those facilities, the strategic plan foresees supporting the renovation of blocks of flats and granting government renovation loans in a limited number of cases. In accordance with the plan, the main measure, however, will consist in providing a scheme to apply for government guarantees regarding credit obtained for reconstruction and renovation of blocks of flats.

As regards measures required to improve the housing environment, the strategic plan lists, amongst others, those of raising the quality of that environment, tidying up grounds surrounding blocks of flats, developing public spaces, raising awareness of the heritage value of districts that reflect the setting of a particular historical period, taking steps to provide for security in housing areas, improving the legal environment and building administrative capacity.

The strategic plan also deals with issues related the development of housing market. It does not, however, extend to matters of provision of universal services, although the latter are intrinsically connected with the development of that market. The Chancellor of Justice has repeatedly drawn attention to the need to consider the connection between vital universal services and housing. On 27 January 2004, the Chancellor sent an memorandum to the Minister of Economic Affairs and Communications, in which he stressed the need to ensure a better protection of the rights of residents of blocks of flats with regard to water supply and sewerage provision. The protection of consumer rights and the maintenance of checks on monopolies that provide a universal service are intrinsically connected with housing provision, and fall into the area of responsibility of the Ministry of Economic Affairs and Communications. The jurisdiction of the Ministry also includes scrutinising the independence and functioning of regulators of universal services, and elaborating solutions to improve existing regulatory mechanisms.[227]
Unfortunately, despite repeated comments and reminders from the Chancellor of Justice concerning

[224] "Housing in Estonia: Strategic Plan 2007-2013" as approved by the Minister of Economic Affairs and Communications on 13 April 2007. However, the plan was rejected by decision of the State Secretary pursuant to instructions from the Prime Minister for the reason that no proposal to prepare the plan had formally been submitted to the Cabinet of Ministers of the Republic. Decision (in Estonian—transl.) to close the administrative file in respect of the plan is available on the Internet at: https://dhs.riigikantselei.ee/ (viewed on 28 June 2007).
The proposal to prepare the plan has now been approved, but it is not clear in what form the plan will be presented. Decision (in Estonian—transl.) to approve the proposal to prepare the plan is available on the Internet at: https://dhs.riigikantselei.ee/dhsavalik.nsf/73e5013fc7005edfc2256e77004fb991/c2256d56004d5f80c22572eb0025a99d?OpenDocument (viewed on 28 June 2007).

[225] Financial Wellbeing of Households, 2005. Estonian Statistics Board (in Estonian—transl.).

[226] Housing in Estonia: Strategic Plan 2007-2013, p 7. Available from the Ministry of Economic Affairs and Communications.

[227] See the Annual Report of the Chancellor of Justice for 2004 (the Estonian-language edition) pp. 40–45, Annual Report for 2005, pp. 103–104.

the legal environment in the field of housing provision and particularly in regard to blocks of flats, the Minister of Economic Affairs and Communications has so far proved unable to arrange for preparation of the necessary legislative amendments.

At the end of 2006, a working group was convened to consider merging the Apartment Associations Act and the Apartment Ownership Act into a single statute. The initiative for this originated from the Ministry of Justice, which is also preparing the corresponding draft law.

1.2. Re-nationalisation of Estonian Railways and transport of hazardous substances by rail

The weightiest decision prepared in the area of government of the Ministry of Economic Affairs and Communications in 2006 was undoubtedly the re-nationalisation of Estonian Railways. The fundamental rights aspect of that re-nationalisation consists in the contribution that this makes to completion of preparations that will make it possible for the Government to guarantee the sustainability and safety of railway infrastructure, and to assert control over rail freight traffic. For that purpose, closer co-operation is required between the corresponding ministries and the agencies in their area of government, which in turn hinges on the reorganisation of the legal environment provided in statutes and international treaties. As long as there is no clear allocation of tasks between administrative authorities, and the obligations of private individuals are not explicitly specified in legislation, one cannot seriously speak of effective supervision. Until Estonia lacks an effective and comprehensive monitoring system concerning hazardous substances, the Government fails in its duty to minimise risks resulting from the transportation of hazardous substances to human life, health, the environment and other values protected under the Constitution.

In a constitutional scrutiny case opened in 2006, the Chancellor of Justice analysed questions of the transportation of hazardous substances by rail through Estonia, and their handling by businesses.[228] The Chancellor's is not authorised to prescribe specific statutory solutions to issues. Neither can he determine the way in which government supervision should be organised, which tasks should be performed by the central government and which ones by local authorities, or the arrangements that need to be introduced in the existing infrastructure, etc.

The Chancellor of Justice concluded that the transit through Estonian territory of large quantities of hazardous substances is insufficiently regulated in statutes. There is no effective and comprehensive supervision by public authorities, such as would make it possible to minimise risks that transport of hazardous substances by rail poses to human life, health, the environment and national security. The Chancellor recommended that in elaborating the necessary draft legislation, drafters should above all scrutinise the Railways Act, the Chemicals Act (but also the Emergency Preparedness Act and the Rescue Act) and the implementing legislation enacted under these statutes. The statutes and other legislation mentioned should be approached systematically, keeping in mind the fact that amendments must respect the principle of clarity of laws, and provide for the organisation of government supervision of transport of hazardous substances, as well as for the competency and tasks of administrative authorities in the matter. Public authorities should be authorised to supervise shipments of hazardous substances passing through Estonia. Competent agencies must be kept up to date on the movement of such shipments from customs to port.

The Chancellor of Justice sent an memorandum to the Minister of Economic Affairs and Communications, in which he listed the shortcomings that had been discovered and recalled the fact that the preparation of necessary draft legislation in this area was incumbent on the Minister.

So far the Chancellor has not been notified of completion of the necessary draft legislation.

[228] For an analysis of shipments of hazardous substances see Annual Report of the Chancellor of Justice for 2005 (the Estonian-language edition), pp. 99–115.

VI AREA OF GOVERNMENT OF THE MINISTRY OF INTERNAL AFFAIRS

1. General outline

On 28 June 1992, on the basis of Article 1 of the Constitution of the Republic of Estonia of 1938, the Estonian people adopted a Constitution the purpose of which was to consolidate and develop a State that was proclaimed on 24 February 1918 pursuant to the inextinguishable right of the Estonian people to self-determination. An important aim cited in the preamble of the Constitution was the protection of public peace in Estonian territory.

Matters concerning protection of public peace in Estonian territory and ensuring the country's internal security were considered an important part of the tasks of the Ministry of Internal Affairs in 1918, and have retained that status in 2006.

The responsibility of the Ministry of Internal Affairs in the field of internal security consists in ensuring, through the agencies in its jurisdiction, the internal security of Estonia, in protecting public policy, in guarding and protecting the borders of the country and in making sure that the rules governing movements of goods and individuals across the border are respected. The Ministry and the agencies in its jurisdiction are also responsible for matters pertaining to crisis management, fire and rescue operations, data protection, citizenship and migration.

Important developments in the field of internal security in 2006 revolved around measures adopted to prevent terrorism, to ensure preparedness in emergency situations and to prepare for accession to the Schengen area. Another important focus in the activities of the Ministry was clarifying arrangements regarding service in law enforcement agencies. The role of competent, loyal and motivated service officers available in numbers that are sufficient to protect public peace in the country's territory cannot be underestimated.

On 17 August 2006 the Cabinet of Ministers of the Republic approved the National Strategy for Combating Terrorism, and the corresponding National Action Plan. The strategy was adopted with the aim of defining the policy of the Estonian Government in combating terrorism. The strategy will help the Government explain to the public and to its international allies the measures adopted in Estonia to prevent terrorism. The goal of the strategy is to provide a coherent framework for preventing the commission of acts of terrorism and of providing funds to terrorists, and to ensure preparedness for responding to crisis situations caused by terrorist attacks. The founding principle of the strategy consists in defining and assigning to each of the relevant agencies its particular tasks that must be carried out within fixed time limits. The activities of agencies subordinated to various Ministers are coordinated by means of linking them to common objectives. This will contribute to better planning and efficacy in the fight against terrorism.

An emergency is a situation that is characterised by imminent, clear and present danger, an increased need for central coordination, for the deployment of additional assets and for an efficient organisation of crisis communication. In order to solve problems revealed in the course of implementation of the Emergency Preparedness Act currently in force and to provide for a more effective coordination and implementation of response measures following occurrence of an emergency, a new approach to emergency preparedness arrangements was elaborated. The approach requires clear definitions of the areas of responsibility and the tasks of various agencies and departments. This will facilitate effective response in crisis situations. The preparation of amendments that need to be introduced in the statute currently in force in order to implement the new approach is scheduled to take place at the end of 2007.

The preparations necessary for Estonia to join the Schengen area mostly fall into the area of responsibility of the Minister of Internal Affairs. The Government has been preparing for joining Schengen from the very first steps taken on the road to accession to the European Union.

The underlying idea of the Schengen Agreement is dismantling the barriers to free movement of persons in the Schengen area. What this means in practice is that border controls on internal borders of Schengen States are abolished. The possible negative consequences of that must be dealt with by means of compensatory measures. These include the Schengen Information System, reinforced controls on external borders, domestic supervision of aliens, cross-border police cooperation, visa cooperation and cross-border cooperation between judicial authorities.

Two conditions must be fulfilled for a State to be admitted to Schengen area. These are implementation of the Schengen Information System and full compliance with Schengen rules.

In addition to introducing the legislative amendments required, the priorities of the Ministry of Internal Affairs in 2006 also included creating the basic conditions needed to implement the Schengen Information System (SIS). Work on installing the relevant software solutions in the Government's IT network started in April 2007 under the coordination of the Ministry. Estonia's SIS application was scheduled to be completed and ready for operational testing by the end of August.

As has already been stated, the service officers staffing a country's law enforcement angecies have an important role to play in protecting public peace in that country. The agencies must have a sufficient number of officers, each of whom must be competent, loyal to legitimate government and motivated to represent public authority.

The focus in the work of the Ministry of Internal Affairs has so far mainly been on developing the police forces. Less attention has been given to arrangements governing service in the Border Guard and in the Fire and Rescue Service. For this reason, in 2006 the Ministry of Internal Affairs prepared a Draft Border Guard Service Bill and a Draft Fire and Rescue Service Bill.

Until recently, border guards in Estonia were regarded as part of the Defence Forces. This meant that in wartime, border guards would take part in defence operations of military nature. Thus, border guard service was equivalent to serving in the defence forces. Border guard officers were members of the defence forces and service in the Border Guard was governed by provisions of the Defence Forces Service Act. In the Founding Principles of Estonia's Security Policy (adopted by Resolution of the Riigikogu of 16 June 2004) the border guard has been dissociated from the nation's military defence. In that document border guards are no longer classed as part of the defence forces, hence it is no longer justified to link service as a border guard to service in the defence forces.

The legislation that the Government needs to enact in Estonia in order to fully implement the Schengen acquis and related instruments plays an important part in reorganising the system of service in the Border Guard. Once the legislation in question enters into force, the Border Guard will have to rearrange its work to conform to a new set of requirements. For the most part, this means that in border monitoring work and in border controls the focus will shift to the external border of Estonia and of the European Union. Border controls of persons crossing the border between Estonia and Latvia will also be discontinued, and increased attention will be directed to cooperation between law enforcement agencies and to operational work on internal borders.

The Ministry of Internal Affairs coordinated preparation work regarding the corresponding amendments to legislation in force. Draft amendments were circulated for consideration to the Ministries. They were then considered in the sitting of the Cabinet of Ministers and were finally adopted in the Riigikogu on 14 February 2007 as the Border Guard Service Act.

A set of fire and rescue service centres was created in Estonia already in the beginning of the 1990s. Unfortunately, unlike in the case of other special services (such as the police forces, the prison service, the defence forces), there was no specific legislation to govern the work of those centres. This situation has persisted to the drafting of the Annual Report at hand. Matters related to the work of the fire and rescue service can only draw on basic statutes applicable to the entire civil service generally—the

Civil Service Act and the Republic of Estonia Employment Contracts Act. Neither of these makes any provision for specific issues encountered in firefighting and rescue work. This has led to problems in applying the statutes in question to rescuers and firefighters. The Minister of Internal Affairs intends to change the situation and to render the hitherto compartmentalised legislation governing internal security more uniform, i.e. to reach a situation in which all services responsible for ensuring internal security in Estonia (police, firefighters and rescuers, and border guards) will work on the basis of equally detailed regulations.

An important part in maintaining law and order in Estonia is played by the implementation of migration policies that belong to the area of responsibility of the Ministry of Internal Affairs. The Migration and Citizenship Board falls into the jurisdiction of the Ministry. For years, the Chancellor of Justice has been monitoring protection of the rights of aliens in various legalisation procedures. On several occasions in 2006, the Chancellor was pleased to note considerable improvements in the work of the Board. The notion of good administrative practice emanating from Article 14 of the Constitution is no longer perceived as something that is beyond definition. Instead, its reflections inform the practice of a wide range of procedures that the Chancellor had occasion to inspect in the course of resolving petitions concerning the work of the Board.

Matters of data protection have concerned the Chancellor of Justice both in 2005 and in 2006. Already in 2004, the Chancellor had raised the issue of individuals' personal identity codes being published on the website of *Sertifitseerimiskeskuse AS* (Certification Centre plc—transl.) without any access restrictions. The Chancellor saw this as impinging on the fundamental right to inviolability of private life enshrined in Article 26 of the Constitution. Debates on the issue continued into 2006 and led to amendments to the relevant statute being passed in the Riigikogu on 7 June 2006. More details regarding this will be provided below.

Questions regarding data protection were also examined by the Chancellor of Justice in his opinion regarding the Draft Regulation of the Cabinet of Ministers proposing to enact requirements concerning photos that appear on identity documents. The draft had been prepared in the Ministry of Internal Affairs and amongst other things established an obligation to provide information to the Minister regarding the religious beliefs of the holder of the identity document. In the view of the Chancellor, such requirement amounted to a serious limitation of the right enshrined in Article 42 of the Constitution, which forbids a public authority to gather or store information regarding the beliefs of an Estonian citizen without a freely given consent of that citizen.

In his opinion regarding the Draft Regulation of the Cabinet of Ministers proposing to enact certain conditions in respect of information and proof to be submitted together with an application for a residence permit by persons seeking temporary protection, and by members of their family, the Chancellor of Justice stressed that the Government may gather information concerning an individual's ethnicity and religious beliefs only where this is mandated by considerations of overriding importance and that the power to do that could only be granted by statute.

2. Legality of rules governing escort to a court hearing

Case 11/050937

(1) The Chancellor of Justice received a petition from an individual. Among other things, the petitioner expressed dissatisfaction with being kept in handcuffs during a court hearing.

(2) The petitioner was a sentenced prisoner who had submitted an application to Tartu Administrative Court seeking judicial review of a measure imposed on him by prison officers. During the hearing held in the court to deal with the case, the petitioner was kept in handcuffs.

The petitioner wrote to the Chancellor of Justice, complaining of the humiliation that he suffered.

The Chancellor of Justice addressed a request for information in the matter to the President of Tartu Administrative Court.

In the reply, the President explained that the use of handcuffs on sentenced prisoners during a court hearing was based on the second sentence of section 54 of Police Commissioner's Decree 6 of 7 January 2003.

To obtain information regarding the considerations that govern the use of handcuffs during hearings, the Chancellor of Justice wrote to the Commissioner of Police. The Commissioner provided the following explanation. The matter is governed by the guidelines ("Guidelines for Escorting Prisoners") established by Police Commissioner's Decree 6 of 7 January 2003 (as amended by Decree 20 of 14 January 2004). As its legal basis, the decree cites section 74 of the Cabinet of Ministers of the Republic Act, section 12(1)(6) of the Police Act, and sections 109(4) and 156(6) of the Imprisonment Act. The Police Act only lays down the general limits for police action. In order to maintain law and order and ensure security it is important that the police across the nation act in accordance with a single set of rules. Therefore the Commissioner considered it necessary to specify the meaning of 'escorting' of which only a vague definition is provided in statutes. The guidelines represent a body of internal rules.

The Commissioner noted that the guidelines contain specific sections dealing with escorting a prisoner to a court hearing. The individuals escorted are in this case either remand prisoners or sentenced prisoners who represent a considerably higher degree of threat and are an escape risk. Since it is the duty of the police to ensure security at the hearing and to guard the prisoners, the use of handcuffs on sentenced prisoners is justified not only during the time of their transfer from departure to destination but also during the hearing. For this reason, the guidelines do not provide any discretion to escorting officers regarding the use of handcuffs. As an exception, the presiding judge may order the handcuffs removed for the time that the prisoner is required to perform certain procedural steps. The use of handcuffs is related to the threat posed by the person. For this reason, providing derogations from the use of handcuffs depending on the type of proceedings is not justified. Thanks to the rules established, escapes by escorted prisoners are a relatively rare occurrence. This testifies to the need for the rules established and to their suitability to purpose.

The second sentence of section 54 of "Guidelines for Escorting Prisoners" (the guidelines) of 7 January 2003 of the Commissioner of Police reads as follows (unofficial translation—transl.):

"54. […] Measures to limit the movements of the escortee shall be used throughout the hearing; as an exception, the escortee's hands shall be freed on an order of the presiding judge when the escortee needs to take notes, or to perform other procedural steps."

(3) The central question that needed to be answered in the case at hand was whether the rules established by virtue of the decree of the Commissioner of Police regarding the procedures for escorting prisoners, including the use of handcuffs during hearings, were lawful.

(4) The Police Act establishes an obligation for the police to guard and escort sentenced prisoners and prisoners remanded in custody. It is an obligation analogous to that entrusted to prison escort guards by virtue of section 109 of the Imprisonment Act (IA). In addition to that, the tasks of the police in relation to escorting prisoners are defined in section 156 of the IA and in the Obligation to Leave the National Territory and Prohibition to Enter National Territory Act (the right to use handcuffs when escorting a prisoner is provided in section 19^2 of that statute).

On grounds of service requirements (which is what the preamble of the relevant decree of Commissioner of Police states), the Commissioner has deemed it necessary to regulate the details of escorting

arrangements. In the Commissioner's reply to the information request from the Chancellor of Justice, by way of additional reasons for enacting the decree in question the Commissioner invokes the need to ensure that the police act in accordance with a single set of rules in order to ensure security and maintain law and order in the national territory. The guidelines for escorting prisoners represent a generally applicable rules (so-called 'internal administrative rules'), which may be established on the basis of a general enabling provision (section 74(1) of the Cabinet of Ministers of the Republic Act) and which by virtue of the same is only binding on employees of the Police Board and of its units. The guidelines are incapable of creating, amending or extinguishing any rights or obligations of individuals outside the administrative agency that established the guidelines in question.

The aim of enacting the guidelines for escorting prisoners must be recognised as legitimate and there is no doubt about the constitutionality of the decision to establish the guidelines. In order to ensure that the rules governing the work of an administrative agency are followed without derogation, that the officers of the agency have regard to the needs dictating those rules, and that the agency's exercise of public authority is efficient, the Head of the agency must have the authority to issue service-related directives applicable generally or in particular cases. It must be noted that failure to follow a service-related directive may constitute grounds for disciplinary action (section 84(1) of the Public Service Act provides: "Disciplinary offences are: 1) negligent conduct amounting to failure to perform service duties or to inadequate performance of the same […]" (unofficial translation—transl.)).

Service-related directives, instructions or guidelines issued by the Head of an agency must conform to higher-ranking legislation—to statutes and to the Constitution. In particular, the Head of an agency may not use internal administrative rules to limit the fundamental rights and freedoms of individuals, or to impose obligations on persons outside the agency.

The use of special restraints on an escortee may infringe the escortee's fundamental rights. For instance, the use of handcuffs or a straitjacket interferes with the escortee's right to security of person enshrined in Article 20 of the Constitution, since these restrict the physical movements of the prisoner and force him/her to maintain a specific body posture and to maintain that posture while moving. According to the Constitution, the right to security of person may only be circumscribed in the cases provided by statute and by observing such procedures as may be prescribed by statute.

Section 14(6)(6) of the Police Act (PA) authorises police officers who are escorting a prisoner to use special restraints (sections 14(2) and 14(3) of the PA), truncheons and gas weapons. These may be used when one of the two following conditions is fulfilled:

1. an escortee fails to obey or resists police officers or other persons acting in pursuance of a public duty to maintain law and order or to fight crime;
2. there are sufficient grounds to believe that the escortee may escape, or cause injury to others, to the surroundings or to him/herself.

Section 14(7) of the PA contains a list of considerations that must be taken into account when deciding to use a special restraint, a truncheon or a gas weapon:

1. the nature of the offence;
2. the person of the offender;
3. the circumstances of the offence;
4. the need to refrain from causing more personal injury than is unavoidable under the circumstances.

Section 15^1 of the PA provides a list of cases in which the use of special restraint and of weapons is unconditionally prohibited.

The rules referred to above show that, with the exception of cases provided in section 15^1 of the PA, the escorting officer has been left a margin of discretion that empowers him/her to decide whether to employ special restraints and which of those to employ (for a definition of discretion, see section 4(1) of the Administrative Procedure Act). Naturally, circumstances may reduce the margin of discretion to an effective zero—i.e. the case may be such that the use of a special restraint remains the sole possible solution and thereby becomes a duty, such as in the case of an offence against public policy or against other persons.

It emerges from the provisions of the PA that special restraints may not be used on a person merely because he/she belongs to a particular class of persons (such as the class of life-sentenced prisoners). In each particular case, the officer must decide whether the conditions listed in section 14(6)(6) of the PA exist or not. The first of these conditions consists in failure to obey, or in resisting. The wording of the provision in question shows that mere conjecture is not enough and that the failure or resistance must be proved. The second condition refers to the danger of the escortee escaping, or causing injury to others, to the surroundings or to him/herself. In this case, a certain probability or suspicion will be enough, although it must be founded on fact ('sufficient grounds to believe').

Section 14(7) of the PA provides that in each case, the officer must make a specific assessment of both the objective circumstances of the case, that is the threat that the situation manifests and the particular special restraint that is suitable in that situation (for instance, the type and the condition of the vehicle, the conditions in its location at the material time, the presence of bystanders, etc.) as well as subjective considerations (for instance, the physical and mental state of the prisoner, his/her earlier actions and conduct, etc.).

The Administrative Law Chamber of the Supreme Court has observed: "[…] recourse to discretion in the cases provided by law is not merely a right but also a duty of the administration."[229] Should the exercise of discretion be renounced in a particular case, an error of discretion will have been committed. According to the court's opinion, in such a case one would be dealing with "[…] a situation in which the government agency competent to exercise discretion fails to consider all facts of the situation and all options that are open to it in resolving the matter."[230]

The first sentence of section 8 of the guidelines for escorting prisoners provides that special restraints that restrict the movement of escortees and are authorised in the PA must be used on the escortees during the time of the entire escort, save where otherwise provided in the guidelines or other internal rules or in legislation. Pursuant to the second sentence of section 54 of the guidelines, restraints that restrict the escortee's freedom of movement are to be used on the escortee during the entire hearing. As an exception, the hands of the escortee will be freed on an order from the presiding judge when the escortee needs to take notes or perform other procedural steps.

In the case of a particular type of escort—escort to a court hearing—the system of rules contained in the guidelines for escorting prisoners amounts to a set of requirements that is stricter than in other types of escorts, i.e. for the purposes of the first sentence of section 8, escort to a court hearing constitutes an exceptional case. In the case of escort to a court hearing, an unconditional obligation is imposed on armed escort officers to employ special restraints to limit the escortee's movement during the hearing (what the drafters of the guidelines probably mean by these are handcuffs and straitjacket, which are mentioned in sections 14(3)(1) and 14(3)(2)) of the PA). They are required to use those restraints even when other legislation (including higher-ranking laws) provide otherwise. Nevertheless, two exceptions are provided regarding the use of handcuffs:

1. when the presiding judge orders the hands of the escortee to be freed because the escortee is required to take notes (an analysis of the structure of the sentence permits the conclusion that the need to take notes does not amount to an independent ground for exception)

or

2. a procedural step must be performed that requires this (the punctuation the drafters have used in the provision suggests that an order by the presiding judge is not required here).

[229] Administrative Law Chamber of the Supreme Court, judgment of 11 November 2002 in case 3-3-1-49-02, para. 11.
[230] Administrative Law Chamber of the Supreme Court, judgment of 6 November 2002 in case 3-3-1-62-02, para. 18.

Hence, the second sentence of section 54 of the guidelines for escorting prisoners rules out the possibility of choosing not to apply a special restraint. Furthermore, the wording of the provision suggests that what the drafters had in mind, in particular, was the requirement established for officers performing an escort to a court hearing to use handcuffs in all cases. The escort officers are not allowed to take into account circumstances listed in sections 14(6)(6) and 14(7) of the PA to decide whether to use handcuffs on a particular escortee during the court hearing. Similarly, the second sentence of section 54 of the guidelines rules out the possibility of having regard to section 15[1] of the PA that lists the cases in which the use of handcuffs is prohibited (for instance, in the case of pregnant women).

The second sentence of section 54 of the guidelines for escorting prisoners implies a presumption that all escortees to court hearings will either fail to obey escort officers' orders or resist those officers, or that there will be sufficient grounds to believe that the escortees may escape or cause injury. The fact that an escortee is being taken to a courthouse cannot warrant the conclusion that the grounds listed in section 14(6)(6) of the PA for the use of special restraints are present. These grounds may be absent due to the particular escortee and the circumstances related to him/her (in fact, the provision of section 54 refers to *kohtualune* (Estonian for 'defendant in a criminal matter'—transl.) although the escortee may also be a suspect or an accused in a criminal case, or an arrestee brought before an administrative court or a civil court), or due to circumstances independent of the escortee. This means that the second sentence of section 54 of the guidelines for escorting prisoners contravenes the PA. Moreover, the sentence in question makes it impossible for escort officers to have regard to section 266(2) of the Code of Criminal Procedure that requires the parties to a criminal matter and other persons present in the courtroom to unconditionally obey any orders given by the judge (the same principle also applies in other types of judicial proceedings).

It must be admitted that in certain cases the obligation to determine whether the grounds justifying preventive use of special restraints, including handcuffs, are present in the case of each particular escortee may be impractical (in view of subjective considerations related to the escortee, as well as of objective circumstances such as the route of the escort vehicle or other similar circumstances). If, in regard to a particular escortee a fact has been established that suggests an enduring threat of that escortee making an attempt to escape, a correct exercise of discretion may lead to that escortee being handcuffed for a specific period of time during the transfer. It must be noted though that the investigative principle contained in section 6 of the Administrative Procedure Act mandates termination of the use of special restraints when the grounds that necessitated their use are no longer present.

For the most part, the guidelines for escorting prisoners enacted by decree of Commissioner of Police contain rules that regard matters internal to the police and only concern escorting officers. However, the guidelines also include a series of provisions the impact of which is not confined to officers of the Police Board and its units.

Thus, section 21 of the guidelines for escorting prisoners lists acts that escortees are prohibited from performing. These include speaking too loudly, making drawings on walls, removing outer clothing except for headdress when moving around in the courthouse. Section 22 provides the maximum allowed weight of an escortee's belongings. Section 50.2 prohibits escortees who are being escorted on foot from speaking, smoking or changing their position. Section 16 provides the principles for placing particular escortees separately during the transfer in order to protect them, sections 32 and 33 contain lists of persons who may not be escorted, section 41 establishes a procedure for taking possession of objects found as a result of the search of a person remanded in custody in the courtroom, etc.

Without calling into question the need to set out the rights and obligations of escortees, and accepting that in the case of most of these the requirement of legal basis will probably be satisfied by the provisions in the Police Act that list the general powers and duties of police officers, and by the Code

of Criminal Procedure, the Chancellor of Justice still suggests the need to transfer the substantive content of the guidelines for escorting prisoners into statutes and ministerial regulations. A number of rules similar to those in the gudelines are provided in the Imprisonment Act (IA) currently in force (compare, for instance, section 21 of the guidelines and section 67 of the IA) as well as in Regulation 20 "Tasks and Procedures of Prison Escort Guards" of 26 March 2003 of the Minister of Justice established pursuant to that statute.

In addition to the foregoing, the guidelines for escorting prisoners contain several provisions that indirectly concern the work of judges. For instance, these include informing the presiding judge of the arrival of escortees (section 53.2), freeing the hands of an escortee on request of presiding judge when this is necessary to permit the escortee to take notes (second sentence of section 54), allowing an escortee to confer with another person pursuant to an order given by the judge orally (section 59) and presentation by presiding judge of a copy of judgment to the senior officer of the escort detail (section 62.1). Once again, while not questioning the existence of an eventual need for the rules in question, the simple fact of the matter remains that the guidelines for escorting prisoners, which in terms of their legal status are an internal document of an agency, cannot be used to establish rules whose impact is not confined to regulating the conduct of officers serving in the Police Board or its units.

Transferring the substantive content of the rules provided in the guidelines for escorting prisoners to the level of statutes and of regulations of the Minister of Internal Affairs would help to maintain the clarity of laws and to improve the protection of fundamental rights and freedoms of individuals. The principle of clarity of laws emanates from paragraph 2 of Article 13 of the Constitution, and amounts to the requirement that "[…] laws must be sufficiently accessible: it must be possible for a citizen to obtain ample reference regarding the rules applicable in the case at hand."[231] The Supreme Court has also stressed that "[l]egal rules must be sufficiently clear and understandable so that an individual could foresee the actions of public authorities with a certain degree of probability and regulate his/her conduct accordingly."[232] "[I]nadequate rules regarding limitations imposed on fundamental rights and freedoms do not protect everyone against arbitrary action of public authorities"[233] and are thus a violation of the second paragraph of Article 13 of the Constitution. "A procedure for limiting rights and freedoms that has been established by statute and publicly proclaimed, as well as the publicity of the process of limiting those rights and freedoms, ensure the freedom of choice and guarantee an opportunity to avoid misuse of authority. The absence of detailed statutory rules containing such a procedure, or the obscurity of such rules, will deprive individuals of their right of informational self-determination, of choosing a course of conduct and of defending themselves."[234]

In view of the fact that the rules governing police escorts are scattered across a number of various legislative instruments and internal documents, considering the generality of wording of the relevant provisions in the Police Act and noting the exclusively internal nature of the guidelines for escorting prisoners, which are not sufficiently accessible to the public, it is doubtful whether those rules conform to the principle of clarity of laws.

(5) As a result of the investigation carried out in the case, the Chancellor of Justice concluded that:

1. The second sentence of section 54 of "Guidelines for Escorting Prisoners" established by Decree 6 of 7 January 2003 of the Commissioner of Police contravenes the Police Act insofar as it mandates the use on escortees of special restraints that limit their movement and, while only allowing two exceptions, in any other case completely rules out the use of discretion regarding employment of a special restraint to restrict movement (for instance, by handcuffs);
2. "Guidelines for Escorting Prisoners" established by Decree 6 of 7 January 2003 of the

[231] Constitutional Review Chamber of the Supreme Court (CRCSC), judgment of 3 May 2001 in case 3-4-1-6-01, para. 16.
[232] Supreme Court (plenary formation), judgment of 28 October 2002 in case 3-4-1-5-02, para. 31.
[233] CRCSC, judgment of 12 January 1994 in case III-4/A-1/94.
[234] CRCSC, judgment of 12 January 1994 in case III-4/A-1/94.

Commissioner of Police contain rules which go beyond those that could be described as purely internal to the police and which should therefore be provided in a statute or a regulation of the Minister. In view of the fact that the rules governing police escorts are scattered across a number of various legislative instruments and internal documents, considering the generality of wording of the relevant provisions in the Police Act and noting the exclusively internal nature of the guidelines for escorting prisoners, which are not sufficiently accessible to the public, it is doubtful whether those rules conform to the principle of clarity of laws.

As a result of an exchange of letters that the Chancellor of Justice conducted with the Minister of Internal Affairs and with the Commissioner of police, the guidelines for escorting prisoners were amended in respect of the permissibility of the use of handcuffs. A clause was inserted into the guidelines that provided for the use of discretion. Section 8 of the guidelines, as amended, now authorises the use of special restraint limiting escortees' movement where this is in conformity with the Police Act. The second sentence of section 54 of the guidelines was struck out and new sections 54^1 and 54^2 were added, worded as follows:

"54^1. Any orders from the judge during the hearing must be obeyed unconditionally.
54^2. During a hearing, an escortee shall be subjected to the use of special restraint to limit his/her movement in consideration of the circumstances and of the characteristics of the escortee and in the case of a risk of escape." (unofficial translation—transl.)

The Minister of Internal Affairs assured the Chancellor that the problem with the guidelines for escorting prisoners not fully conforming to the principle of clarity of laws would be dealt with in the clauses of the new Draft Police Bill that was under preparation at the time.

3. Clarity of laws and good administrative practice in resolving an application for citizenship

Case 7-1/060538

(1) A petitioner sought the assistance of the Chancellor of Justice in relation to conflicting advice provided to the petitioner by different officials in connection with an application for citizenship submitted on behalf of the petitioner's child.

(2) The petitioner's child was born at a time when the parents had not yet determined their nationality. The petitioner was naturalised as an Estonian citizen a few months after the child was born.

The petitioner's child was registered in the Population Register as an illegal resident of Estonia.

Officials of a branch of the Vital Statistics Office advised the petitioner to approach the Citizenship and Migration Board. When the petitioner phoned the Board by dialling the number 3370781, which the petitioner found on the Internet, the petitioner was told that except for the birth certificate no further documents needed to be submitted and that a child that has been issued a personal identity code and a birth certificate cannot be considered an illegal resident of Estonia.

The petitioner placed another call to the information desk of the Population Register. The information desk officer asked the petitioner to give the phone number that the petitioner had called in the Citizenship and Migration Board and from which the petitioner had been told that no further documents needed to be submitted. The officer then told the petitioner that a request would be made to the relevant officials in the Ministry of Foreign Affairs in order to resolve the matter of the petitioner's son.

The petitioner then called the branch vital statistics office. The officials of the branch informed the petitioner that they had not been informed of the petitioner's case and that the matter was outside the scope of their competence, and advised the petitioner to approach the Citizenship and Migration Board.

