CHANCELLOR OF JUSTICE

THE ANNUAL REPORT 2003–2004 of the Chancellor of Justice of Estonia

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TO THE RIIGIKOGU

In accordance with § 4 of the Chancellor of Justice Act I will present an overview of the work in the main fields of activity of the Chancellor of Justice.

The overview covers activities from 1 September 2003 until 31 May 2004, which were aimed at reviewing the legislative acts for conformity with the Constitution and the laws, and the tasks that the Chancellor of Justice carried out between 1 January and 31 December 2003 in order to ascertain whether state agencies guarantee the protection of fundamental rights and freedoms of people. The overview contains generalisations as well as summaries of the most important cases and proposals for improving the protection of fundamental rights and freedoms and raising the quality of law-making. The readers of the overview will be able to acquainted themselves with the forms and methods of work of the Chancellor of Justice and with the organisation of work in the Chancellor's Office.

It is important to emphasise that in connection with the entry into force of the Amendment Act of the Chancellor of Justice Act on 1 January 2004 the functions of the Chancellor of Justice were significantly expanded. Now the law allows everyone to submit an application to the Chancellor of Justice for reviewing the activities of all the agencies and persons who perform public functions for compliance with the laws and for observance of the principles of good governance. The previous version of the law only provided for such review in connection with the activities of state agencies in ensuring fundamental rights and freedoms. The amendment gives the Chancellor of Justice the right to settle disputes of discrimination between private persons and provides for new tasks for promoting equality and the principle of equal treatment.

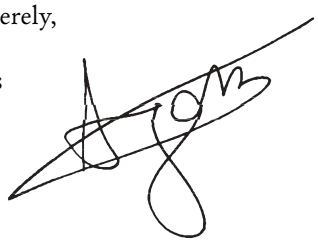
According to the Constitution, the Chancellor of Justice is an independent constitutional institution. Such a status enables him to assess problems objectively and to protect people effectively from arbitrary measures of the state authority. One tool for fulfilling this task is the possibility of the Chancellor of Justice to submit to the Riigikogu his conclusions and considerations regarding the shortcomings in legislation in order to ensure to the maximum extent the protection of everyone's fundamental rights and freedoms. The activities of the Chancellor of Justice can only be effective if he has the trust and support of the parliament as he has had so far.

Although paying attention to all applications submitted to the Chancellor of Justice, I have, however, tried to examine more closely some of the issues which are essential from the point of view of the development of society. In recent years, these have been the issues of accessibility and quality of education, health care services and legal assistance. Particular attention during the review period was given to the problems of school violence and ensuring the rights of persons without parental care, people with low income and people with disabilities. I do not aim to solve the problems myself because I do not have legal remedies at my disposal to do this. I have, instead, tried to formulate the problems clearly so that the parliament and the executive agencies could prepare and implement appropriate and effective measures.

When presenting this overview, I hope that the ideas contained in it will enable the Riigikogu to make assessments of principle with regard to the results of solving individual cases as well as the situation of guaranteeing fundamental constitutional principles and fundamental rights of people.

Yours sincerely,

Allar Jõks



Tallinn 20 September 2004

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PRESENTATION BY THE CHANCELLOR OF JUSTICE ON 30 SEPTEMBER 2004 IN THE RIIGIKOGU ON THE ACTIVITIES OF THE PREVIOUS YEAR

Honourable Speaker, Members of the Riigikogu,

About a week ago you received an annual overview of the activities of the Chancellor of Justice which contains 212 pages and is the most extensive of all the reports so far. The number of applications submitted to me has grown year by year. In 2003, the Office of the Chancellor of Justice received 1966 applications which were all motivated by people's concerns. This is a sign that the relationship between the citizen and the state in Estonia does not function the way it should.

One of the objectives of the Chancellor of Justice is to contribute with his activities to the creation of the sense of social confidence, increasing the trust between the state and the citizen, ensuring justice in society and strengthening democracy.

Today I have to observe with sadness the recent trend in exercise of the state authority to govern the state through commands and prohibitions, through harshening of penalties and restriction of fundamental freedoms, through strict and categorical measures. All this does not contribute to legal certainty, social sense of security and trust and love towards one's country. In fact, a trustful dialogue between the state and the citizen is created the opposite way – people feel secure when society is functioning naturally and there is no reason to impose excessive restrictions and orders.

According to the Constitution, the state can only restrict people's fundamental rights if the intended measures are proportional to the aim sought and other measures do not effective enough to achieve the same objective. In order to ensure that these preconditions are met, problems and possible solutions have to be carefully considered. In Estonia, however, explanatory memorandums to legislation contain the analysis of legal, economic and social impacts and instead of weighing different solutions they often just contain transcription of the texts of laws with paragraph marks being omitted. Public life is often organised in a formal and arbitrary manner.

Although the Constitution has been in effect for thirteen years and many problems of legislative drafting have been solved in this time, the issue of inadmissibility of retroactive force of laws is still a problem for the Riigikogu, the ministries and the local government. The need to establish laws retroactively, however, is always a result of the failure to do one's work in due time.

According to the Constitution, the law enters into force on the tenth day after the publication in the *State Gazette*, unless it is otherwise provided in the law itself, and only laws which have been published have obligatory force. Thus, the enforcement of legislation retroactively should be avoided unless there is an extremely compelling reason for it. It is particularly important to observe this rule in the field of penal law and with regard to the norms which restrict people's rights or impose duties on them.

It is equally important to ensure that the time period between the adoption of new regulations and their enforcement is sufficiently long, so that people can bring their activities and legal relations into compliance with the new regulation.

To illustrate this I can bring some examples from the practice of the recent months.

On 28 June this year the Riigikogu passed the Amendment Act of the Weapons Act which entered into force on 25 June 2004, i.e. even before the Riigikogu passed the law. The enforcement of the law retroactively was due to the Supreme Court decision of 25 February which declared part of the regulation of the Weapons Act void as of 25 June. I can only ask why the Ministry of Internal Affairs in cooperation with the Riigikogu legal committee could

not ensure that the law would have been amended during the four-month period given by the Supreme Court.

Another example is even more striking and shows that playing with the date of enforcement of legislation can also entail serious financial consequences for the legislator. On the basis of an application I analysed the justification for a swift enforcement of the prohibition of night sale of alcohol imposed by Tallinn City Council. The city council passed the regulation on 30 June 2004 and it entered into force on 7 July. The regulation substantially restricts the entrepreneurial freedom of businesses. With the enforcement of the ban, undertakings incurred extensive additional expenses in connection with changing the work regime, terminating prematurely labour contracts and arranging security service for their shops. I am of the opinion that the city council deprived undertakings, which were previously selling alcohol 24 hours a day, of a reasonable time for reorganising their work and therefore violated the principle of legal certainty. Today, the association of owners of alcohol shops in Tallinn intends to sue the city and to demand the compensation of 700 000 kroons of damage.

In the previous overview of the activities of the Chancellor of Justice I focused on areas to which the legislator should pay more attention. Looking at the developments that have taken place during the past year, we can witness progress with regard to the protection of the rights of children, guaranteeing legal assistance and supervision over surveillance activities. However, in connection with the accession to the European Union and problems of political parties and election law there are also areas where we can talk of a standstill or even regression.

But let us first take a look at positive developments.

The protection of the rights of child continues to be one of the priorities for the Chancellor of Justice. Last year I received 50 applications which involved issues relating to the right of the child to education, safety of the school environment, access to kindergarten places and issues of the mental well-being of children. Together with my advisors I also went to inspection visits to special schools in Tapa, Kaagvere and Puiatu. Although there were still many concerns, today I am happy to note that the state pays increasing attention to the protection of the rights of child. Also a discussion held in the Riigikogu in January about the situation of children and the protection of the rights of child is a sign of appreciation of a caring and safe school environment and awareness of school violence as a problem.

Another area about which I can for the first time talk positively to the Riigikogu is the availability of legal assistance. On 28 June the Riigikogu passed the Legal Assistance Act that will enter into force in March 2005. The aim of the Act is to ensure timely and sufficient availability of a competent and reliable legal service for all persons. I would like to point out that a draft of Reply to Memorandums and Requests for Explanations Act is waiting adoption in the Riigikogu. The Act would impose an obligation on state and local government agencies to give explanations free of charge about the legislation forming the basis of their work, about legislative activities and the content of pertinent legislative acts. To ensure access to legal assistance, it is important that the draft is passed soon.

The third area where progress can be witnessed in the last year is the criminal proceedings and the protection of fundamental rights that can be restricted in surveillance activities. The Constitution allows to restrict the inviolability of private and family life and the confidentiality of messages. But only if the surveillance agencies, before restricting these fundamental rights of persons, are convinced that it is impossible to achieve the aimed results with other measures that have a less restrictive impact on people's rights. In the case of intensive restrictions and restrictions made for the protection of state secrets – such as secret surveillance, phone logs or wiretapping of telephones – it is particularly important to ensure effective supervision of the Riigikogu and executive authority over surveillance agencies.

As a result of the long-time work of the Ministry of Justice, Ministry of Internal Affairs and the Riigikogu, the new Code of Criminal Procedure entered into force on 1 January this year. According to the new Code, surveillance operations for collecting evidence can only be used with the permission of a preliminary investigation judge or a prosecutor. As concerns detection and prevention of crime, the supervision of the courts and the prosecutor's office over surveillance activities should guarantee a stronger protection of fundamental rights of people.