The petitioner made a personal visit to the offices of the Citizenship and Migration Board. The officials of the Board informed the petitioner that in the first place the petitioner would have to submit the documents required in order to be granted a residence permit and after that, those required for the grant of citizenship.

The petitioner requested that the Chancellor of Justice verify whether the information the petitioner had been given was correct.

The Chancellor of Justice addressed a request for information to the Ministry of Internal Affairs.

The Chancellor received a reply from the Minister of Regional Affairs. The Minister explained that, in the matter of the petitioner seeking a grant of citizenship to the petitioner's child, according to the requirements in the Citizenship Act and the Aliens Act the petitioner must first regularise the child's residence in Estonia (by obtaining a residence permit for the child) and will only then be entitled to request a grant of citizenship to the child.

With regard to differences in the interpretations given to the relevant requirements by various officials and concerning the advice provided by those officials, the Minister of Regional Affairs observed that, in view of the fact that the officials in question were approached by telephone, it was not possible to evaluate the information provided by them.

(3) The main question that had to be answered in the case was how to interpret the rules governing the procedure for submitting an application for Estonian citizenship on behalf of an underage child of undetermined nationality and whether the communication practices of officials' who had derogated from established formats were in conformity with good administrative practice.

(4.1) In order to be admitted in Estonia and to stay in its territory, an alien must have a legal basis. Legal bases for residing in Estonia are listed in section 5^1(1) of the Aliens Act (AA).

In a case such as the petitioner's who has requested the grant of Estonian citizenship to the petitioner's underage child, the operative provision is section 13(1) of the Citizenship Act (CA). That provision states that a child under 15 years of age will be granted Estonian citizenship if a corresponding application is submitted by one of the following:

- the child's parents who are Estonian citizens;
- a parent who is an Estonian citizen, pursuant to an officially authenticated agreement bearing the signatures of that parent and of the parent who does not hold Estonian citizenship;
- a single parent who is raising a minor;
- an adoptive parent who is an Estonian citizen.

Under the terms of section 13(2) of the CA a minor under 15 years of age on whose behalf an application for Estonian citizenship has been submitted must reside permanently in Estonia and must have been relieved of his/her previous citizenship, or declared a stateless person, or it must be proved that the minor will be relieved of the previous citizenship as a result of acquiring Estonian citizenship.

Pursuant to section 11 of the CA and for the purposes of that statute permanent residence in Estonia means legal residence in Estonia during 183 days per year, with the additional condition that any periods of absence from Estonia during that year may not be longer than 90 consecutive days.

Under section 12(3[1]) of the Aliens Act a permanent residence permit may be issued to the child of an Estonian citizen residing in Estonia, or of an alien residing in Estonia on the basis of a permanent residence permit, except where he or she resides in another country and wishes to take up residence in Estonia.

In accordance with the requirements emanating from the CA and the AA, a parent who wishes to submit an application for Estonian citizenship on behalf of his/her underage child of undetermined nationality must first apply for a permit regularising the child's residence in Estonia (the residence permit) and will only then be allowed to submit the application for Estonian citizenship.

(4.2) Officials of the branch of the Vital Statistics Office and of the Citizenship and Migration Board must be regarded as representatives of public authorities.

Under the terms of section 5(2) of the Administrative Procedure Act, administrative proceedings must be conducted efficiently and with a view to their purpose, as well as in as straightforward and expeditious manner as possible, avoiding unnecessary cost and inconvenience to individuals.

Important principles and requirements of administrative procedure include among other things good customer service and a duty to assist, which means that information must be provided in a manner that will allow it to be understood by a layperson. The information must also be correct and relevant.

Caring for individuals, respecting the dignity of individuals and the exercise of rights by individuals are requirements that must be observed by officials. People are often ignorant of their rights and unaware of proper procedures, such as the procedure for submitting an application for citizenship in the petitioner's case. The most straightforward means of gathering the relevant information is often by telephone, which was also what the petitioner used.

The Chancellor of Justice took the view that since obtaining information by telephone is a means of gathering information that is among the most accessible, it is very important that officials, even if they remain anonymous, reply to the questions of individuals to their best professional knowledge, having regard to public interest and to the interest of the individuals. Article 14 of the Constitution requires the Government (and all its officials) to ensure an effective exercise of individuals' rights.

(5) The Chancellor of Justice wrote to the Minister of Regional Affairs, suggesting that current practices in regard of the above be amended and information be circulated to the relevant agencies so as to permit a uniform application of the law.

As regards the matter of replying to an individual's questions by telephone, the Chancellor of Justice agreed with the position expressed in the reply by the Minister of Regional Affairs. For reasons of insufficient evidence, it was impossible to provide a legal opinion of the conduct of various officials who provided differing recommendations and advice to the petitioner.

VII AREA OF GOVERNMENT OF THE MINISTRY OF SOCIAL AFFAIRS

1. General outline

The area of government of the Ministry of Social Affairs includes the preparation and implementation of plans for the solution of national social problems, making general arrangements regarding the protection of public health and the provision of medical services, employment, the organisation of the labour market and employment environment, social security, the organisation of social insurance and social welfare, the promotion of gender equality and the co-ordination of activities in that area, as well as the preparation of corresponding draft legislation.

The area of government of the Ministry of Social Affairs includes the following agencies: the State Agency of Medicines, the Social Insurance Board, the Labour Market Board, the Health Care Board, the Health Protection Inspectorate and the Labour Inspectorate.

Although positive developments took place in the area of government of the Ministry of Social Affairs in 2006, it must generally be concluded that the Minister of Social Affairs has unfortunately been unable to resolve a number of important problems in his area of government.

This outline of the area of government of the Ministry of Social Affairs is divided into three parts which, by area, are as follows: an outline of social policy issues, an outline of health policy issues and an outline of employment policy issues.

In the area of social policy issues, neither the occupational accident insurance nor the occupational illness insurance scheme has been reformed, and the reform of the care provider's allowance carried out in 2004 should in legal terms be considered a failure. There are also problems in the law of rehabilitation services (organisation, provision and funding of and applications for rehabilitation), and the legal provisions governing childcare services.

The development of the area of health policy issues has until now been restrained by the absence of a strategic plan. In addition, the Minister has had difficulty with the timely performance of the tasks assigned to him by law. The Chancellor of Justice has also on several occasions had to remind the Minister of Social Affairs of the need to observe good administrative practice in communicating with individuals.

In the area of employment policy issues, many long-awaited and promised changes failed to materialise in 2006. Important draft bills that had been planned remained sitting on the drafters' desks, let alone reaching anywhere as far as the Riigikogu. The need for a new Employment Contracts Act is particularly urgent. The existing statute, which was prepared before the Constitution entered into force, is obsolete. The law contained in the Collective Bargaining Agreements Act has yet to be amended. The Chancellor of Justice directed the attention of the Minister of Social Affairs to the unconstitutionality of that statute in 2005. The current rules on support strikes are unconstitutional, and the total ban on strikes in the public sector is also constitutionally problematic.

1.1. Social policy issues

The developments that took place in the area of social policy can tentatively be divided into two categories: developments that took place in social insurance and developments that took place in social welfare. No significant developments took place in social insurance at the national level in 2006, although the European Court of Human Rights (ECHR) did hand down an important judgment in that field in 2006, which will also have an influence on the assessment of the constitutionality of existing Estonian law. Thus the following is mainly an examination of ECHR practice in the field of social insurance with a view to determining the scope of protection of the right to property.

Negative developments in the area of social welfare continued in 2006. As a result, social welfare has been considered in greater detail in relation to the scrutiny of legislation for conformity with the Constitution and relevant statutues, in connection with the cases that the Chancellor of Justice investigated in the capacity of *ombudsman*, as well as in regard to the consequences of implemented reforms. The following starts with an examination of developments in the area of social insurance, after which social welfare topics will be considered.

On 16 September 1996, the ECHR pronounced a ruling in the case of *Gaygusuz v. Austria*, in which the court took the position that entitlement to emergency assistance was a pecuniary right, and thus belonged to the scope of protection of the right to property that is provided in Article 1 of Protocol 1 to the European Convention for the Protection of Fundamental Rights and Freedoms (the Convention). The court found that the entitlement to emergency assistance must be regarded as property irrespective of whether the entitlement has arisen only because a person has been required to pay contributions or taxes in order to become entitled to the relevant benefit, i.e. not only the connection between the entitlement to the benefit and the performance of the obligation to make the corresponding payments is important in assessing whether or not social insurance entitlements can be considered to be property.[235]

This approach permitted the court to assess whether Austria had, in prescribing citizenship as one condition for obtaining benefits, violated the principle of equal treatment, and discriminated against a worker who was a Turkish national and who had lost his job in Austria. Since Article 14 of the Convention, which enshrines the principle of equal treatment, can be applied in conjunction with other rights provided in the same, the relevant decision essentially meant that in matters of equal treatment, the effects of the Convention were broadened to include pecuniary entitlements to social benefits, whose protection was not otherwise guaranteed by the Convention.

On the basis of this ruling, a number of persons who, in matters related to social insurance benefits and assistance, had exhausted the judicial remedies available in Estonia, took their cases in to the ECHR.[236] The judgment also gave rise to a lively discussion among jurists concerning the consequences of the ruling for national and European Union social insurance law, and whether the ECHR decision also places non-contributory social services funded from the national budget in the scope of the protection of the right to property.[237] Thus a conference entitled "Social Security, Non-discrimination and Property"[238], dedicated to the above-mentioned ruling, took place on 31 January 1997.

It must be noted that property-based approach in the area of social insurance is not an exclusive part of the practice of the ECHR, but has also been acknowledged by the Inter-American Court of Human Rights.[239]

Based on the above-mentioned judgment, the Chancellor of Justice has found that the entitlement to parental benefits is protected by virtue of Article 32 of the Constitution. Thus in his January 2006 speech to the Riigikogu on the topic of compensation of the difference between the parental benefit and the maternity benefit, the Chancellor drew the legislature's attention to the fact that the difference

235 ECHR, judgment of 16 September 1996 in case 39/1995/545/631, Gaygusuz v. Austria, paras. 39-41.

236 ECHR, judgment of 11 June 2002 in case 36042/97, Willis v. United Kingdom; ECHR, judgment of 20 June 2002 in case 56679/00, Azinas v. Cyprus, ECHR, judgment of 12 October 2004 in case 60669/00, Kjartan Àsmundsson v. Iceland; ECHR, judgment of 30 September 2003 in case 40892/98, Koua Poirrez v. France; ECHR, judgment of 4 June 2002 in case 34462/97, Wessels-Bergervoet v. the Netherlands.

237 See, for instance C. Krause, M. Scheinin. The Right Not To Be Discriminated Against. T. S. Orlin, A. Rosas, M. Scheinin. The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach. Turku 2000, pp. 265–267; European Institute of Social Security, S. Van Den Bogaert. Social Security, Non-Discrimination and Property. Antwerpen-Apeldoorn.

238 D. Pieters. Preface. – European Institute of Social Security, S. Van Den Bogaert. Social Security, Non-Discrimination and Property. Antwerpen-Apeldoorn, p. 11.

239 Inter-American Court of Human Rights, judgment of 28 February 2003 in case "Five Pensioners" v. Peru, para. 103, available on the Internet at: http://www.corteidh.or.cr.

between the said benefits is a pecuniary right that falls within the scope of protection of the right to property. More precisely, the Chancellor asked the Riigikogu to present some reasonable justification of why comparable recipients of the parental benefit are treated unequally. Thus, parents of a child under the age of two and a half, whose parental benefit upon the birth of their next child would be greater than or equal to that granted for the previous child, are not entitled to compensation of the difference between the parental benefit and the maternity benefit, although the same entitlement accrues to parents of a child under the age of two and a half, whose parental benefit upon the birth of their next child would be less than the previous parental benefit.

The ECHR decision in the case of *Gaygusuz v. Austria* remained unclear in the matter of whether entitlement to a social insurance benefit or assistance is protected by the right to property even when the relevant benefit or assistance is non-contributory. However, the ECHR clarified the law in its judgment of 12 April 2006 in the case of *Stec et al. v. the United Kingdom*. The court took the position that entitlements to social insurance benefits and assistance can be regarded as property regardless of the source from which those benefits and assistance are funded (whether individuals have made fixed contributions to certain funds, or the relevant benefits are funded from overall tax revenue).[240]

In light of the above, the legislature should revise existing laws, in order to avoid potential litigation that may result in a decision, which as a result of the ECHR position might be unfavourable for the Estonian Government. Moreover, there is already a case in Estonian jurisprudence in which an administrative court found that entitlements to social insurance benefits (this particular case involved parental benefits) fell within the scope of protection of the right to property, and as a result issued a ruling that the Parental Benefits Act must be interpreted in accordance with the Constitution.[241]

In connection with the parental benefit, one must also mention the decision of the Constitutional Review Chamber of the Supreme Court. Namely, the Supreme Court ruled that section 3(7)(2) of the Parental Benefits Act (PBA) was in conflict with the first sentence of paragraph 1 of Article 12 of the Constitution, insofar as the above-mentioned section of the PBA prescribed that a parental benefit allocated to a person must be reduced by the amount of back pay paid by fault of the employer in the month in which the parental benefit was to be paid.[242] The Chancellor of Justice found in agreement with the Supreme Court, that the said provision is incompatible with the Constitution.

As regards social insurance reforms, the reform of occupational accident and occupational illness insurance schemes is still incomplete. The existing arrangements do possess a certain degree of functionality, but in the longer term the absence of a proper system of occupational accident and occupational illness insurance may become an impediment to the free movement of individuals between Member States of the European Union.

As concerns social welfare law, the number of complaints against local authorities has indeed increased. The petitions considered by the Chancellor of Justice show that local authorities are unable to fulfil the obligations imposed on them by the Administrative Procedure Act. The majority of considered cases involved regulations of local authorities in which the authorities had exceeded the scope of the power conferred on them in the enabling provision (for instance, the payment of additional social assistance from surplus funding for the subsistence benefit pursuant to section 42(4) of the Social Welfare Act (SWA), or the establishment of conditions and policies for allocating a care provider's allowance pursuant to SWA 23(2)). Cases also concerned situations in which the local authority had made regulations that contained conditions that could not be fulfilled as a matter of fact (thus, the requirement of having a licensed babysitter was established as a precondition for obtaining home

240 ECHR, decision of 6 July 2005 concerning admissibility of the applications in case 65731/01 and in case 65900/01, Stec et al. v the United Kingdom, paras. 42–56; ECHR, judgment of 12 April 2006 in cases 65731/01 and 65900/01, Stec et al. v. the United Kingdom, para. 43.

241 Tartu Administrative Court, judgment of 31 October 2005 in case 3-362/05, para. 11.

242 Constitutional Review Chamber of the Supreme Court, judgment of 20 March 2006 in case 3-4-1-33-05.

childcare services, although existing legislation did not provide for such licenses). In addition to these, there were petitions in which individuals complained that the activities of municipal or city councils had failed to comply with the principle of guaranteeing fundamental rights and freedoms and with good administrative practice.

There are several reasons for failure to comply with an enabling provision. On the basis of the resolved petitions one can, however, conclude that one of the reasons for which the scope of the power conferred in such provisions was exceeded is the confusing system of rules contained in the Social Welfare Act. In establishing regulations concerning the care provider's allowance, for instance, municipal and city councils exceeded the bounds of the enabling provision because it is not readily apparent whether the assignment of care provision to an individual constitutes an separate welfare measure for the purposes of the Family Law Act or not. Nor is it clear how social welfare principles and the Social Welfare Act should be applied in the implementation of this measure. Another reason why authorising provisions are exceeded lies in the fact that local authorities appear to have insufficient capacity for ensuring that the Administrative Procedure Act is applied correctly. Thus several municipal and city councils included in the regulations enacted to provide the conditions and procedures for assigning and paying a care provider's allowance, also provisions that essentially amounted to regulating the assignment of care provision as such and the appointment of a care provider, which the legislature had not authorised them to do. This was done because neither the Social Welfare Act nor the Family Law Act, in which the institution of care provision is prescribed, included sufficiently precise definitions of when, to whom and how to assign care provision and to appoint a care provider. At the same time, adequate knowledge of the Administrative Procedure Act would have made it possible to overcome the legislature's omissions without exceeding the bounds of the authorising provision contained in the Social Welfare Act.

In the area of compliance with the principle of the guaranteeing of fundamental rights and freedoms and with good administrative practice, the main problem is that municipal and city councils keep failing in their attempts to correctly implement the Administrative Procedure Act. This results in a situation in which persons to whom a local authority should provide assistance, instead of being regarded as subjects entitled to assistance, are relegated to the status of objects of that assistance. Sometimes arbitrary exercise of authority has led to a violation of the rights of the person seeking assistance instead of the provision of assistance to that person.

The arbitrary exercise of authority is also evident in cases in which a person is refused assistance, when a person is not offered the opportunity to be heard, when explanations are not provided, or when relevant notices of administrative acts are not transmitted to the person. Sometimes the applicant who requested assistance is instead sent a muddled letter from which it can be gathered that assistance has been refused, but which even after multiple re-reading remains obscure in terms of any logical justification based in law for why assistance was not provided. It is clear that a person who seeks support from the social welfare system is not determined enough and does not possess the persistence in asserting his/her rights, or the necessary legal knowledge to be able to react to such refusal in an adequate manner and to take steps to find the correct administrative act, and to contest it as required. In other words, neglect of good administrative practice may lead to questioning the existence of the person needing assistance.

As in previous Annual Reports, this year too mention must be made of the issue of the social welfare reform that has been conceived in the Ministry of Social Affairs, and the implementation of which has gradually begun.

In 2004, a reform of the care provider's allowance was implemented, with the aim of guaranteeing improved availability of assistance to disabled persons, and streamlining the procedure for the assignment of care provision. A couple of months after the entry into force of the corresponding amendments to the Social Welfare Act on 1 April 2005, the Chancellor of Justice received the first petition, from Kohtla-Järve, in which it was found that the local council had contravened the

Constitution by enacting a regulation that established a system of conditions and procedures for the allocation and payment of the care provider's allowance. In examining the petition, it became evident that those implementing the reform had scarcely analysed the procedure for the assignment of care provision and the appointment of a care provider, and for the assignment and payment of the care provider's allowance. In addition, it became evident that the reformers were unaware of what tasks should be performed by the guardian of an adult person, which led to the situation that each guardian was automatically entitled to a care provider's allowance, regardless of whether they were truly capable of caring for their ward, and whether they indeed provided that care. In conclusion, in a legal sense the implementation of the reform can be considered a failure.

The Chancellor of Justice has repeatedly drawn the attention of the Ministry of Social Affairs to corresponding problems in the system of care provider allowances, but the steps required to amend the existing law have not to date been taken.

At the beginning of 2005, rules governing the organisation, provision and funding of as well as applications for rehabilitation services were inserted into the Social Welfare Act. The first signs that the reform had been ill designed appeared in the second half of 2006.[243] Namely, it became evident that the Ministry had not appropriated sufficient funds in the national budget to ensure the availability of the said services. In addition, the Social Insurance Board, which administers these services, had to admit that the law did not provide adequate instructions to verify whether waiting periods for the provision of the services were justified, nor did it specify criteria for assessing whether the services were truly available to individuals. According to the information possessed by the Chancellor of Justice, the Ministry now plans to narrow the circle of individuals entitled to receive rehabilitation services, and to limit and reduce the number of rehabilitation services offered. In conclusion, it can be said that this reform too was relatively poorly implemented, as it should have been possible to foresee the problems that would arise in the application of the law.

While the reform was under way, the Chancellor of Justice directed the legislature's attention to the fact that the planned provisions did not provide a sufficient guarantee for the availability of the services, but the legislature did not heed the Chancellor's advice. In fact, the Ministry has still done nothing to create the necessary legal mechanisms to guarantee the availability of the service.

A body of rules governing the provision of home childcare services was inserted into the Social Welfare Act in 2006. The objective of these services is to help persons who are caring for a child to cope and to work. The services are generally paid for by the local authority, but in cases in which the child cared for has a serious or profound disability, funding for childcare services is provided by the Government. Problems will most likely arise with the availability of the service funded by the Government. Firstly, it is not at all clear whether there are babysitters in every corner of Estonia who are willing and able to take care of children with serious or profound disabilities. Secondly, the finances of the care provider appointed to a child with a serious or profound disability may become an obstacle to receiving the service: if the Government sets an unreasonably low the price tag on the service, the difference between that rate and the market rate will have to be paid by the child's care provider, who may not have sufficient funds for that purpose. Other problems may also arise: when the fee of babysitters who meet the relevant requirements is significantly greater than that of babysitters who fail to meet those requirements, the child care service may prove useless in its present form. In conclusion, this reform too must be viewed with reservation, because even the explanatory note to the Bill by which the reform was proposed mainfested traces of insufficient analysis in the

[243] Mari Kamps. Erivajadustega inimeste rehabilitatsioonisüsteem pole jätkusuutlik [The system for the rehabilitation of persons with special needs is not sustainable, by Mari Kamps], available on the Internet at: http://www.postimees.ee (viewed on 11 December 2006); Askur Alas. Riigikontroll: erivajadustega inimeste rehabilitatsioonisüsteem pole jätkusuutlik [National Audit Office: the system for the rehabilitation of persons with special needs is not sustainable, by Askur Alas], available on the Internet at: http://www.epl.ee (viewed on 11 December 2006); Kadri Ibrus. Tasuta rehabilitatsiooniravi tuleb kohati pikalt oodata [Waiting periods for free rehabilitation treatment can be long, by Kadri Ibrus], available on the Internet at: http://www.epl.ee (viewed on 27 April 2006).

stage of planning the reform (for instance, it was not analysed whether problems might arise in the implementation of the proposed body of rules).

During the process of elaboration of the service in question, the Chancellor of Justice directed the legislature's attention to the eventual problems that may arise in its implementation, but the legislature chose to heed only a part of those problems.

The existing system of welfare benefits has not yet been reorganised in order to guarantee that persons who are unable to provide for their own subsistence can live a dignified life. This need is clearly demonstrated by a petition received by the Chancellor of Justice at the end of 2006. In the course of investigating the petition it became evident that calculating the subsistence level for the current year takes place on the basis of data from the calendar year before the last, which is not adjusted for anything. Thus the 2005 subsistence level was calculated on the basis of the Statistical Office's data for 2003. On the basis of data from 2003, the 2005 subsistence level was 750 kroon. At the same time, the cost of the basic food basket in 2005 was 816 kroon. Thus in 2005 persons who received the benefit were unable to cover even food expenditures with the part of the subsistence benefit that was intended for food, clothing, footwear and other goods, as well as services for basic needs. From the above it is clear that the methodology for the calculation of the subsistence level is inappropriate. The Chancellor of Justice hopes that the Minister of Social Affairs will take steps to review the method for the calculation of the subsistence level, because only in that way will it be possible to ensure individuals' human dignity.

In conclusion, one can say that in social insurance, where no extensive reforms have been undertaken although there is great need for these in certain areas, in social welfare there have been repeated but intermittent drives to reform the field. In addition, complaints submitted concerning the activities of local authorities in the area of social welfare show that those authorities lack the required knowledge and skills to implement the Administrative Procedure Act. From the latter, one can deduce that individuals have been left unprotected from the arbitrary exercise of public authority.

1.2. Health policy issues

The year 2006 in the area of health policy was full of contradictions. Economic growth in Estonia allowed the population to meet basic needs. This was accompanied by increased pressure on the authorities to achieve social stability and to reduce inequalities in society. The largest discrepancies between the population's demand for services and the available supply of the same have arisen in the health sector. Yet, Estonia still lacks a firm development plan that would allow the Government to implement the principle of social welfare state. The agencies responsible for the field remained relatively passive throughout 2006.

In a public sitting on 8 June 2006, the Social Affairs Committee of the Riigikogu conducted a debate on a document entitled "National Health Policy—Investment in Health".[244] The aim of the document is to establish the foundations for the preservation of the Estonian people and for population growth in Estonia by providing healthcare and by introducing measures to improve the physical and mental health of the population. Health policy must map current problems and project visions and goals through 2015. The policy should also provide specific levels on which it is to be implemented. The Cabinet of Ministers of the Republic approved the national health policy document in its sitting on 12 October 2006. The Ministry of Social Affairs, in cooperation with other Ministries has been entrusted with elaborating a national health development plan together with an implementation schedule by November 2007.

The existence of a framework instrument for national health policy, together with thought-out action plans pursuing specific goals hold considerable importance from the point of view of ensuring

[244] Available on the Internet at: http://www.riigikogu.ee/public/Riigikogu/Sotsiaalkomisjon/tervisepoliitika.pdf (in Estonian--transl.).

the sustainability of the health of Estonia's population. In this connection, the first step should be to chart existing threats and to elaborate favourable scenarios that take into account changes in the external environment. However, the entire document must not remain overly general.

Since there is as yet no general plan of action for health policy, there were few significant developments in this field in 2006. In addition, the development of health policy was also slowed by poor administrative capacity of the agencies dealing with the matter. The Chancellor was repeatedly compelled to draw the attention of the Minister of Social Affairs to the need to observe good administrative practice in the work of the Ministry and to guarantee the fundamental rights of persons. Thus, for instance, the Chancellor sent an memorandum to the Minister of Social Affairs in relation to the Ministry's actions in compiling an analysis of the annual weighted average margin. Pursuant to section 15(2) of the Medicines Act, the holder of a wholesale licence is required each year by 1 March to submit to the Ministry of Social Affairs an aggregated turnover statement in respect of all prescription drugs and OTC medicines sold, except for veterinary medicines, for all of the holder's wholesale outlets. Pursuant to the statements submitted to it, the Ministry of Social Affairs will perform an analysis the results of which will permit it to assess the correspondence of the Cabinet of Ministers Regulation 36, "Maximum wholesale and retail margins and the procedure for application of the margins" of 21 February 2005 to the criteria set out in the Medicines Act. Statements had been submitted to the Ministry by wholesale vendors of medicines whose total market share amounted to 92.94% of the medicines market. The amount of data that this provides is in all likelihood sufficient for carrying out the analysis required under section 15(2) of the Medicines Act. Nevertheless, the price margins of medicines were not analysed in the Ministry of Social Affairs during the entire 2006. The analysis was finally performed in the beginning of 2007, following a reminder from the Chancellor of Justice. Yet the results of the analysis are the yardstick to decide whether the system of calculating price margins provided in the Cabinet of Ministers regulation 36 of 21 February 2005 meets the requirements of the enabling provision in the Medicines Act and therefore limits the fundamental right of addressees of that rule to freedom to engage in economic activity. In his memorandum, the Chancellor directed the attention of the Minister of Social Affairs to problems with the Ministry's administrative capacity and asked the Minister in the future to adhere strictly to the requirements of the Constitution and relevant statutes and to observe good administrative practice meticulously.

In addition to the work of the Ministry of Social Affairs, there were problems also in the areas of responsibility of the Ministry's subordinate units. For instance, the administrative capacity of the Health Care Board that must exercise government oversight of the entire area of health care is relatively low, mostly because of staff shortages and in some cases because of lack of competence. For the most part, the Board currently functions as a reactive institution. Yet the inadequate knowledge that persons have of their fundamental rights and the right that they enjoy to the protection of health suggests that the oversight authority in the health care sector should be proactive.

However, there were also positive developments in 2006. Thus, the level of awareness of fundamental rights issues has risen among healt care providers. Considerable developments were also noted in the knowledge that mental health care providers showed regarding the protection of fundamental rights. Undoubtedly, this was partly the result of the work of the Chancellor of Justice, who performed two inspection visits to the major mental health care facilities in Tallinn and in Jämejala.[245] The new Cabinet of Ministers Regulation 274, "The list of healthcare services of the Estonian Health Insurance Fund" of 22 December 2006 provides a better protection than before of the right of a physician who sends to an autopsy, to security of property protected under Article 32 of the Constitution. The new regulation establishes fee caps (linked to actual cost) that may be charged for transport services required for the provision of health care. Furthermore, the Chancellor's initiative led to amendments being introduced to Minister of Social Affairs Regulation 36, "Health protection requirements for school schedule and organisation of study" concerning provisions establishing

[245] Cases 7-2/060564 and 7-9/061173.

minimum classroom temperature values that must be respected. This allowed the regulation to be brought into conformity with the requirement of equal treatment provided in the Constitution and with the duty to guarantee individuals' right to the protection of their health.

1.3. Employment policy issues

The area of employment policy in the area of government of the Ministry of Social Affairs includes matters related to employment, the labour market, the work environment, and the preparation of rules governing individual and collective employment relations. The task of the Ministry in the area of employment policy is to contribute to guaranteeing individuals' rights and freedoms emanating from Article 29 of the Constitution—the right to freely choose one's area of activity, profession, and job, the right to conditions of work controlled by the Government, the right to assistance from the Government in looking for work, the right to union membership and the right to resort to collective measures in order to ensure the exercise of work-related rights and freedoms.

In his recent book, the author Anthony Giddens writes that, in the light of globalisation and, in particular, the strengthening of Asia, as well as of the aging of the populations of Europe, employment legislation in most European countries is in dire need of reform. Only extensive reform in the area in question will make it possible for the continent to retain its competitiveness and sustain its social model. The hitherto rigid law of employment should be replaced by more flexible rules. For Giddens, flexible rules are not synonymous with the much-feared American-style 'hire and fire' practices. Instead, he sees them as a body of law that focusses on protecting the employee, as opposed to protecting the job. For this reason, Giddens suggests focussing on workers' desire and ability to move on when their old jobs disappear, and not on protecting the right of workers to hold the same job for extensive periods of time. This position does not amount to a complete abolition of the rights of the workers. In fact, quite the opposite—the introduction of flexible rules means that many of the hitherto rights of the workers must be retained. These include, for instance, the right to be informed and consulted, the right to dignified working conditions, and to non-discrimination.[246] It is not just Giddens who has drawn attention to introducing an important shift into our thinking. The same has been pointed out by a number of scientists, researchers and businessmen.[247]

The Legislative Work Programme of the Cabinet of Ministers for 2006 included the following activities in the section entitled "Improving the quality of work life": preparation and submission to the Riigikogu of a new Draft Employment Contracts Bill, a Draft Collective Bargaining Agreements Bill, a Draft Bill to Amend the Collective Employment Disputes Resolution Act, and a Draft Employees' Representatives Bill. The Cabinet of Ministers has only managed to complete work on the last of these drafts, which the Riigikogu has also adopted. Thus, the year 2006 did not bring any groundbreaking change in the field of employment issues.

Hence, in 2007 practitioners in the field of employment still labour under the Employment Contracts Act (ECA)—a statute that was drafted before the Constitution and reflects the economy's needs and social values as they were at the end of the 1980s and the beginning of the 1990s. The aim of that statute was to protect the right of employees to work in one and the same job for extended periods of time. The statute in question does not take into account the fact that today it is impossible to assure individuals the possibility of working the same job from the time of finishing school to the retirement age. This is one of the reasons why the ECA contains a number of rules that are questionable from the point of view of the Constitution. This undermines legal certainty. An example of the problem might be provided by citing the law of the employment record book.

246 A. Giddens. Europe in the Global Age. Polity Press 2007, pp. 21ff.

247 See for example: A. Sapir. Globalisation and the Reform of European Social Models. 2005. p. 1, available on the Internet at: http://www.bruegel.org/Files/media/PDF/Publications/Papers/EN_SapirPaper080905.pdf

Pursuant to section 119 of the ECA, an employer who withholds an employee's employment record book must pay that employee average remuneration for each day by which delivery of the record book to the employee is delayed, until actual delivery. The rule stems from the period during which the employment record book was an important proof of the length of service to be calculated towards the retirement pension. In those days, the employment record book was also significant in that an employee was not allowed to start work in a new position if he/she was unable to produce his/her employment record book. It was thus presumed that employees to whom their employment record books were not delivered on time would suffer pecuniary loss. To lighten the burden of proof weighing on the employee, a provision was introduced in the statute that contained a presumption of pecuniary loss and obligated the employer who had withheld the employment record book, to compensate that loss to the employee. Nowadays, employment record books seldom have much practical value. A rule that requires employers to pay employees average daily remuneration in the case that delivery of the employment record book is delayed is disproportionate in a situation in which the employee incurs no loss.

In the autumn of 2006, the Supreme Court had occasion to rule on the matter.[248] The court applied the provisions of the ECA in conjunction with those in the Law of Obligations Act (LOA). The court observed: "Under the terms of section 6(1) of the LOA, the obligor and obligee must base their relations on the principle of good faith. The Chamber finds that it would be repugnant to the principle of good faith if an employer were ordered to pay compensation for delayed delivery of the employment record book, although this had not resulted in any loss to the employee. Section 101(1)(3) of the LOA lists bringing an action for compensation as one of the remedies available in the case of the breach of an obligation. If an employer breaches the obligation to deliver the employment record book, the employee is entitled to require that the employer compensate him/her for the loss thereby caused pursuant to section 115(1) of the LOA. However, a precondition that must exist for such an action to succeed is an actual loss, i.e. the employee will have to show that delayed delivery of the employment record book has actually resulted in pecuniary loss to the employee."
In this judgment, the Supreme Court showed how a rigid rule in the ECA could be overcome by the application of the principle of good faith. Nevertheless, resorting to good faith as a means to resolving disputes that arise in the field of employment law should not become the norm, because it does not always ensure clarity of the law or, for that matter, legal certainty. In fact, it is legal certainty that should be centre stage in employment relations, which are a highly significant issue for the society as a whole and which should therefore merit particular attention. For this reason, it must be regarded as imperative that the legislature should adopt a statute providing for employment relations in a manner that takes account of the Constitution in force and of changed social circumstances. The current law deprives both parties of an effective legal protection.

In addition to individual employment relations, collective employment relations also need new rules. Without a working system of rules to govern collective employment relations, and without competent social partners, there will be no stability in matters of employment. The Chancellor has also pointed to the problems in the area of employment law in the previous years.

Thus, in 2005 the Chancellor drew the attention of the Minister of Social Affairs to the fact that the law of the collective bargaining agreement appeared to be unconstitutional in that it interfered disproportionately with the freedom to engage in economic activity. Such interference could be seen, for instance in that without any preliminary conditions having to be established, the law allowed to extend the applicability of the clauses on remuneration and the terms of work and rest time in a collective bargaining agreement concluded of the one part between an employers' association, or a federation of those associations, and of the other part, between a trade union, or a federation of trade unions, and between the national federation of employers' associations and the national federation of trade unions to persons who were not party to that collective bargaining agreement. The Minister agreed to the Chancellor's view. Unfortunately, so far the Cabinet of Ministers has not formally initiated work on the relevant amendments.

248 Civil Law Chamber of the Supreme Court, judgment of 1 November 2006 in case 3-2-1-76-06, para. 17.

The Chancellor has also pointed out that the current rules on support strikes are in contravention of the Constitution, and that a complete ban of strikes in the public sector appears problematic when viewed through the prism of the same. The Ministry of Social Affairs has admitted that problems exist in both areas, and has promised to start tackling those problems. In regard to strikes in the public sector, the Chancellor also prepared a report to the Riigikogu in the beginning of 2006.[249] Nevertheless, the Riigikogu has so far not adopted the relevant amendments yet.

As for the law of strikes, a curious incident must be reported from the area of collective employment relations in Estonia. In June 2006, the term of office of the then incumbent National Conciliator came to an end. According to section 8 of the Collective Employment Disputes Resolution Act, the National Conciliator must be appointed pursuant to an agreement between the Ministry of Social Affairs, the national federation of employers' associations and the national federation of trade unions for a term of up to three years. By November 2006, the office was still vacant, nor had an acting National Conciliator been installed. In view of the foregoing, the parties in employment relations were deprived of seeking conciliation during a period of six months. This also means that the right to strike was limited as well, for strikes are generally only lawful when the conciliation proceedings have failed.

In November 2006, the Chancellor of Justice drew the attention of the Minister of Social Affairs to the need to take immediate action to appoint a new National Conciliator. In the sitting of 7 December 2006, the Cabinet of Ministers of the Republic adopted a directive by which Mr Henn Pärn was appointed National Conciliator as of 11 December 2006.

The biggest achievement in the sphere of employment law in 2006 was related to the enactment of a new statute on employees' representatives. The statute implemented in Estonia the European Community's Framework Directive 2002/14, which provides the general framework for information and consultation of employees in the EC. In view of the fact that prior to the adoption of the new Employees' Representatives Act, Estonian law did not prescribe a general duty to provide information to employees and consult with employees to the extent required in Directive 2002/14/EC, the passage of the implementing statute should be unreservedly applauded.

Although adopting the Employees' Representatives Act was in itself a positive development, the Cabinet of Ministers and the Riigikogu will soon have to take firm and decisive steps to reform the law of employment as a whole. Failing this, the economic well-being of Estonia and its social protection model will be at risk.

2. Taking a child from the parents, placing the child in a children's shelter and making it possible for the child to receive compulsory schooling in the shelter

Case 7-1/060416

(1) A petitioner requested that the Chancellor of Justice verify whether the Executive Board of Tallinn Central Borough had acted lawfully when it took the petitioner's child, placed the child in Tallinn Children's Shelter and made it impossible for the child for two weeks to receive compulsory schooling.

(2) On 20 January 2006, employees of Tallinn Children's Hospital Foundation notified the Social Welfare Department of the Executive Board of Tallinn Central Borough of a case of mistreatment in the family of a child born in 1998. Having received this information, officials of the Social Welfare Department of the Executive Board of Tallinn Central Borough spoke with the child's parents on

[249] See Part 1, III 2. The constitutionality of section 21(1) of the Collective Employment Disputes Resolution Act.

30 January 2006. The parents refused the cooperation with the social and family workers of the *MTÜ Lapsele Oma Kodu* (non-profit corporation "To Each Child His/Her Own Home"—transl.) that the officials had suggested. After that, on 1 February 2006 the Social Welfare Department informed the North Estonia Police Force of the situation, requesting the institution of criminal proceedings in the matter of mistreatment of the child. On 8 February 2006, the North Estonia Police Force instituted criminal proceedings in respect of the petitioner pursuant to section 121 of the Penal Code.

An investigator of the North Estonia Police Force phoned the Social Welfare Department on 16 February 2006, and informed the department officials that mistreatment of the child continued. On these grounds, the Social Welfare Department of the Executive Board of Tallinn Central Borough decided on 17 February 2006 to place the child for two months with a safe group at Tallinn Children's Shelter (the shelter) in order to ensure the child's safety. The Executive Board of Tallinn Central Borough requested that the shelter not release the child without the written consent of the Social Welfare Department of the Executive Board of Tallinn Central Borough.

After the child had been placed in the shelter, both of the child's parents were informed of the FLA, and of the considerations that the decision was founded on, by telephone on 17 February 2006. It was suggested that the parents meet with the officials of the Social Welfare Department on 20 February 2006 in order to discuss the situation and the possibilities for resolving it.

On 21 February 2006, the petitioner made an inquiry to the Social Welfare Department of the Executive Board of Tallinn Central Borough, asking to be informed of the considerations that had caused the child to be placed in the shelter and to be provided the name of the person who had taken that decision. The Social Welfare Department responded to the petitioner's request on 20 March 2006.

The child was allowed to receive compulsory schooling by attending the child's school starting 9 March 2006. Before that date, the child participated in home study classes in the shelter.

On the basis of sections 28 and 29 of the Chancellor of Justice Act, the Chancellor requested information and an explanation from the Executive Board of Tallinn Central Borough regarding the reasons and the legal basis pursuant to which the child had been taken from the family. The Chancellor also requested information on whether and how the parents had been notified of the fact that the child had been taken from the family and placed in Tallinn Children's Shelter, whether the Executive Board of Tallinn Central Borough possessed informtion regarding the institution of mandatory extra-judicial proceedings regarding physical mistreatment of the child, whether and how and starting what date the child has received compulsory schooling after being taken from the family and placed in the shelter, what procedural steps the Executive Board of Tallinn Central Borough intended to take next in the matter of separating the child from the family and placing the child in the shelter.

The Executive Board of Tallinn Central Borough (the Board) replied to the Chancellor that on 20 January 2006 the Board had received information from an employee of the Children's Hospital Foundation, according to which the petitioner's child had been mistreated at home. After this, an interview was arranged with the petitioner and the petitioner's spouse. It was recommended to them to cooperate with the staff of the non-profit corporation *MTÜ Lapsele Oma Kodu*. The petitioner and the petitioner's spouse did not agree to the recommendation. On 1 February 2006, the Executive Board of Tallinn Central Borough filed a complaint with the North Estonia Police Force, requesting that criminal proceedings be instituted in regard to mistreatment of the petitioner's child. On 9 February 2006, the Board received information from the North Estonia Police Force, according to which criminal proceedings had been instituted in respect of the petitioner in the matter of mistreatment of the petitioner's child. On 16 February 2006, a police investigator informed the Board that mistreatment of the petitioner's child at home was continuing. On 17 February 2006, on the basis of sections 50(3) and 50(4) of the FLAmily Law Act (FLA), sections 3, 32(1)(1), 32(3),

62(1) of the Republic of Estonia Child Protection Act and section 25(1) of the Social Welare Act (SWA), the petitioner's child was placed in Tallinn Children's Shelter (the shelter). On 17 February 2006, the Board informed the petitioner and the petitioner's spouse by telephone of the fact that the child had been placed in the shelter. On 20 February 2006, the Board met with the petitioner and the petitioner's spouse. On 21 February 2006, the petitioner submitted a request to the Board, asking to be provided information regarding the circumstances surrounding the placement of the child in the shelter. A reply was dispatched to the petitioner on 20 March 2006. According to the Board, the petitioner's child had received homeschooling in the shelter until 9 March 2006, after which the child was allowed to receive compulsory schooling by attending the usual school. The Board found that, until the criminal proceedings instituted in respect of the petitioner were concluded, the Board would try to do everything in its power in order to permit the child to return home.

(3) The principal question in the case was whether the Executive Board of Tallinn Central Borough had acted lawfully when it took the petitioner's child from the petitioner, placed the child in the shelter and prevented the child from receiving compulsory schooling by attending the child's usual school.
(4.1.) Article 26 of the Constitution provides that everyone has the right to inviolability of private and family life and that government agencies, local authorities and their officials may only interfere with the family or private life of an individual in the cases provided by statute and pursuant to the procedure provided by statute in order to protect public health, morals, public policy and the rights or freedoms of other people, or to prevent a criminal offence from being committed, or to apprehend a criminal. In addition, paragraph 3 of Article 27 of the Constitution 27 provides that parents have the right and the duty to raise their children and to care for them.
The provisions listed above set out with clarity the rights of the parents, but also the duties that the parents must perform in raising the child and in caring for the child. Among other things, these provisions protect the parents against the Government's interference with the parents' family life and with the raising of the parents' children, and impose on the Government a duty to take steps to ensure the protection of individuals' family life from encroachments, as provided in Articles 26, 27 and 19 of the Constitution.
The rights and duties of a parent *vis-à-vis* the child have been specified in the Family Law Act.

In essence, section 50(1) of the FLA echoes the rule set forth in paragraph 3 of Article 27 of the Constitution. It states that a parent has the right and owes a duty to raise the child and to care for the child. When the first sentence of section 50(2) of the FLA, according to which the parent is obliged to protect the rights and interests of the child, is examined in conjunction with the second and the third sentence of that subsection, which provide that the parent is a lawful representative of the child and as such enjoys the powers of a guardian, means that the parent has an exclusive right to determine what is or is not in the interests of his/her child and how the rights and interests of the child should be protected. In making such determinations, however, the parent's authority is limited by virtue of section 50(4) of the FLA—the parent may not exercise parental rights in a way that harms the child's interests.

This means that the FLA requires parents who are raising a child and caring for the child to consider the interests of that child. Insofar as a parent performs the obligations imposed on him/her adequately, it is clear that no one may interfere with his/her parenting, or take the child from him/her. This constitutional principle, among other things, enjoys the protection stemming from the first sentence of paragraph 3 of Article 30 of the Constitution, which vests parents with the right to require the return of their child from any person who holds the child without a statutory basis.

At the same time it is understandable that a child needs protection if the parent does not exercise parental rights and perform parental duties in accordance with the interests of the child.

Measures for the protection of children are contained in a number of provisions in the FLA. Among other things, the FLA prescribes the possibility for a court to authorise separating the child from

one or both parents without terminating the relevant parent's or parents' parental rights, where this is requested by a parent, the guardian or the guardianship agency, provided it is not safe to leave the child with the parents (section 53(1) of the FLA). Thus, as the first step towards separating a child from his/her family, the general rule referred to above requires that the guardianship agency present a petition to a court requesting an authorisation to take the child from the family. Only when this petition has been granted is the agency authorised to proceed to take the child from the family.

In view of the fact that the above proceedings would be ill-suited to their purpose in the case where it is in the child's interests that the child be taken from the family immediately (there is no time to wait for the judgment of the court), the legislature has also provided a special rule, contained in the first sentence of section 53(2) of the FLA, pursuant to which the guardianship agency may proceed to take the child from the family before the relevant judgment is pronounced by the court, provided leaving the child with the parent would endanger the child's life or health. In such a case, the agency must observe the rule in the second sentence of section 53(2) of the FLA, i.e. it must within ten days submit a petition to the court requesting an authorisation to take the child from the parent, or to terminate the parent's parental rights. This means that section 53(2) allows a child to be taken from his/her family, provided this is in the interests of the child's life or health. However, after having exercised this power, the agency must address a petition to the court requesting an authorisation to take the child from the parents.

Both of the provisions referred to above are imperatively worded, and protect the parent against arbitrary exercise of authority by the guardianship agency in matters regarding family life and the parenting of children, and care for children. Among other things, by providing for judicial review of the lawfulness of the actions of the agency, these rules also guarantee the parent's right to be heard.

In order for the guardianship agency to be able to fulfil the public duties imposed on it by virtue of section 53 of the FLA, the agency must refer the matter to the relevant county court pursuant to section 9(1) of the Code of Civil Procedure (CCiP). Under section 475(1)(8) of the CCiP, the court must dispose of non-contentious family business pursuant to the procedure established for non-contentious matters. Section 550(1)(2) of the CCiP provides that matters concerning a determination of the rights of a parent *vis-à-vis* the child, and arrangements regarding communication with the child are to be disposed of pursuant to non-contentious procedure.

When the court has entered an order authorising the taking of the child from the parent, which means that the child will be deprived of parental care, according to section 53(3) of the FLA the living arrangements of that child must be organised by the guardianship agency. The latter will continue to do so until the reasons that led to taking the child from the parent become inoperative, and the court rules that the child should be returned to the parent pursuant to section 53(4) of the FLA. Among other things, that provision contains a rule according to which the child must not be returned to the family before the relevant court order has become effective. This, in its turn, means that the child will not be returned to the parent before it has been ascertained that the parent no longer poses a threat to the life or health of the child. For this reason, a situation in which the agency decides from the outset the term for which the child must remain separated from the family, be it by way of a specific period of time, or by reference to an external event such as the conclusion of criminal proceedings instituted in respect of the parent, cannot be regarded as lawful.

The facts of the case indicate that the actions of the guardianship agency did not conform to section 53(2) of the FLA, because the agency had failed to bring a petition to the county court in the matter of taking the child from the family. Such conduct on the part of the agency must be regarded as amounting to a reprehensible violation of the petitioner's fundamental rights and freedoms.

(4.2.) The FLA does not prescribe any specific manner in which a parent should be informed of the fact that his/her child has been taken from the family. In view of the fact that the agency, in taking

the child from the parents, performs a public duty arising from the public interest[250], the agency's actions must respect good administrative practice.

Good administrative practice is a fundamental right that springs from Artidcle 14 of the Constitution. In addition to the right to proceedings and arrangements, it also includes the requirement that administrative proceedings be conducted in accordance with the principles of administrative law. This means that administrative proceedings must be conducted efficiently and having regard to the purpose of those proceedings; they must also take place in as straightforward a manner as possible, and as fast as possible, avoiding unnecessary costs and inconvenience to individuals.[251]

This principle also applies to the work of a guardianship agency, when that agency is performing public duties flowing from the general interest. It follows from this that the agency, when it invades the family life of an individual, must also take into account the fact that its actions must conform to good administrative practice and the requirements that emanate from such practice, and must respect those requirements in its work. Thus, the agency must without delay inform the parent of a decision to take the child from the family and of the reasons that justify this decision. Moreover, the parent must be notified of his/her right to require a written statement of reasons in respect of the measure in question. The parent must also be notified of the name of the court in which he/she can contest the actions of the agency, and of the time limits established for contestation.

In the case that the parent desires a written statement of reasons for the measure, that statement must be provided as soon as possible. This will permit the parent to effectively exercise his/her rights and freedoms. The written statement must also set out the possibilities that the parent has for appealing the measure.

In the case at hand, the guardianship agency informed the petitioner by telephone on the same day that the child was taken from the petitioner. It was agreed with the petitioner that another meeting would take place in three days' time, in which the parties would discuss the situation and the possible ways of resolving it. A day after the meeting, the petitioner submitted a request to be provided a written statement of reasons for the measure.

At the same time, the facts of the case contain no indication suggesting that the petitioner had been provided a reply at the earliest opportunity, or that the possibilities open to the petitioner to contest the actions of the guardianship agency had been explained to the petitioner. The material facts of the case show that the request submitted by the petitioner on 21 February 2006 was only replied to on 20 March 2006, and the reply did not provide information to the petitioner regarding the court before which the petitioner might have contested the actions of the agency, or of the time limits involved. Such conduct on the part of the agency must be regarded as contravening good administrative practice.

(4.3.) Under the terms of section 53(3) of the FLA, the living arrangements of a child who has been taken from the parents, and who has been deprived of parental care, must be organised by the guardianship agency. A child will also be deprived of parental care when he/she is placed in a shelter, since the child's parent will by virtue of that placement have been deprived of the necessary authority to decide matters pertaining to the child. Thus, for instance, the parent would not be able to monitor whether the child is receiving compulsory schooling.

Accroding to section 17(1) of the Middle School and Upper Secondary School Act (MSUSSA), receiving compulsory schooling is a basic duty that must be respected by any child who has turned seven years of age by 1 October of the current year, until he/she acquires a middle school education, or turns 17 years of age. The general rule provided in the MSUSSA is that compulsory schooling

[250] Civil Law Chamber of the Supreme Court, judgment of 5 December 2001 in case 3-2-1-145-01.
[251] Constitutional Review Chamber of the Supreme Court, judgment of 17 February 2003 in case 3-4-1-1-03, paras. 16-17.

should be received by attending a school. At the same time, section 20 of that statute contains a special provision that permits compulsory schooling to be received also by way of home studies pursuant to the rules established by the Minister of Education and Research.

The Minister has provided the rules in question in Regulation 24, "Homeschooling Rules" of 18 July 2000 (the Rules). Under the terms of section 1(1) of the Rules, home studies means learning that is performed in the place of residence of the student, or in a hospital, in order to receive compulsory schooling. This means that a student can only receive compulsory schooling by means of home studies while at his/her place of residence or in a hospital.

According to section 1(2) of the Rules, receiving compulsory schooling by means of home studies at the student's residence may be chosen where the parent (guardian) so wishes, or for health reasons. Section 2(1) of the Rules provides that, should the parent (guardian) so wish, a student who must receive compulsory schooling can be taught at his/her residence within the scope of the curricula of the I and II school levels (Forms 1–6). Pursuant to the second sentence of section 1(3) of the Rules, home studies at the student's residence must be supervised by the parent (guardian), while the task of the school is to check and assess the student's learning outcomes.

In order for a child to be able to pursue home studies at his/her residence, the parent (guardian) of the child is required by virtue of section 2(3) of the Rules to submit a corresponding application to the Headmaster of the child's school by 20 August at the latest, in which the parent states the reasons for choosing homeschooling and provides information regarding the person who will teach the child. According to section 3(1) of the Rules, permission for home studies will then be granted by the General Teachers' Meeting of the school for a term of up to one year. The teachers will also determine the intervals at which the learning outcomes of the student must be assessed.

On the basis of the above, a guardianship agency that has taken it upon itself to organise the living arrangements of a child who has been deprived of parental care, must decide the manner in which the child will receive compulsory schooling. Should the agency find that it is in the interests of the child to pursue a course of home studies, the agency must respect the body of rules set out above. This means that the agency must submit the corresponding application to the Headmaster, following which the general meeting of the school's teachers will decide whether to allow the child to receive compulsory schooling by way of home studies.

The facts of the case show that the guardianship agency prevented the petitioner's child from receiving compulsory schooling by attending school during the period from 18 February to 8 March 2006. Nor was the child allowed to receive compulsory schooling by way of home studies meeting the requirements established for these studies. For this reason, the actions of the guardianship agency must be regarded as a violation of section 53(3) of the FLA.

(5) The Chancellor of Justice recommended that the Executive Board of Tallinn Central Borough petition the County Court in accordance with section 53(2) of the FLA with a request to take the child from the parents, or to terminate the parents' parental rights if the life or health of the petitioner's child is in danger while the child is with the parent, and that the Board make a written apology to the petitioner for overstepping the bounds of good administrative practice and for preventing the child's from receiving compulsory schooling by way of attending school. The Chancellor further recommended that in cases where a child must be taken from the parents, the Board act in the future strictly in accordance with section 53 of the FLA, and that the Board take steps to ensure that school-age children in the shelter receive compulsory schooling either by attending school or by homeschooling, if the latter appears justified.

The Executive Board of Tallinn Central Borough agreed to the Chancellor's recommendation and submitted a petition to Harju County Court requesting authorisation to take the child from the parents. The Board also dispatched a letter to the petitioner, in which it admitted the mistakes it had made.

The Executive Board of Tallinn Central Borough promised that it would in the future abide strictly by section 53 of the FLA and only take a child from his/her parents where this was justified by valid grounds and evidence. Prior to taking the child, the Board promised to have recourse to warning measures (such as previous notification of the parent regarding the possible consequences that might follow if mistreatment of the child continued).

Since the reply that the Chancellor received remained unclear as to what steps had been taken to ensure that children continue to receive compulsory schooling either by attending school or by homeschooling, provided the latter appears justified (the information that was provided in the reply only addressed the question of how well the shelter performed in providing for its children to receive compulsory schooling, but was silent as to precisely how the procedure provided by statute was being followed), the Chancellor decided to perform an inspection visit to Tallinn Children's Shelter on 15 November 2006.

3. Term of involuntary committal in a closed institution

Case 6-1/060087

(1) A petitioner requested that the Chancellor of Justice verify whether the term of up to three years that was provided in statutes as the maximum period for involuntary committal in a closed institution, was compatible with the Constitution.

(2) The petitioner drew the Chancellor's attention to section 19(3) of the Social Welfare Act (SWA), section 538(2) of the Code of Civil Procedure (CCiP) and section 13 of the Mental Health Act (MHA). Section 19(3) of the SWA (as amended with effect as of 1 January 2006) provides as follows:

"Section 19. Provision of involuntary care to a person in a care institution

[…]

(3) The court may authorise involuntary care of a person in a care institution for a term of up to three years. If, upon the expiration of that period, the grounds listed in subsection 1 of this section are still present, the court may, on the basis of an application submitted by the local authority on whose territory the person has his or her place of residence, authorise extensions, each by a term of three years, to involuntary care of the person in the care institution. (unofficial translation—transl.)

[…]"

Section 538(2) of the CCiP, as amended with effect as of 1 January 2006 provides:

"Section 538. Court order

[…]

(2) A person may not be involuntarily committed in a closed institution for more than three years from the day the corresponding order is made." (unofficial translation—transl.)

In the petition submitted to the Chancellor, the petitioner noted that the provisions at issue did not contain any rules governing determination of the period for which an involuntary committal may be ordered. Nor did they contain any rules regarding intervals at which such committals must be reviewed. In addition, the petitioner drew the Chancellor's attention to the fact that the MHA made no mention whatsoever of a period for which involuntary treatment might be ordered. What is more, the statutes mentioned above failed to provide a procedure for a regular review of committals to closed institutions.

The Chancellor of Justice addressed a request for information to the Minister of Social Affairs.

The Minister of Social Affairs replied to the Chancellor that the Minister did not regard it as appropriate that involuntary and unavoidable psychiatric treatment was being ordered for terms of up to three years. For this reason, preparations were being made to amend the legislation so as to provide a maximum term of one year for involuntary committals, which could be extended by a court by periods of up to one year. The Minister also informed the Chancellor that plans were being elaborated to provide a more efficient mechanism for reviewing committals for involuntary care or involuntary treatment to establish whether the grounds justifying the committal continued to be present.

(3) The principal question in the case was whether the period for which a person could be committed for involuntary care was in conformity with the Constitution and the European Convention for the Protection of Fundamental Rights and Freedoms.

(4) Paragraph 1 of Article 20 of the Constitution protects everyone's physical liberty against arbitrary detention. The right to liberty and security of person is one of the most basic human rights. It is what the exercise of many other rights is founded on. In certain cases, however, derogations are possible from this right. An exhaustive list of these is provided in points 2–6 of paragraph 2 of Article 20 of the Constitution. A general requirement for any derogations is that they must be provided by statute and pursuant to the procedure provided by statute, and may not be arbitrary, i.e. unfounded.[252]

Under point 5 of paragraph 2 of Article 20 of the Constitution, a person who suffers from a contagious disease or mental illness, or who is an alcoholic or a drug addict, may be deprived of his/her liberty provided that person presents a threat to him/herself or to others. The resulting detention must be unavoidably necessary and must seek to achieve a specific objective, i.e. it can only be implemented in pursuing the objective that it is intended for. What must also be taken into account is that the procedure prescribed for authorising the deprivation of liberty should be practicable, reasonable and entail the least possible interference with the right to liberty of the individual.

Under the terms of section 19(1) of the SWA, a person can be placed in a care institution without the consent of that person or his/her lawful representative if the person suffers from a serious mental disorder that limits his/her ability to understand or control his/her conduct, provided the person would be a threat to him/herself or to others if not placed in the care institution, and if earlier measures in his/her case have proved inadequate, or cannot be used. Pursuant to section 19(3), a court may authorise involuntary care of the person in a care institution for a term of up to three years. If, upon expiration of the three-year term, the grounds listed in subsection 1 of that section are still present, a court may, on the basis of an application submitted by the local authority on whose territory the person has his or her place of residence, authorise extensions, each by a period of three years, to involuntary care of the person in the care institution.

Under section 11(1) of the MHA, a person would be admitted without his/her consent or the consent of his/her lawful representative for treatment in the psychiatry unit of a hospital by way of unavoidable mental health care measure, or the person's treatment would be continued on an involuntary basis only if the person suffers from a serious mental disorder that limits his/her ability to understand or control his/her conduct, provided the person would be a threat to the life, health or security of him/herself or of others if not committed for treatment, and if other mental health care measures in his/her case are inadequate. Under section 13(1) of the MHA the application, extension or termination of involuntary treatment must be determined by a court according to the procedure established for committals to closed institutions on the basis of an application submitted by the local

[252] R. Maruste. Kommentaarid §-le 20. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Commentary on Article 20, by R. Maruste, in "The Constitution of the Republic of Estonia", an annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 20, note 15.

authority on whose territory the person has his/her place of residence. The MHA does not provide a maximum term of treatment, or any interval at which a review of the term of committal should be arranged.

Chapter 54 of the CCiP lays down the rules of judicial procedure for involuntary committal with deprivation of liberty of persons of unsound mind in a psychiatry clinic or a care institution, for involuntary committal of a person infected with a contagious disease in a hospital and for administering treatment to that person, provided this is necessary in order to contain a particularly dangerous contagious disease, and for other cases of committal to closed institutions provided by statute. Pursuant to section 538(2) of the CCiP a person may not be committed in a closed institution for a term exceeding three years of the date the corresponding order is made.

The law of involuntary commitment as provided in the SWA and the CCiP is not in conformity with the principle stated by the European Court of Human Rights (ECHR) in its judgment in *Herczegfalvy v. Austria,* pursuant to which the state of health of a person committed in a closed institution must be reviewed, and a new determination made, at intervals that, in any case, are shorter than 15 months.[253]

The Chancellor concluded that section 19(3) of the SWA and section 538(2) of the CCiP might not be compatible with the Constitution.

(5) Since in the reply to the request for information, the Minister of Social Affairs had informed the Chancellor of plans to amend the law of involuntary committal to closed institutions, the Chancellor considered it unnecessary to issue a recommendation in the case. In addition, the Minister had promised to start resolving other issues that the petitioner had raised. The measures that the Minister had suggested included amending relevant legislation and arranging for the preparation of the draft of a new Mental Health Bill.

On 29 May 2006, the Cabinet of Ministers of the Republic formally introduced a bill proposing to amend section 538(2) of the CCiP and section 19(3) of the SWA[254]. The Riigikogu adopted the amendments on 15 November 2006 and the amendments entered into force on 1 January 2007. Section 538(2) of the CCiP (as amended) provides:

"(2) A person may not be involuntarily committed in a closed institution for more than one year from the day the corresponding order is made." (unofficial translation—transl.)

Section 19(3) of the SWA (as amended) provides:

"(3) The court may authorise involuntary care of a person in a care institution for a term of up to one year. If, upon the expiration of that period, the grounds listed in subsection 1 of this section are still present, the court may, on the basis of an application submitted by the local authority on whose territory the person has his or her place of residence, authorise extensions, each by a term of one year, to involuntary care of the person in the care institution." (unofficial translation—transl.)

4. Inspection visit to Tallinn Children's Shelter

Case 7-8/061058

(1) On 15 November 2006, the Chancellor of Justice performed an inspection visit to Tallinn Children's Shelter (the Children's Shelter) on his own initiative.

[253] ECHR, judgment of 24 September 1992 in case 10533/83, Herczegfalvy v. Austria, para. 77.

[254] A Bill to Amend the Social Welfare Act, the VAT Act, the Public Health Act, the Stamp Duties Act and the Code of Civil Procedure as of 29 May 2006 (Bill 918 SE), available on the Internet at: http://www.riigikogu.ee (in Estonian—transl.).

The Children's Shelter is a care institution under the authority of Tallinn Board of Social Welfare and Health Care. The Children's Shelter provides assistance to minors who are deprived of parental care and who have substance abuse problems. The Lilleküla branch of the Children's Shelter has 16 places for children deprived of parental care, to whom care and rehabilitation services, and medical assistance is provided. These services and assistance are provided in the Lilleküla branch to all children, regardless of their place of residence or their origin. Generally, the children who stay at the branch continue to receive compulsory schooling by attending the same school that they attended before admission to the Children's Shelter.

The Nõmme Road branch has 30 places for children with substance abuse problems, to whom round-the-clock care, counselling, rehabilitation and aftercare services are provided. These services and assistance are provided to children whose permanent residence is in Tallinn. Children whose residence is in the territory of other local authorities are provided the services subject to availability of free places in the branch facility. The children who stay in the Nõmme Road branch receive compulsory schooling in the Children's Shelter.

(2) The Chancellor of Justice checked whether fundamental rights and freedoms had been guaranteed to the children in the Children's Shelter.

(3.1) The inspection revealed that the staff of the Children's Shelter used segregation of the children in the Nõmme Road branch from other persons in the Children's Shelter as punishment. This is in contravention with section 20(1)(4) of the Social Welfare Act (SWA) and with section 4(1) of Minister of Social Affairs Regulation 8, "Procedure for imposing limitations in a care institution" of 30 May 2002. The provisions in question authorise the placement of a resident of a care institution in a segregation room if the resident poses a threat to him/herself, to others or to someone's property.

The inspection revealed that decisions to segregate children were being made by the social educators who were working closely with those children. Pursuant to the statute and the Minister of Social Affairs regulation referred to above, the right to order segregation is only vested in the Head of the care institution, or a person acting in his/her stead. Liberty is an individual's vital fundamental right, and may not be limited on the basis of an emotional judgment. For this reason, the statute in question provides a list of persons who are authorised to decide the use of segregation in respect of a person residing in the care institution.

The Chancellor issued a recommendation to the Head of the Children's Shelter to rearrange the work of the shelter so that decisions to employ segregation would be taken by the Head or a person acting for the Head, i.e by one who does not have everyday contacts with the segregee and would therefore be better placed to remain objective (for instance, the Head of the branch). The Chancellor recommended that the Head of the Children's Shelter limit the use of the segregation room exclusively to segregation for the purposes provided in the relevant statute and to make a note in the statement of reasons for segregation of whether the child presented a threat to him/herself, to others or to someone's property.

(3.2) The inspection also revealed that the psychologists of the Children's Shelter were reading the letters that arrived in the name of the children staying in the Nõmme Road branch, and the letters that those children had written. Pursuant to the first sentence of Article 43 of the Constitution, everyone has the right to confidentiality of communications relayed by means of post. The second sentence of the same article allows that right to be limited on two grounds: in order to prevent a criminal offence from being committed (provided the preventive measure is authorised by a court), or in criminal proceedings in order to establish the truth of the case. In addition, the limitation must be explicitly provided by statute. Grounds for limiting the rights of a person residing in a care institution are provided in section 20(1) of the SWA. Point 2 of that provision lists the limitations applicable to parcels addressed to a resident of a care institution. It provides that, if a care institution possesses information according to which a postal parcel or other delivery in the name of a resident

of the care institution contains any narcotic substances, any means of use of narcotic substances or any other substances that may pose a danger to the life of health of persons, the Head of the care institution may authorise a search of the resident, or of the postal parcel or other delivery made to the resident.

This means that the law does not authorise an employee of a care institution to read any letters received or sent by residents of that care institution. The Chancellor finds that by reading the letters that arrive in the name of a child and the letters that the child sends, the psychologists employed by the Children's Shelter are infringing the right that the Constitution guarantees to that child in respect of the confidentiality of communications and the inviolability of private life. For this reason, the Chancellor issued a recommendation to the Head of the Children's Shelter to instruct the staff of the shelter to refrain from reading any letters arriving in the name of, or sent by children residing in the shelter.

(3.3) The inspection revealed that each child staying in the Nõmme Road branch of the Children's Shelter was required to clean the toilet facility of the branch approximately once every five weeks. Assigning the job of cleaning the toilet facility to children, however, amounts to a violation of section 15(8) of Minister of Social Affairs Regulation, "Health protection requirements in children's care institutions" of 9 January 2001. The Chancellor admits that children must indeed be taught everything that is susceptible to enhance their independence and their coping skills. Nevertheless, cleaning a toilet facility that is in common use may entail a danger to the child's health, and in certain cases to the child's dignity. For this reason, the Chancellor issued a recommendation to the Head of the Children's Shelter to cease assigning children the duty of cleaning toilet facilities and to amend section 56 of the Work Regulations of the Nõmme Road branch so as to bring it into conformity with section 15(8) of Minister of Social Affairs Regulation, "Health protection requirements in children's care institutions" of 9 January 2001.

(3.4) During the inspection visit, the administration of the Children's Shelter explained that children staying in the Lilleküla branch should be provided pocket money for everyday expenses. The administration claimed that children's homes provide an allowance of this type. The administration noted that the Tallinn Board of Social Welfare and Health Care had not made provision for corresponding funds in the budget of the Children's Shelter.

The Chancellor finds that children in the Lilleküla branch of the Children's Shelter, who are separated from their parents and deprived of parental care, are thereby placed in a situation that is worse than that of other children. Pursuant to section 1.6 of Schedule 1 of Tallinn City Council Executive Board Regulation 50, "Approving the Constitutive Regulations of Tallinn Children's Shelter" of 15 May 2002, authority to approve the budget of the Children's Shelter is delegated to the Board of Social Welfare and Health Care. For this reason, the Chancellor recommended that the Head of Tallinn Board of Social Welfare and Health Care amend the budget of the shelter so as to make it possible for employees of the shelter to provide pocket money to children in the Lilleküla branch of the Children's Shelter.

(3.5) The Nõmme Road branch of the Children's Shelter provides assistance to children who have substance abuse problems. These children receive round-the-clock care, rehabilitation and counselling services. The Children's Shelter also arranges for the children in question to receive compulsory schooling. According to the Head of the Children's Shelter, it is the only such rehabilitation centre in Estonia for children with substance abuse problems. This results in considerable demand, also in other regions of Estonia, for the services provided by the Children's Shelter. Since the Children's Shelter, however, is an institution that is under the authority of an administrative agency of Tallinn Council, it must primarily look after children from Tallinn.