However, in connection with the increased threat of terrorism in recent years, there is also a need to restrict fundamental rights of completely law-abiding people with the aim of guaranteeing the security of the state. I see this as a point for reflection. The basis for such restrictions is the Security Authorities Act, according to which supervision over security authorities and the guaranteeing of fundamental rights is carried out by the Riigikogu select committee. In a modern democratic world intertwined with security risks, parliamentary control should definitely be strengthened in order to guarantee the reliability of security information and the balance between the state's security needs and fundamental rights of persons.

Now a few words about areas where the developments have been more modest.

When analysing and comparing the financing schemes and control methods which are possible under today's Political Parties Act I have come to the conclusion that unfortunately there has been no significant breakthrough towards the desired goals. For example, under the previous regulation making of cash donations was limited but now such donations can be made in unlimited amounts, which probably tempts the not so well-off municipal officials to bring their savings to the party coffers also in the future.

From the point of view of the Constitution, it is important to note that the current regulation under the Political Parties Act, which limits both the right of undertakings to dispose of their assets in a way suitable for them as well as the political parties' fundamental right to look for sources of financing, in reality fails to fulfil its objectives due to weak control mechanisms and gaps in regulations. It is contrary to the Constitution to impose restrictions of fundamental rights without sufficient measures to supervise their implementation.

Political parties law is also closely linked to the issues of the right to vote. For half a year the Riigikogu has been processing the draft for the amendment of the Riigikogu Election Act initiated by the Government of the Republic. The draft will eliminate the system of national compensation of mandates and will bring the modified d'Hondt distribution method to the electoral district level.

I believe that the changes proposed in the draft are contrary to the Constitution because they infringe the principles of proportionality, uniformity and democracy arising from the Constitution.

I am of the opinion that there are no constitutional justifications in favour of the new system and the aims sought by the draft can also be achieved through measures which comply with the principles enshrined in the Constitution. For example, the application of a more proportional method than the modified d'Hondt method or the distribution of compensation mandates on the basis of open lists.

But before the elections of the Riigikogu, the local government council elections will take place in October 2005. I can clearly remember the hot summer of 2002 which peaked with the decision of the Supreme Court to declare the abolition of election coalitions in local government elections unconstitutional. Then the Riigikogu decided to allow election coalitions in the elections of 2002. However, as of 1 January 2005, i.e. in the next elections, election coalitions of citizens are again prohibited according to the Local Government Councils Election Act.

I am still of the opinion that the prohibition of election coalitions on the level of local government disproportionately restricts the right of active people who do not wish to join a national political party to have a say in deciding issues at local level.

I admit that the prohibition of election coalitions could be considered constitutional if the law would allow to establish political parties on local level. Although the Constitution gives citizens the right to belong to political parties, the Riigikogu has so far not legalised the possibility of establishing local political parties. Therefore, to ensure constitutionality of next local government council elections, before 1 January 2005 the Riigikogu should legalise the right to establish local political parties or election coalitions. Otherwise there will be a possibility of new constitutional court disputes over the election law – the Constitutional Review Court Procedure Act allows such disputes on the initiative of the Chancellor of Justice, courts or citizens themselves.

Next I would like to explore a point which literally cannot be overlooked any longer. The Office of the Chancellor of Justice is regularly receiving complaints in connection with subsistence benefits. I would first like to emphasise that subsistence benefits are not a generous gift of the Riigikogu, the Government or the Ministry of Social Affairs to the Estonian people; on the contrary, this is an obligation imposed on the state by the Constitution, according to which Estonian citizens have a constitutional right to state assistance in the case of need. According to the Constitution, Estonia is a social and democratic country governed by rule of law where people have to be guaranteed minimum human dignity. The Supreme Court has interpreted this principle as the duty of the state to guarantee the satisfaction of primary needs of destitute people.

Since 1 November 1997, the amount of the subsistence benefit has been 500 kroons a month. At the same time, for example in 2003 the cost of the minimum food basket per person was 657 kroons per month and the estimated minimum subsistence level was 1411 kroons a month. The improvement of economic possibilities and the general rise in the cost of living is also clearly testified by the fact that since 1998 the Estonian state budget has increased more than twofold.

In February this year I made a presentation to the Riigikogu where I pointed out that the current level of the minimum subsistence benefit of 500 kroons a month is clearly insufficient to cover the basic needs of a person and to ensure dignified life, and therefore it is not in conformity with the Constitution. Today we know that the draft budget for 2005 submitted by the Government provides for the increase of the level to 750 kroons, which is definitely a step forward. However, in my presentation, in addition to the size of the subsistence benefit, I also raised the following issues. Who can say what is the amount of money that guarantees the satisfaction of the basic needs of a person living in Estonia, what is the formula to calculate that amount and what are the basic needs of a person in 2005? I cannot answer these questions. Obviously without answering these questions no one can sincerely claim that 750 kroons is a sufficient amount that covers the minimum needs of a person required by the Constitution.

First we should precisely determine the basic needs of people and establish the procedure for the calculation of the level of subsistence benefit on the basis of the methodology for the calculation of the poverty line. In correlation with the increasing cost of living, the rate of the subsistence benefit should be reviewed annually. It is equally important to create necessary conditions so that the assistance allocated by the state would reach all people who are in need. If the Riigikogu in cooperation with the Ministry of Social Affairs would decide these issues today and would establish the relevant methodology, it would no longer be necessary to ponder whether 500 or 750 kroons is too little or too much. I am of the opinion that fundamental social rights are most related to a person's daily life and therefore they are also most sensitive and the substance of these rights cannot be an object of political guess-work.

In November this year ten years passes from the decision of the Supreme Court which declared as unconstitutional the provision of law that allowed members of the Riigikogu to belong to administrative boards of public undertakings. The Supreme Court found that this violated the constitutional principle of the separation of powers and the article of the Constitution according to which member of the Riigikogu may not hold any other public office.

Regardless of this, as a result of the proceedings initiated by the State Audit Office and carried out by the Office of the Chancellor of Justice in spring it appeared that as many as one fifth of the members of the tenth composition of the Riigikogu have been at the same time appointed by the Ministers of the Government to serve as members of different public undertakings. They implement the state's economic policies by observing the guidelines given by the ministers, and they also report to ministers about their activities and accept the remuneration established by ministers.

On the basis of the analysis I concluded that combining different offices in such a way results in a direct contradiction with the Constitution and violates significantly one of the basic principles of a democratic state enshrined in the Constitution – i.e. the principle of the separation and balance of powers. There is also no law that allows members of the Riigikogu to serve on boards of public undertakings as being appointed by the ministers. The situation where a large number of members of the Riigikogu violate openly the Constitution and their oath of office is scandalous, to say the least.

The proposed solution to this unconstitutional situation, according to which the Riigikogu itself would appoint the members of the Riigikogu as members of supervisory boards of companies, is insufficient and does not ensure compliance with the Constitution. Such a solution would transfer to the level of state powers and institutions the controversy and conflict of interest that so far existed only on the level of persons – a member of the Riigikogu whose duty it is to exercise parliamentary scrutiny over the executive power is at the same time under the supervision of the minister as a member of the supervisory board and himself or herself exercises administrative functions of the state. According to the Constitution, the state's economic policy is implemented by the executive power and the partial delegation of these functions to the members of the legislative body is not allowed.

If the aim of the Riigikogu is to increase parliamentary control over the activities of companies, a separate form of parliamentary control should be established which would not have the characteristics of holding another office in the meaning of the Constitution.

As according to the Constitution powers of a member of the Riigikogu expire upon accepting a different public office, I have so far waited for the statesmanlike step of the deputies who are also members of supervisory boards of companies to start following the principles of the Constitution and either resign from the supervisory board or from the position of the member of the Riigikogu. With regard to the members of the Riigikogu who do not wish to take that decision, the Constitutional Review Court Procedure Act provides for relevant proceedings. According to the Act, the Supreme Court has the right to terminate the powers of a member of the Riigikogu who does not comply with the requirements of the Constitution.

To conclude my today's presentation, I would like to take a look at the future of Estonian and European constitutional law. The task of the Chancellor of Justice is also to review whether international treaties concluded by Estonia are in conformity with the Constitution. To answer the question how to incorporate into Estonian legal order the European Constitutional Treaty we should first answer the question to what extent does the Constitutional Treaty affect the application of the Estonian Constitution. We must certainly distinguish between legal and political aspects. If it appears that in the framework of the current Constitution Estonia can accede to the Constitutional Treaty, the question of a possible referendum and amending the Constitution becomes merely a question of making a political choice in which the Chancellor of Justice has no say.

My opinion in this issue from the point of view of constitutional law is the following. According to § 2 of the Constitutional Amendment Act of 1 May 2004, the Constitution of the Republic of Estonia should be applied in view of the rights and duties arising from the EU Accession Treaty. As neither the Estonian Constitution nor the Accession Treaty mention the Constitutional Treaty we should closely examine the changes made by the Constitutional Treaty which the Accession Treaty and the current basic EC treaties did not entail and in the case of which a question of conflict with the Estonian Constitution may arise. If the changes affect the application of the Estonian Constitution, the Constitution needs to be changed because EU law is directly applicable and has supremacy over national law.