The Chancellor finds that all children suffering from a substance abuse problem must be provided an opportunity for effective rehabilitation. For this reason the Chancellor issued a recommendation to

the Minister of Social Affairs to take steps to ensure that all children suffering from substance abuse problems be provided means for effective rehabilitation.

(3.6) The inspection revealed that the Juveniles Board was referring juveniles who had substance abuse problems for participation in the social rehabilitation programme of the Children's Shelter. The application of measures listed in the Sanctions for Juvenile Offenders Act (SJOA) is essentially a voluntary affair (except for referrals to special schools of juveniles with special needs, which is determined by a court), because if a child does not comply with the sanction imposed on him/her, the Board must simply order another sanction. This means that situations can arise in which the Board will be unable to exercise an influence on the juvenile, since if the juvenile refuses to comply with the sanction, the only things the Board can do is to impose a new one. In the case of a child who suffers from a substance abuse problem, the initial measure, i.e. participation in a social rehabilitation programme, may well be the only choice. In this connection, the Chancellor finds that it should be possible to provide rehabilitation services to a child who suffers from a substance abuse problem also by other means than a sanction imposed in relation to an offence. Furthermore, it must be possible for the child to receive services to help him/her overcome the substance abuse problem if those services are desired either by the child him/herself or by a lawful representative of the child.

The Chancellor made a suggestion to the Minister of Social Affairs to perform an analysis of the sufficiency and applicability of the sanctions provided in the SJOA. The Chancellor also suggested that the Minister consider amending those sanctions so as to make them applicable in practice, and ensure that they achieve the intended objective.

(3.7) The Chancellor of Justice verified whether children in the Children's Shelter were receiving compulsory schooling. The inspection revealed that children with substance abuse problems, who were staying in the Nõmme Road branch received compulsory schooling on the premises of the shelter. Studies in the Children's Shelter are organised by the Head of the shelter on the basis of Minister of Education and Research Regulation 24, "Homeschooling Rules" of 18 July 2000. The Regulation allows children to be assigned to home studies for health reasons. Teaching children in the shelter takes place in the form of group work. According to both the Head of the Children's Shelter and the Senior Specialist of the Department for Extracurricular Work of Tallinn School Board, the rules pursuant to which schooling is currently organised are insufficient in terms of organising the studies of children with substance abuse problems in the shelter. Starting the year 2002, the Head of Tallinn School Board was said to have repeatedly submitted proposals to the Minister of Education and Research regarding the organisation of studies of children with special educational needs, and regarding amendments to groupwork arrangements and to the implementation of individual curricula. Yet, no concrete steps had been taken by the Minister to change the situation.

The Chancellor issued a recommendation to the Minister of Education and Research to review the legislation governing compulsory schooling and to provide for an opportunity for children with substance abuse problems to receive schooling on such conditions as were appropriate in their case. The Chancellor also asked the Minister to clarify how the Minister had in 2006 amended studies arrangements of children with special educational needs, and what supplementary actions the Minister was envisaging in 2007. The Chancellor expects an explanation from the Minister of Education and Research regarding whether and how the Minister has taken into account the proposals made by the Head of Tallinn School Board concerning improvementsin the studies arrangements of children with special educational needs.

(3.8) The inspection visit revealed that the Governor of the county had never inspected the Children's Shelter within the thirteen years of its operation. According to the explanation of the governor, in a situation in which there was a shortage of staff, he had set the priority at overseeing first and foremost the national care institutions. Sections 7(2) and 38 of the SWA provide an obligation for a county governor or a person appointed by the governor to oversee the quality of provision of social services and other assistance in the territory of the county, and the use of targeted funds allocated to social

welfare provision. This means that the Governor of Harju County is by law obligated to exercise oversight, among other things, of the quality of social services and other assistance provided in the local authorities within the county, and of the use of targeted funds allocated by the Government for social welfare provision.

The Chancellor finds that by failing to inspect the work of the Children's Shelter the Governor of Harju County has neglected the oversight obligation imposed on him by virtue of the SWA. For this reason, the Chancellor made a suggestion to the governor to approach the oversight tasks imposed on him by the SWA with extreme assiduity and to find ways of exercising oversight of the quality of social services and other assistance provided in the care institutions of local authorities.

(3.9) During he inspection visit the Chancellor also considered the matter of whether officials in the executive boards of Tallinn's boroughs respected the requirements of the FLAmily Law Act (FLA) when taking a child from his/her parents. Checks conducted in the matter revealed that executive boards of the boroughs did not always approach a judge with a petition to obtain an order terminating parental rights or authorising the boards to separate a child from his/her parents within ten days of having taken the child from the parents and having placed that child in a children's shelter. The guardianship agency is authorised to take the child from his/her parents in order to ensure the safety of the child. This power is linked to the duty imposed on the guardianship agency by virtue of section 53 of the FLA, which requires the agency to inform a judge of the measure within ten days of having taken the child from the parents. This requirement protects the rights of parents and children against arbitrary actions of the authorities, and against unfounded interference with their family life.

The Chancellor finds that a guardianship agency that fails to respect the requirements arising from section 53 of the FLAmily Law Act (FLA) will have taken the child from his/her parents unfoundedly, which means that the relevant actions of the guardianship agency will be unlawful. For this reason, the Chancellor issued a recommendation to the Mayor of Tallinn to direct the officials of the executive boards of the city's boroughs to make sure that their actions in taking children from their parents in the future always comply with section 53 of the FLA.

(4) As a result of the inspection visit, the Chancellor of Justice issued recommendations and made suggestions to Tallinn Children's Shelter, to the Mayor of Tallinn, to Tallinn Board of Social Welfare and Health Care, to the Governor of Harju County, to the Minister of Social Affairs and to the Minister of Education and Research.

Tallinn Board of Social Welfare and Health Care, and Tallinn Children's Shelter have complied with the Chancellor's recommendations and suggestions.

5. Inspection visit to Psychiatry Clinic of North Estonia Regional Hospital Foundation

Case 7-2/060564

(1) On 31 May 2006, the Chancellor of Justice performed an inspection visit to the Psychiatry Clinic (the clinic) of the North Estonia Regional Hospital Foundation (the regional hospital).

The clinic is a unit of the regional hospital. It serves the entire region of North Estonia and provides inpatient care to patients from the Lääne-Viru County, the Lääne County and the islands. The provision of care in the clinic makes up more than one third of specialist psychiatric care provision in Estonia. The clinic employs 40 psychiatrists, four child psychiatrists, 12 psychologists and two child psychologists, two speech therapists, two neurologists, one internal medicine specialist, one anesthesiologist and 95 nurses, 127 orderlies, seven activity leaders, one social worker and 49 other employees. The clinic has an outpatient department and an inpatient treatment centre. The centre has eight units with a total of 230 patient beds. In 2005, the clinic admitted 3137 patients and consulted

50,432 outpatients. Main reasons for treatment were psychotic disorders and mood disorders. The outpatient department of the clinic falls into five separate units: the East Tallinn and the West Tallinn sections, the Harju section, the children's unit and the forensic psychiatry unit. There is a 2–3 weeks' waiting list for regular appointments. No free-of-charge services are provided to persons insured by the Sickness Fund. I addition to regular reception hours, the outpatient department also has a duty psychiatrist who sees patients from 8:00 a.m. to 6:00 p.m. on working days. The duty psychiatrist will see emergency patients outside the waiting list, on a 'first come first served' basis. In order to ensure quick access to psychiatric care for as many patients as possible, persons coming to the clinic for assistance are also seen by psychiatry nurses.

(2) The aim of the inspection visit was to scrutinise various aspects related to admissions for involuntary treatment. The summary below provides the gist of the principal facts established regarding the work of the clinic.

Articles 20 and 21 of the Constitution are concerned with the central part of the general right to liberty—the protection of everyone's physical freedom against arbitrary arrest and detention. The right to liberty and security is one of the principal human rights, since it is on this right that the exercise of many other rights and freedoms is founded. However, the right to liberty and security of person is not an absolute right because it too is subject to possible exceptions. The grounds justifying limitations of the rights in question are contained in an exhaustive list provided in points 1–6 of Article 20 of the Constitution. Point 5 of that article permits to deprive an individual of his or her liberty in the cases provided by statute and pursuant to the procedure provided by statute, amongst others, in the cases of the mentally ill provided they are a threat to themselves or to others.[255]

Pursuant to Article 21 of the Constitution the freedoms that an individual enjoys may only be limited if this is explicitly provided by statute, if reasons are stated and if the limitation is lawful.[256] Paragraph 2 of the same article requires a judicial review of deprivation of liberty. The purpose of that review is to avoid arbitrary deprivation of liberty and to ensure the lawfulness and unavoidable necessity of detention. The review, and the decision to continue or terminate detention must take place within 48 hours of the deprivation of liberty.

Pursuant to section 11(1) of the Mental Health Act (MHA) a person may be admitted for emergency treatment to the psychiatry department of a hospital on an involuntary basis, without that person's consent or the consent of his/her guardian, or kept in that department in order to continue treatment only in the case that the following conditions are fulfilled at the same time: the person suffers from a serious mental disorder that limits his/her capacity to understand his/her actions or control the same; if not admitted for treatment the person will, due to his/her disorder pose a threat to his/her own life, health or safety, or the lives, health or safety of others; and if other forms of mental health care are insufficient. As a rule, involuntary treatment may only be applied on the basis of a court order. Under section 13(1) of the MHA a person may only be treated in a psychiatric department of a hospital on an involuntary basis for more than 48 hours if this is authorised by a court. A person subjected to involuntary treatment may not discontinue medical tests or treatment or leave the psychiatric department. Where this is necessary in order to protect a person him/herself or to protect the public, the person must be taken to the psychiatric department of a hospital by an ambulance, by the police, by family members or by other persons.

In 2005, 1071 patients were admitted for involuntary treatment and in 2006 (as of 31 May 2006) the corresponding figure was 263. The average duration of involuntary admissions to the clinic is

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255 R. Maruste. Kommentaarid §-le 20. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Commentary to Article 21, by R. Maruste, in 'The Constitution of the Republic of Estonia', annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 20, notes 1-6.

256 R. Maruste. Kommentaarid §-le 21. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Commentary to Article 21, by R. Maruste, in 'The Constitution of the Republic of Estonia', annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 21, note 1.

12 days. Main diagnoses of patients admitted on this basis are schizophrenia, psychotic disorders, depression accompanied by psychotic symptoms and the acute phase of a bipolar mood disorder.

(3.1) Judicial review of deprivation of liberty lasting more than 48 hours

Responses of the administration of the clinic to a questionnaire administered before the inspection, and interviews conducted in the clinic on 31 May 2006 showed that there were serious problems in ensuring the protection of individuals' rights in judicial proceedings regarding admission for involuntary treatment.

Violations of the 48-hour rule mainly take place in the case of individuals who are arrested during weekends or on holidays, or at a time when the court is overloaded with work, when there is insufficient staff on duty in the clinic, etc. It is understandable that various circumstances may complicate an expeditious exchange of information between the clinic and the courts. However, this cannot constitute a justification for violating the relevant constitutional rule that requires detention to be reviewed within 48 hours in order to avoid arbitrary deprivation of liberty and to ensure the lawfulness and unavoidable necessity of detention. The Constitution does not authorise the detaining authority or the court to go beyond the 48-hour rule. As a result of the fact that ensuring individuals' fundamental rights is a fundamental principle of a democratic government based on the rule of law, the clinic and the courts must create the conditions necessary for reviewing the necessity of detention within the established time limit.

Based on the above, the Chancellor of Justice issued a recommendation to the administration of the clinic to elaborate a procedure for submitting petitions to admit an individual for involuntary treatment in the psychiatric department of a hospital by way of interim relief, which could be applied regardless of the day of week or the number of staff on duty and which would absolutely rule out detaining individuals in the clinic for more than 48 hours without the corresponding authorisation of a court.

In addition to that the Chancellor issued a recommendation to Presidents of county courts to organise the work of these courts so that petitions to admit an individual for involuntary treatment in the psychiatric department of a hospital by way of interim relief might be considered and resolved without delay. The Chancellor also recommended that the presidents take steps to make sure that individuals are not subjected to involuntary detention for more than 48 hours without judicial review of the relevant measure.

(3.2) The right to be present when one's case is heard and the right to have a representative

In addition to the foregoing, problems were discovered in the work of representatives appointed by courts pursuant to state legal aid rules in proceedings concerning orders of involuntary treatment. During the visit, the medical files of three patients admitted for involuntary treatment were examined. In all of these, the court order authorising treatment had been made in written proceedings. Under paragraph 2 of Article 24 of the Constitution everyone has the right to be present whe his or her case is heard. The *ratione materiae* scope of protection of that right does not only include passive attendance at the hearing. The right to participate in judicial proceedings as the subject of those proceedings presumes the right to be heard by the court. It also presumes that the court, in drawing up its decision, must have regard to the submissions made by the person and, if it rejects those submissions, give reasons for why it chose to do so.[257]

Where a person is incapable of representing him/herself, that person may retain a representative.

[257] E.Kergandberg. Kommentaarid §-le 24. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [Commentary to Article 24, by E. Kergandberg, in 'The Constitution of the Republic of Estonia', annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 24, note 9.

Persons who, because of lack of means, are unable to pay for provision of competent legal services at the time that they require such services, may be appointed a state legal aid provider to represent them in judicial proceedings. Pursuant to section 2 of the State Legal Aid Act, the aim of that statute is to make competent and reliable legal services accessible to everyone in good time and on an adequate basis by means of providing for the availability of state legal aid. Yet, the court orders authorising involuntary treatment that were examined in the clinic did not refer to appointing a representative to the person whose treatment was ordered, or the participation of that representative in the hearing.

Persons who are in need of mental health care are often incapable, because of the state of their health, of participating in a court hearing. This has been provided for also in section 534(2) of the Code of Civil Procedure (CCiP), which states that a person does not have to be heard if the hearing is likely to seriously harm the person's health or if the person is clearly incapable of expressing his/her intent. However, in such a case it is vital that a representative of the person participate in the hearing. It is also important that in general the use of the possibility provided in section 534(3) of the CCiP should be avoided. That possibility consists in ordering an interim relief measure already before hearing the person and other individuals, and before the appointment of a representative to the person. The court that is considering the case should, immediately upon receipt of an interim relief petition for admitting a person for involuntary treatment, appoint a state representative to the person and notify this to the representative and to the principal. This should make it possible for the representative, before the court enters an order in the case, to meet with the principal, to examine the documents concerning that person's treatment and obtain other information regarding the mental disorder that the principal suffers from, and regarding the methods used to treat and diagnose that disorder. In any case, a hearing must be held in order to rule on a petition to admit a person for involuntary treatment. It must be possible for the person or a representative of the person to take part in the hearing, which would guarantee the person's right to be present when his/her case is heard that is provided in Article 24 of the Constitution.

On the basis of the foregoing, the Chancellor issued a recommendation to the Presidents of county courts to guarantee, in a greater degree than has been the case before, individuals' exercise of the right to be present when their case is heard, which is enshrined in paragraph 2 of Article 24 of the Constitution. In addition, the Chancellor stressed the need to appoint a state representative to the person immediately upon receipt from a health care provider of a petition by way of interim relief to admit a person for involuntary treatment, and to notify the appointment without delay to the representative and the principal.

Furthermore, the Chancellor of Justice recommended that courts look into the possibility of organising a seminar on the protection of the rights of persons in need of mental health care for all judges or for the judges dealing with petitions regarding admissions for involuntary treatment.

Similarly, the Chancellor recommended that the Estonian Bar Association organise a seminar for advocates regarding the rights of persons in need of mental health care and regarding the protection of those rights in order to rule out mere semblance of representation of those perons before the courts.

(3.3) Exercise of the right to seek redress in a court of law

Paragraph 5 of Article 24 of the Constitution provides the right of everyone to appeal a judgment entered by a court in his or her case to a higher court pursuant to the procedure established by statute. This right underpins one of the fundamental principles of a democratic judiciary—the review that a higher court exercises over the rulings of a lower one. Pursuant to section 543 of the CCiP, an order to commit a person in a closed institution, or to dismiss a petition to commit a person in a closed institution, or to terminate a committal, or to dismiss a petition to terminate committal, and an order of interim relief are subject to an interlocutory appeal to a higher court. This means that in cases of involuntary treatment the law guarantees individuals' right to seek redress in the courts.

Interviews with the staff of the clinic and the patients, however, showed that the exercise of the right to appeal was often complicated, since court orders did not provide exhaustive information about the relevant appeal procedure. Neither was the procedure explained by the judge dealing with the case, or the person's representative. On the basis of the above the Chancellor recommended that Presidents of county courts advise the judges in their courts to provide sufficiently clear information regarding appeal procedures and possibilities in any orders made in the proceedings dealt with in Chapter 54 of the CCP. This would take due account of the limited ability of persons in respect of whom such proceedings are conducted to perform searches for information concerning the rules governing appeals against orders entered in their case. Among other things, the information provided should contain the address of the courthouse to which an appeal lies and set out the details required for the payment of the corresponding stamp duty, as well as information regarding possibilities for requesting a waiver of that duty.

(3.4) Exercise of the right to internal complaints

Regulations in regard to the exercise of patients' right to internal complaints within the clinic are contained in the complaints management system established in the regional hospital. The regulations of the management system define a complaint as an oral or written expression of dissatisfaction. A written reply will be provided to all complainants who have provided their contact information. Pursuant to section 3.1.2 describing the management system, complaints must be submitted by filling out the complaint form. Where possible, clerical staff will fill out complaint forms in respect of complaints communicated by phone. Under section 3.2.1 describing the management system, complaints that have been submitted in due form must be replied to within 15 days. On the basis of the complaints management system, only written complaints are considered to be in due form. These will receive a due-form reply.

Interviews with the staff of the clinic showed that in reality many complaints are communicated orally but no record is kept of these or of any replies, if provided. This means that at the relevant time the clinic had no rules on how and whether complaints that had been submitted orally were to be dealt with and whether any replies were to be provided to those complaints. Persons who are suffering from a mental disorder and who have been admitted for involuntary treatment may not always be capable of making a complaint that respects due form (i.e., using the complaint form and reducing their complaint to writing). Hence the Chancellor of Justice issued a recommendation to the administration of the clinic to make provision for the protection of individuals' interests by means of guaranteeing their right to submit internal complaints, and to regulate oral submissions of complaints, and the procedure for considering these and replying to these.

(3.5) Delivery of patients to the clinic by police

In cases where this is unavoidable for the protection of a person from him/herself, or of the public from that person, section 12(1) of the MHA authorises the police to deliver the person to the psychiatry department of a hospital. On the basis of a written request by a physician, the police may also assist a health care provider in apprehending a person, in performing a medical examination of the person and in delivering the person to the psychiatry department of a hospital. According to the information of the clinic, the police deliver approximately 50% of the patients referred to the clinic for involuntary treatment.

Delivery to the clinic of persons who are in need of mental health care and in whose regard admission for involuntary treatment appears justified is accompanied by increased risk of the use of excessive force on the part of the police. When a patient arrives in the clinic, a medical inspection is performed, in the course of which the patient's injuries are described. In most cases, it is impossible to link the injuries to their cause. The staff of the clinic further observed that the police often use abusive language and manifest an attitude regarding the patient they have brought to be admitted to the clinic. This means that police actions in delivering persons who are in need of mental health care to the clinic may infringe the human dignity of those persons and humiliate them.

On the basis of the foregoing the Chancellor of Justice issued a recommendation to the Commissioner of Police to find a means to organise a seminar for police officers regarding protection of the rights of persons who are in need of mental health care in order to prevent physical and verbal abuse degrading the human dignity of those persons. In order to avoid similar problems in the future, the insertion of a module dealing with fundamental rights of individuals should be considered in the programme of studies followed in the Police School of the Police College of the Estonian Defence and Public Service Academy.

(3.6) Accessibility of case management services in the clinic

Case management should be regarded as an important method for reintegrating involuntary patients into society. It encompasses advice regarding the services and resources required as well as the linking of and referral to those services and resources, and may also include direct clinical treatment that is related to the patient's quality of life and functioning. Case management reduces rehospitalisation rates and improves patients' quality of life. Efficient case management includes specific interventions and determines the level of care by reference to the needs of the patient and of the FLAmily. An important factor in case management is the relationship between the patient and the case manager.[258]

Currently, the clinic does not provide case management services. Where this is necessary, the patient is referred to a service provider. The clinic only employs one social worker; the hiring of supplementary staff has been prevented by lack of funds. Yet it is vital that access to case management be made as simple as possible for persons suffering from a mental disorder. The service would permit such persons to be part of society in spite of their condition. Provision of the service also reduces the possibility of admission to active treatment, especially to treatment on an involuntary basis. Therefore, the clinic should start providing case management and the provision should commence already during the time that the patient is in treatment. Referral to a service provider may limit actual availability of the service because access to the provider may be complicated.

On the basis of he foregoing the Chancellor of Justice issued a recommendation to the administration of the North Estonia Regional Hospital Foundation to find and make available to the psychiatry clinic the funds necessary to employ additional social workers who would provide efficient case management services.

(3.7) Equal access to rehabilitation services

Section 10(1[1]) of the Social Welfare Act (SWA) lists rehabilitation services as a subtype of social services. Rehabilitation services are services provided with a view to facilitate a person's coping, the person's social integration and his/her working or starting work. In the course of rehabilitation an individual rehabilitation plan must be drawn up in accordance with the requirements set forth in section 2[1] of the Disabled Persons Social Benefits Act for a period from six months to three years. During rehabilitation, the rehabilitee will receive services that appear on a list established by the Cabinet of Ministers of the Republic and in the rehabilitation plan. The rehabilitee will also receive advice regarding how to carry out the activities described in the plan.

Interviews with the staff of the clinic revealed that the provision of rehabilitation services in different regions of Estonia is extremely different. Another problem consists in considerable delays in drawing up rehabilitation plans. These delays often amount to three months. The fact that is of particular concern in this regard is that 1/3 of long-term patients stay in the clinic without this being medically necessary, waiting for rehabilitation services to be provided to them.

[258] Skisofreenia ravijuhis: III Psühhosotsiaalsed sekkumised ja teenuste jaotamine. Tartu Ülikooli Kliinikum, kättesaadav arvutivõrgus [Guidelines for treating schizophrenia: III Psychosocial interventions and distribution of services. The University of Tartu Clinics Foundation, available on the internet at: http://www.kliinikum.ee/psyhhiaatriakliinik/Programm/ravi/ps-ravi/SCH/F2_III_osa.htm.]

Paragraph 1 of Article 12 of the Constitution provides a general right of equality and prohibits discrimination on any grounds. This means that individuals may not be treated differently on the ground that they do not reside in the same place. When rehabilitation services are made dependent on the location of a person's residence, the fundamental right of equality is infringed. Reintegration into society of persons in need of mental health care should be regarded as important. In this connection it is unacceptable that distinction is made in the provision of rehabilitation to persons on the basis of their place of residence.

Thus the Chancellor of Justice issued a recommendation to the Minister of Social Affairs and the Minister of Regional Affairs that the Ministers conduct a joint investigation into the reasons behind differences in availability of rehabilitation services in different regions and elaborate an action plan to ensure provision of those services in a manner that rules out infringement of the fundamental rights of persons entitled to rehabilitation services, and guarantees a life of dignity to those persons.

(3.8) Matters pertaining to living conditions of persons treated in the clinic

An inspection of the clinic revealed that the patients were housed in wards that had 3–4 beds each; one bed had also been placed in a common TV room. Sanitary conditions in the clinic were satisfactory. By and large, the patients' wards, the common rooms, and the hygiene facilities were clean. The problems of overcrowding and of lack of modern amenities will be solved when the clinic moves into its new facility in the Mustamäe District.

It was also revealed that it was impossible for patients to store personal belongings in a manner that would ensure their preservation. Alothough most of the wards did have nightstands next to beds, those nightstands lacked locks. The clinic should, however, ensure preservation of the belongings of its patients by making it possible for the patients to place their belongings in locked storage.

No information was provided on the notice boards of the clinic's departments regarding the possibilities of making an internal complaint within the clinic. In addition to other information concerning the daily living of its patients, the clinic should post on the notice boards information regarding the patients' right of making an internal complaint within the clinic and clearly state the possibilities for the use of that right.

On the basis of the foregoing, the Chancellor of Justice issued a recommendation to the administration of the clinic to ensure that patients have a possibility of storing personal belongings in locked nightstands and to post information on the notice boards of departments regarding the rules governing internal complaints within the clinic.

(4) Conclusion

A a result of the inspection visit, the Chancellor of Justice issued recommendations to the Minister of Social Affairs, the Minister of Regional Affairs, the Presidents of county courts, the Estonian Bar Association, the Commissioner of Police, the administration of the North Estonia Regional Hospital Foundation, and the administration of the psychiatry clinic. Upon the expiration of a period of six months following issue of the recommendations, the Chancellor will perform a verification inspection to establish whether the recommendations have been given effect.

6. Inspection visit to Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation

Case 7-9/061173

(1) On 25 September 2006, the Chancellor of Justice performed an own-initiative inspection visit of Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation (the clinic).

The clinic is a unit of the Viljandi Fospital Foundation. The clinic itself has seven units with a total of 211 beds. According to the disorders of the patients, the units have been divided into those providing active treatment (four units) and those providing long-term treatment (three units). The acute psychiatry unit has 20 beds for providing short-term treatment to patients in acute psychotic states. Two general psychiatry units have 20 beds each. In the children's department, treatment can be provided to up to 10 children who are less than 14 years old. Special units for long-term treatment include the forensic unit (to which patients are committed by court order, 71 beds), a unit for mentally ill tuberculosis patients (25 beds) and a unit for long-term treatment of unstable psychotic patients (55 beds). In cooperation with social welfare agencies, the clinic offers rehabilitation services to individuals in need of mental health care. The clinic employs six psychologists, three social workers and 19 psychiatrists, as well as other health care staff.

(2) During the inspection visit, the Chancellor of Justice verified whether fundamental rights and freedoms were guaranteed to persons admitted for involuntary or forensic treatment. The summary below presents an outline of the most significant facts established during the visit with respect to the work of the clinic.

During the visit the Chancellor of Justice inspected the forensic unit, the acute psychiatry unit and the unit for involuntary tuberculosis patients. The Chancellor of Justice met with four patients from the clinic.

Articles 20 and 21 of the Constitution deal with a central part of the general right of liberty—the protection of everyone's physical liberty from arbitrary arrest or detention. The right to liberty and security is one of the most basic human rights since it provides a foundation for the exercise of many other rights and freedoms. However, the right to liberty and security is not an absolute right and may in certain cases be derogated from. Grounds for such derogation are listed in points 1 through 6 of Article 20. Point 5 of that article authorises deprivation of liberty in order to detain a person who is mentally ill provided that person presents a threat to him/herself or to others; the deprivation must be provided by statute and must be imposed according to the procedure provided by statute.[259]

Under Article 21 of the Constitution, interference with the freedom of a person will only be allowed is it is specifically provided by statute, if reasons are given for the interfering measure and if the measure is imposed in conformity with valid laws.[260] Paragraph 2 of the article prescribes judicial review of measures depriving individuals of liberty. The purpose of providing for judicial review is to rule out arbitrary deprivation of liberty and to ensure that detentions are carried out lawfully and only where this is unavoidably necessary. Authorisation to detain a person must ensue within 48 hours of the person's arrest.

Pursuant to section 11(1) of the Mental Health Act (MHA) a person may be admitted for emergency treatment to the psychiatry department of a hospital on an involuntary basis, without that person's consent or the consent of his/her guardian, or in order to continue treatment only in the case that the following conditions are fulfilled at the same time: the person suffers from a serious mental disorder that limits his/her capacity to understand his/her actions or control the same; if not admitted for treatment the person will, due to his/her disorder pose a threat to his/her own life, health or safety, or the lives, health or safety of others; and if other forms of psychiatric care are insufficient. As a rule, involuntary treatment may only be applied on the basis of a court order. Under section 13(1) of the MHA a person may only be treated in a psychiatric department of a hospital on an involuntary basis for more than 48 hours if this is authorised by a court. A person subjected to involuntary treatment

[259] R. Maruste. Kommentaarid §-le 20. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [Commentary on Article 20, by R. Maruste, in "The Constitution of the Republic of Estonia", an annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 20, notes 1-6.

[260] R. Maruste. Kommentaarid §-le 21. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [Commentary on Article 20, by R. Maruste, in "The Constitution of the Republic of Estonia", an annotated edition prepared in the Ministry of Justice]. Tallinn 2002, Article 21, note 1.

may not discontinue medical tests or treatment or leave the psychiatric department. Where this is necessary in order to protect a person him/hersolf or of the public, that person must be taken to the psychiatric department of a hospital by an ambulance, the police, family members or other persons.

Pursuant to section 86(1) of the Penal Code the court must make by order commit a person to forensic treatment if the person has committed an unlawful act while being mentally incapable of comprehending that act, or has, after judgment was entered in his/her case but before serving the sentence, become mentally ill, senile or has suffered another serious mental disorder, or where the same are observed during pre-trial investigation or during trial, and if these conditions dot allow the persons's mental state to be assessed as it was during the act, and the person's state of mental health makes that person a threat to him/herself and to society. Forensic treatment must be ordered until the person gets well or no longer presents a threat. The procedure for making an order of forensic treatment is provided in Chapter 15 of the Code of Criminal Procedure.

Pursuant to the enabling provision contained in section 17 of the MHA, the Minister of Social Affairs has enacted Regulation 105, "Requirements of psychiatric treatment and the organisation of work of psychiatric hospitals in applying forensic treatment ordered by a court" of 26 August 2002 (the Regulation). Under section 1(2) of the Regulation individuals in whose respect a court has made an order of inpatient forensic psychiatric treatment must be committed in the forensic treatment unit of the Viljandi Hospital Foundation, where they must be held in conditions that rule out the possibility for these individuals to commit any dangerous acts. The forensic treatment unit must ensure conditions of regular and of strict supervision and the corresponding work arrangements.

At the time of the visit forensic treatment was administered to 80 persons, of whom 38 were kept in the strict regime unit. One person had been admitted to involuntary treatment.

(3.1) The duty of the health care provider to inform a court of cases of involuntary treatment extending beyond 48 hours and to submit those cases for review to the court

The inspection visit revealed that the clinic did not always adhere to the duty to notify the court within 48 hours of admitting a person for involuntary treatment. An examination of the medical files of persons who were being treated on an involuntary basis in the clinic showed that there had been cases in which persons had been kept in the clinic against their will for four days without an authorisation of the court. Such practice does not meet the requirements of Article 21 of the Constitution or of section 13(2) of the MHA.

On the basis of the above, the Chancellor of Justice recommended that the administration of the clinic take measures to ensure that in the future courts are notified, without exception, of cases of involuntary treatment and that the notification is effected in a manner that permits to make sure that persons are not held in the clinic for more than 48 hours without the corresponding authorisation of a court.

(3.2) The right of a person to be present when his/her case is heard and to have a representative

Responses to the questionnaire preparing the visit and the interviews conducted in the clinic on 25 September 2006 revealed that the patients are not present in the hearing in which orders authorising involuntary treatment are made. The position of the administration was that valid legislation does not impose an obligation to take the patient to the hearing and to organise an escort.

Responses to the questionnaire preparing the visit and the interviews conducted in the clinic revealed that as a rule, in reviewing involuntary treatment arrangements, no representatives had been appointed to patients by the court, nor had any been requested by the clinic. A representative is only appointed for the hearing held regarding extension of involuntary treatment. In practice, the

first time that a representative was appointed to a person in whose respect an order of involuntary treatment was considered was in August 2006. No hearing had yet been held in that case at the time that responses to the questionnaire preparing the visit were provided (11 September 2006).

Pursuant to paragraph 2 of Article 24 of the Constitution, everyone must be guaranteed the right to be present when his or her case is heard. Under section 536(1) of the Code of Civil Procedure (CCiP), before a court makes an order committing an individual in a closed institution, the court is required to hear the individual in person and to explain the procedure to him/her. Where necessary, the court must hear the individual in an environment that is habitual for him/her. Section 13(6) of the MHA provides that, when it is necessary to take a person from the hospital to the court for a hearing, this must be done by the police. The requirement to hear the individual in person may only be derogated from in the case provided in section 534(2) of the CCiP, i.e in the case that hearing the individual may seriously harm his/her health or if the person is clearly incapable of expressing his/her intent.

Where the person him/herself is unable to participate in a hearing, he/she may use a representative. Under the terms of section 535(1) of the CCiP, the court must appoint a representative to a person whose committal to a closed institution the court is considering, if this is clearly in the interests of the person and if the person is not already represented by another person who has the capacity required to perform procedural steps in a civil action. Persons who, due to insufficient finances, are unable to pay for competent legal services when they need those services may be granted state legal aid for representation in judicial proceedings. Pursuant to section 2 of the State Legal Aid Act, the purpose of that statute is to ensure everyone timely and adequate access to competent and reliable legal services by means of providing for the availability of state legal aid.

In addition, the Supreme Court has repeatedly emphasised that any proceedings that may in law lead to a limitation of the rights of an individual must be conducted by the courts so that those courts would perform any and all procedural steps necessary for establishing a maximum degree of conviction as to the correctness of a decision to summons the individual to the hearing or to forgo such summonsing.[261] This means that a court called to rule in a matter of involuntary treatment must take steps to establish the capacity of the individual to participate in the hearing and ensure the participation of that individual in the hearing in which a determination is made in regard to limiting his/her rights. Derogations from this rule are only permitted where necessary in order not to harm the health of the individual and must in each case be founded on objective reasons, and be documented. If the individual is not provided an opportunity, during the proceedings, to address the judge or to confer with a representative, this may amount to a limitation of the right that that individual has under paragraph 5 of Article 24 of the Constitution (i.e. the right to appeal), for the individual may not, without assistance, be able to understand the possibilities open to him/her to appeal the court order entered.

On the basis of the foregoing, the Chancellor of Justice issued a recommendation to the Chief Judge of Viljandi Courthouse of Tartu County Court to take steps in order to ensure that, in hearings held to determine petitions for involuntary treatment, individuals can effectively exercise their right to be present when their case is heard, which is enshrined in paragraph 2 of Article 24 of the Constitution. If for health reasons an individual cannot be brought to the courthouse, the Code of Civil Procedure permits a hearing to be arranged in the clinic. In addition, the Chancellor also stressed the fact that, once a health care provider has submitted a petition for involuntary treatment of an individual by way of interim relief, the court must without delay determine the question of appointing a state representative to the individual and to notify that immediately to the representative and to the principal.

[261] Civil Law Chamber of the Supreme Court (CiLCSC), judgment of 19 December 2005 in case 3-2-3-14-05, judgment of 26 September 2005 in case 3-2-3-10-05, judgment of 12 September 2005 in case 3-2-3-11-05, judgment of 8 June 2005 in case 3-2-3-8-05, judgment of 6 April 2005 in case 3-2-3-3-05, judgment of 18 April 2006 in case 3-2-2-1-06, and others.

Moreover, the Chancellor of Justice also issued a recommendation to the administration of the clinic to have recourse to assistance from the police in transporting the individual to the courthouse. Where necessary, the clinic should be prepared to make arrangements for rooms suitable for a hearing to be made available in the grounds of the clinic.

(3.3) Procedure for termination of involuntary treatment

The interview conducted in the clinic on 25 September 2006 revealed that problems have arisen in the practice of terminating involuntary treatment. Pursuant to section 13(1^1) of the MHA, courts must rule on extending or terminating the involuntary treatment of an individual according to the procedure provided for matters of committing individuals to closed institutions and must do so on the basis of an petition from the local authority on whose territory the individual has his/her place of residence.

When amendments to the MHA entered into force in the beginning of 2006, it turned out that there was often a lack of prompt cooperation between providers of mental health care and local authorities. Local authorities have widely different procedures and differing time limits for dealing with requests from the clinic to petition a court for a termination of involuntary treatment. Thus, the termination of an order of involuntary treatment made by a court by way of interim relief may take up to a month after the individual has recuperated. During the proceedings, the health care provider lacks a basis for releasing the (recuperated) individual. Such a limitation of the security of person has no basis in point 5 of Article 20 of the Constitution, since the individual is no longer a threat to him/herself or to others.

On the basis of the above, the Chancellor of Justice issued a recommendation to the Minister of Social Affairs to take steps to amend the Mental Health Act so as to allow mental health care providers, in addition to filing petitions for involuntary treatment by way of interim relief, also to file petitions for termination of involuntary treatment ordered by way of interim relief.

(3.4) Limitation of the fundamental right to liberty of persons who do not have a registered place of residence

Responses to the questionnaire preparing the visit and the interviews conducted in the clinic on 25 September 2006 revealed that persons who do not have a registered place of residence, or persons whose place of residence is not known, are not discharged from the clinic when they recuperate. The same applies to persons whose illness has abated and who are in need of a guardian but do not have one.

Under Article 20 of the Constitution, everyone has the right to liberty and security of person. A person may only be deprived of his/her liberty in the cases and pursuant to the procedure established by statute. According to section 766(3) of the Law of Obligations Act, a patient may only be examined, and health care services may only be provided to the patient if that patient consents.

Problems arise in situations in which treatment is no longer necessary, but the patient should be referred to a care home. Often, there is not enough places in the care homes and, in particular, in the care homes providing strict supervision. This means that, for instance, forensic treatment patients who require post-treatment care must also be held in the clinic when they no longer need treatment. The situation amounts to an excessive limitation of the fundamental right to liberty in the case of persons who do not require treatment. In addition, the clinic in such cases is in principle forced to provide social services, which limits the number of beds available and may cause the clinic to refuse timely treatment to persons who need it.

Additional problems were revealed in relation to the appointment of guardians to persons wishing to leave the clinic. Under the terms of section 26(1)(7) of the Social Welfare Act (SWA) executive boards of rural or urban municipalities must make arrangements for appointing guardians and providing

care to individuals with a disability in order to ensure that the opportunities of the individuals are equal to those of other persons, that the individuals are able to participate actively in the life of the society and that they may cope independently. In the opinion of the social workers of the clinic, certain local authorities are reluctant to fulfil that obligation and to make arrangements for guardians to be appointed to persons departing from the clinic. The greatest problem in that regard has arisen in connection with Pärsti Municipality. Under section 9(3) of the SWA, the Executive Board of Pärsti Council is the authority that must provide social services, unavoidable social assistance and other assistance to persons whose place of residence cannot be determined. This means that the municipality in question should provide guardianship to any persons who have become entitled to its assistance while in the clinic, which is on the territory of the municipality, regardless of the fact that those persons have never actually been registered as residents of the municipality. Assuming such guardianship duties entails an unspecified amount of additional expenses to the municipality. In addition, it should be pointed out that in order for a person whose legal capacity has been limited to be admitted to a care home, a written application of the guardian is required. Where a person has no guardian, it will be impossible to make provision for that person to receive further social services.

On the basis of the above, the Chancellor of Justice issued a recommendation to the Chair of the Executive Board of Pärsti Council to strictly comply in the future with the requirement of providing social services, unavoidable social assistance and other assistance provided in section 9(3) of the SWA. Among other things, this means that the municipality must arrange for guardians to be appointed, and organise provision of care, to persons whose place of residence cannot be determined.

At the same time, the Chancellor of Justice issued a recommendation to the Minister of Social Affairs to consider the possibility of making additional allocations of funds to local authorities that are required by law to arrange guardianship and care for persons who have been placed in closed institutions or care homes that are located in the territory of the authority but who are not registered as residents of the municipality in question. In addition, the Chancellor recommended that the Minister take measures to ensure that care homes have sufficient capacity, in order to rule out situations in which persons must be kept in a health care facility for the mere reason that it is impossible for them to be placed in a care home because of a lack of places in the home.

(3.5) Exercise of the right to complaints in the clinic

Responses to the questionnaire preparing the visit and the interviews conducted in the clinic on 25 September 2006 revealed that, pursuant to the document entitled "The procedure for resolving complaints in the Viljandi Hospital Foundation", complaints in the clinic are made exclusively in writing and that complaints submitted orally are not registered. Complaints may only be submitted orally in respect of problems regarding which no written reply is desired. Such a problem would be dealt with immediately and would not require further consideration.

Persons who suffer from a mental disorder and who are admitted for involuntary treatment might not be capable of making a written complaint about the situation in the clinic. In view of this, the clinic should provide for the registration of complaints submitted orally and for reasoned replies to be provided to the complainants in a manner that is understandable to them.

On the basis of the above, the Chancellor of Justice issued a recommendation to the administration of the clinic to take steps to guarantee patients the opportunity to exercise their right of complaints and to make provision for dealing with complaints submitted orally and for replying to those complaints.

(3.6) Limitation of the right to property of persons admitted for treatment

Responses to the questionnaire preparing the visit and the interviews conducted in the clinic on 25 September 2006 revealed that parcels received for persons treated in the clinic were opened by

a medical employee in the presence of the patient and that any items prohibited in the clinic were removed from the parcel.

However, such a limitation of the right to property lacks a statutory basis. Under Article 32 of the Constitution, everyone's property is inviolable and ejoys equal protection. A disposition of a person's property may only be made without the consent of the person if such disposition is provided by statute and implemented according to the procedure provided by statute. Any limitation of the right to property enjoyed by individuals must also be provided by statute. Neither the MHA nor any other statute contains any lists of items permitted or prohibited in a psychiatry clinic, nor does any statute authorise a health care provider to seize any prohibited items. By way of analogy, it may be pointed out that in the case of custodial institutions, an exhaustive list has been established on the basis of section 15(2) of the Imprisonment Act in Chapter 12 of Minister of Justice Regulation 72, "Internal Rules of Prisons" of 30 November 2000.

Understandably, certain restrictions must apply with respect to items that may be brought onto the premises of a mental health care facility. Restricted items may include, for instance, arms, alcoholic and psychotropic substances, etc. However, a statutory basis must exist in order to establish such restrictions. The restrictions cannot be based on the discretion of a health care provider or a medical worker.

On the basis of the above, the Chancellor of Justice issued a recommendation to the Minister of Social Affairs to establish a statutory basis that would allow limitations to be imposed on the right to property of persons in mental health care facilities, and to enact a list of items that are permitted, or prohibited, in a mental health care facility, and the procedure for storing prohibited items removed for temporary safekeeping.

(3.7) Issues related to daily living in the clinic

During the inspection visit on 25 September 2006 it was revealed that the windows in the segregation room of the clinic's forensic treatment unit lacked curtains. Since patients who are in a state of emotional disturbance may be highly sensitive to light, the Chancellor of Justice issued a recommendation to the administration of the clinic to consider installing curtains in the segregation room.

It was also revealed in the course of the inspection that a number of wards had doors with a glass pane that could not be covered from the inside. Similar doors in staff rooms were provided with curtains on the inside, and thus allowed for privacy. This meant that the right to privacy of the patients of the clinic had been limited. On the basis of the foregoing, the Chancellor of Justice issued a recommendation to the administration of the clinic to enhance the protection of the privacy of patients housed in wards that have a door with a glass pane, for instance, by installing curtains on the inside of the glass pane.

The patients in the clinic may make personal phone calls from a telephone in the nurses' room. This is only allowed in the presence of a medical worker. The administration of the clinic has not considered it necessary to provide other means of making phone calls. Pursuant to Article 26 of the Constitution, everyone has the right to inviolability of private life. Article 43 of the Constitution provides everyone's right to confidentiality of his or her communications, or of communications he or she receives by a common means of communication. When patients in the clinic can only attend to personal business in the presence of a medical worker, the exercise of the above-mentioned rights enshrined in the Constitution is not sufficiently assured. The presence of an employee of the clinic within earshot may in practice also prevent a patient from contacting a representative in confidence and from discussing problems related to the clinic. In any case, if in future patients are allowed to use the clinic's telephone to contact their family, it would also be possible to monitor the activities of the patient in the room where the telephone is located either through a window opening into

the room or through a glass door. In addition, the installation of payphones, or the purchase of a portable payphone should be considered, in order to make it possible for patients to make calls at the time of their choosing and without disturbance. On the basis of the foregoing, the Chancellor of Justice issued a recommendation to the administration of the clinic to find a solution that would allow to put an end to the situation in which patients treated in the clinic are not guaranteed their right to confidentiality of communications relayed by telephone and theor right to inviolability of private life.

(4) Conclusion

As a result of the inspection visit, the Chancellor of Justice sent a memorandum stressing the need to protect patients' fundamental rights to the Minister of Social Affairs and to the administration of Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation and made certain suggestions to the Chief Judge of the Viljandi Courthouse of Tartu County Court and the Chair of the Executive Board of Pärsti Council. Six months later, the Chancellor wrote to the authorities mentioned above to check whether the recipients of the memorandum and suggestions had acted on the same.

The Chair of Executive Board of Pärsti Municipality replied to the Chancellor's request for information that the municipality has never refused to initiate proceedings to appoint a guardian and that the Board's specialist for social affairs has been appointed guardian. Finding persons to serve as guardians is a serious problem for the Board. The chair noted that at the time the reply was drafted, 17 patients treated in Jämejala Psychiatry Clinic were registered as having their residence in the clinic, which is on the administrative territory of Pärsti municipality. Registering patients of the clinic as residents of the municipality results in additional tasks and financial obligations on the municipality. The Chair of the Executive Board has approached the Minister of Social Affairs in the matter of compensating the corresponding costs. In sum, the chair concluded that the issue of guardianship requires legislative review and adjustment to meet actual needs.

The Chief Judge of the Viljandi Courthouse of Tartu County Court replied to the Chancellor's letter enquiring about compliance with the suggestion made by the Chancellor that that in resolving matters related to involuntary treatment the judges of the courthouse abide firmly by the provisions of the Code of Civil Procedure. Among other things, hearings of the person concerned are arranged either in the psychiatry clinic, at the person's place of residence or in the care home. Moreover, the first step in proceedings of this type on the part of the Chief Judge has always been to appoint a representative to the person.

The Chairman of the Board of Jämejala Psychiatry Clinic of the Viljandi Hospital Foundation replied to the Chancellor's letter concerning compliance with the recommendation that there are rooms in the clinic that are suitable for conducting a hearing of a person by a judge in judicial proceedings regarding authorisation of involuntary treatment. Where necessary, both the hospital and the police have provided transportation of persons to the courthouse. The Chairman of the Board also stated that the rules on processing complaints submitted orally and the procedure for replying to those complaints has been amended so that the hospital staff will take down the person's complaint or will assist the person in drawing up the complaint in a form that can be reproduced. In order to protect the confidentiality of communications relayed by the telephone and the inviolability of private life, the clinic's patients have been provided the possibility to use the telephone in a separate room and alone. For a better protection of privacy, the segregation unit and other wards that have a glass pane in the door have been provided with curtains on the outside. All in all, the Chairman of the Board of the hospital pointed out that amendments had been introduced to find the best possible solution that would also minimise the risks involved.

PART 3.

PERFORMANCE OF OTHER TASKS ENTRUSTED TO THE CHANCELLOR OF JUSTICE BY LAW

I INTRODUCTION

The principal tasks of the Chancellor of Justice involve scrutinising legislation for constitutionality and performing the duties of the ombudsman. These, however, are not the only powers that have been entrusted to the Chancellor. Thus, the Chancellor has been vested with a number of additional powers, not all of which are reflected in the Chancellor of Justice Act (CJA). These are examined in this part of the Annual Report.

The following starts by focussing on the powers that the Chancellor holds by virtue of the CJA. After that, a summary of powers entrusted to the Chancellor by virtue of the Constitution and other statutes is provided. This includes a detailed description of the actions of the Chancellor in bringing disciplinary proceedings against judges and in promoting equality and the principle of equal treatment.

Section 1(3) of the CJA echoes the provision in paragraph 3 of Article 139 of the Constitution, which empowers the Chancellor to recommend to the Riigikogu that a member of the same, the President of the Republic, a Minister of the Cabinet, the Auditor General, the President of the Supreme Court or a judge of that court be prosecuted for a criminal offence. In relation to accession to the European Union, the Chancellor has been granted a similar power in regard of a Member of the European Parliament elected from Estonia. Thus, section 1(3^1) of the CJA vests in the Chancellor the power to request that the President of the European Parliament revoke the immunity that a Member of that parliament elected from Estonia enjoys by virtue of the Protocol on the Privileges and Immunities of the European Community.

In 2005 the Chancellor of Justice submitted two recommendations to the Riigikogu to authorise the prosecution of a member of the same for a criminal offence. In 2006, the Chancellor did not have to consider making a recommendation to authorise a prosecution in respect of a high public office holder.

In the Annual Report for 2005, the Chancellor drew the attention of the Riigikogu to the fact that the legislation concerning relieving public office holders of the immunity attached to their office required amendment. Thus, for instance, the Code of Criminal Procedure did not make specific provision for the conduct of criminal proceedings in respect of a member of the Riigikogu at the stage in the proceedings when an indictment has been drawn up and the judicial phase of proceedings has begun. It was also unclear whether members of the Riigikogu were also protected by their immunity against misdemeanour charges. These lacunae have unfortunately not been filled by the legislature yet.

In the run-up to the presidential election of 2006, the issue of medical check-ups of top public office holders became a hot topic.[262] Health problems can constitute sufficient grounds for declaring the President of the Republic enduringly incapable of performing his or her duties. Section 1(4) of the Chancellor of Justice Act provides that the corresponding reference must be submitted to the Supreme Court (sitting in plenary formation) by the Chancellor of Justice. The only specification provided with respect to the notion of 'enduringly incapable' in the Organisation of Work of the President of the Republic Act refers to health grounds ('enduring incapacity on health grounds'). However, no such limitation is provided in Article 83 of the Constitution, or in CJA provisions conferring authority on the Chancellor to refer the matter to the Supreme Court. Moreover, no such limitation is contained in the part of the Constitutional Review Procedure Act (CRPA) that deals with the corresponding proceedings in the Supreme Court.

If the Supreme Court finds the President of the Republic enduringly incapable of performing his or her duties, the mandate of the President is suspended. Should the President remain incapable of

[262] See, for instance, H. Nurm. Päevapoliitika meditsiiniline külg [The medical side of short-term politics, by H. Nurm]. The daily Postimees, 16 August 2006; P. Talimaa. Allar Jõks: Riigijuhtide tervist saab kontrollida ka ilma pidevalt tegutseva erikomisjonita [The health of government leaders can be checked without setting up a Standing Committee, by P. Talimaa, Allar Jõks]. – The journal Meditsiiniuudised, 12 September 2006.

performing his or her duties for more than three months, the Riigikogu must, within fourteen days, elect a new incumbent.

The Chancellor of Justice has never had to make use of this power.

Section 1(5) of the CJA provides that the Chancellor may on the basis of the Constitution and other relevant statutes determine disputes involving allegations of discrimination that arise between private parties. Division 3 of Chapter 4 of the CJA deals with conciliation procedure for resolving a discimination dispute. The Chancellor must also act to promote the principles of equality and equal treatment (Division 4 of Chapter 4 of the CJA). This means that the Chancellor has been entrusted with an extensive duty to monitor the actions of the Riigikogu, the Executive, the local authorities and other public bodies, and to ensure that they observe the principle of equal treatment in their work.

The relevant power of the Chancellor is dealt with in more detail below (see Part 3, section III).

Each year the Chancellor receives a large number of petitions in which the petitioners express their dissatisfaction with the judicial actions of courts, or with judgments pronounced in their case. Pursuant to the Constitution, the administration of justice in the courts must be independent, and may not be interfered with by any other bodies or agencies. Among others, this also applies to the Chancellor of Justice.

Section 91(2)(2) of the Courts Act (CA) empowers the Chancellor to institute disciplinary proceedings in respect of any judge. This power is not referred to in the CJA. The manner in which the Chancellor's exercise of oversight of the work of judges, and the institution of disciplinary proceedings is founded, as well as the legal basis on which it rests and the Chancellor's practice thereof are dealt with in more detail below (see Part 3, section II).

The CRPA grants the Chancellor the right to address the Supreme Court in various types of review proceedings.

Apart from the Chancellor, the power to institute constitutional review proceedings in respect of legislation is also vested in the President of the Republic, any municipal council, and the courts. In proceedings brought by any of these institutions, the Chancellor will be invited to state his or her opinion in the matter of the constitutionality of the contested piece of legislation. In 2006, there were seven proceedings in which the Chancellor provided an opinion of this type to the Supreme Court:

1. Application by Tallinn Court of Appeal to review for constitutionality the limitation contained in the second sentence of section 257(3) of the Law of Property Act;
2. Appeal submitted by B. Bodemann and T. Bodemann to the Supreme Court petitioning the Court to quash the judgment entered by the Administrative Law Chamber of Tallinn Court of Appeal on 8 July 2005 in administrative matter 2-3/24/05 concerning an application by B. Bodemann and T. Bodemann to annul a decision of the Tallinn City Commission on Restitution of Unlawfully Expropriated Property;
3. Request for an opinion of the Supreme Court regarding the interpretation of Article 111 of the Constitution of the Republic of Estonia in conjunction with the Act to Amend the Constitution of the Republic of Estonia, and with EU law;
4. Application by Tallinn Administrative Court to declare sections 71 and 275 of the Regulations of the Defence League unconstitutional;
5. Application by the President of the Republic to declare unconstitutional the Act to Repeal Section 7(3) of the Foundations of Property Reform Act;
6. Application by Jõhvi Municipal Council to review section 13 of the Construction Act for constitutionality;
7. Appeal by full advocate Kersti Põld, as a defence lawyer of Tiit Kaasik, petitioning the Supreme Court to quash the judgment entered by Pärnu County Court on 30 March 2006 in the misdemeanour matter of Tiit Kaasik pursuant to section 26^3 of the Anti-Corruption Act.

Under the terms of the CRPA, the Chancellor of Justice may be invited to provide an opinion also in proceedings instituted with a view to terminating the activities of a political party. The same applies to proceedings that must be brought by the Speaker of the Riigikogu acting for the President of the Republic in order to obtain the Supreme Court's consent to calling an extraordinary election or to refusing to promulgate a statute passed by the Riigikogu. Fortunately, the Supreme Court has so far never had to resort to these powers.

II INSTITUTING DISCIPLINARY PROCEEDINGS AGAINST JUDGES

1. General outline

Section 91(2)(2) of the Courts Act (CA), inserted in that statute with effect as of 29 July 2002, authorises the Chancellor of Justice to institute disciplinary proceedings in respect of any judge, i.e. to exercise oversight of the work of the third branch of government, the Judiciary. Previously, the Chancellor was only empowered to oversee the work of the Legislature and the Executive.

Section 91(1) of the CA provides that disciplinary proceedings must be instituted in respect of a judge when a disciplinary offence appears to have been committed. Under section 87(2) of the CA, a disciplinary offence is defined as an intentional or negligent act of a judge consisting in failure to perform or unsatisfactory performance of the duties attaching to the office of the judge, or in conduct unworthy of a judge.

In the Annual Report for 2004 and the Annual Report for 2005, the Chancellor pointed out that the rules governing disciplinary procedure in the CA are vague and fail to deal with certain aspects of disciplinary proceedings. This complicates practical work in the matter. Unfortunately, the defects in question have not been remedied by the legislature yet. Thus, for instance, the rules on disciplinary procedure in the CA do not exclude simultaneous institution of disciplinary proceedings by several authorities having the relevant powers. In fact, the very definition of disciplinary offence is rather vague and difficult to use in practice. A possible problem lies, for example, in distinguishing it from substantive administration of justice, which pursuant to Article 146 of the Constitution is an exclusive power of the courts.

In view of the above, the Chancellor has found it necessary to elaborate a set of criteria and principles to guide him in his exercise of oversight of the courts. These have received detailed treatment in the Annual Report for 2005.[263] The Chancellor has also dicussed the problems related to overseeing the judiciary with his counterparts abroad. Thus, in April 2006, a trilateral meeting took place in the Office of the Chancellor with the Swedish and the Finnish ombudsman. During the meeting, the participants discussed the topic "The role of a Chancellor of Justice in overseeing the lawfulness of the actions of courts". Issues related to the institution of disciplinary porceedings against judges were taken up during a conference with the presidents of courts that took place in December 2006. The Chancellor also has a say in matters concerning the administration of courts through the Courts Administration Council, of which he is a statutory member by virtue of section 40(1) of the CA.

In 2006, the Chancellor received 12 petitions in which the petitioners requested taking disciplinary action against judges. One of these led to proceedings being instituted and disciplinary charges filed. The Disciplinary Chamber convened under the aegis of the Supreme Court did not agree to the criticism expressed in the charges laid by the Chancellor, and acquitted the judge.

On the basis of proceedings conducted pursuant to petitions received by the Chancellor, and of the evidence gathered during these proceedings, the Chancellor deemed it necessary to make two suggestions to Viru County Court, in which he pointed out problems in the organisation of work at the court. Both cases concerned the right of individuals to have a hearing in their case within a reasonable time. This can, in fact, be regarded as the most common problem that petitioners requesting the institution of disciplinary proceedings against judges approach the Chancellor with. The fact that this is a serious issue, which the Government should take resolute action to resolve has been confirmed by the European Court of Human Rights.[264]

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263 See the Chancellor's Annual Report for 2005. Tallinn 2006, pp. 144 – 145.

264 See ECHR, judgment of 2 December 2003 in case 48129/99, Treial v. Estonia; judgment of 18 January 2007 in case 35062/03, Štšiglitsov v. Estonia.

In addition to the above, the Chancellor's actions in 2006 in these matters included a letter that the Chancellor addressed to the President of Tallinn Administrative Court. In the letter, the Chancellor stressed the need to be more attentive in explaining to applicants (in particular, to those who are sentenced prisoners) what evidence must be adduced if an applicant is unable to address the court in Estonian. The Chancellor also drew the attention of the Supreme Court to considerable differences that could be observed in the practice of courts of first instance and courts of appeal regarding early release of sentenced prisoners. In addition, the Chancellor also transmitted to the Supreme Court a petition that he had received. In connection with that petition, the Chancellor asked the court to provide an opinion whether standing in elections to a municipal council as part of a party list, sitting on a committee in a municipal council and acting as the village elder is compatible with the requirements and limitations attaching to judicial office, and with the professional ethics of judges. Of his own initiative, the Chancellor also drew the attention of court presidents to problems related to the publication of data in the Courts' Information System.

In 2000, when serving as a judge and presiding the Association of Judges, the Chancellor had stressed that the guarantees established in order to ensure the independence of judges are not there in the interests of judges but of society.[265] This has remained the founding principle for the Chancellor's activities in the field of disciplinary oversight of the work of judges.

1.1. Completion of judicial proceedings within a reasonable time

Case 7-3/051643

(1) A sentenced prisoner petitioned the Chancellor of Justice. The petitioner complained that the application submitted by the petitioner to Tallinn Administrative Court had not been dealt with within a reasonable time.

(2) The petitioner's sentence ran from 28 July 2003 to 28 July 2006. The petitioner's application to annul the prison governor's decision to relieve the sentenced prisoner of work duties was registered at Tallinn Administrative Court on 3 January 2005. On the same day, the case was assigned to a judge. Since in the opinion of the petitioner judicial proceedings in the case were not expeditious enough, the petitioner addressed a petition to the Chancellor of Justice on 16 November 2005. The petitioner complained about the work of the judge in conducting the case.

To obtain the information necessary to resolve the complaint, the Chancellor of Justice addressed a request for information to the President of Tallinn Administrative Court and the Minister of Justice. The Chancellor then examined the relevant case file.

The information gathered by the Chancellor indicated the following: On 24 January 2005, the petitioner had addressed a communication to Tallinn Administrative Court, inquiring whether the petitioner's application had been received by the court. On 26 January 2005, Tallinn Administrative Court replied that the application had been assigned to a judge on 3 January 2005.

On 7 February 2005, the petitioner addressed Tallinn Administrative Court, asking what other evidence is required for determining the application.

On 9 February 2005, the judge addressed an information request to the prison in order to clarify the facts stated in the petitioner's application. The judge ordered the governor to produce to the Court forthwith the original decision to relieve the sentenced prisoner of work duties, or if this was not available, to explain (since the governor's handwriting was difficult to read) the reasons that had been stated in that decision. The governor responded to the information request on 15 February 2005.

[265] Annual meeting of the Estonian Association of Judges, 24 November 2000.

On 18 February 2005, the judge made an order that declared the application admissible. The order required the prison governor to submit by 28 March 2005 a written explanation regarding the petitioner's application together with any other documents necessary for determining the case. On 21 February 2005, a copy of the order was served on both the petitioner and the prison administration. On 28 March 2005, the prison administration transmitted the relevant written explanation about the petitioner's application to Tallinn Administrative Court. On 30 March 2005, the court transmitted the administration's reply to the petitioner.

On 18 May 2005, the petitioner complained to the President of Tallinn Administrative Court about not being informed of the date of the hearing. On 23 May 2005, the President of Tallinn Administrative Court replied to the petitioner that the petitioner's case was being prepared for hearing. The President also explained the nature of preliminary proceedings and pointed out that the slow progress of the case was due to the high workload of Tallinn Administrative Court.

On 31 May 2005 the prison administration dispatched a reply to the request made by the judge by telephone to provide further information and evidence regarding the facts on which the contested decision was taken.

On 1 June 2005 the petitioner again wrote to the President of Tallinn Administrative Court and complained that consideration of the petitioner's application was being unjustifiably delayed. On 7 June 2005, Tallinn Administrative Court asked the petitioner to state his views with respect to the supplementary facts submitted in the prison administration's explanation. On 15 June 2005, the petitioner filed written objections to the administration's explanation. On 17 June 2005, the President of Tallinn Administrative Court replied to the petitioner's complaint (submitted on 1 June) and explained the process of distribution of cases and of establishing a date for hearings.

The judge was on vacation from 4 July to 5 August 2005.

On 14 October 2005, the judge made an order setting the date of the hearing on 7 March 2005.

The hearing took place on 7 March 2006.

On 22 March 2006, the judge entered a judgment in the case.

During the first half of 2005, the judge conducted preliminary proceedings by collecting the necessary explanations and evidence from the prison administration. In most cases, steps were taken in the proceedings after the petitioner had contacted the court. The judge did not take any steps in the petitioner's case during April, May, August and September of 2005.

According to the the President of Tallinn Administrative Court, the time limit established in section 13(1) of the Code of Administrative Court Procedure (CACP) for conducting a hearing in the case has not been realistic for years due to the Court's excessive workload. Proceedings in the petitioner's case had been conducted at the usual pace. The President of Tallinn Administrative Court admitted that judicial proceedings should be faster, but pointed out that this did not solely depend on the judge, but also on the resources available for the administration of justice.

The reply of the Minister of Justice provided the statistics of proceedings (average length of proceedings) in respect to all administrative courts, including Tallinn Administrative Court and the judge concerned. In addition to that, the information provided included the total number of administrative cases assigned to the judge concerned, including applications from sentenced prisoners. The average number of days that proceedings conducted by the judge lasted in 2005 was 199.8. For Tallinn Administrative Court as a whole, that figure was 298.0 days and for all administrative courts, 203.8 days. In 2003, the judge determined applications from sentenced prisoners on average in 176.3 days. For 2004 and 2005, the figures were 260.7 days and 159.6, respectively.

After having examined the case file, the Chancellor of Justice addressed another information request to the President of Tallinn Administrative Court. The President of Tallinn Administrative Court noted that the general assembly of Tallinn Administrative Court had resolved that a reasonable workload for a judge amounts to 10 hearings per calendar month. Any additional hearings are conducted out of a sense of mission and at the expense of judges' free time (during evening hours, weekends or while officially on vacation). At the same time, overworking may result in judgments of uneven quality.

According to the information provided by the President of Tallinn Administrative Court, the judge conducted 111 hearings in 2005. When the time on leave is deducted, the average number of hearings the judge held in a calendar month is approximately 10.4.

In the reply, the President of Tallinn Administrative Court also explained the planning of hearings after the judge's return from leave. Judges are free to plan their work and working hours and, as a result, practice in this respect varies to a great extent. Before the vacation, the number of hearings is usually reduced, so that the judge can make pressing arrangements and complete work on pending judgments. On returning from leave, it is impossible to focus on hearings due to the backlog of work accumulated during the leave, attention is chiefly concentrated on conducting preliminary proceedings. The President of Tallinn Administrative Court admitted that almost all judges working at the court's Tallinn courthouse have cases in their docket in which no hearings have been held for a year.

(3) The main issue in the case was whether leaving a gap of one year or more between the registration of an application and a hearing of the same amounts to a disciplinary offence on the part of the judge.

(4) The Supreme Court has repeatedly emphasised that the right to an effective remedy, as set forth in Articles 13, 14 and 15 of the Constitution of the Republic of Estonia and in Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), is an important fundamental right of the individual. The right to seek redress in a court of law must guarantee comprehensive and efficient protection of the individual's rights.[266] A right to which no effective judicial remedy attaches is a mere declaration, devoid of substance and of meaning.

The right to an effective remedy includes *inter alia* the right to a hearing within a reasonable time. Thus, the first sentence in Article 6(1) of the Convention establishes *expressis verbis* the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Supreme Court has also repeatedly referred to the need to determine cases within a reasonable time.[267]

"Reasonable time" is an undefined legal term the meaning of which, according to settled case-law, must be established on a case by case basis, having regard to the particular characteristics of the situation. Whether the time following which a hearing is held is reasonable or not depends on the following considerations: the complexity of the dispute, the significance of the interests at stake, the conduct of the person bringing the application, claim or petition and the conduct of the authorities

266 The importance of this principle has also been referred to in the following orders and judgments entered by the Supreme Court (plenary formation): order of 22 December 2000 in case 3-3-1-38-00, paras. 15 and 19; judgment of 17 March 2003 in case 3 3-1-3-10-02, paras. 17 and 18; judgment of 6 January 2004 in case 3-3-2-1-04, paras. 26 and 27; order of 28 April 2004 in case 3-3-1-69-03, para. 24; and also in the judgment of the Constitutional Review Chamber of the court of 25 March 2004 RKPJKo 25.03.2004 case 3-4-1-1-04, para. 18.

267 See, for instance, Supreme Court (Special Panel), order of 10 April 2002 in case 3-3-4-2-02, para. 10; Supreme Court (plenary formation), judgment of 17 February 2004 in case 3-1-1-120-03, para. 18; Administrative Law Chamber of the Supreme Court, judgment of 29 September 2004 in case 3-3-1-42-04, para. 22; Administrative Law Chamber of the Supreme Court, order of 15 November 2004 in case 3-3-1-58-04, para. 21.

(in particular, of courts).[268] The Supreme Court has emphasised that "[i]n order to measure whether the length of proceedings has been reasonable, the complexity of the dispute and the conduct of the parties, and of the court must be taken into account"[269] Thus, it is also the purpose of "[…] the rules of administrative procedure to ensure that the case is heard and resolved as quickly as possible."[270]

The criterion of "within a reasonable time" must be considered in conjunction with such objective facts as the resources available, the number of applications, the complexity of cases, etc. All of these influence the court's workload.

To sum up, the 'reasonable time' within which judicial proceedings must be completed depends on the complexity of the particular case, the conduct of the parties and other objective facts.

In order to assess whether the administrative court was able to resolve the case within a reasonable time, the conduct of the parties and the court needed to be scrutinised first.

The Chancellor of Justice took the view that the length of judicial proceedings in the petitioner's case did not depend on the conduct of the parties. The slow progress of proceedings could not be attributed to the conduct of the applicant or the respondent. The applicant took every possible step to expedite judgment in the matter. These included submitting in timely fashion all replies required by the court, and making a number of inquiries to the court about the progress of the case. The prison administration also submitted its replies on time.

During the first half of 2005, the court collected the necessary explanations and evidence from the prison administration. Pursuant to section 12(1) of the CACP, the case should be prepared for hearing so that it would be possible to determine it in that hearing without the need for any interruptions. Under section 12(2) of the CACP, the court is authorised to require the institution concerned to produce documents and written evidence regarding a contested administrative measure. The investigative principle, which also applies in judicial administrative proceedings, confers on the admistrative judge extensive powers to shape the course of those proceedings in a particular case.[271]

In the petitioner's case, the judge addressed several requests for explanations and evidence to the prison, which undisputably added to the length of the proceedings.