I think the changes in the Constitutional Treaty that have relevance to the Estonian Constitution are primarily the identification of new areas of activity in which the competence is transferred from member states to the European Union and also the expansion of the range of issues to be decided by qualified majority as a result of which the right of veto of member states is restricted. Another potentially important change concerns the status of the legal personality and the right to be a subject of international law given to the European Union. It is difficult to say today how much these changes affect the application of the Estonian Constitution. All this requires extensive discussions both on the political as well as legal level and also explanation to the people, in whom the highest state authority is vested. Unfortunately the discussions on this topic have so far been almost non-existent. As the Constitutional Treaty has to be ratified by 1 November 2006 there is still sufficient time for analysis.

The Government's current position is that it is enough to have parliamentary ratification to accede to the Treaty. Today such a position seems somewhat impetuous. Let alone the fact that the decision to hold the referendum is not for the Government to make but for the Riigikogu.

I call upon the Riigikogu to consult people from many fields of life before making a decision about the Constitutional Treaty. The result of the wide-ranging discussion can certainly also be the conclusion that the ratification by the Riigikogu is sufficient to accede to the Constitutional Treaty, but we should also be prepared for a conclusion that the legitimacy of the Constitutional Treaty can only be guaranteed through the amendment of the Constitution. Or maybe it would be wise to consider the idea that has been expressed recently that a new constitution in the context of the European Union could be drafted for Estonia. Weighing all these alternatives is definitely in the competence of the Riigikogu and it would be very unfortunate if hasty decisions about the Constitutional Treaty would cause a situation where the final interpretations of the legal effects of the Constitutional Treaty will have to be given by the Chancellor of Justice or the Supreme Court.

Honourable members of the distinguished assembly! I have provided you a selection of topics which are important and relevant from the point of view of the state's legal order and constitutionality and the protection of fundamental rights and freedoms of persons. In solving these and many other issues contained in my written report the Chancellor of Justice can mostly only be the institution pointing out the problems or making moderate criticism. The key to finding right and just solutions is held by the Riigikogu to whom the people have entrusted the mandate. I wish you strength and determination in this work!

Thank you for your attention!

Allar Jõks

INTRODUCTION. BASIS FOR THE ACTIVITIES OF THE CHANCELLOR OF JUSTICE

Historical overview

The institution of the Chancellor of Justice in Estonia was created with the Constitution of 1938. Then the Chancellor of Justice was a higher level official with the rights of a Minister under the Office of the President of the Republic and his task was "to guard over the legality of the activities of state agencies and other public institutions". The term of office of the first Chancellor of Justice of Estonia, Anton Palvadre, however, remained very short. After the occupation of Estonia in summer 1940 by the Soviet Union, the Chancellor of Justice's institution was eliminated and the Chancellor of Justice Anton Palvadre himself was condemned to death.

The exercise of the function of the Chancellor of Justice, however, did not stop either during the German or the Soviet occupation. On 18 September 1944 Prime Minister Jüri Uluots formed the Government of the Republic of Estonia which also included the Chancellor of Justice whose tasks were given to Richard Övel. In 1949-1981 the continuity of the institution was maintained by the Chancellor of Justice under the Estonian exile government Artur Mägi who had also been one of the drafters of the 1938 Constitution.

The institution of the Chancellor of Justice was recreated on the basis of continuity in 1992 by the constitution approved at a referendum. On 28 January 1993, the Riigikogu appointed Eerik-Juhan Truuväli as the Chancellor of Justice. He assumed office on 17 June 1997. Since 7 March 2001 the Chancellor of Justice of the Republic of Estonia is Allar Jõks.

Estonian model of the institution of the Chancellor of Justice

The Estonian Chancellor of Justice's institution is not part of the legislative, executive or judicial power, it is not a political or a law enforcement institution. The Chancellor of Justice's institution has been established with the Constitution and the Chancellor of Justice only reviews the Constitution and his conscience. The Chancellor of Justice is appointed by the Riigikogu on the proposal of the President of the Republic for a term of seven years. Once a year the Chancellor of Justice submits to the Riigikogu an overview of his activities.

First and foremost, the Chancellor of Justice's institution is an establishment whose task is to implement the general right of petition, his main task being to find a legal solution to the problems that people bring to his attention through their applications. The result of the Chancellor of Justice's activities can be a memorandum or even a proposal to change an administrative practice or interpretation of a norm or even the norm itself. The latter choices are used if it appears in the course of the proceedings that the injustice of the case lies not in the application of the law but in the law itself. If the Chancellor of Justice is of the opinion that the applied legislation is not in conformity with the constitution or the laws, he has the right to file a request to the Supreme Court Constitutional Review Chamber for declaring the norm as unconstitutional and invalid. This way the function of the general body of petition and the guardian of constitutionality are combined in the Chancellor of Justice. Such a combined competence is unique in international law.

Duties and proceedings of the Chancellor of Justice

According to the Constitution, the Chancellor of Justice is an official who is independent in his or her activities and who reviews the legislative acts of the legislative and executive powers and of local governments to ensure its conformity with the Constitution and the laws. If the Chancellor of Justice finds that legislation is in conflict with the Constitution or

a law, he or she may propose to the body which passed the legislation – for example to the Parliament – to bring the legislation into conformity with the Constitution. If the legislation is not brought into conformity, the Chancellor of Justice has the right to make a request to the Supreme Court Constitutional Review Chamber, asking to declare the legislation invalid. During the more than ten years of his existence the Chancellor of Justice has made more than 400 requests for bringing various legislation into conformity with the Constitution. In most cases the requests were complied with. The Chancellor of Justice has turned to the Supreme Court in 18 cases, and in 16 of them the Court granted the Chancellor of Justice's request.

Another important constitutional task entrusted to the Chancellor of Justice is the function of the ombudsman that was given to him by the Chancellor of Justice Act[1] passed on 25 February 1999. According to this, the Chancellor of Justice monitors whether state agencies comply with persons' fundamental rights and freedoms and with the principle of good governance. An amendment to the Act[2] that entered into force on 1 January 2004 further expanded the functions of the Chancellor of Justice as an ombudsman – now the Chancellor of Justice also supervises local governments, legal persons in public law and private persons who exercise public functions. Everyone who feels that he or she has been subject to illegal or unjust behaviour through violation of the principles of good governance can turn to the Chancellor of Justice. When the Chancellor of Justice receives a relevant application he will hold an efficient and independent enquiry in the course of which he has the right to collect information and documents relating to the case. The proceedings end with the expression of the Chancellor of Justice's opinion where he can give recommendations to the infringing body for rectifying the situation. Although the recommendations are not legally binding, the proposals made in the Chancellor of Justice's memorandum are almost always complied with.

The Chancellor of Justice also has the right to initiate proceedings on his own initiative if he considers it necessary for the protection of a person's rights or for guaranteeing constitutional order. The Chancellor of Justice has raised important issues and issues that concern many people, for example the protection of the rights of the child, closing of small schools or sufficiency of the subsistence benefits.

The Chancellor of Justice also performs other functions provided for in the law. The most important of them are giving his opinion to the Supreme Court in the constitutional review court proceedings, initiating disciplinary proceedings with regard to judges and organising conciliation procedure in discrimination disputes.

[1] RT I 1999, 29, 406; 2003, 23, 142.

[2] RT I 2003, 23, 142.

PART I

CONFORMITY OF THE LEGISLATIVE ACTS OF THE STATE LEGISLATIVE AND EXECUTIVE POWERS AND OF LOCAL GOVERNMENTS WITH THE CONSTITUTION AND LAWS

This is the eleventh report of the Chancellor of Justice on the conformity of legislative acts with the Constitution and the laws and it provides an analysis of the problems of law-making and constitutional review in Estonia. The report covers the period from 1 September 2003 until 31 May 2004.

The report explores the problem areas that received closest attention by the Chancellor of Justice during the reporting period and many of the problems are not new to the Chancellor of Justice or the Riigikogu. The report also deals with issues which have been subject to lively debates among law-makers and in society. With regard to these issues, new angles and solutions from the point of view of constitutionality are offered.

When taking a look at the problem areas of law-making that were pointed out in the last year's report it appears that progress has been made both in respect of availability of legal assistance as well as exercising supervision over the activities of surveillance agencies.

However, it should be noted that from the constitutional viewpoint there are still problems with the financing of political parties and the supervision of financing. The principle of democracy requires an effective and independent regular control over the financing of political parties.

1. DRAFT OF THE RIIGIKOGU ELECTION ACT – THREAT TO PROPORTIONALITY OF ELECTIONS

Since 22 March 2004, the Riigikogu is discussing the draft of the Riigikogu Election Act initiated by the Government and the relating draft 302 SE for eliminating national election lists (hereinafter called the *draft*). Already during the discussions of the draft in the Government the Chancellor of Justice expressed doubts that the amendments made with the draft, both individually and particularly in combination, would tilt the proportionality of elections clearly in favour of the political parties that received most votes. The Chancellor of Justice also drew the Government's attention to the fact that a large number of votes which so far were returned through compensation mandates would be lost in the new system. This would significantly reduce the legitimacy of democracy. The Government took note of the Chancellor of Justice's position but still submitted the draft to the Riigikogu.

According to the Constitution, members of the Riigikogu are elected in free elections on the principle of proportionality. Elections are general, uniform and direct. According to the Constitution, the procedure for the election of the Riigikogu is provided by the Riigikogu Election Act.