The court has a wide discretion in gathering the evidence necessary in order to resolve a case. Since gathering evidence has an immediate bearing on the administration of justice, the Chancellor of Justice as an authority empowered to institute disciplinary proceedings cannot assess whether a judge has performed his or her judicial duties as required, i.e. whether the judge has formulated the questions with a sufficient degree of precision to avoid having to request further explanations later. Depending on the complexity of the case, the conduct of the applicant and of respondent, the judge may be justified to request further clarifications from the respondent in order to be able to resolve the case properly.

Judicial proceedings in the petitioner's case lasted significantly longer than the average proceedings in Tallinn Administrative Court in 2005. Counting from the moment of registration of the application, it took 444 days for the judge to reach judgment, which is twice the time usually spent on dealing with an application from a sentenced prisoner. At the same time, delays in the proceedings cannot be attributed to the conduct of either the applicant or the prison administration.

268 See ECHR, judgment of 22 June 2006 in the case of Coëme et al v. Belgia, paras. 136 and 140: "The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities […] Article 6 "commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice" […] The conduct of the judicial authorities was compatible with the fair balance to be maintained between the various aspects of this fundamental requirement."

269 Administrative Law Chamber of the Supreme Court (ALCSC), order of 15 November 2004 in case 3-3-1-58-04, para. 16.

270 ALCSC, order of 11 May 2005 in case 3-3-1-22-05, para. 10.

271 ALCSC, order of 6 February 2006 in case 3-3-1-4-06, para. 12.

The Chancellor of Justice found that in the petitioner's case regard should be had to the principle that judicial proceedings can be deemed sufficiently fast if judgment is not rendered worthless by the time the court has taken to reach it. Therefore, the fact that the sentenced prisoner was to be released on 28 July 2006 must not be overlooked in evaluating the reasonableness of the length of the proceedings. In view of the contents of the application and of the legal value for which protection was sought, it was likely that the applicant's interest in obtaining a judgment in the case would be lost due delays in proceedings. The applicant's need for a remedy was also likely to be lost. The petitioner may have thought that this was the reason for delay in the proceedings.

The fact that in April, May, August and September of 2005 the judge took no steps in the case is an important consideration in assessing the conduct of the judge. As evidenced by the facts of the proceedings, the procedural steps were usually performed after the petitioner had contacted the court.

Considering the above, it was difficult for the Chancellor of Justice to discern a reason that would explain why the order setting the date for a hearing was only made on 14 October 2005. According to the information conveyed to the Chancellor by the President of Tallinn Administrative Court, it took the judge two months to set a date for the hearing after the judge had returned to work from vacation (the order was made on 14 October 2005, the judge returned from leave on 5 August 2005), and five more months for the hearing to take place (7 March 2006).

Considering these circumstances, the Chancellor of Justice held that there were no valid reasons for such a long delay in determining the petitioner's application. The high workload of courts is undoubtedly a serious problem, yet the length of judicial proceedings cannot always be justified by the workload. Thus, the Chancellor of Justice concluded that the time that the court took to resolve the petitioner's application was unreasonably long.

Section 91(2)(2) of the CA authorises the Chancellor of Justice to institute disciplinary proceedings in respect of any judge. Section 91(1) of the CA provides that disciplinary proceedings must be instituted in respect of a judge when a disciplinary offence appears to have been committed. Under section 87(2) of the CA, a disciplinary offence is defined as an intentional or negligent act of a judge consisting among other things in a failure to perform, or in an unsatisfactory performance, of the duties attaching to the office of the judge.

The Chancellor of Justice took the view that the judge of Tallinn Administrative Court appeared to have committed a disciplinary offence. In not resolving the petitioner's case within a reasonable time, the judge had, intentionally or negligently, performed the duties attaching to the office of the judge in an unsatisfactory manner.

Thus, pursuant to section 92(2) of the CA, the Chancellor of Justice filed disciplinary charges against the judge with the Disciplinary Chamber convened under the aegis of the Supreme Court, and forwarded the relevant documents to the Disciplinary Chamber.

(5) The Disciplinary Chamber acquitted the judge of Tallinn Administrative Court of the disciplinary charges.

The Disciplinary Chamber agreed with the Chancellor of Justice in that 444 days is not a reasonable time for resolving the petitioner's application. Still, the chamber held that the excessive length of the proceedings was caused by objective facts linked to the high workload of the court. With regard to judges' workloads and the relation between the workload and the time spent on resolving applications, the Disciplinary Chamber noted that the judge concerned did not fail to meet the workload requirements set by the general assembly of Tallinn Administrative Court, i.e. ten hearings in a calendar month.

The average number of days that proceedings before Tallinn Administrative Court took in 2005 was 298 days, which suggests that there were cases in which the proceedings lasted more than one year. The Disciplinary Chamber also relied on the acknowledgment of the President of Tallinn Administrative Court that almost all judges have cases in their dockets in which no hearings have been held for a year.

As a result of the analysis of the evidence collected, the Disciplinary Chamber concluded that the judge concerned dealt with judicial business at the same pace as other judges, or even slightly faster. The Disciplinary Chamber found no evidence that the judge had delayed the proceedings intentionally. Resolving applications from sentenced prisoners is not a priority recognised by law. Thus, such applications must be dealt with according to normal procedure. The Disciplinary Chamber pointed out that it would be unfair to treat a judge who is one of many judges in a similar position differently from those other judges merely because a complaint had been filed against that judge in particular.

1.2. Completion of judicial proceedings within a reasonable time

Case 11/60625

(1) The Chancellor of Justice received a petition from an individual. The petitioner expressed dissatisfaction with the resolution of an employment dispute in Viru County Court.

(2) According to the petitioner's account, the dispute went back to 1998, when the petitioner had sought the assistance of an employment tribunal. On 4 March 1999, the tribunal pronounced its ruling in the matter submitted to it. Both parties appealed the ruling in a court of law. The judgment entered in the case by Narva City Court on 30 October 2001 was appealed by both parties in the competent Court of Appeal. By judgment of 26 April 2002, the Court of Appeal returned the case to Narva City Court to be reconsidered.

On 3 November 2003, the petitioner received a letter (No. 2-1640/02-259) from the then President of Narva City Court. The letter proposed to remove the case from Narva City Court and submit it to Rakvere Court. The petitioner refused the proposal on 10 November 2003, and requested to be informed of the date of the hearing in the petitioner's case. According to the petitioner, no such information was provided.

On 12 February 2004 the petitioner received a letter from a judge of Narva City Court, in which the petitioner was asked to provide a translation of the claim and the documents annexed to it into the official language. It was also explained in the letter that, if no such translation was provided, the court would be entitled to disregard the claim and the annexed documents. According to the petitioner, all previous proceedings in the case had been conducted in Estonian by mutual agreement of the parties and the court (pursuant to section 7(1) of the Code of Civil Procedure as amended to the material time), for which reason the petitioner did not regard the requirement justified. Nevertheless, the petitioner translated the claim into Estonian within the established time limit (15 days), hoping that this would expedite a hearing in the case.

When two years had elapsed (17 February 2006) the petitioner addressed a letter to the judge of Narva City Court, requesting the court to expedite proceedings in the case. According to the petitioner, no reply has been provided to that letter.

On 17 April 2006 the petitioner approached the Chancellor of Justice. The petitioner found that preparations for a hearing could not last for years. Yet this was precisely what was happening in the petitioner's case. The petitioner stressed, in particular, that the reason why the case had been sent back from the Court of Appeal to the court of first instance was the incompetence of the judge who had heard the case initially on that judicial level.

In order to clarify the facts of the case, the Chancellor of Justice addressed a request for information and for clarifications to the judge to whom the case had been assigned, and to the President of Viru County Court.

The President of Viru County Court explained in reply that in 2002 and 2003, there had been three judicial vacancies in Narva City Court. Civil cases had been dealt with by only two judges to whom approximately 1600 cases had been assigned. The workload was enormous. In cooperation with Lääne-Viru County Court and the Ministry of Justice, in November 2003, in order to alleviate the situation, Narva City Court proposed the opportunity to parties to pending civil cases to agree to a change of jurisdiction and to refer their cases for a hearing to Rakvere (Lääne-Viru County Court). The President of the court, who signed the proposals, was not involved in civil cases. For this reason, the office of the court transmitted the parties' replies instead of the president to the two judges who dealt with the court's civil business. For reasons of work overload, these were apparently unable to set hearing dates in all cases.

In December 2003 and in January 2004, three new judges were appointed. This reduced the number of cases in the dockets of individual judges to approximately 320. When a case is assigned to a judge, the judge is under a duty to check whether it should be accorded priority.

The President of Viru County Court expressed the opinion that considering heavy workload, the court should be seen as having done everything in its power to make it possible to adjudicate cases within a reasonable time.

The explanation provided by the judge to whom the case had been assigned indicated that together with that case, the judge had received 320 other cases. Moreover, new cases kept being added to the docket constantly.

On 12 December 2004 the judge sent a letter to the petitioner. The letter did contain a request to provide a translation into Estonian of the claim and the documents annexed to it. All previous proceedings in the case had been conducted in Estonian. The petitioner presented the translations within the established time limit. The judge explained that the request submitted by the petitioner with respect to the language used in judicial proceedings had been noted and that the case file had been sent for translation to the court's translators.

In January 2006, the court laid down a plan to hold a hearing in the civil matter 2-1640/02 (new number: 2-99-23) on 10 May 2006. Instructions were given to the courtroom secretary to dispatch summonses to the parties.

The petitioner's letter seeking to expedite proceedings in that civil matter, and to rule on the merits of the case were received in the court on 20 February 2006. Having received the Chancellor's request for information, the judge asked the courtroom secretary for an explanation.

According to the explanation, the petitioner had called the secretary some time after having sent the letter. The secretary had informed the petitioner of the time and place that had been set for the hearing. According to the secretary, the petitioner had stated that a written response to the letter that had been received at the court on 20 February 2006 was not necessary.

Acording to the explanation, the hearing took place on 10 May 2006 and judgment in the case was made public in the Office of the court on 14 June 2006. In the hearing, the situation was explained to the petitioner and an apology made for the inconvenience caused.

(3) The principal question that had to be answered in the case was whether judicial proceedings related to the initial employment dispute had been completed within a reasonable time.

(4) The Supreme Court has repeatedly observed that Articles 13, 14 and 15 of Estonia's Constitution and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) enshrine an important fundamental right of the individual—the right to an effective remedy. The right to seek legal redress in a court of law is intended to guarantee the individual a comprehensive and efficient protection.[272] A right to which no effective and enforceable remedy attaches will remain purely declaratory, devoid of substance and of meaning.

The right to an effective remedy includes, among other things, the right to a hearing within a reasonable time. Thus, the first sentence of Article 6(1) of the Convention for instance, provides, *expressis verbis*, a human right to a hearing within a reasonable time, before an independent and impartial tribunal established by law. Under the terms of section 2 of the Code of Civil Procedure (as amended to 1 June 2006) the rules of civil procedure must guarantee that courts dispose of civil matters justly, within a reasonable time and at the least possible cost. The need to dispose of a dispute within reasonable time has also been stressed by the Supreme Court.

The concept of 'reasonable time' is an undefined legal term the meaning if which, according to settled case-law, must be established on a case by case basis, having regard to the particular characteristics of the situation. Whether the time following which a hearing is held is reasonable or not depends on the following considerations: the complexity of the dispute, the significance of the interests at stake, the conduct of the person bringing the application, claim or petition and the conduct of the authorities (in particular, of courts).[273] The Supreme Court has emphasised that "[i]n order to measure whether the length of proceedings has been reasonable, the complexity of the dispute and the conduct of the parties, and of the court must be taken into account."[274]

What must also be taken into account in connection with the 'reasonable time' test for proceedings is the objective circumstances related to the work of the court: the resources at its disposal, the number of applications it must process, the complexity of disputes it must resolve, etc.

In short, the reasonableness of the length of proceedings should be a function of the facts of the case, weighted by the complexity of the particular case, the conduct of the parties and other objective circumstances.

It appears from the description of proceedings set out above that the first judgment in the case was entered by Narva City Court on 30 October 2002. Viru Court of Appeal pronounced its ruling on 26 April 2002, sending the case back to be reconsidered in Narva City Court, which entered a new judgment in the matter on 14 June 2006.

In the opinion of the Chancellor, it is deeply deplorable that over four years' time was needed to enter a new judgment after the case was returned to the first instance. In fact, what must also be taken into account is that proceedings in this case actually go back as far as April 1999, when the petitioner filed claims in Sillamäe City Court. This means that, during seven years, the judiciary has been unable to provide a final judgment in the matter. Therefore judicial proceedings in the petitioner's case cannot be regarded as having been completed within a reasonable time.

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272 The importance of this principle has also been referred to in the following orders and judgments entered by the Supreme Court (plenary formation): order of 22 December 2000 in case 3-3-1-38-00, paras. 15 and 19; judgment of 17 March 2000 in case 3 3-1-3-10-02, paras. 17 and 18; judgment of 6 January 2004 in case 3-3-2-1-04, paras. 26 and 27; order of 28 April 2004 in case 3-3-1-69-03, para. 24; and also in the judgment of the Constitutional Review Chamber of the court of 25 March 2004 RKPJKo 25.03.2004 case 3-4-1-1-04, para. 18.

273 See judgment by the ECHR of 22 June 2006 in the case of Coëme et al v. Belgia, paras. 136 and 140: "The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities […] Article 6 "commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice" […] The conduct of the judicial authorities was compatible with the fair balance to be maintained between the various aspects of this fundamental requirement."

274 Administrative Law Chamber of the Supreme Court, order of 15 November 2004 in case 3-3-1-58-04, para. 16.

As appears from the explanatory note provided by the judge who last heard the matter, the case was assigned to that judge in December 2003, i.e. 1.5 years after the ruling by the Court of Appeal. Prior to that, the then President of the court had expressed concern over the fact that proceedings were stalling. By way of solution, the President suggested submitting the matter to another court, which was refused by the petitioner.

Having been assigned the case, the judge immediately took steps to resolve it, asking the petitioner to provide translations of the claim and the documents annexed to it. The material in the case file was sent for translation to the court's translators. Section 7(1) of the Code of Civil Procedure, as amended to the material time, provided: "Civil proceedings shall be conducted in Estonian. Proceedings may also be conducted in another language, provided the court and the parties have sufficient knowledge of that language" (unofficial translation—transl.). This meant that a presumption in favour of the Estonian language had to be applied. Proceedings could only be conducted in another language if the court and all parties agreed to that.

According to the information available to the Chancellor of Justice, the court did not perform any procedural steps in the case in 2005. In the beginning of 2006, a date was set for a hearing in May 2006.

Judicial statistics[275] show that in 2002 the average length of proceedings in civil cases across all courts was 140 days. In Narva City Court, the relevant figure stood at 215 days. In 2003, the average length of proceedings was 310 days (i.e. the highest of all courts), while the average length of proceedings across all courts amounted to 167 days. According to the statistics for 2004, the average length of proceedings in civil cases was 168.4 days. In Narva City Court, this was 383.1 days (i.e. over one year). The corresponding figures for 2005 were 159.8 and 384.6 days.

The heavy workload of Narva City Court results from the particular situation in the region, from the language problem, the shortage of judges and other circumstances that, in conjunction, have filled the dockets of the court's judges to the limit and have caused proceedings take inordinately long to finish. The Government has, by various measures (see explanations of the President of Narva City Court regarding mergers of judicial districts effective as of 1 January 2006) tried to alleviate the problem, but the situation remains critical.

Understandably, considerations such as those set out above cannot justify dragged-out proceedings, nor will they diminish in any way the harm caused to the interests of the petitioner in the case in point. At the same time, no intentional or negligent conduct can be reproached to any particular judge who has dealt with the matter, which rules out the institution of disciplinary proceedings under section 87(2) of the CA. For this reason, the Chancellor held it inappropriate to take disciplinary action. Furthermore, disciplinary measures would not contribute in any way towards restoring the rights of the petitioner, or resolve the deplorable situation that has arisen.

(5) The Chancellor of Justice concluded that the best solution in this particular case would be for the President of Viru County Court to apologise for the inconvenience that inordinately long proceedings have caused the petitioner.

The President of Viru County Court informed the Chancellor that an apology was made to the petitioner.

[275] Available on the Internet (viewed on 2 June 2006): http://www.kohus.ee/10925 (in Estonian—transl.).

1.3. Setting a date for a hearing within a reasonable time

Case 11/061261

(1) An individual petitioned the Chancellor of Justice. The petitioner expressed dissatisfaction with the work of Viru County Court in relation to the petitioner's case.

(2) The petition stated that on 1 March 2005 the petitioner had filed a claim in Narva City Court (as of 1 January 2006, part of Viru County Court) in relation to an illegal transaction by the petitioner's ex-spouse. Subsequently, the petitioner also filed an application for an injunction freezing the defendant's assets in order to satisfy expected judgment. The application was rejected.

On 13 September 2006, the petitioner sought the assistance of the Chancellor of Justice. Until that date, i.e. during a year and a half following the filing of the claim, no hearing had been held in the matter, and the petitioner's case remained unresolved.

According to the petitioner, it was incomprehensible why the court had not reacted to the claim within such a long time.

In order to clarify the facts of the case, the Chancellor of Justice addressed a request for information to the President of Viru County Court. In his request, the Chancellor also asked the President to arrange for an explanation by the judge who was in charge of the case to be transmitted to the Chancellor.

The explanation provided by the judge stated that the claimant filed a claim against the claimant's ex-spouse on 1 March 2005. The ex-spouse had entered into transactions involving real property by means of concluding a gift agreement and a purchase and sales agreement. The petitioner requested that these be declared illegal and that the defendant be enjoined to cede certain property use rights to the claimant (petitioner).

Since no stamp duty had been paid on the claim, the court gave the petitioner a time limit by which payment was to be effected. The petitioner paid the duty and on 20 April 2005 submitted to the court a payment order proving the transaction.

On 10 May 2005, the court ruled the claim admissible. On the same date, the judge ordered notification to be issued to the defendant, and copies of the claim and other documents to be dispatched to the same, ordering a response to be submitted by 10 June 2005 at the latest.

During the period of 7 June 2005 to 19 July 2005 the judge assigned to the case went on a paid leave.

The material in the case file made available to the Chancellor of Justice shows that the courtroom secretary had dispatched the materials of the claim together with the order requiring a response on 5 August 2005, setting the time limit for response at 12 September 2005. The defendant received the documents on 18 August 2005 but did not provide a response to the court. Since the petitioner had also requested a third party to be joined to the proceedings, the claim was dispatched to that party on 19 June 2006, but could not be served on the party.

On 16 June 2006 the petitioner filed an application to freeze the defendant's assets in order to satisfy expected judgment, seeking an order to cause a notice to be entered in the Land Register restricting dispositions and sale of the registered immovable that was the subject matter of the contested transactions. By bringing the application, the petitioner wished to prevent illegal acts involving the immovable from being performed. By order of 19 June 2006 the court rejected the application to freeze assets for the reason that the owner of the immovable in question was not the defendant but a third party. For that reason, there was no need to for an injunction to freeze assets.

The judge to whom the case was assigned explained that since then the petitioner has not communicated with the court.

The judge also explained that, in view of the large number of unresolved cases, and many applications seeking to expedite hearings in a particular case, the court is doing everything in its power in order to resolve cases submitted to it within a reasonable time. According to the explanation provided, the judge in question started work at Narva City Court in December 2003 and has since then disposed of 350 civil cases a year on average. On 30 September 2006, 383 civil cases had been assigned to the judge. In addition, the judge has been called to rule in criminal matters.

In the explanatory note, the judge also informed the Chancellor of the fact that the hearing date had been set on 21 November 2006 and that summonses had already been issued to the parties.

(3) The question that had to be answered in the case at hand was whether setting a date for the hearing in the petitioner's case took place within prescribed time limits and whether elements of a disciplinary offence sufficient for bringing disciplinary proceedings against the judge could be discerned in the case.

(4) Pursuant to section 2 of the CCiP it is the aim of civil procedure rules to ensure that the courts dispose of civil matters justly, within a reasonable time and at the least possible cost.

The right to a hearing within a reasonable time is provided as a central human right in the first sentence of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which runs as follows: "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The need to ensure that cases are resolved within a reasonable time has also been stressed repeatedly by the Supreme Court.[276]

Judicial proceedings in the case had not been concluded by the time that the Chancellor started his investigation. Hence, the Chancellor did not have information regarding the point that had been reached in the proceedings during the initial hearing, or about the time of conclusion of the proceedings. For these reasons, the Chancellor was unable to give a verdict in the matter of whether the court had observed the principle of ensuring a 'hearing within a reasonable time'. Instead, the Chancellor only formulated a finding in respect of whether setting a date for the first hearing took place within the prescribed time limit.

Pursuant to section 341(1) of the CCiP, a civil matter must be considered and determined in a hearing, unless otherwise provided by law. Section 342(1) of the same statute provides that the court should hold a hearing to determine a petition or application that cannot be otherwise determined. Section 342(2) of the CCiP states that a hearing date must be set immediately upon receipt of an application or petition, and of responses to these. The second sentence of section 397 provides that, if the defendant has been assigned a time limit for providing a written response to the claim, the hearing date may not be set before the defendant has provided a response and that response has been transmitted to the claimant, or before the time limit expires.

The petitioner filed the claim in the court on 1 March 2005. The claim was ruled admissible on 10 May 2005. The 'Notes' page of the case file shows that the courtroom secretary only issued summonses in the case to the defendant on 15 August 2005, setting the time limit for a response at 12 September 2005. In the view of the Chancellor, the judge could not have set the hearing on an

[276] See, for instance, Supreme Court (Special Panel), order of 10 April 2002 in case 3-3-4-2-02, para. 10; Supreme Court (plenary formation), judgment of 17 February 2004 in case 3-1-1-120-03, para. 18; Administrative Law Chamber of the Supreme Court, judgment of 29 September 2004 in case 3-3-1-42-04, para. 22; Administrative Law Chamber of the Supreme Court, order of 15 November 2004 in case 3-3-1-58-04, para. 21; Civil Chamber of the Supreme Court, order of 21 March 2006 in case 3-2-1-12-06, para. 13.

earlier date than 12 September 2005, i.e. before a response had been received from the defendant, or before the time limit established for submitting the response had expired.

The documents in the case file show that after this no steps were taken in the matter up to 19 June 2006, when the application to freeze assets was considered and a summons was issued to the third party who had been joined to the proceedings. The court set the date of the first hearing in the matter on 20 October 2006, i.e. after it had received a request for information in the matter from the Chancellor.

The Chancellor found that the period following the expiration of the time limit established for the defendant to provide a response (i.e., when it became possible for the court to set a hearing date) and preceding the setting of a date for the first hearing, and carrying out that hearing, had indeed been unacceptably long—over one year.

Nevertheless, it is the opinion of the Chancellor that in evaluating the pace of work of courts and of individual judges, objective circumstances that are likely to cause delays such as those described above cannot be disregarded. An analysis of judicial statistics reveals that a similar circumstance in the case at hand is the heavy workload of Viru County Court (former Narva City Court) and its considerable backlog of cases. The problem was amplified further by the 80% surge in the number of claims filed in civil courts, which has filled the dockets in all courts, but has been felt the most in Ida-Viru County Court and in Narva City Court.

According to judicial statistics, in 2005 the average number of cases resolved by a judge in Estonia amounted to 221.4. The judge to whom the case of the petitioner was assigned had in the last years disposed of an average 350 cases per year, which means a considerably higher workload than average.

The Chancellor found the case unreservedly deplorable. On the other hand, the Chancellor held that in the case the delay of the court had been founded in objective circumstances and could not be reproached exclusively to the judge hearing the case. In the circumstances, the Chancellor held that bringing a disciplinary action against the judge pursuant to section 87(2) of the CA would be inappropriate, because no fault was in evidence on the part of the judge in connection with the failure to perform official duties, or unsatisfactory performance of the same. Moreover, the court had already made up for its delay during the proceedings conducted by the Chancellor, by setting a hearing date at relatively short notice. The hearing had taken place by the time the Chancellor's proceedings were concluded.

(5) The Chancellor of Justice concluded that the best solution under the circumstances would be for the President of Viru County Court to apologise to the petitioner for the worry and inconvenience caused by delays of the court.

The President of Viru County Court informed the Chancellor that an apology had been made to the petitioner regarding delays with setting a date for a hearing in the petitioner's case.

III EQUALITY AND THE PRINCIPLE OF EQUAL TREATMENT

1. General outline

The Estonian Constitution, European Union law and the international agreements signed by the Republic of Estonia prohibit discrimination, require the elimination of existing inequality and promote the principle of equal treatment.

Pursuant to the Chancellor of Justice Act (CJA), the following matters in the area of equality and equal treatment are in the jurisdiction of the Chancellor of Justice:

1. Scrutiny of legislation for compliance with the Constitution and relevant statutes ('scrutiny of legislation competence');
2. Violations of the principle of non-discrimination in the activities of public authorities ('ombudsman competence') and
3. Conciliation proceedings between private individuals ('competence to resolve discrimination disputes').

To determine in which part of the Chancellor's equality jurisdiction a particular case falls, firstly, a distinction must be made between the actions of a representative of the national government, a local government body or another public authority or the activities of another private individual. Secondly, it is important to distinguish whether the issue requires a particular piece of legislation to be scrutinised for constitutionality or whether the lawfulness of the actions of a person or an authority must be assessed. The relevant powers of the Chancellor are examined in greater detail below:

1. Pursuant to section 15 of the CJA, everyone has the right to approach the Chancellor of Justice, requesting that the Chancellor scrutinise a statute or other legislation for conformity with the Constitution or relevant statutes.

The rules of equal treatment as laid down in the Constitution and expounded by the Supreme Court, are founded on the underlying idea of equal treatment, pursuant to which only those who are equal should be treated equally, and all those who are not equal should not be treated equally. Thus the Chancellor of Justice has in many cases requested that persons who are subject to the Chancellor's oversight powers explain and justify what determined the different treatment of certain persons or situations.

In the year reflected in the Annual Report, the question of equal treatment arose in the following cases, for instance: teachers' different minimum wage levels (*case 6-2/060742*)[277] and the calculation of time studied at the Estonian Public Service Academy as part of the person's length of service in the public service (*case 6-1/060051, 6-1/060288*)[278]. The above-mentioned cases are examined in greater detail in Part 2 of the Annual Report.

Pursuant to section 19(1) of the Chancellor of Justice Act, everyone whose rights have been violated may seek the assistance of the Chancellor of Justice by petitioning the Chancellor to scrutinise whether a government agency, an agency or body of a local authority, a public-law corporation, a natural person or a private-law corporation performing public duties adheres to the principle of ensuring the protection of individuals' fundamental rights and freedoms and to good administrative practice.

This provision authorises the Chancellor to scrutinise the lawfulness of the activities of public authorities, including the lawfulness of the actions and decisions of any officials. Discrimination is

[277] See Part 2, II 2.
[278] See Part 2, XI 5.

not clearly and distinctly specified in what is at first sight a general provision. At the same time, the requirement of non-discrimination and of equal treatment is one of the most important principles that persons exercising public authority are required to observe in their actions.

In the year in which the Annual Report was prepared, the question of equal treatment arose in the following cases, for instance: the election of the rector of the Estonian Maritime Academy (*case 7-1/060760*)[279] and the dismissal of an official on grounds of age (*case 7-4/061532*)[280]. The above-mentioned cases will be examined in greater detail in Part 2 of the Annual Report.

Pursuant to section 19(2) of the Chancellor of Justice Act, everyone who finds that he or she has been discriminated against by a natural person or a private corporation on the basis of sex, race, nationality (ethnic origin), colour, language, origin, religion or religious belief, political or other opinion, property or social status, age, disability, sexual orientation, or other grounds of discrimination listed by law, is entitled to approach the Chancellor of Justice and request that the Chancellor conduct conciliation proceedings.

Conciliation proceedings are based on the idea that it should be as easy as possible for a person (or for instance a legal person) to petition the Chancellor of Justice. Due to the confidentiality of proceedings, the rights and interests of the petitioner are safeguarded during the entire course of the investigation. The result of the proceedings is not, however, the imposition of sanctions on one party. Instead, the Chancellor hears both parties as a mediator, providing explanations and conciliating. Information regarding conciliation proceedings is only disclosed in anonymous form, preventing the identification of the persons that participated in the proceedings.

The objective of conciliation is to achieve a rapprochement between parties to a dispute, encourage them to change their positions and collectively find a solution to the dispute. The Chancellor of Justice plays an active role in this process, offering possible solutions to the parties.

The idea of conciliation is very significant in restoring a just peace. In labour relations, for instance, it is very important that a person be able to return to work after the conclusion of conciliation without having to fear possible bad treatment from his/her employer.

Participation in any conciliation proceedings conducted by the Chancellor is voluntary, as is reaching an agreement on the dispute concerned. However, if an agreement is reached, it is legally binding on both parties. If a party refuses to perform an agreement reached in the Chancellor's conciliation proceedings, the other party will be entitled use the agreement as an executory title, which can be enforced by a bailiff.

No conciliation proceedings took place in the Office of the Chancellor of Justice in 2006. Nevertheless, two petitions requesting the initiation of conciliation proceedings were submitted to the Chancellor of Justice.

The first case was a matter of gender inequality, more precisely of the discrimination of a woman with small children. However, giving effect to this petition was barred by section 35^6 of the Chancellor of Justice Act. This provision prescribes a time limit of four months from the date the person became aware or should have become aware of the alleged discrimination. It appears from the applicant's petition that the discrimination against her took place 11 months before she submitted her petition to the Chancellor of Justice. Thus it was no longer in the Chancellor's jurisdiction to consider her petition. The petition was forwarded to the gender equality representative, who has jurisdiction of monitoring the observance of the requirements established in the Gender Equality Act.

[279] See Part 2, II 3.
[280] See Part 2, XII 16.

In the second case, a sentenced prisoner petitioned the Chancellor of Justice, requesting that the Chancellor initiate conciliation proceedings between the prisoner and the Ministry of Justice to guarantee the prisoner's fundamental rights and freedoms. The petitioner found that continual relocation from one prison to another amounted to a violation of the petitioner's fundamental rights and freedoms. The Chancellor found it impossible to initiate proceedings on the basis of the petition, because it did not appear that the petitioner had been discriminated by a natural person or a private corporation.

The objective of the three provisions mentioned above (sections 15, 19(1), and 19(2) of the CJA) is to ensure the protection of the rights of a potential victim of discrimination as simply, rapidly and effectively as possible. Cases of discrimination are always emotionally difficult, because they relate directly to the individual's person and subjective perceptions. Thus the conciliation offered by the Chancellor of Justice constitutes a solution that seeks to consider the rights of the victim as much as possible. The aim is to rule out situations in which a person is likely to forgo defending his or her rights because the proceedings in which he/she would have to participate are overly complicated or do not take into consideration the peculiarities of unequal treatment.

Output from the activities of the Chancellor of Justice in the area of violations of the fundamental right of equality may include making a recommendation or suggestion to the Riigikogu, a government agency or other representative of public authority (for instance a recommendation to issue a new ruling or apologise to the petitioner) and an agreement in conciliation proceedings (which cannot be contested in court, but is enforceable by a bailiff).

The Chancellor of Justice does not have any coercive powers to compel individuals or institutions to give effect to his recommendations. However, the Chancellor has great authority in Estonian society, and as a result most of his recommendations are implemented.

The concepts "effective measures" and "effective sanctions" are used in various European Union laws. The experience accumulated by the Chancellor of Justice has shown that even so-called mild outputs (such as a recommendation or a suggestion) can in practice be very effective. This demonstrates the importance of accepting the varied legal practice of EU member states regarding the protection of fundamental equality rights. Such practice does not prejudice European rules on equal treatment, and the fact that it works provides a justification for maintaining arrangements meeting each country's particular needs.

Pursuant to section 35[16] of the CJA, the Chancellor of Justice is authorised to take the following action to promote equality and the principle of equal treatment:

1. To analyse how the implementation of legislation influences the lives of members of society;
2. To notify the Riigikogu, the Cabinet of Ministers, central government agencies, local government agencies and bodies, and other interested persons and the public of the implementation of equality and the principle of equal treatment;
3. To make recommendations regarding amendment of legislation and other rules to the Riigikogu, the Cabinet of Ministers, central government agencies, local government agencies and bodies, and employers;
4. To develop co-operation between individuals, legal persons and government bodies within Estonia and internationally, in order to observe equality and the principle of equal treatment;
5. To promote equality and the principle of equal treatment.

Each of the above-mentioned fields of action has its particular importance in ensuring that any arrangement established by the Estonian government in the field of equality policy assist towards the implementation of the idea of equal treatment. In 2006 a draft Equal Treatment Bill was prepared by the Ministry of Justice as a general statute. The Chancellor of Justice supported the draft law, but also made a series of recommendations as to how to ensure the actual implementation of the solutions specified in the draft.

In 2006, the Chancellor of Justice or his representatives participated in numerous meetings within Estonia and abroad that examined various topics in the area of equal treatment.

IV STATISTICS OF PROCEEDINGS

1. General outline of statistics of proceedings

1.1. Petition-based statistics of proceedings

In 2006 the Chancellor of Justice received 1858 petitions. On the basis of communications received by and information submitted to the Chancellor, 1594 cases were opened. Compared to 2005, the number of petitions dropped slightly, yet basically remained in the same range as in 2003 and 2005. The decrease in the number of petitions may be explained by an increase in the general awareness of the nature of the powers of the Chancellor. A surge in the number of petitions in 2004 can be attributed to a public information campaign aimed at raising public awareness of the new powers conferred on the Chancellor of Justice on 1 January 2004 in relation to the protection of fundamental rights and freedoms.