According to the Act, the results of the elections of the Riigikogu in the re-independent Estonia have been so far determined on the basis of a three-tier system:

- first the candidates who received a personal mandate are determined;

- in the second stage, district mandates are distributed between the political parties who exceeded the 5% national election threshold, whereas according to the current system the number of mandates of a political party whose balance of votes is at least 75% of the simple quota is increased by one;

- in the third stage, the remaining mandates on the national level are distributed between the political parties that exceeded the election threshold in accordance with the modified d'Hondt distribution method.

The main changes introduced to the system of determination of the results of elections by the draft are the following:

- the level of national compensation mandates is eliminated;

- on the level of the election district the number of mandates of a political party that received 75% of the simple quota is no longer increased;

- the modified d'Hondt distribution method is brought to the election district level.

The analysis carried out by the Office of the Chancellor of Justice shows that the proposed changes would first of all affect such constitutional rights as the proportionality and uniformity of elections and the principle of representativity of the parliament.

According to the constitutional principle of proportionality of elections, the political parties participating in elections should be represented in the parliament as proportionally to the number of votes given to them as possible. In the interests of the efficiency of the parliament and to avoid political fragmentation it is still allowed to deviate somewhat from absolute proportionality – the traditional method used for this is the 5% threshold for political parties to get to the parliament. It is important that in proportional elections the label of seeming proportionality would not be used to make the rules for the distribution of mandates increasingly disproportionate and similar to the majority system ("winner takes all" principle).

When analysing in the light of the above the draft submitted to the Riigikogu, it appears that the elimination of national compensation mandates and application of the modified d'Hondt method on the level of election districts which have retained their previous sizes would significantly affect the proportionality of election results. The application of the d'Hondt method, in comparison with alternative methods used in the world, causes more disproportionality by favouring larger political parties to the detriment of smaller parties. The modified d'Hondt method used on the national level in Estonia, in comparison with the ordinary d'Hondt method, causes even more disproportionality. By bringing the modified d'Hondt method to the election district level (as proposed in the draft), the proportionality would be reduced even one step further.

The second constitutional principle that can be pointed out with regard to the regulation is the principle of uniformity of elections. According to this, every voter has one vote. In addition to the requirement that the voter can vote once, the principle of uniformity also requires that the votes given should have as equal weight as possible after the determination of the election results. If the election rules favour larger and stronger political parties, the equal weight of votes of supporters of weaker political parties is not guaranteed. For example, each vote given to a political party that gained 25% of support in elections would acquire several times more weight than the vote given to a party that gained 5% of support. It is not difficult to understand that such a system sways voters who want to have a say in deciding matters of the state to favour the political parties who have more potential. The Constitution does not allow to change the election system with the aim to influence political preferences of voters.

The third important constitutional principle is the principle of democracy of elections that enshrines the requirement of representativity of the representative body. The Supreme Court in its decision No. 3-4-1-7-02 of 15 July 2002 found that "the principle of democracy of forming a local government representative body is aimed at achieving sufficient representativity

of the body. All voters and voter groups should be guaranteed a possibility to influence the composition of the representative body". The requirement of representativity was also emphasised in the Supreme Court decision No. 3-4-1-3-03 of 27 January 2003: "The less votes are lost the more representative a body can be assumed to be". The principle of representativity is internationally generally recognised and arising from this the loss of votes should be minimal regardless of the peculiarities of the system for the distribution of mandates.

What is noteworthy in connection with the proposed draft is the additional loss of votes which is caused by the abolition of compensation mandates and the application of the modified d'Hondt method on the election district level.

In the light of the foregoing I should take the position that the changes envisaged with the draft would considerably reduce the proportionality of the election results and would infringe the principles of uniformity and representativity of elections. Such important restrictions of the principle of democratic elections definitely need a constitutional justification in order to be considered compatible with the constitution. In other words, the restrictions can only be constitutional and acceptable if their reasons and the values protected by the changes would outweigh the impairment of the principles of proportionality, uniformity and representativity.

The limitations of constitutional principles arising from the draft and analysed above can be significantly alleviated in the course of the proceedings of the draft in the Riigikogu. Disproportionality could be diminished by allowing election coalitions which would let smaller political forces to remain competitive if they join forces. For example, it is so in Finland whose election system the drafters brought as an example. Definitely the proportionality of the system would be strengthened if a more proportional alternative method would be used instead of the modified d'Hondt method. The modified d'Hondt method clearly favours larger political parties without directly affecting the relationship between the voter and political parties. In the period of consolidating democracy the need for strengthening political parties is obvious and the imposition of rules limiting numerous small political parties is understandable. But today the number of political parties in Estonia is not significantly higher as compared to Western European democracies.

2. RIGHT OF PERSONS IN NEED TO RECEIVE ASSISTANCE FROM THE STATE

2.1 Introduction

Article 28 paragraph 2 of the Constitution stipulates that a person has the right to state's assistance in the case of need. This is a subjective fundamental social right of a person and to ensure this right to persons the state is required to take active steps. Fundamental social rights prescribe which aims the state should observe. Article 28 paragraph 2 of the Constitution requires that the state should provide assistance to persons in need.

Article 28 paragraph 2 of the Constitution does not define who are the persons in need and who thus require the assistance of the state, or the extent to which the state is required to provide such assistance. The legislator has been given extensive discretion to define fundamental social rights because due to a high cost such fundamental rights depend on the economic possibilities of the state and often require the relocation and reorganisation of state funds. At the same time, the legislator does not have absolute freedom in shaping fundamental social rights. The Supreme Court Constitutional Review Chamber in its decision of 10 November 2003 has also said that in defining fundamental social rights the Riigikogu is bound by the letter and spirit of the Constitution and by obligations arising from international treaties binding on Estonia.

Currently state assistance to persons in need is mostly provided through subsistence benefits and the detailed regulation for this is contained in the Social Welfare Act. The Chancellor of Justice has received many complaints in connection with subsistence benefits. In the current regulation of subsitence benefits there are many shortcomings the most important of which are related to the minimum subsistence level, the range of persons entitled to subsistence benefits and the housing allowance given as part of the subsistence benefit. Problems have mostly occurred because constitutional requirements were not taken into account when establishing the regulation.

2.2 Problems relating to the level of state assistance in the case of need

According to Article 10 of the Constitution, Estonia is a state based on democracy and social justice. The centre of the modern state based on social justice and rule of law is the person whose right to free self-realisation and human dignity is recognised. It is a deplorable situation if persons in need live below the level of human dignity. The Supreme Court Constitutional Review Chamber in its decision of 21 January 2004 said that "the principles of social state and human dignity are guaranteed if the state ensures the satisfaction of basic needs of persons in need". Therefore, in order to guarantee human dignity and comply with the requirements of Article 10 and Article 28 paragraph 2 of the Constitution, the state assistance given in the case of need should guarantee the satisfaction of basic needs of a person.

According to § 22(1)1 of the Social Welfare Act, the amount of the money per one calendar month to cover the basic needs of persons (except to cover dwelling expenses) is established by the state budget for each budgetary year. The amount of the subsistence benefit since 1 November 1997 has been 500 kroons a month. Thus, the Riigikogu as the body establishing the minimum subsistence level has found that 500 kroons a month is sufficient to cover the basic needs for food, clothing, footwear and other goods and services per month.

However, various economic and statistical indicators prove that the sum needed to cover basic needs is currently significantly higher than 500 kroons a month. According to the data of the Statistical Office, for example, the cost of the minimum food basket per month was 657 kroons in 2003. The estimated minimum subsistence level for 30 days was 1411 kroons in 2003. The improved economic possibilities of the state can also be witnessed from the fact that the revenue in the state budget has grown by 199% since 1998.

These figures suggest that the cost of living and the expenses to cover basic needs have significantly increased since 1998 when the minimum subsistence level of 500 kroons was established, and today more than 500 kroons a month is needed to cover the basic needs of a person. Therefore, 500 kroons is clearly insufficient considering the Estonian circumstances and the estimated 30 days minimum subsistence level and the general cost of living, and therefore the subsistence benefit is not on the level required by Article 10 and Article 28 paragraph 2 of the Constitution.

According to Article 14 of the Constitution, the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. On 2 February 2004 the Chancellor of Justice made a presentation to the Riigikogu and supplemented it with his letter of 19 April 2004 in which he explained the need to review the system of state assistance to persons in need and to guarantee the basic needs of persons. In his presentation the Chancellor of Justice also noted that in order to establish an adequate minimum subsistence level to cover the basic needs of persons it is necessary to determine exactly what the basic needs are and to establish the general procedure for calculating the minimum subsistence level based on scientifically recognised methodology. In addition, the minimum subsistence level should be regularly reviewed to ensure that it is in correlation with the rise of the cost of living.

The Riigikogu has not yet taken steps to raise the minimum subsistence level or implement other measures to guarantee human dignity of persons in need although the state has the constitutional obligation to guarantee state assistance to persons in need to the extent which allows them to cover their basic needs and retain their human dignity. The Chancellor of Justice hopes that the Riigikogu will review the system of state assistance given in the case of need and will guarantee adequate subsistence benefits or other state assistance to persons living in poverty. The answer of the Riigikogu to the Chancellor of Justice suggests that the Riigikogu has become aware of the problem.