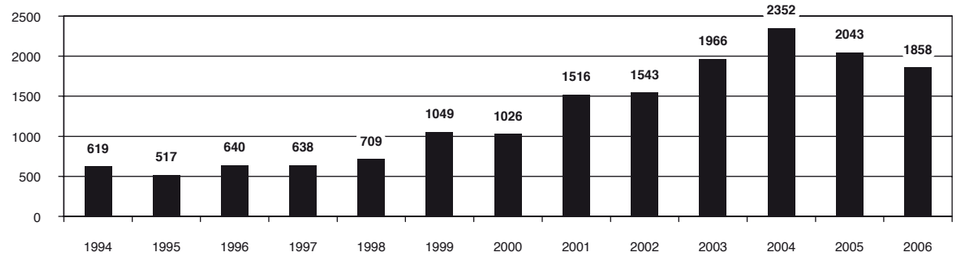

Figure 1. Number of petitions received in 1994–2006

1.2. Statistics based on cases opened

In previous years, the statistics of proceedings were based on petitions submitted by individuals. The statistics presented in this Annual Report in respect of the period from 2005 onwards are based on cases opened on the basis of petitions or by the Chancellor's own initiative. A 'case opened' means that certain procedural steps were performed and documents drafted in relation to a matter falling within the jurisdiction of the Chancellor. Petitions that raise the same issue are joined for the purposes of proceedings and are regarded as a single case. In 2006, a total of 1594 cases were opened. In 2005, the corresponding figure stood at 1666, or 4% above that in 2006.

The Chancellor of Justice has the power to open a case on the basis of a petition or on his own initiative. In 2006, 35 cases (2.2 % of the total) were opened on the Chancellor's own initiative. As to the rest, an investigation was carried out in 516 cases (32.4% of the total), while 1043 (65.4% of the total) were deemed not to warrant detailed scrutiny for various reasons (see Section 4: Cases not investigated). Eight inspection visits were performed.

Compared to 2005, the percentage of cases investigated has dropped. Thus, of the total number of cases opened in 2005, 3.4% were initiated by the Chancellor, and investigated. The body of petition-based cases gave rise to a further set of investigations that amounted to 41.5% of the total number of cases opened. The percentage of petitions that were not considered to warrant detailed scrutiny stood at 58.5%.

1.2.1. Distribution of cases by substantive field

By substantive field, cases opened in 2006 can be divided as follows:

- scrutiny of legality or constitutionality of legislation (207 cases or 13% of cases opened, 37.5% of investigated cases);
- scrutiny of legality of measures of the Government, local authorities, other public-law corporations or of a private person, body or institution performing a public duty (258 cases or 16.2% of cases opened, 46.8% of investigated cases);
- opinion in regard to legislation contested in constitutional review proceedings (seven cases or 0.4% of cases opened, 1.3% of investigated cases);
- replies to interpellations, written questions or requests of members of the Riigikogu (9 cases or 0.6% of the total number of cases, 1.6% of investigated cases);
- institution of disciplinary proceedings against judges (12 cases or 0.8% of cases opened, 2.2% of investigated cases);
- other duties imposed by statute (58 cases or 3.6% of cases opened);
- cases not investigated (1043 cases or 65.4% of cases opened).

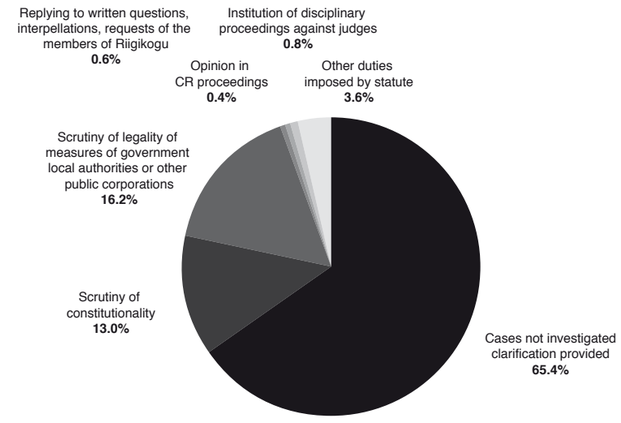

Figure 2. Distribution of cases by substantive field

1.2.2. Distribution of cases by region

The largest number of cases in 2006 was opened on the basis of petitions received from Tallinn (425 cases) and from Harju County (345 cases, the city of Tallinn excluded). A large number of cases was also opened on the basis of petitions received from Tartu (152 cases) and from Tartu County (69 cases, the city of Tartu excluded), Pärnu County (71 cases) and Lääne-Viru County (65 cases). Thus, geographically viewed, the regional distribution of cases correlates with the size of major urban populations in Estonia. The least number of cases was opened on the basis of petitions received from Hiiu County (10 cases). 23 cases were opened on the basis of petitions received from foreign countries. Compared to 2005, the distribution of cases by petitioner's location has roughly stayed the same.

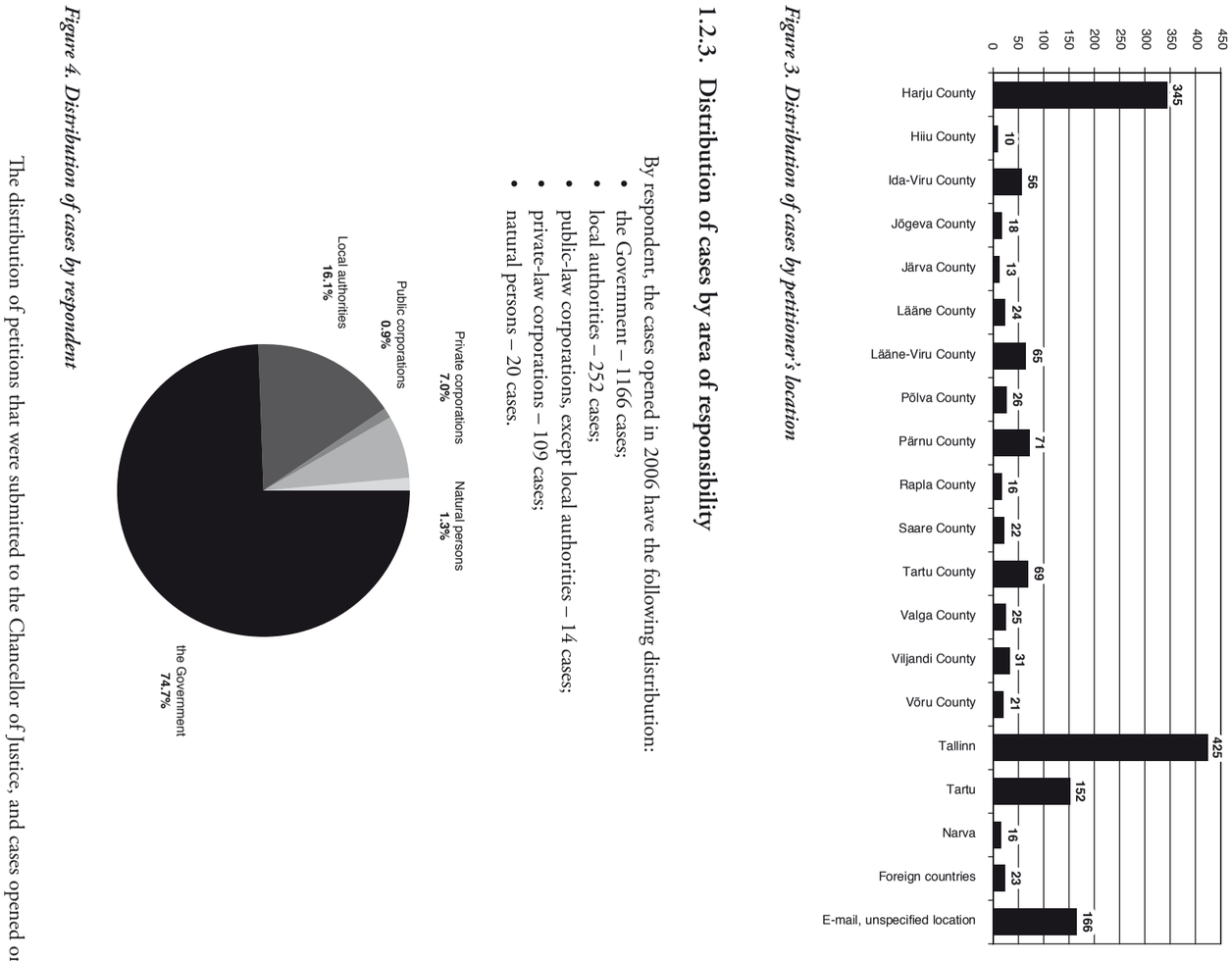

Figure 3. Distribution of cases by petitioner's location

1.2.3. Distribution of cases by area of responsibility

By respondent, the cases opened in 2006 have the following distribution:

- the Government – 1166 cases;
- local authorities – 252 cases;
- public-law corporations, except local authorities – 14 cases;
- private-law corporations – 109 cases;
- natural persons – 20 cases.

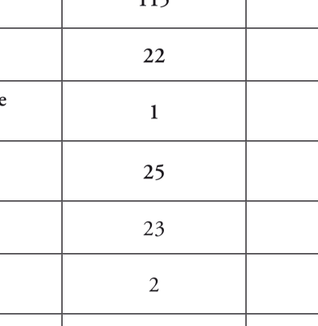

Figure 4. Distribution of cases by respondent

The distribution of petitions that were submitted to the Chancellor of Justice, and cases opened on the basis of those petitions is illustrated in the following tables (Tables 1 and 2). The petitions and cases opened are classified according to the sphere of authority of the ministries or other government agencies, as well as other institutions, in whose jurisdiction the petitions originated or whose measures the petitioners took issue with.

Table 1. Distribution of cases by respondent government agency/institution

Agency, body, person	Cases opened	Cases investigated	Infringement or contravention established	Recommendations reports, informational letters, suggestions	Cases not investigated, referred	Cases not investigated, clarification provided
Riigikogu	**138**	**81**	**9**	**6**	4	53
Supreme Court of Estonia or other courts, except Registry Departments	**115**	**19**	4	**3**	**2**	94
Cabinet of Ministers or Prime Minister	**22**	**2**	**1**	**1**	-	**20**
Chancellor of Justice or the Office of the Chancellor of Justice	**1**	**1**	-	-	-	-
Sphere of authority of the Ministry of Education and Research	**25**	**10**	**5**	**5**	**5**	**10**
Ministry of Education and Research	23	10	5	5	4	9
Agencies subordinate to the Ministry of Education and Research	2	-	-	-	1	1
Sphere of authority of the Ministry of Justice	**384**	**75**	**19**	**16**	**64**	**245**
Ministry of Justic e	72	23	8	6	21	28
Agencies subordinate to the Ministry of Justice	20	3	-	-	6	11
Tallinn Prison	83	21	4	4	5	57
Ämari Prison	61	11	4	3	9	41
Tartu Prison	57	7	1	1	7	43
Murru Prison	42	5	2	2	7	30

Prosecutor's Office	22	2	-	-	2	18
Pärnu Prison	17	2	-	-	3	12
Harku Prison	6	1	-	-	2	3
Viljandi Prison	4	-	-	-	2	2
Sphere of authority of the Ministry of Defence	**15**	**6**	-	-	**2**	7
Ministry of Defence	9	3	-	-	1	5
Agencies subordinate to the Ministry of Defence	5	3	-	-	1	1
Defence Resources Agency	1	-	-	-	-	1
Sphere of authority of the Ministry of Environmental Affairs	**48**	**23**	**3**	**1**	**8**	**17**
Ministry of Environmental Affairs	20	17	3	1	2	1
Agencies subordinate to the Ministry of Environmental Affairst	7	1	-	-	1	5
Land Board	16	3	-	-	4	9
Environmental Inspectorate	5	2	-	-	1	2
Sphere of authority of the Ministry of Culture	**9**	**4**	**1**	**1**	**1**	**4**
Ministry of Culture	9	4	1	1	1	4
Sphere of authority of the Ministry of Economic Affairs and Communications	**42**	**10**	**3**	-	**18**	**14**
Ministry of Economic Affairs and Communications	24	4	2	-	11	9
Agencies subordinate to the Ministry of Economic Affairs and Communicationss	5	2	-	-	1	2

Consumer Protection Board	3	2	-	-	-	1
Technical Inspectorate	3	1	1	-	2	-
Energy Market Inspectorate	2	1	-	-	1	-
Road Administration	2	-	-	-	1	1
Patent Office	2	-	-	-	1	1
Competition Board	1	-	-	-	1	-
Sphere of authority of the Ministry of Agriculture	**13**	**2**	**1**	**1**	**5**	**6**
Ministry of Agriculture	6	-	-	-	3	3
Agencies subordinate to the Ministry of Agriculture	1	-	-	-	1	-
Agricultural Registers and Information Board	4	2	1	1	-	2
Plant Production Inspectorate	1	-	-	-	-	1
Veterinary and Food Board	1	-	-	-	1	-
Sphere of authority of the Ministry of Finance	**36**	**5**	**1**	-	**5**	**26**
Ministry of Finance	13	4	1	-	2	7
Agencies subordinate to the Ministry of Finance	3	1	-	-	-	2
Tax and Customs Board	18	-	-	-	1	17
Public Procurement Office	2	-	-	-	2	-
Sphere of authority of the Ministry of Internal Affairs	**126**	**48**	**14**	**10**	**21**	57

Ministry of Internal Affairs	25	16	2	2	2	7
Agencies subordinate to the Ministry of Internal Affairs	15	5	2	1	8	2
Police Board	44	8	1	1	6	30
Citizenship and Migration Board	26	12	4	1	1	13
Data Protection Inspectorate	7	2	2	2	3	2
Security Police Board	4	2	-	-	-	2
Rescue Board	3	1	1	1	1	1
Border Guard	2	2	2	2	-	-
Minister of Regional Affairs, county administrations or subordinate agencies	**33**	4	**3**	**2**	**16**	**13**
Sphere of authority of the Ministry of Social Affairs	**95**	47	**17**	**6**	**18**	**30**
Ministry of Social Affairs	53	28	10	6	12	13
Agencies subordinate to the Ministry of Social Affairs	2	-	-	-	1	1
Social Insurance Board	34	17	6	-	4	13
Health Protection Inspectorate	3	1	1	-	-	2
Labour Inspectorate	2	1	-	-	-	1
Health Care Board	1	-	-	-	1	-
Ministry of Foreign Affairs	**2**	**2**	-	-	-	-
State Chancellery	**1**	-	-	-	-	**1**

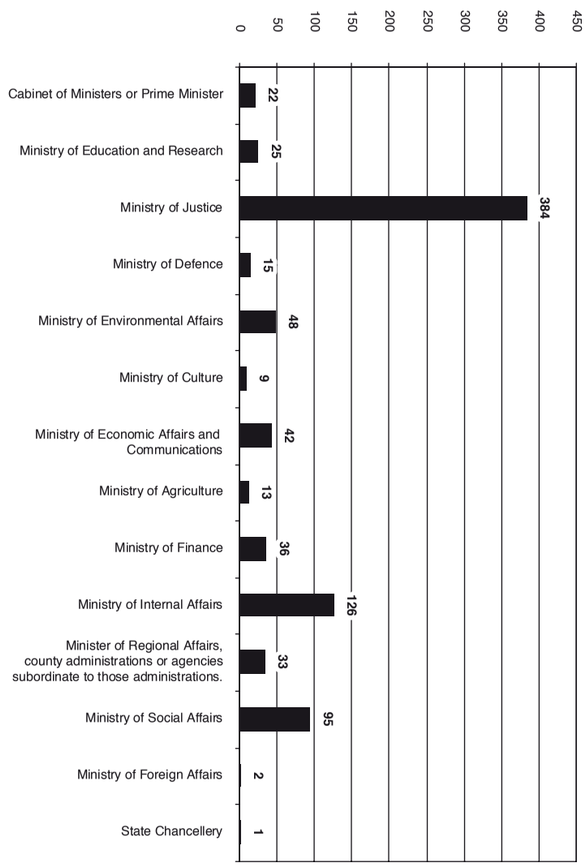

Figure 5. Distribution of cases by the sphere of authority of government agencies

Table 2. Distribution of cases by respondents on the level of local authorities

Respondent local authorities	Cases opened	Cases investigated	Infringement or contravention established	Recommendations reports, informational letters, suggestions	Cases not investigated, referred	Cases not investigated, clarification provided
Local authorities of Harju County, the city of Tallinn excluded	44	12	7	5	3	28
Local authorities of Hiiu County	1	-	-	-	-	1
Local authorities of Ida-Viru County, the city of Narva excluded	32	11	8	4	2	19
Local authorities of Jõgeva County	10	5	-	-	2	3
Local authorities of Järva County	4	2	-	-	1	1
Local authorities of Lääne County	10	4	2	1	2	4
Local authorities of Lääne-Viru County	10	3	2	1	-	7
Local authorities of Põlva County	1	-	-	-	-	1
Local authorities of Pärnu County	10	2	1	1	2	6
Local authorities of Rapla County	4	-	-	-	2	2
Local authorities of Saare County	3	1	1	1	-	2
Local authorities of Tartu County, except the city of Tartu	12	8	5	3	3	1
Local authorities of Valga County	6	4	1	-	-	2
Local authorities of Viljandi County	5	-	-	-	-	5
Local authorities of Võru County	7	-	-	-	2	5
The city of Narva	4	1	-	-	1	2
The city of Tallinn	55	24	13	7	4	27
The city of Tartu	21	6	-	-	4	11

1.2.4. Distribution of cases opened in 2006 by area of law

The largest number of cases was opened in relation to sentence enforcement procedure and imprisonment law. Compared to other areas of law, a significant number of cases were also opened in relation to property reform, social welfare and social insurance law.

Table 3. Cases opened in 2006 by area of law

Area of law	Number of cases
Sentence enforcement procedure and imprisonment law	272
Property reform law	90
Social insurance law	72
Social welfare law	68
Health law	63
Pre-trial criminal procedure	60
Local government organisation law	55
Criminal and misdemeanor court procedure	53
Construction law	51
Civil procedure	50
Financial law (including tax and customs law, state budget, public property)	48
Administrative law (administrative management, administrative procedure, administrative enforcement, public property law, etc.)	44
Public service	40
Environmental law	40
Citizenship, migration and language law	40
Education and research law	39
Transport and roads law	31
Labour law (including collective labour law)	30
Property law, including intellectual property law	29
Enforcement procedure	26
Private data protection, databases, public information and state secrets law	25
Police and law enforcement law	25
Family law	22
Government organisation law	22
Legal assistance and notarial law	22
Misdemeanour procedure	19
Law of obligations	18
Administrative court procedure	16
Energy, public water supply and sewerage system law	15
Company, bankruptcy and credit institution law	15
Traffic regulation law	10
Election and referendum law, political party law	9
Economic and trade management and competition law	8
Law of non-profit corporations and foundations	8
Law of succession	8
National defence law	8

Consumer protection law	8
Telecommunication, broadcasting and postal service law	7
Animal welfare, hunting and fishing law	6
Substantive penal law	6
Agricultural law (including food and veterinary law)	4
International law	4
Other public law	50
Other private law	22
Other area of law	36

1.2.5. Language of proceedings

The cases opened in 2006 were mostly based on petitions submitted in the Estonian language. Petitions in Russian amounted to approximately one sixth of the total number of petitions. Compared to 2005, the proportion of petitions in Russian has remained roughly the same (18.7% of petitions submitted in 2005 were in Russian).

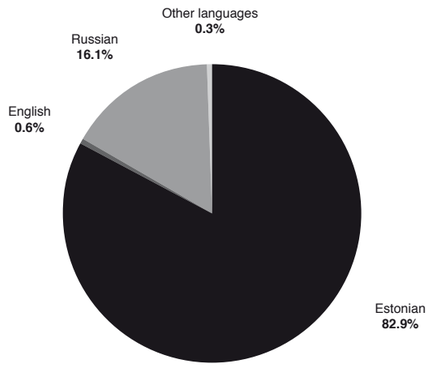

Figure 6. Distribution of cases by language of the petitions

1.2.6. Outcomes of proceedings

In considering the petitions submitted to him, the Chancellor of Justice has recourse to the principles of freedom of form and suitability to purpose, taking necessary steps to ensure an efficient and impartial investigation of the matter. The outcomes of particular cases will vary depending on the type of proceedings instituted.

The scrutiny of the constitutionality or legality of legislation may yield the following outcomes:

- a recommendation to bring a statute into conformity with the Constitution;
- a recommendation to bring an Executive regulation into conformity with the Constitution and relevant statutes;
- an application to the Supreme Court to declare legislation unconstitutional and invalid;
- a report to the Riigikogu;
- an informational letter to the Executive suggesting that a specific bill be proposed to the Riigikogu;
- an informational letter to the Executive suggesting enactment of generally binding rules in a matter;

- resolution of the problem by the competent institution during the proceedings;
- a finding of no contravention.

The scrutiny of the legality of measures of institutions performing a public duty may yield the following outcomes:

- a recommendation to eliminate the violation;
- a suggestion as to steps that should be taken to ensure lawfulness of actions and observance of of good administrative practice in those actions;
- resolution of the problem by the competent institution during the proceedings;
- a finding of no violation.

Other proceedings governed by the Chancellor of Justice Act and other statutes may yield the following outcomes:

- an opinion submitted as part of constitutional review proceedings;
- a reply to an interpellation of a member of the Riigikogu;
- a reply to a written question of a member of the Riigikogu;
- a reply to a communication from a member, committee, group or the Board of the Riigikogu;
- a recommendation to the Riigikogu to prosecute a public office holder;
- an opinion addressed to the Riigikogu regarding the prosecution of a public office holder;
- institution of disciplinary proceedings against a judge;
- a decision not to institute disciplinary proceedings against a judge
- an agreement reached in conciliation proceedings;
- termination or suspension of conciliation proceedings due to inability to come to an agreement.

When a case that was opened is not investigated, the following outcomes are possible:

- a clarification of reasons for not investigating the case;
- referral to a competent agency;
- a reply stating that the information has been noted.

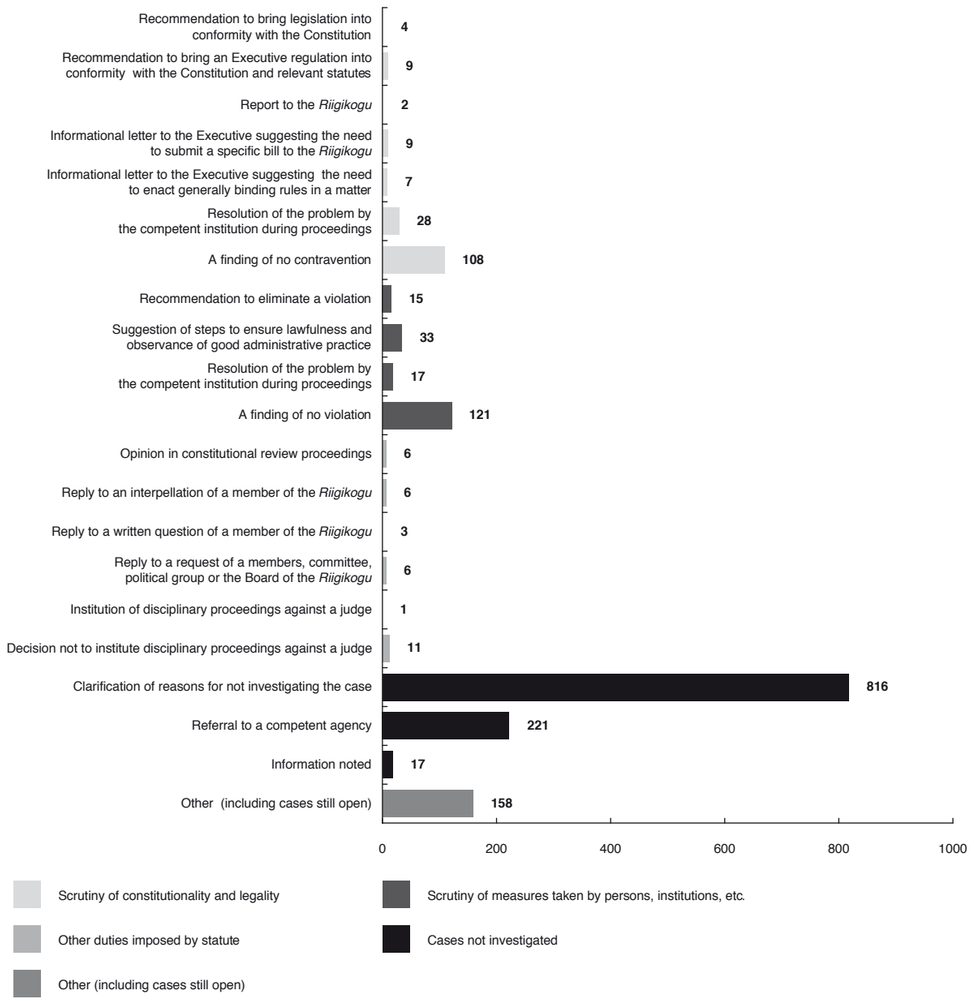

Figure 7. Outcomes of proceedings

2. Scrutiny of the legality and constitutionality of legislation, bylaws and other rules of similar nature

In 2006, 207 cases (compared to 247 in 2005) were opened to scrutinise the legality and constitutionality of legislation, bylaws and other rules of similar nature. 194 of those cases were opened on the basis of petitions submitted by individuals, and 13 on the Chancellor's own initiative. The scrutiny proceedings yielded the outcomes illustrated in Figure 10.

The scrutiny proceedings can be divided as follows:

- scrutiny of the constitutionality of statutes (129 cases: 120 on the basis of individuals' petitions and 9 on the Chancellor's own initiative);
- scrutiny of the constitutionality and legality of regulations of the Cabinet of Ministers (11 cases: 10 on the basis of individuals' petitions and 1 on the Chancellor's own initiative);

- scrutiny of the constitutionality and legality of Ministers' regulations (10 cases: 8 on the basis of individuals' petitions and 2 on the Chancellor's own initiative);
- scrutiny of the constitutionality and legality of regulations of local councils, or of the executive boards of those councils (45 cases: 5 on the basis of county governors' petitions, 39 on the basis of individuals' petitions and 1 on the Chancellor's own initiative);
- scrutiny of the legality of the internal rules established by a governing body of a public-law corporation (1 case opened on the basis of an individual's petition);
- scrutiny of the lawfulness of other legislation (11 cases opened on the basis of individuals' petitions).

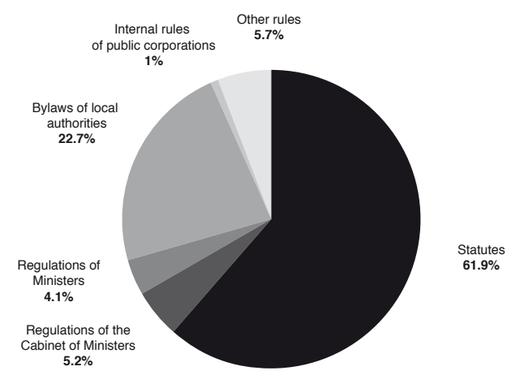

Figure 8. Distribution of cases opened on the basis of petitions requesting scrutiny of legislation, bylaws and other rules of similar nature

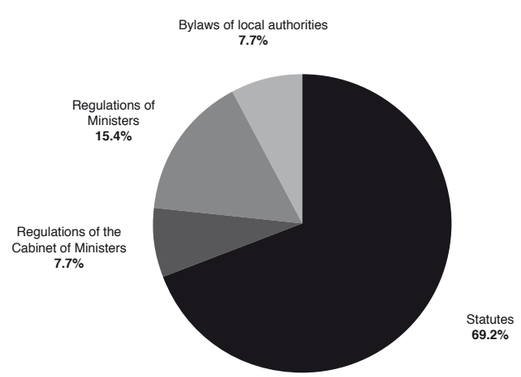

Figure 9. Distribution of cases opened by the Chancellor's own initiative to scrutinise legislation and bylaws

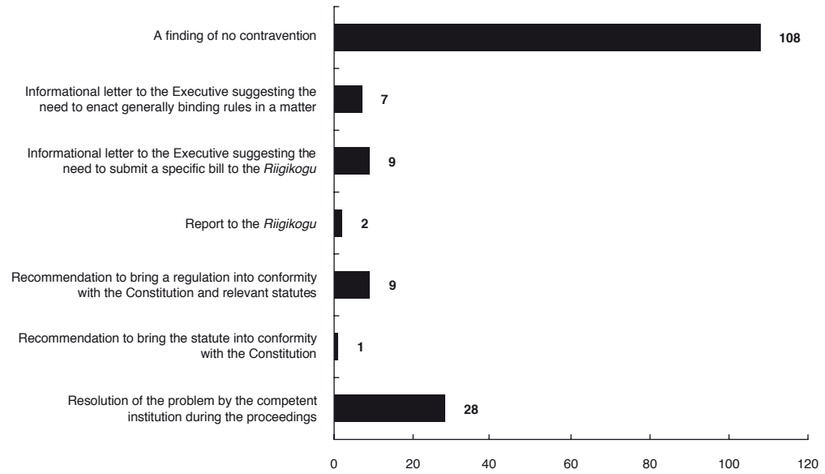

Figure 10. Outcomes of the scrutiny of legality and constitutionality of legislation

3. Scrutiny of the lawfulness of measures of institutions performing a public duty

In 2006, 258 cases (compared to 372 in 2005) were opened to scrutinise the legality of measures of the Government, local authorities, other public-law corporations or of private individuals, bodies or institutions performing a public duty. 236 of those cases were opened on the basis of petitions submitted by individuals and 22 on the Chancellor's own initiative. The scrutiny proceedings yielded the outcomes described in Figure 12.

The petitions submitted in relation to measures of the Ministry of Justice and the Ministry of Social Affairs provided the largest number of cases. Most of the complaints concerning the actions of various agencies subordinated to these, and other ministries arose from dissatisfaction with the measures of prisons and police authorities, and the Social Insurance Board. Most of the complaints submitted in relation to measures of various local government units concerned the actions of the executive boards of the councils of Tallinn and Tartu. Complaints were frequently submitted also in relation to measures taken by the local authorities in Harju County and Ida-Viru County.

The scrutiny of the lawfulness of measures of agencies or institutions performing a public duty can be divided as follows:

- scrutiny of the lawfulness of measures of central government agencies or institutions (196 cases: 179 on the basis of individuals' petitions and 17 on the Chancellor's own initiative);
- scrutiny of the lawfulness of measures of local government agencies or institutions (46 cases: 44 on the basis of individuals' petitions, two on the Chancellor's own initiative);
- scrutiny of the lawfulness of measures of the organs or institutions of a public-law corporation, or of the organs or institutions of a private-law corporation performing a public duty (16 cases: 13 on the basis of individuals' petitions and 3 on the Chancellor's own initiative).

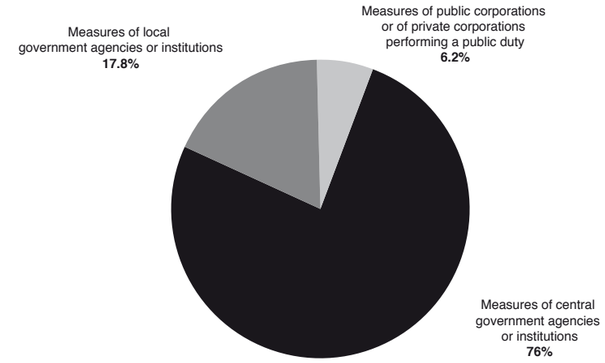

Figure 11. Distribution of cases opened to scrutinise measures of corporations, institutions and agencies

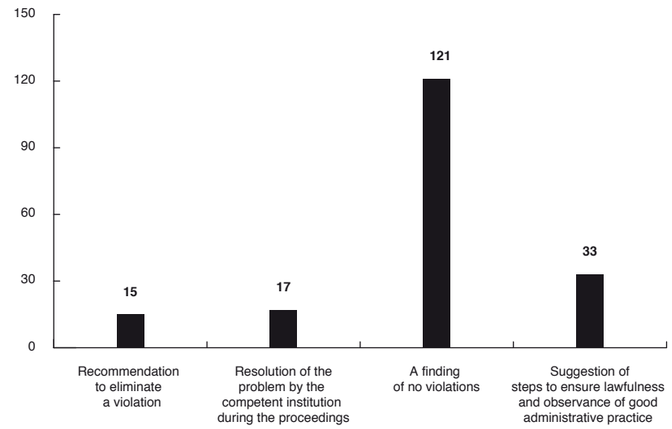

Figure 12. Outcomes of scrutiny proceedings in respect of the measures of corporations, institutions, and agencies

4. Cases not investigated

The Chancellor of Justice decided to forgo an investigation in 1043 cases, i.e. in 65.4% of the total number of cases opened. Compared to 2005, for which the corresponding figure was 58%, the number of petitions that the Chancellor considered unsuitable for investigation has increased.

The Chancellor's decision to forgo an investigation in a case opened was based on one or more of the following reasons:

- the petitioner had not exhausted his/her right to administrative appeals, or had some other legal remedy at his/her disposal (431 cases, or 27% of the total number of cases opened);
- the matter was beyond the Chancellor's jurisdiction (402 cases, including 45 requests for legal assistance from the Chancellor, or 25.2% of the total number of cases opened);
- judicial proceedings or mandatory extrajudicial proceedings were pending in the matter (79 cases, or 5% of the total number of cases opened);
- the petition was clearly unfounded (73 cases, or 4.6% of the total number of cases opened);
- the petition did not meet the requirements set out in the Chancellor of Justice Act (41 cases, including 3 anonymous and illegible petitions, or 2.6% of the total number of cases opened);

- the petition was submitted after more than one year had elapsed since the petitioner had become aware of the violation concerned (9 cases, or 0.6% of the total number of cases opened);
- administrative appeal proceedings or other optional extrajudicial proceedings were pending in the matter (8 cases, or 0.5% of the total number of cases opened).