If the legislator fails to guarantee the constitutional rights of persons, the Chancellor of Justice is compelled to initiate constitutional review proceedings and if necessary turn to the Supreme Court. The Supreme Court, however, does not have the competence to establish a new minimum subsistence level, the Court can only declare the disputed provision invalid. According to the Constitution, only the Riigikogu can establish the new minimum subsistence level or take other measures to guarantee human dignity of persons in need. Therefore, only the legislator can bring the regulation of state assistance to persons in need into conformity with the Constitution. The Chancellor of Justice would like to avoid a legal vacuum that may arise if the Supreme Court is forced to declare the minimum subsistence level unconstitutional and the Riigikogu has not yet established the new level. Let us hope that the legislator also wishes to avoid unjustified delay and will adjust the minimum subsistence level as soon as possible.

3. LEGAL PROBLEMS IN ORGANISING PUBLIC TRANSPORT

3.1 Introduction

During the overview period the case of transport benefits to Tallinners attracted much public attention. The Tallinn City Council with its regulation No. 57 of 13 November 2003 "The procedure for the payment of fares in Tallinn public transport within the common ticket system and the establishment of prices of tickets" established different prices of tickets for persons living in Tallinn and for those living outside Tallinn. The regulation was amended with the Tallinn City Council regulation No. 4 of 19 February 2004, according to which the disputed benefits apply to all inhabitants of local governments that have joined the Tallinn common ticket system. According to § 29(3) of the Public Transport Act, in addition to the provisions of § 27 of the Act and subsection (1) of § 29, rural municipality and city councils may establish travel fare concessions in public regular services out of their budgets to particular categories of passengers and increase the amount of travel fare concessions. The Chancellor of Justice found that the Tallinn City Council by establishing a benefit to all inhabitants of local governments that have joined the Tallinn common ticket system had exceeded the delegating norm in § 29(3) of the Public Transport Act. The aim of the norm is to make public transport available by establishing additional benefits on the basis of persons' social, financial or other condition or health. On the basis of this delegating norm it is possible to give benefits to a person who needs it due to his or her particular condition. There is no justification arising from the delegating norm to favour all inhabitants of local governments that have joined the Tallinn common ticket system.

3.2 The notion of public service

In theory of administrative law, *public service* is understood as a type of administrative activity. Public service means the acts and measures of the state or other bearers of public authority which are in conformity with the state's policy and support the implementation of a public interest recognised by the legislator. Public service is not aimed at realising economic interests. The availability of the service and its good quality are important. Such interpretation

is also supported by European Community law. According to Article 16 of the EC Treaty, the Community and the Member States shall take care that services of general economic interest (or universal service[3]) are provided in accordance with their purpose. Services of general interest are of general interest and therefore the provider of the service should observe the requirements imposed on public service, such as continuity of the service, quality, equal availability, affordable price etc[4]. Article 73 of the EC Treaty provides for a possibility that a certain transport service may belong to the public services in the case of which the government support is not incompatible with the EC Treaty.

The organisation of public transport in rural municipalities and cities is a task provided for in § 6(1) of the Local Government Organisation Act. It is actually the duty of the local government which is established due to great public interest. It means that the question whether to organise a service becomes irrelevant and there is only a question how to organise it. This is such an important public task that the state has considered it necessary to determine relatively extensively in the Public Transport Act how the local government should organise this area. The first sentence of Article 3 paragraph 1 of the Constitution (which enacts the principle of legality) suggests that the local government must observe the law and it has the discretion to decide to the extent provided by the law. It cannot regulate the area if the law does not provide a delegating norm for this. Therefore, it can be claimed that the local government should strictly observe the meaning and purpose of the Public Transport Act in organising public transport.

In conclusion, it can be said that the public transport service (public regular transport service in the meaning of the Public Transport Act) is a public service the provision of which is imposed on local government institutions as well as state agencies and the provision of which is regulated to a certain extent by public law.

3.3 Benefits paid by the public power

Section 3, clause 7 of the Local Government Organisation Act provides one of the principles of operation of local government – to provide a public service at most favourable conditions. The main aim of providing of a public service is not to earn profit but to guarantee the availability of the service based on public interest. This means providing of the service at most favourable conditions for the receiver, such as economic affordability, equal availability, optimum quality etc. Thus, in the interests of availability it may prove necessary to give benefits to certain categories of persons.

Making of benefits inevitably raises the question whether it amounts to unequal treatment of persons who were not granted the benefit, in which case it would be the infringement of the principle of fundamental right to equal treatment (first sentence of Article 12 paragraph 1 of the Constitution). The fundamental right to equal treatment has been infringed if the unequal treatment is arbitrary, i.e. it cannot be reasonably justified. There is no infringement if the basis for the distinction is a reasonable justification arising from the nature of the matter. Such a reasonable justification is particularly necessary in the case of a benefit granted by public authority.

It follows from this that all persons are entitled to use the public transport service on an equal basis. Making distinctions presumes the existence of a legitimate reason. The basic norm for

[3] The notions of obligation of providing a universal service and the obligation of providing a public service have been introduced in the case law of the Court of Justice (*Corbeau* case C-320/91 [1993]; *Almelo* case C-393/92 [1994]) and they have been developed further in the legislation on services for which a common regulatory framework for the completion of European common market has been developed.

[4] Euroopa Liidu reform: institutsioonid, poliitika, laienemine. Seletussõnastik. Eesti Õigustõlke Keskus, 1999. pp. 13, 100 and 124.

determining the persons entitled to benefits provided for in the Public Transport Act is the right of Estonian citizens to state's assistance in the case of old age, incapacity for work, loss of a provider, or need, as established in Article 28 paragraph 2 of the Constitution.

3.4 Connection between the tax and the corresponding benefit

The Tallinn City Council was initially of the opinion that a reasonable justification for establishing travel benefits for the inhabitants of Tallinn is the participation of the inhabitants in the financing of the provision of the public transport by Tallinn city through the personal income tax. The inhabitants of other local governments would participate only through income generated from ticket sales. It would therefore be useful to examine the nature of the tax.

Tax is a single or periodic financial obligation which is imposed on taxpayers by an Act or a rural municipality or city council regulation issued pursuant to an Act for the performance of the public law functions of the state or local governments or to obtain revenue required therefor and which is subject to performance pursuant to the procedure, in the amount and within the terms prescribed by an Act or a regulation, without direct compensation to taxpayers therefor (§ 2 of the Taxation Act). By purpose, taxes can be divided into general purpose taxes, e.g. income tax and land tax, and special purpose taxes, e.g. social tax and gambling tax. Income tax is a general purpose tax which is used for generating the revenue needed for the exercise of state and local government public functions and the payment of which does not give the taxpayer the right to a corresponding benefit. The general legislative principle is that every law has its scope of regulation. Therefore, taxes and corresponding benefits should be regulated in the Taxation Act and not in the local government legislation. As an essential characteristic of the legal definition of the notion of *tax* is that the taxpayer does not get a direct return for the tax, the local government should not link the payment of the income tax as a general purpose tax with the benefits made to the taxpayer as the user of a public service. This would be incompatible with the essence of the income tax. The European Court of Justice in its judgement of 16 January 2003 (C-388/01) found that in order to grant a benefit to the taxpayer, the tax and the benefit should have a direct link. Thus, granting of benefits to local inhabitants could be considered, for example, in the case of a transport tax.

3.5 Conclusion

It can be assumed that the actual reason behind the emergence of the problems is financing of public transport, not the desire of a local government to provide benefits to its inhabitants. In order not to be fighting with consequences but deal with the causes, the Chancellor of Justice met with the representatives of the Tallinn City Council and City Government, Union of Harju County Municipalities and the Ministry of Economic Affairs and Communications on four occasions (on 27.02.2004, 05.03.2004, 18.03.2004 and 21.05.2004). At all the meetings a common understanding was reached that a solution needs to be found that would help to avoid similar problems in the future and that those who use the public transport service should also participate in financing it. Therefore, the Ministry should draft a law setting out the principles of financing public transport and as precise a procedure of financing as possible. The Chancellor of Justice hopes that the present analysis will be of help for introducing amendments to the Public Transport Act and that for the beginning of the new budgetary year a solution to the problem has been found that complies with the Constitution, takes into account the rights of persons and proceeds from the criterion of equal access to the public transport service as a public service.

4. BELONGING OF MEMBERS OF THE RIIGIKOGU TO SUPERVISORY BOARDS OF COMPANIES

In reply to the questions asked by the State Audit Office, the Chancellor of Justice formed his opinion with regard to the participation of the members of the Riigikogu in the work of supervisory boards of public undertakings and the legality of receiving remuneration for such participation. The Chancellor of Justice concluded that in accordance with Article 4 and Article 63 paragraph 1 of the Constitution and § 7(1) of the Riigikogu Internal Rules Act members of the Riigikogu are not allowed to belong to supervisory boards of companies or receive remuneration for this.

4.1 Incompatibility of holding another public office with the powers of the Member of the Riigikogu

In his letter of 19 April 2004 to the State Auditor, the Chancellor of Justice gave the following justifications to his opinion.

According to Article 63 paragraph 1 of the Constitution, a member of the Riigikogu may not hold another public office. The aim of the prohibition is to ensure the separation of powers, avoid the conflict of interest and give the members of the Riigikogu a possibility in conformity with the law to focus on the exercise of their tasks in the Riigikogu and to be independent. The restriction imposed by Article 63 paragraph 1 of the Constitution is one of the guarantees of the principle of separation and balance of powers provided in Article 4 of the Constitution. The prohibition to hold another public office and the restrictions on remuneration from other sources as provided in Article 75 of the Constitution are set out in detail in § 7 of the Riigikogu Internal Rules Act.

By appointing a member of the Riigikogu to serve as a member of a supervisory board of a public undertaking, the principle of separation of powers is violated on the personal level and a member of the Riigikogu is placed in a situation which may give rise to a conflict of interests: on the one hand, he or she is a member of a supervisory body of a company and, on the other hand, a member of a legislative body. Appointment to a supervisory board of a public undertaking or state company can be interpreted as assumption of another public office in the meaning of Article 63 paragraph 1 of the Constitution which is incompatible with the powers of the members of the Riigikogu. Supervisory board is a type of a managerial board of a company and the member of the board participates in the management of the company. As the state's economic policy is implemented through the management of a public undertakings or state companies a member of the supervisory board participates in executive action which involves exercise of administrative functions.

The characteristics on the basis of which the belonging of a member of the Riigikogu to a supervisory board of a public undertaking or state company is assessed were already mentioned in the Supreme Court decision III-4/1-6/94 of 1994 where the constitutional review chamber declared invalid § 7(1) of the Riigikogu Internal Rules Act which did not consider the appointment of a member of the Riigikogu as a chairman or member of an administrative board an assumption of another public office.

Despite the partial invalidation of § 7(1) of the Riigikogu Internal Rules Act by the Supreme Court in its decision of 2 November 1994, a new legislative amendment to specify the conditions of the prohibition of holding another public office (draft 847 SE) was initiated in the Riigikogu only in 1998, immediately before the termination of the powers of the VII composition of the Riigikogu. Unfortunately, it has to be noted that the amendment still left it unclear whether membership of a supervisory board of a public undertaking or state company can be considered compatible with the powers of a member of the Riigikogu.

When interpreting § 7(1) of the Riigikogu Internal Rules Act in combination with Article 63 paragraph 1 of the Constitution, according to which a member of the Riigikogu may not hold any other public office, it appears that after the Supreme Court decision of 2 November 1994 there is no law that allows a member of the Riigikogu to belong to such supervisory boards. Section 7(1) of the Riigikogu Internal Rules Act prohibits members of the Riigikogu to be appointed to a board of a company as representatives of the state by a Minister.

Having analysed the rules that regulate the formation of supervisory boards of public undertakings or state companies and their role in the management and supervision of companies, the Chancellor of Justice concluded that the status of a member of the Riigikogu in a supervisory board of a public undertaking has the characteristics described in the Supreme Court decision No. III-4/1-6/94 of 2 November 1994: they are appointed by a Minister, i.e. their powers are granted by the executive authority; they exercise the tasks of the executive authority; their remuneration is determined by the Minister; they are accountable to the Minister.

Correspondence to these characteristics was ascertained according to the Commercial Code and the specific regulation set out in the Foundation of and Participation in Private Legal Persons by the State Act. Similarly, the participation in the work of supervisory boards is regulated by the State Participation in Private Legal Persons Act that entered into force on 16 April 2004 and according to § 20(2) and (3) of the Act a member of a supervisory board of a state company or public undertaking is appointed or presented to the general meeting for appointment by the Minister who governs the participation and the Minister of Finance; according to § 24(1) the amount of remuneration paid to a member of a supervisory board of a company and the procedure of payment is decided by the Minister governing the participation; according to § 22(1) clauses 1 and 2 a representative of the state in a managerial body of a private legal person must fulfil the guidelines given by the Minister who appointed him or her or who made the proposal for his or her appointment and he or she is accountable to the Minister, including submitting of information about the activities of the supervisory board or other managerial body to the Minister in the form and by the date determined by the latter. In the light of this it was concluded that a member of a state company or public undertaking executes state economic policy which, according to Article 87 clause 1 of the Constitution is within the competence of the state executive authority as part of the state's domestic and foreign policy.

A member of the Riigikogu whom the Minister has appointed to a supervisory board of a company as a representative of the state, who is accountable to the Minister and whose remuneration is paid in accordance with the procedure determined by the Minister has no possibility to exercise parliamentary scrutiny over the activities of the Minister who is executing economic policy in the relevant field. Otherwise the member will have to supervise his or her own activities. If a member of the Riigikogu has to represent the state in a supervisory board of a company, i.e. at the same time exercising his or her powers as a member of the parliament and fulfilling the tasks of the executive authority, he or she cannot fulfil the function of scrutiny of powers or comply with the principle of balance of powers. This means contradiction with the principle of separation of powers on the personal level.

A state's representative in the supervisory board of a public undertaking is an official in the meaning of § 7 of the Anti-Corruption Act whose economic interests may promote or cause a conflict of private and public interests, the commitment of an act of corruption or the creation of a relationship involving the risk of corruption. This proves once again that the status of a member of the Riigikogu as a member of a supervisory board of a state company or public undertaking should be interpreted in accordance with Article 63 paragraph 1 of the Constitution as holding of another public office which is incompatible with the powers of a member of the Riigikogu.

4.2 Government of the Republic and the Riigikogu as guarantors of constitutionality

It ensues clearly from the above analysis that until the law provides for a constitutionally compatible basis for the participation of members of the Riigikogu in the work of supervisory boards of state companies or public undertakings the belonging of a member of the Riigikogu to a supervisory board is unconstitutional.

The Chancellor of Justice notified the Government of the Republic of his position on this issue and also forwarded to the Government the copy of his reply to the State Audit Office.

With the letter of the State Chancellery of 2 June 2004 the Chancellor of Justice received a reply drawn up in the Ministry of Justice. Having acquainted himself with the opinion of the Chancellor of Justice, the Minister of Justice consented that in the light of current norms regulating the formation of supervisory boards of state companies and public undertakings Article 63 paragraph 1 of the Constitution does not allow a member of the Riigikogu to serve as a member of the board. The Minister of Justice emphasised as an obstacle the fact that a member of the supervisory board of a state company and public undertaking is appointed by a representative of the executive authority. In the opinion of the Minister of Justice, Article 63 of the Constitution would not prohibit participation of a member of the Riigikogu in the supervisory board of a public undertaking if the Riigikogu itself would have the competence to appoint the member of the board and if the justification for the appointment would be the exercise of parliamentary scrutiny. The Minister of Justice noted that the necessity of such a control should be raised by the Riigikogu and the legislative initiative in this case should come from the Riigikogu, not from the Government of the Republic.

The issue raised by the State Auditor and the Chancellor of Justice regarding whether a member of the Riigikogu can participate in a supervisory board of a company was also discussed in the Riigikogu select committee on state budget control on 31 May 2004. Attending the meeting were the State Audit Office, the Chancellor of Justice and the Chairman of the Riigikogu Legal Committee. Members of the committee voiced the opinion that belonging of the members of the Riigikogu to supervisory boards was necessary to supervise the activities of the executive authority and to guarantee that public interests are taken into account in the management of the companies and to draw an increased attention of the public to the activities of the supervisory boards. In conclusion, the members of the committee admitted that there is currently no legal basis for belonging of members of the Riigikogu to the supervisory boards of state companies or public undertakings. As a solution, they saw the drafting of a relevant act by the Government. The chairman of the committee Harri Õunapuu turned to the State Secretary to solve this issue.

Three months after the notification of the Government of the Republic about the opinion given to the State Audit Office, the Chancellor of Justice had not been informed of the recalling of the members of the Riigikogu from the supervisory boards or of the drafting of a act which would be in conformity with the Constitution and would allow members of the Riigikogu to participate in the work of the boards. On 27 July 2004 the Chancellor of Justice turned to the State Secretary for information and asked for a list of the members of the Riigikogu who have been appointed as members of supervisory boards of state companies or public undertakings by a Minister and who have not been recalled from the boards.

In his reply of 27 August 2004 the State Secretary stated that the Prime Minister had asked the Minister of Finance to prepare the issue for a Cabinet meeting in September. The State Secretary also forwarded to the Chancellor of Justice a list of the members of the Riigikogu who have been appointed or presented to be appointed as members of supervisory boards of state companies and public undertakings and also forwarded the letter of the chairman of the Riigikogu select committee Harri Õunapuu that he had sent to the Government of the Republic, and an opinion of the Ministry of Finance.

4.3 Constitutional preconditions for legalisation of participation in the work of supervisory boards

According to the opinion of the Chancellor of Justice, Article 63 paragraph 1 of the Constitution does not rule out the possibility of scrutiny by members of the Riigikogu over the activities of state companies or public undertakings and some form of their participation in the work of supervisory boards. If the legislator considers additional parliamentary scrutiny necessary, this possibility should also be provided for in law and in that case the Riigikogu Internal Rules Act needs to be amended. It should also be taken into account that the activities of members of the Riigikogu participating in the work of supervisory boards should not have any characteristics of holding another public office in the meaning of Article 63 paragraph 1 of the Constitution. According to the Commercial Code the supervisory board is a managerial body of a company, not merely the bearer of a supervisory function. Therefore, in order to legalise the participation of members of the Riigikogu it is not sufficient to have a regulation according to which a member of the Riigikogu is appointed to the supervisory board by the Riigikogu itself. In accordance with the Constitution, it is possible to provide for a form of parliamentary scrutiny by law, under which members of the Riigikogu would be exercising independent scrutiny over the activities of supervisory boards, without participating in the management of companies that would involve execution of the functions of the executive authority. The constitutional preconditions for the participation of members of the Riigikogu in the work of supervisory boards of companies are the principle of separation of powers and guaranteeing the independence of the members of the Riigikogu and avoiding the conflict of interests.