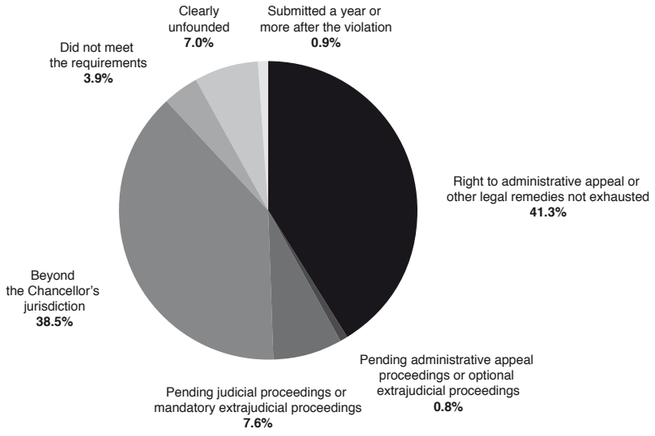

Figure 13. Reasons for not investigating

In the case of petitions that were not investigated, explanatory notes were provided to the petitioners regarding the limits of the jurisdiction of the Chancellor of Justice, and regarding the provisions of relevant statutes and other legislation. According to their tenor, these notes can be divided as follows:

- a clarification of the reasons for not investigating the case (816 cases);
- the petition was referred to another agency (221 cases);
- the information contained in the petition was noted by the Office of the Chancellor (17 cases).

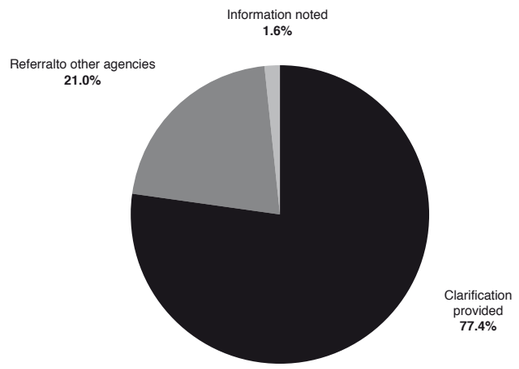

Figure 14. Replies to petitioners whose petitions were not investigated

5. The Chancellor's meetings with individuals

In 2006, 467 persons came to meet the Chancellor of Justice or officials of the Office of the Chancellor at the Chancellor's Office in Tallinn or during the visits performed by the Chancellor or the Chancellor's advisors in the counties (see also Figure 1). In addition to Tallinn, meetings with individuals took place in Tartu, Jõhvi, Narva and Pärnu. The Chancellor's advisors also met with individuals during their inspection visits to county administrations, to the executive boards of local government councils and other institutions. Information regarding the possibility of arranging a meeting was provided beforehand in the media.

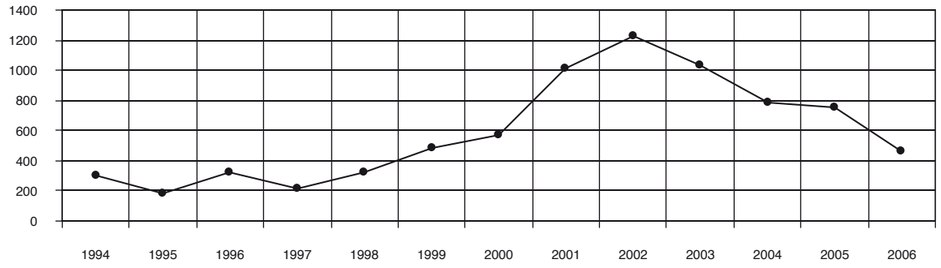

Figure 15. Meetings with individuals in 1994-2006

Most of the questions raised in the meetings concerned administrative law matters (including such topics as property reform, residence permits and citizenship), constitutional law and private law (private companies and civil procedure). Many meetings raised issues that concerned the police or other investigative agencies.

In most cases, individuals used the meetings to request legal advice and a clarification of the law. Some of the questions also gave rise to subsequent investigations, while others remained, for various reasons, beyond the limits of the Chancellor's jurisdiction (e.g., disputes between private persons that cannot be solved in conciliation proceedings). Where necessary, the Chancellor's advisor assisted the individual in drawing up a written petition.

6. Summary

In comparison with the figures for 2005, the number of petitions received by the Chancellor of Justice did not increase in 2006, and remains in the same range as in 2003 and 2005.

The proportion of complaints from sentenced prisoners against measures taken by prison administrations continues to remain significant (270 cases). This, however, should not be seen as an indication that a large number of violations are taking place in custodial institutions. The large number of complaints against prison administrations can be explained by the fact that sentenced prisoners are assiduous petitioners. In accordance with the principle of avoiding unnecessary duplication of oversight proceedings, the Chancellor generally suggests that petitioners start by recourse to more efficient legal remedies. However, where this is required by the nature of the case, or where a gross violation of the law has taken place, he will also proceed to investigate immediately.

In 2006, the Chancellor of Justice received numerous petitions, which according to the law he was unable to investigate (1043 cases). Compared to 2005, the proportion of such petitions has increased (65.4% of the total number of cases opened in 2006 and 58% of the total number of cases opened in 2005).

The issues brought to the Chancellor's attention most frequently concerned sentence enforcement procedure and imprisonment law, as well as social welfare and social law. As in previous years, numerous cases raised questions concerning property reform, healthcare law and pretrial criminal procedure.

The number of meetings with individuals, which had remained constant from 2004 to 2005 (753 and 751 meetings, respectively), dropped significantly in 2006 (467 meetings).

PART 4.

ACTIVITIES BY THE OFFICE OF THE CHANCELLOR OF JUSTICE

I THE OFFICE

The Office of the Chancellor of Justice (the Office) is an agency established to support the Chancellor of Justice, a constitutional authority. The Chancellor of Justice is Head of the Office. Funding for the work of the Office is provided from the national budget.

The Chancellor and the Office organise their work in accordance with the Chancellor's mission, vision and fundamental values. These emanate from the tasks imposed on the Chancellor and the Office by virtue of the Constitution and relevant statutes.

1. Structure and composition

In addition to the Chancellor of Justice, the staff of the Office comprises two Deputy and Advisors to the Chancellor, the Office has a Director and four departments. The departments include the Administrative Department and three specialised departments that divide their competences along the lines of the areas of government of the Ministries. Each departments is led by a Head of department who is also an advisor to the Chancellor.

The Chancellor of Justice directs the work of the Office according to the principles and pursuant to procedures laid down in the Constitution, the relevant statutes and the Constitutive Regulations of the Office.

The Deputy and Advisors to the Chancellor of Justice provide all-round advice to the Chancellor and act in his stead when the Chancellor is absent.

The Director of the Office is responsible for development of the agency and advises the Chancellor and the Office on strategic and management-related issues. He/she is responsible for the elaboration of the mission and the vision, as well as strategic plans of the Office, and for their implementation. The Director also monitors compliance with internal guidelines and regulations of the Office and supervises the preparation of the annual budget and the arrangement of public procurements.

The first department deals with matters that fall into the area of government of the Ministry of Social Affairs, the Ministry of Education and Research, the Ministry of Culture and into the sphere of competence of their subordinate agencies and other units.

The second department deals with matters falling into the area of government of the Ministry of Economic Affairs and Communications, the Ministry of Agriculture, the Ministry of Finance and the Ministry of Environmental Affairs, and into the sphere of competence of their subordinate agencies and other units. The department also deals with developments at the Bank of Estonia, the Financial Supervision Authority and the National Audit Office.

The third department deals with matters falling into the area of government of the Ministry of Internal Affairs, the Ministry of Defence, the Ministry of Foreign Affairs and the Ministry of Justice, and into the sphere of competence of their subordinate agencies and other units. The department also deals with developments in the sphere of competence of the Prime Minister, Ministers without Portfolio and the State Chancellery, and with matters concerning institution of disciplinary proceedings against judges, as well as any other matters that fall outside the responsibilities of the first and the second department.

The administrative department deals with arrangements concerning the administrative work of the Office, meetings of staff members with individuals, preparation of a draft budget, and monitoring and analysing the use of funds in the Office. The department is also responsible for arrangements concerning accountancy and economic analysis at the Office, for communication with other institutions and the public, for human resources and training matters, for clerical business, and for ensuring that proper organisational, eonomic and technical conditions are guaranteed for the work of the Office.

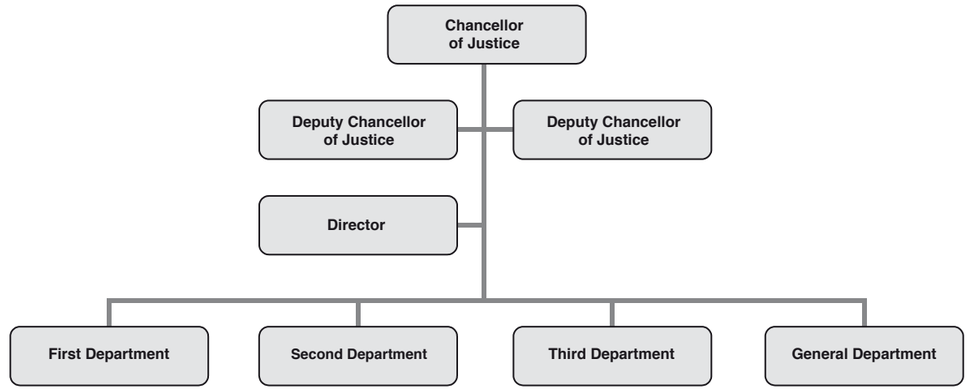

Figure 16. Outline of the structure of the Office of the Chancellor of Justice

2. The gender, age and educational composition of the staff

As of 31 December 2006, there were 48 staff positions in the Office, of which 41 were filled. Staff members included 25 women and 16 men. 27 of the filled positions belonged to the public service rank group of higher officials and 14 to the rank group of senior officials.

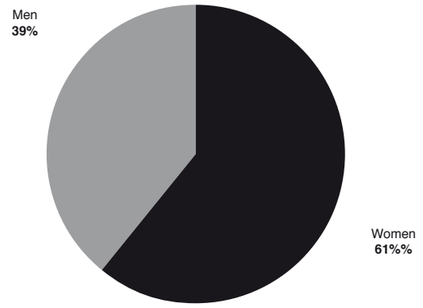

Figure 17. Gender composition of the staff of the Office as of 31 December 2006

Most of the staff belonged to the age group 21–30. The youngest employee was 21 years of age and the oldest 77 years of age. The average age of the Office's staff was 34 years.

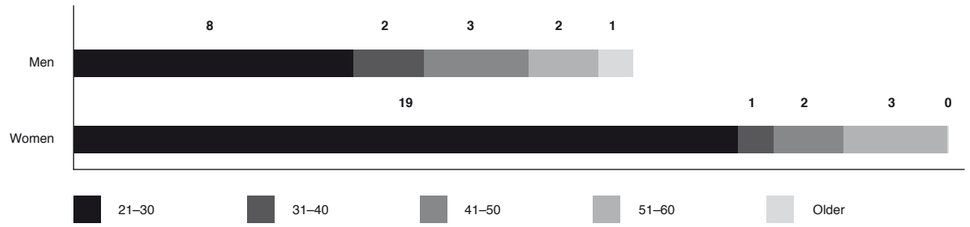

Figure 18. Age composition of the staff of the Office as of 31 December 2006

38 employees had a higher education, two had a vocational secondary education and one a secondary education. In 2006, 13 employees were pursuing a course of studies either at the Bachelor's, Master's or Doctoral level. Four employees held a PhD and six held a Master's degree.

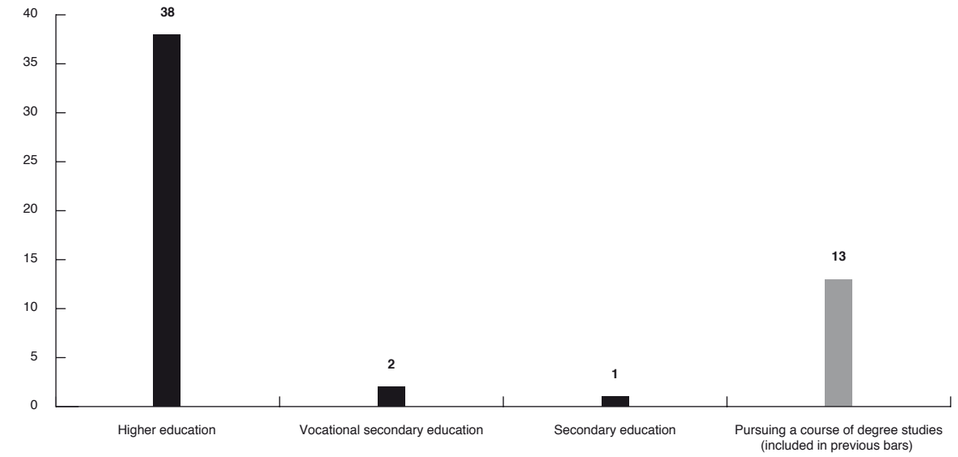

Figure 19. Education level of employees of the Office as of 31 December 2006

II ACADEMIC ACTIVITIES

1. Academic events

1.1. Public lecture of the Director of the Institute for Human Rights of Åbo Akademi University

Professor Martin Scheinin, Director of the Institute for Human Rights of Åbo Akademi University held a public lecture entitled "Global trends in the protection of human rights and the situation in Estonia: the observations of a critical friend" at the Office of the Chancellor of Justice on 3 March 2006.

Professor Scheinin's main research interests include domestic implementation of international human rights treaties, international monitoring mechanisms for human rights treaties, minority rights, human rights and the fight against terrorism, foundations of humanity, human rights and biotechnology. His research has yielded several widely acclaimed books, such as "International Human Rights Norms in the Nordic and Baltic Countries", "Welfare State and Constitutionalism: Nordic Perspectives" and "Comparative Jurisprudence of Human Rights Law".

Professor Scheinin is the United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism.

The public lecture was intended to promote a discussion of human rights among experts of the subject, and also in the Estonian society as a whole. The lecture also presented new developments rooted in the theory and practice of human rights.

1.2. Conference "Millions and milieu"

In cooperation with the German Foundation for International Legal Cooperation, on 12 May 2006 the Chancellor of Justice organised a conference entitled "Millions and milieu" on the planning and construction law. The purpose of the conference was to highlight important issues in the area, to spark a discussion and to examine the solutions proposed in hitherto practice, in order to bring about change in the legal rules and values governing the field.

The conference was divided into two thematic sections: planning law and construction law.
The first section, which was moderated by the Chancellor Allar Jõks, concentrated on the main characteristics of the planning law in Germany and Estonia, and on analysis of the nature and purpose of planning. The latter should be seen in the creation of a sustainable and balanced living environment that takes into account the needs of the largest possible number of members of the public, achieved by involving the public and giving stakeholders opportunity to defend their interests.

The second thematic section, moderated by Märt Rask, President of the Supreme Court of Estonia, focussed on the right to build and the limits imposed on building, on the requirements of preserving traditional historical settings and of considering the interests of the neighbours, on methods of construction supervision and the case law concerning removal of illegal buildings.

The conference was organised around eight presentations. The speakers from Germany included administrative court judges, renowned legal experts in their areas. The speakers from Estonia were Kaire Pikamäe (court of appeal judge), Indrek Koolmeister (Supreme Court judge), Nele Parrest and Arnika Kalbus (both advisors to the Chancellor of Justice). The Chancellor of Justice Allar Jõks delivered the opening speech of the conference. A welcoming address was pronounced by Jaan Õunapuu, Minister of Regional Affairs, and by Matthias Weckerling, Director of the German Foundation for International Legal Cooperation.

Among the participants of the conference were representatives of the Riigikogu, of the Cabinet of Ministers, of various ministries and courts, local government officials, planning and construction specialists and experts, legal scholars, international guests, etc.

1.3. Public lecture by the President of the European Court of Human Rights

Luzius Wildhaber, President of the European Court of Human Rights, delivered a public lecture entitled "Article 8 as a pivotal provision in the European Convention of Human Rights" at the Office of the Chancellor of Justice on 6 July 2006.

Article 8 of the European Convention of Human Rights provides a right to respect for one's private and family life, home and correspondence. The article protects the privacy of individuals. The case law of the European Court of Human Rights (ECHR) has linked the notion of privacy to the rights of foreign nationals, the protection of personal data, access to environment-related information, privacy at workplace, security of person and freedom of conscience. For example, the ECHR has construed protection of privacy so as to include the right to request information about toxic chemicals spreading from a chemical factory.

The concept of privacy as set out in Article 8 remains a dynamic notion.When the provisions of Article 8 were drafted, no one was able to predict the dangers inherent in information technology. In all likelihood, the question whether a same-sex partnership could amount to family life was also far from the minds of most people in 1950s. The threat of international terrorism in the context of globalisation has also shed some unexpected light on the gathering of personal data. The European Court of Human Rights has repeatedly emphasised that the concept of 'private life' cannot be exhaustively defined.

Paragraph 2 of Article 8 allows for restrictions that are necessary in a democratic society. It was also taken into consideration when Article 11 of the Constitution of the Republic of Estonia was drafted. According to that article, rights and freedoms may be limited only in accordance with the Constitution. Such limitations must be necessary in a democratic society and must not distort the nature of the rights and freedoms on which the limitations are imposed. Article 8 of the European Convention of Human Rights has played a pivotal role in the development of the ECHR's case law and Luzius Wildhaber has also tackled the matter in his research.

In addition to the above-mentioned issues, the case law of the European Court of Human Rights concerning Estonia was discussed.

Prof. Dr. Luzius Wildhaber has many academic titles, including Doctoral degrees from the University of Basle and from Yale Law School. After completing his university studies, Dr. Wildhaber lectured at the University of Basle and worked as Professor at the University of Fribourg, where he taught international law, constitutional law and administrative law. He has been granted honorary doctorates from the University of Prague, the University of Sofia, the University of Bratislava, Moldova University and the University of Bucharest, as well as from the Russian Academy of Sciences and from the Law University of Lithuania. President Wildhaber is a leading expert on the Swiss Constitution. He is an Associate of the International Law Institute and a former President of the Swiss Society of International Law. He has authored nine books and 200 articles. His career as a judge began in the Supreme Court of Liechtenstein in 1975. In 1991, he was elected Judge of the European Court of Human Rights and in 1998 he became President of that court.

2. Cooperation and Joint Projects

25 March 2006 marked the 120th birthday of Anton Palvadre, the first Chancellor of Justice in Estonia. The birthday of the eminent lawyer, Supreme Court judge and one of the main authors of the Estonian Constitution was celebrated by opening a Palvadre personal exhibition in the National

Library of Estonia on 24 March. Allar Jõks pronounced an opening speech at the exhibition, which was followed by a salutatory address from Professor Eerik-Juhan Truuväli, the first Chancellor of Justice of postwar Estonia. Lea Palvadre, daughter of Anton Palvadre, who has researched the history of Soviet repressions, provided the background information to the exhibition. The exhibition was organised as a joint effort by the National Library, Lea Palvadre and the Office of the Chancellor of Justice. It featured numerous documents and original items from the collections of the National Archives, the National Library and the Office of the Chancellor of Justice.

2.1. Round table discussions

The Chancellor of Justice organised a round table on preventive health check-ups entitled "Preventive health check-ups: healthy people, sustainable healthcare" held at the Office of the Chancellor of Justice on 7 June 2006. The purpose of the round table was to involve policymakers in a discussion on whether preventive health check-ups could provide a guarantee of the sustainability of the Estonian healthcare system and the preservation of the Estonian people. Participants of the round table included Mai Treial, Chair of the Social Affairs Committee of the Riigikogu; Paul-Eerik Rummo, Minister of Population and Ethnic Affairs; Peeter Laasik, Junior Minister at the Ministry of Social Affairs; Mihkel Oviir, the Auditor General; Üllar Kaljumäe, Director General of the Health Care Board; Peeter Mardna, Head of the Supervision Department of the Health Care Board; Hannes Danilov, Chairman of the Board of the Estonian Health Insurance Fund; Andres Kork, President of the Estonian Medical Association; Madis Tiik, Chairman of the Estonian Society of Family Physicians; Toomas Veidebaum, Acting Director of the National Institute for Health Development, and Andra Veidemann, Chair of the Foundation for National Unity. As a result of the round table discussion, in addition to the usual conclusions, the Chancellor of Justice also formulated a number of recommendations to improve the efficiency of preventive health check-ups. These were submitted to the Minister of Social Affairs.

The Chancellor of Justice also organised a round table on the topic "Nursery places – one for every child?", to draw attention to the lack of capacity in Estonia's nursery school system. The round table was held at the Office of the Chancellor of Justice on 8 November 2006. The purpose of the discussion was to map viable solutions to the problem by examining what local authorities and the Government should do to ensure free access to nursery places for every child, and how alternative childcare options could be expected alleviate the problem. The round table was attended by the following members of the Riigikogu: Olav Aarna, Mai Treial, Maret Maripuu and Ülle Rajasalu. In addition to them, the list of participants included Paul-Eerik Rummo, Minister of Population and Ethnic Affairs and Erika Vahtramäe, employee of the Office of the Minister of Population and Ethnic Affairs; Janar Holm, Deputy Secretary-General of the Ministry of Education and Research; Tarmo Kurves, Advisor in the Department of Social Welfare of the Ministry of Social Affairs; Jüri Võigemast and Ille Allsaar from the Association of Estonian Cities; representatives of the Association of Estonian Municipalities and the Association of Harju County Municipalities, representatives from the Estonian Association of Nursery School Workers, the Association of Estonia's Private Nurseries and the Estonian Association of Childcarers, representatives from the Estonian Union for Child Welfare and the Association of Estonia's Parents, representatives of the National Confederation of Employers and the National Confederation of Employees' Unions, etc. For the first time, all concerned parties were invited to share a table and discuss the lack of nursery places and related problems before a diverse audience. The Chancellor of Justice drew up a report on the results of the round table and made relevant recommendations and suggestions to the Minister of Education and Research, the Minister of Social Affairs, the Minister of Population and Ethnic Affairs, and to local authorities.

2.2. Cooperation seminars with ombudsmen

Allar Jõks hosted a cooperation meeting with the Chancellor of Justice of Sweden and the Chancellor of Justice of Finland. The meeting was held at the Office of the Chancellor of Justice on 18–19 May

2006. Discussions in the meeting focussed on the role of Chancellors of Justice in the scrutiny of the legality of measures of courts and of local authorities. The Nordic countries were represented by Göran Lamberz, the Swedish Chancellor of Justice, and Paavo Nikula, the Finnish Chancellor of Justice.

On 24–25 August 2006, a cooperation seminar with the participation of the ombudsman of the Parliament of Finland and of the Estonian Chancellor of Justice was held at the Office of the Chancellor. The seminar concentrated on problems related to environmental law and the scrutiny of measures of local authorities. The Finnish delegation included Deputy Ombudsmen Petri Jääskeläinen, Jukka Lindstedt, as well as a number of legal counsel and the Secretary-General of the Office of the Ombudsman.

III INTERNATIONAL RELATIONS

1. Visits abroad

19–21 Jan	Madis Ernits, Deputy and Advisor to the Chancellor, met with representatives of the German Foundation for International Legal Cooperation in Bonn to discuss the preparation of and arrangements for cooperation projects in 2006.
20–23 Jan	The Chancellor of Justice Allar Jõks participated as an expert in a seminar held in Amman on the creation of legal foundations for a statute establishing in Jordania the institution of *ombudsman*.
29 Jan–10 Feb	Eight Advisors and Junior Advisors to the Chancellor participated in a study trip that took place as part of a cooperation project of the Nordic Council of Ministers. The purpose of the trip was to learn about the work of the Office of the Chancellor of Justice of Sweden and of those of the ombudsmen of the Danish and Swedish parliaments.
1–3 Feb	Kristi Kass, Personal Assistant to the Chancellor of Justice, participated in a study trip to Brussels to learn about the public relations work and public relations management in various EU institutions.
7–9 Feb	Kristiina Albi, Advisor to the Chancellor of Justice, and Marit Olesk, Personal Assistant to the Head of the Administrative Department, participated in the annual meeting of Equinet, the European Network of Equality Bodies in Brussels.
15–18 Feb	Kristiina Albi, Advisor to the Chancellor of Justice, participated in a seminar on conciliation proceedings in Strasbourg.
5–9 March	Mari Amos, Advisor to the Chancellor of Justice, participated in an international seminar held in Edinburgh on ensuring the protection of fundamental rights of individuals with mental disabilities.
7–9 March	Eve Liblik, Head of the first department, participated in a meeting organised in Brussels of the European Commission's working group on fundamental rights, discrimination and equal opportunities.
23–26 Apr	The Chancellor of Justice Allar Jõks participated in a round table held in Vienna on the theme "Human rights commissioners and ombudsmen in Latin America and Europe".
27–28 Apr	The Chancellor of Justice Allar Jõks participated in a seminar organised in Riga by the Latvian Centre for Human Rights on the topic "Independent detention monitoring in custodial institutions".
7–10 May	Eve Liblik, Head of the first department, participated in the anti-discrimination conference titled "The fight against discrimination in practice" in Trier.
18–20 May	Ave Henberg, Advisor to the Chancellor of Justice, participated in the first annual conference of the European Labour Law Network in Leiden.
22 May	Eve Liblik, Head of the first department, participated in a conference of experts entitled "Closing the gender pay gap".
29 May–2 Jun	Kalle Kirss, Junior Advisor to the Chancellor of Justice, participated in the conference entitled "Biological diversity is life", organised as part of the Green Week 2006 in Brussels.
17–20 Jun	Kertti Pilvik, Head of the Administrative Department, participated in a cooperation seminar held in Strasbourg for contact persons of the European Ombudsman.
22–23 May	Madis Ernits, Deputy and Advisor to the Chancellor of Justice, participated in the seminar titled "EU–China human rights dialogue" in Vienna.
10–14 Jun	Allar Jõks, Chancellor of Justice, and Mihkel Allik, Senior Advisor to the Chancellor, participated in a meeting of European ombudsmen and the General Assembly of the International Ombudsman Institute in Vienna.
11–14 Jun	Kärt Muller and Ave Henberg, Advisors to the Chancellor of Justice, participated in a training event entitled "Practical implementation of anti-discrimination and equal treatment legislation" in Budapest.

6–8 Jul	Eve Liblik, Head of the first department, participated in a regular meeting of the European Commission's Advisory Committee on equal opportunities for women and men in Brussels.
9–14 Jul	Kärt Muller, Advisor to the Chancellor of Justice, participated in the second World Forum on Human Rights in Nantes.
4–06 Aug	Madis Ernits, Deputy and Advisor to the Chancellor of Justice, participated in a lawyers' summer school "Academia Philosophia Iuris" in Leipzig.
19–22 Sep	Madis Ernits, Deputy and Advisor to the Chancellor of Justice, attended the 66th German Lawyers' Day in Stuttgart.
28 Sep–1 Oct	The Chancellor of Justice Allar Jõks participated in the conference entitled "Ombudswork for children" in Athens.
11–13 Oct	Eve Liblik, Head of the first department, participated in the working group of the Open Days 2006 conference as a representative of the European Commission's Advisory Committee on equal opportunities for women and men and also participated in the 29th regular meeting of that committee in Brussels.
13–18 Oct	The Chancellor of Justice Allar Jõks participated in a conference entitled "Ombudsmanship in Italy and Europe" in Florence and met with high-ranking legal officials.
16–18 Nov	The Chancellor of Justice Allar Jõks participated in an international conference of institutions promoting equal rights, held in Vilnius.
21–22 Nov	Evelyn Tohvri, Advisor to the Chancellor of Justice, participated in the conference entitled "Borders of the European Union – open or closed? Child sexual exploitation, trafficking and the internet" in Helsinki.
24–26 Nov	Allar Jõks, Chancellor of Justice, and Mari Amos, Advisor to the Chancellor, participated in the INSPECT! conference held in Budapest on monitoring the protection of human rights in mental health institutions in the EU.
26–28 Nov	Eve Liblik, Head of the first department, participated in a conference titled "Anti-discrimination action programme: results, achievements and future needs" in Brussels.
3–5 Dec	Allar Jõks, Chancellor of Justice, together with Alo Heinsalu, Director of the Office of the Chancellor, Mihkel Allik, Senior Advisor, Andres Aru, Eve Marima and Jaana Padrik, Advisors, and Kaidi Kaidme, Personal Assistant, participated in a conference titled "The role of the ombudsman institution in the modern world" in Riga.
12–14 Dec	Madis Ernits, Deputy and Advisor to the Chancellor of Justice, met with representatives of the German Foundation for International Legal Cooperation in Bonn to discuss preparations of and arrangements for cooperation projects in 2007.

2. Visits of international guests to the Office of the Chancellor of Justice

18–19 Apr	Göran Lamberz, Chancellor of Justice of Sweden and Paavo Nikula, Chancellor of Justice of Finland.
14 Feb	Delegation of Macedonian civil servants.
08 Mar	Professor Martin Scheinin, Director of the Institute for Human Rights of Åbo Akademi University.
3–5 May	Delegation of the Latvian National Human Rights Office.
12 May	Matthias Weckerling, Director of the German Foundation for International Legal Cooperation, Professor Dr Wolfgang Ewer, Eckart Hien, President of the German Federal Administrative Court, Dr Matthias Keller, President of Administrative Law Chamber of the German Federal Administrative Court, Professor dr Ulrich Ramsauer, President of Administrative Law Chamber of the German Federal Administrative Court.
2 Jun	6-member delegation of the Constitutional and Legal Affairs Committee of the Georgian Parliament.

13 Jun	Delegation of the Legal Affairs Committee of the German *Bundestag*.
14 Jun	Delegation of the Petition Committee of the German *Bundestag*.
6 Jul	Luzius Wildhaber, President of the European Court of Human Rights.
24–25 Aug	Delegation of the Office of the Finnish ombudsman.
11 Oct	Tapio Susi, judge of the National Discrimination Tribunal of Finland.
27 Oct	Diana Würtenberg and Jürg Würtenberg from the Swiss Baltic Chamber of Commerce.
29 Nov	Delegation of the Office of the Commissioner of Human Rights of the Council of Europe.
4–6 Dec	Klaus-Dieter Haase, Dr Rita Zimmermann-Rhode and Peter Paul Aengenvoort, judges of the Administrative Court of Cologne.
13–15 Dec	Delegation of the Office of the Danish ombudsman.

3. Participation in the work of EU institutions and international organisations

3.1. European Ombudsman

In 2006, the Chancellor of Justice continued to have good cooperation relations with the European Ombudsman, who is authorised to investigate complaints about maladministration in the institutions and bodies of the European Union, including the European Commission, the Council of the European Union and the European Parliament. The Ombudsman is also empowered to investigate the activities of all other EU institutions, e.g. the European Environment Agency and the European Agency for Safety and Health at Work, with the exception of the Court of Justice and the Court of First Instance, when these institutions act in their judicial role.

In addition to the duties described above, the European Ombudsman has also contibuted significantly to fostering cooperation between the ombudsmen of the EU member states. To facilitate communication, an information network and an intraweb has been established for the contact persons of ombudsmen. The Chancellor of Justice has actively participated in the activities of the network through his contact persons and contributed to the European Ombudsmen Newsletter, which is published by the European Ombudsman's Office.

3.2. European Commission's Advisory Committee on equal opportunities for women and men

In 2006, the Chancellor of Justice continued to participate in the European Commission's Advisory Committee on equal opportunities for women and men as a full member. The Chancellor of Justice is represented in the Committee by Eve Liblik, the Head of the first department and Advisor to the Chancellor. Ms. Liblik has been the President of the Committee since 2005. The Committee has two regular meetings per year, both of which are held in Brussels.

3.3. International cooperation network Equinet

In December 2004, the Office of the Chancellor of Justice joined the Equinet (also called the EuroNEB), the European Network of Equality Bodies, created as part of the EU's anti-discrimation framework programme. 25 organisations from 20 member states of the EU participate in the programme. The main purposes of the network are to improve communication between equality bodies, to support cooperation between respective institutions in the member states and the European Union, and to harmonise the practice of interpretation and implementation of EU law in across member states. Cooperation in the network takes place in the form of annual meetings, working groups, training sessions and by means of electronic communication systems.

3.4. International Ombudsman Institute

The International Ombudsman Institute (IOI) was created in 1978 as an international non-profit organisation that connects ombudsmen worldwide. The IOI aims to promote ombudsmanship all over the world, to facilitate the training of ombudsmen and communication between them, and to encourage academic activity at the Offices of ombudsmen. The IOI connects the ombudsman institutions of many countries representing all continents. The Chancellor of Justice of Estonia has been full member of the IOI since 2001.

3.5. German Foundation for International Legal Cooperation

The beginnings of the cooperation between the Chancellor of Justice and the German Foundation for International Legal Cooperation go back to 2003. Support from the Foundation has made it possible for the Chancellor to organise a number of academic conferences. Thanks to assistance from the Foundation, many training seminars and several study trips have also taken place, and a number of legal expert assessments have been carried out.

3.6. Council of the Baltic Sea States

The Council of the Baltic Sea States was founded in March 1992. Its members include Denmark, Germany, Finland, Sweden, Norway, Estonia, Latvia, Lithuania, Poland, Russia and Iceland. The purpose of the Council is to improve and strengthen cooperation between the Baltic Sea countries. The ombudsmen of Baltic Sea countries have primarily cooperated to ensure non-military security. Cooperation seminars have been held for the ombudsmen of the Baltic Sea countries, the last of which took place in Warsaw in 2004 and in Tallinn in 2003.

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on persons' reception	maternity leave

RECEPTION TIMES

The Chancellor of Justice or the Deputy Chancellor of Justice receives persons on Wednesdays at 9.00-11.00.

The Adviser to the Chancellor of Justice receives persons on Tuesdays at 9.00-11.00 and 14.00-17.00, and Wednesdays at 14.00-17.00.

RECEPTION OF PERSONS IN REGIONS

The Adviser to the Chancellor of Justice receives persons at the following places:

Pärnu County Government
Akadeemia 2, 80088 Pärnu
Every other month on the third Thursday of the month at 10.00-17.00.

Tartu Courts House
Kalevi 1, 50050 Tartu
Every other month on the third Thursday of the month at 10.00-17.00.

Narva City Government
Peetri Square 5-316, 20308 Narva
Every month on the first Monday at 10.00–13.00

Ida-Viru County Government
Keskväljaku 1, 41594 Jõhvi
Every month on the first Monday at 14.00–17.00

Registration to the reception by telephone +372 693 8404.