5. THE PROTECTION OF PERSONAL DATA

5.1 Introduction

The Chancellor of Justice has had to deal increasingly more with the issues of the right to privacy, first of all as concerns the issues of the protection of personal data. During the last reporting period the Chancellor of Justice solved several cases where the state's activities in processing of personal data turned out to be unjustifiably restrictive of private life.

In 2003 some changes in the legislation on personal data were introduced. It is important to note the entry into force of the new Personal Data Protection Act. When analysing the cases during the reporting period it seemed that there had often been difficulties with the combined application of the laws regulating access to information and data protection. With the adoption of the new Personal Data Protection Act the situation became clearer because all general provisions now derive from one and the same law.

The issues of the protection of personal data have not drawn considerable public attention. To a certain extent the media has begun to explore the right to information but it must be noted that in the coming years the Chancellor of Justice will have an important role in the promotion of data protection and the right to privacy in general.

Previously, the Chancellor of Justice has had to deal with two types of unjustified restrictions of private life: the state has illegally forwarded or disclosed the legally collected personal data, or in collecting the data has disproportionately restricted the right to privacy.

5.2 The protection of personal data and freedom of information

Issues of the protection of personal data often arise in situations where, on the one hand, the state or the public has interest in the free movement of information, and, on the other hand, unlimited distribution of information would threaten the privacy of individuals. Neither of these fundamental rights may suppress the other and therefore a solution has to be found that has the smallest possible negative impact on these rights. The Chancellor of Justice has dealt with several applications concerning such a conflict of interests.

The question is to what extent the public should be able to use the information in the state or local government databases and documents which may also contain personal data. On the one hand, we cannot forget the practical value of such information. The collected information is a valuable resource and its collection has required time and money. It is reasonable to provide access to information to a possibly large number of consumers as it would raise the usefulness of various registers[5]. Certainly freedom of information is an inevitable precondition for an open society and transparency of the state. On the other hand, the country recognising fundamental rights of people should guarantee the protection of privacy and personal data which sets strict requirements for the use of public data.

It is interesting to note that of the two sets of issues the area of public information is better developed, while the right to privacy and data protection do not seem to be so important for people. At least such a conclusion can be drawn on the basis of applications received by the Chancellor of Justice – statistically, there were approximately ten times more complaints concerning access to public data than complaints about the misuse of personal data. People often turn to the Chancellor of Justice with a concern that a state agency is withholding certain information but they rarely feel that there has been excessive intervention in their private life. Considering our historical heritage, the small sensitivity with regard to private life may seem surprising but, on the other hand, it can also be understood as in the course of years people developed a habit of filling out many forms and questionnaires without questioning their purpose. However, possible risks should be dealt with in an early stage and attention should be drawn to them.

5.2.1 Disclosure of court decisions and the protection of privacy and balancing of interests

The conflict between the protection of privacy and the need to disclose information becomes clearly evident in the case of disclosure of personal data in court decisions made available in the Internet. In accordance with § 28(1) clause 29 of the Public Information Act, court decisions are published in the database of court decisions and court statistics which is available for everyone on the Internet at http://kola.just.ee/. There have been cases when an unedited court decision was posted in the Internet, containing the names of all the relevant persons and sometimes very sensitive personal data, for example descriptions of bodily injuries or rape. In such a situation the acceptable interest in the disclosure of a court decision, transparency of court practice and legal clarity and availability of statistical and generally educating information gets into conflict with the constitutional rights of all persons to the inviolability of their private life. Although admitting that the disclosure of court decisions serves legitimate aims, the disclosure of all personal data of court decisions in the Internet cannot be justified or legal. Apart from the need to protect personal data, it should be avoided in any case that, for example, cases of rape do not even reach the court because the victims are afraid of its subsequent publication in the Internet.

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[5] See, for example, the audit report No. 058/2001 of the State Audit Office, which strongly recommends to make wider use of the data in the population register, including in the private sector. See also the article by E.-M. Tiit, Admekogud on rahvuslik rikkus…. Postimees 03.12.2002.

Section 35(2) clauses 10 and 11 and § 39 of the Public Information Act in combination with § 14 of the Personal Data Protection Act provide that it is prohibited to disclose sensitive personal data (i.e. data concerning private life) (except in the cases provided for by the law). Less sensitive personal data can be disclosed, in addition to other bases provided for in the law, in accordance with the principle of balancing of interests: if the disclosure would damage the privacy of the subject of the data, also non-sensitive personal data cannot be made available to the public. It is important to emphasise that restrictions only apply with regard to the disclosure of a court decision to the wider public. An institution or a person who needs court decisions for the exercise of functions arising from law can have access to them in accordance with special rules. These requirements should be kept in mind when disclosing court decisions. Statistical and generally educating functions can also be fulfilled without excessive intervention in the private life of the parties to the proceedings, for example by disclosing court decisions without personally identifiable data. This way the public can obtain information about court practice and the privacy of parties to the proceedings is also protected. According to law, the privacy of both the victims and offenders is protected. Persons convicted for offences do not lose their constitutional right to the protection of privacy.

In accordance with the current regulation, the interests should be weighed by those implementing the database of court decisions. If such a practice proves to be ineffective, the establishment of better guarantees in laws should be considered, for example not mentioning the parties to the proceedings in the disclosed court decisions. Information must be generally accessible and at the same time the privacy of persons must be protected.

Decisions to balance different interests also need to be made by other holders of public information when they restrict access to personal data. If in many cases the legislator has explicitly determined the type of personal data to which access is restricted (data concerning private life and sensitive personal data), sometimes the data processor has the discretion to make the decision. The decision to balance the interests must be properly justified in accordance with the requirements of the Administrative Procedural Law. Weighing of interests and the importance of justification was also emphasised by the Supreme Court in its decision of 23 October 2003.[6]

Officials who must make discretionary decisions to balance access to personal data have raised a problem in the media saying that the fulfilment of this task is too excessive for them.[7] Definitely the cases vary and therefore it is not possible to give an ultimate definition as to which information "significantly damages the privacy of a subject of data". Yet the officials in this field are experts of their field who should be in the best position to sense the potential risks: both those that arise from the distribution of data as well as risks that arise from the failure to forward data. A specialist of a field is aware of the conflicting interests in the field better than for example a judge, data protection specialist or the Chancellor of Justice and therefore he or she is able to give better arguments why certain data (combination of data) need to be protected or not. By using the knowledge of experts of different fields, decisions for balancing the interests should be made.

[6] Supreme Court decision of 23 October 2003 No. 3-3-1-7-03 in the case of OÜ Eesti Isikuloo Keskus.

[7] See for example an article in the Eesti Päevaleht on 29.01.2004 "Erafirma teeb maksumaksja kulul isikuandmetega äri" [Private company is making business with personal data at the expense of the taxpayer].

5.2.2 Restriction of access to personal data

A set of problems concerned the provision of access to personal data in the police and in the prosecutor's office.

In a democratic country it is extremely important to guarantee people's right of access to data that the state collects about him or her. Misuses of data in power structures are particularly dangerous. There have been cases with the police and the prosecutor's office where access is restricted to data which according to law should be made available to the person requesting the data. For example, the Chancellor of Justice received an application from a person who wished to have data about himself/herself from the police but it took unacceptably long before his/her request for information was complied with and the request was refused several times on ambiguous grounds. In the particular case it could be concluded that the bases for access to data were not clearly set out in the Police Board. The Ministry of Internal Affairs took the Chancellor of Justice's observations fully into account and sent a memorandum to the Police Board with a proposal to introduce appropriate clear rules and train its officials. Similar problems have occurred with access to the data concerning a person himself/herself in the prosecutor's office and in the court.

5.3 Disproportionately extensive collection of personal data

There are examples in the Chancellor of Justice's practice where the state with its activities has unconstitutionally violated the privacy of individuals. An example from the reporting period was a practice to ask considerably more data form prospective spouses in the vital statistics office than was necessary for the contraction of marriage. For example, they had to disclose their professional activity, the time they had lived together, how many previous marriages each of them had had etc. Justifiably a question arose why a person entering into a legal marriage should disclose to the state how many months and with whom they had been living together. In reply to his enquiry the Chancellor of Justice was informed that a large amount of the data was collected for statistical purposes and according to the law the person was not obliged to provide such data. In accordance with the effective legislation, the person could submit statistical information either voluntarily or also anonymously. After the Chancellor of Justice's intervention the forms used for collecting the data were changed, so that it would be clear to people which data fields are mandatory and which can be filled voluntarily for statistical purposes. Clear distinction between the fields contributes to informational self-determination of persons: a person himself or herself can decide to whom and to which extent they wish to give information about themselves.

By the time of writing this report, there have been more of such cases. Often the reason is the old type of forms that have been in use for years or insufficient consideration of the need for data collection. Mostly the problems have been solved very rapidly after the Chancellor of Justice's intervention and there are rarely any substantive counterarguments. This shows that many mistakes in infringing privacy of people are caused by little awareness of officials who draft legislation. However, in the case of marriage applications described above the infringement had been continuing for a relatively long time. This shows that public pressure for the protection of privacy is not very effective. Therefore, the Chancellor of Justice needs to act more on his own initiative because in many cases of infringements people might not submit an application themselves. Encouraging of the debate about data protection – both in specialist publications as well as with the participation of the wider public in the media – would help to raise the awareness of subjects of data and data processors. It would definitely be a good opportunity for the development of data protection taking into account the specific Estonian circumstances.

5.4 Conclusion

In almost all the cases that the Chancellor of Justice raised, data processors took measures to bring their activities into compliance with the Constitution and the laws. Therefore, there is no reason to assume on the basis of the actual cases that the problem lies in the wording of law or that there are significant legal gaps. It rather seems that in many respects the reason for unconstitutional collection of data is the habit that has taken root in time and the small level of awareness of public officials about the right to privacy. This may be due to the fact that there has not been any effective training for officials in the field of data protection. As was mentioned above, lack of awareness is a wider problem in the whole society.

In order to improve the situation, the Chancellor of Justice will try to deal more closely with the issues of the protection of personal data and also draw more attention of the public to these topics.

PART II

THE ACTIVITIES OF THE CHANCELLOR OF JUSTICE IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

1. BASES FOR THE ACTIVITES OF THE CHANCELLOR OF JUSTICE

There is no official in Estonia called with the internationally known title 'ombudsman'. However, such an institution is not unknown for us: since 25 February 1999 the Chancellor of Justice performs the function of the ombudsman that has been entrusted to him by law[8]. In the performance of this function the Chancellor of Justice reviews whether state agencies comply with the fundamental rights and freedoms of persons and with the principles of good governance. With the amendment of law that entered into force on 1 January 2004[9] the Riigikogu extended the functions of the ombudsman – now the Chancellor of Justice also supervises local governments, legal persons in public law and private persons who perform public functions.

The Chancellor of Justice also has other tasks entrusted to him by law. The more important of them are the right to initiate disciplinary proceedings against judges and the carrying out of conciliation proceedings in discrimination disputes.

The Chancellor of Justice is an independent constitutional institution. Such a status enables him to assess objectively the activities of state agencies, while being free from departmental interests. The Chancellor of Justice can adequately react to activities which are not compatible with the principle of rule of law, the Constitution, laws or other legislation or the principles of good governance. The task of the Chancellor of Justice as an ombudsman is to protect persons from the arbitrary action of state powers. The exercise of the Chancellor of Justice's ombudsman's function is also related to the other function of the Chancellor of Justice – to supervise, on the basis of Article 139 paragraph 1 of the Constitution, the compliance of the legislation of general application of the state and local governments with the Constitution and the laws. By exercising these closely linked tasks, the Chancellor of Justice focuses on the supervision of compliance with the fundamental values of the state – freedom, legality and justice. Whether a law or a regulation of the Government, Minister or local government is in conformity with the Constitution can to a large extent be assessed on the basis of information that the Chancellor of Justice has obtained when verifying the guarantee of fundamental rights. This is one of the reasons why the report with an overview of the Chancellor of Justice's activities in 2003 for the first time contained a summary of the most important cases of both constitutional review and the ombudsman's proceedings.

Everyone who claims that his or her rights have been violated or he or she has been treated contrary to the principles of good governance may file a petition to the Chancellor of Justice asking him to review whether the state agency or local government body, a legal person in public law or a natural person or private legal person who are exercising public functions comply with the principles of guaranteeing fundamental rights and freedoms and good governance.

The Chancellor of Justice also has the right to initiate proceedings on his own initiative if he considers it necessary for the protection of people's rights or for guaranteeing constitutional order. The Chancellor of Justice has raised important issues that concern a large number of people, for example the protection of the rights of child, safety of the school environment or sufficiency of the subsistence benefits.

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[8] RT I 1999, 29, 406; 2003, 23, 142.

[9] RT I 2003, 23, 142.

Everyone has the right to apply to the Chancellor of Justice with a request to carry out conciliation proceedings if the person finds that a natural or private legal person has discriminated him or her on the basis of sex, race, nationality, colour, language, origin, religious or other conviction, proprietary or social status, age, disability, sexual orientation or other grounds specified in law.

The Chancellor of Justice will reject an application when its resolution is not within his competence. In that case, the Chancellor will explain to the applicant who should deal with the issue. The Chancellor of Justice can also reject an application if it is clearly unfounded or if it is not clear from the application what, in the applicant's opinion, constituted the violation of the applicant's rights or principles of good governance.

One precondition for filing an application is also that no court judgment may have entered into force in the matter of the application and the matter may not be concurrently subject to pre-trial complaint proceedings or judicial proceedings, for example when a complaint is being reviewed by an individual labour dispute settlement committee or any other similar pre-judicial body. This principle derives from the fact that filing an application to the Chancellor of Justice is not a legal remedy. Rather, the Chancellor of Justice is a petition body who has no direct possibility to use any means of enforcement and who resolves cases of violation of people's rights if the person has no recourse to other means of protection of his or her rights, for example for the reason that the deadline for filing a complaint to a court of law has passed. The Chancellor of Justice cannot and is not allowed to duplicate these proceedings because he is first of all an institution to be turned to when there are no other legal remedies or when other remedies cannot be used for some reason.

The Chancellor of Justice may reject the submitted application if the person can file a challenge or use other legal remedies or if there are challenge proceedings or other non-compulsory pre-trial proceedings pending. This is a discretionary decision which takes into account the circumstances of the particular case.

The Chancellor of Justice may reject the application if it 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. The application of the one-year deadline is in the discretion of the Chancellor of Justice and it depends on the circumstances of the case – for example, how serious the violation was, what consequences it had, whether the violation affected the rights or duties of third parties, etc.

If the Chancellor of Justice accepts for proceedings an application concerning a violation of a person's rights or disregard for good governance, he will inform the applicant about it and will mention the measures that he has taken or intends to take to resolve the application. The main procedural acts that the Chancellor of Justice can take are information request and taking of explanations and statements. If necessary, the Chancellor of Justice can also use other forms of procedural acts. In the proceedings, the Chancellor of Justice will follow the principles of purposefulness, efficiency, simplicity and speediness and will avoid causing of excessive expenses and inconveniences to the person.

The Chancellor of Justice's proceedings end with the statement of the Chancellor in which he will express an opinion whether the activities of the body mentioned in the application were legal and compatible with the principles of good governance. The Chancellor of Justice can criticise, make recommendations and express his opinion in other ways, as well as make a proposal to eliminate the violation. The Chancellor of Justice's opinion is notified to the applicant and the relevant body in writing. The Chancellor of Justice's opinion is final and it cannot be challenged in court.

When the Chancellor of Justice is carrying out conciliation proceedings to resolve a discrimination application, he will send a copy of the application to the respondent whose activities are contested in the application and shall set a term for the submission of a written response. If the applicant consents to the respondent's proposal to resolve the dispute and such resolution ensures a fair balance in the rights of the parties, the Chancellor of Justice will deem the petition to be resolved and will conclude the proceedings. In the case of dispute a session is held with the participation of parties or their representatives. If the applicant and respondent consent to the proposal of the Chancellor of Justice, the Chancellor of Justice shall approve the agreement. Performance of an agreement approved by the Chancellor of Justice is mandatory to the parties. If an agreement is not performed within the term of thirty days, the applicant or respondent may submit the

agreement approved by the Chancellor of Justice to a bailiff for enforcement. If conciliation proceedings are terminated or the Chancellor of Justice has stated 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.

In the subsequent parts of this report, there is an overview by areas showing what the Chancellor of Justice and his Office did in 2003 to guarantee constitutional rights, and an analysis of problems that the Chancellor of Justice has already begun or will begin to resolve in the near future. When the Riigikogu and other agencies of public authority have become aware of the problems it is possible to initiate relevant debates and purposeful actions for strengthening legality and increasing the trust towards the state authority.

2. RESOLVING OF APPLICATIONS

2.1 Introduction

In 2003, the Chancellor of Justice received 1966 applications from persons, institutions and organisations, which is 27.4% more than in 2002. Persons submitted 1424 applications and institutions and organisations 542. 1032 persons came to a reception with the Chancellor of Justice. Most applications were from Harju County (688 applications) and the smallest number from Hiiu County (3 applications). Seventeen applications were sent from eight foreign countries and 108 by e-mail.

Figure 1. Written applications of natural persons and reception of persons in 1994–2003

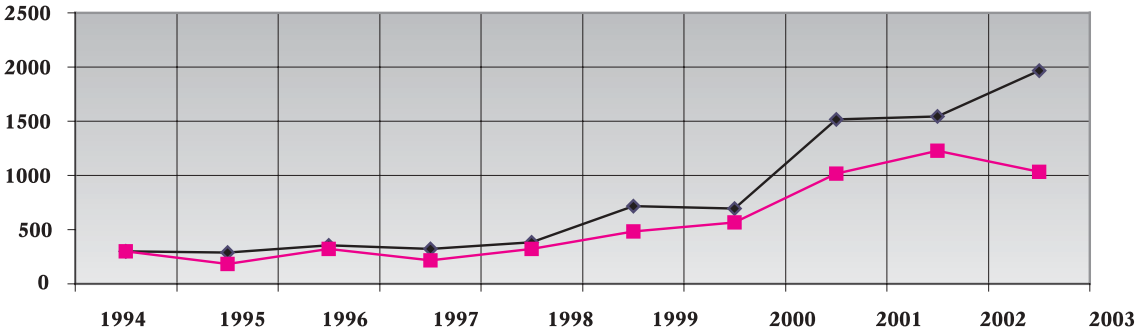
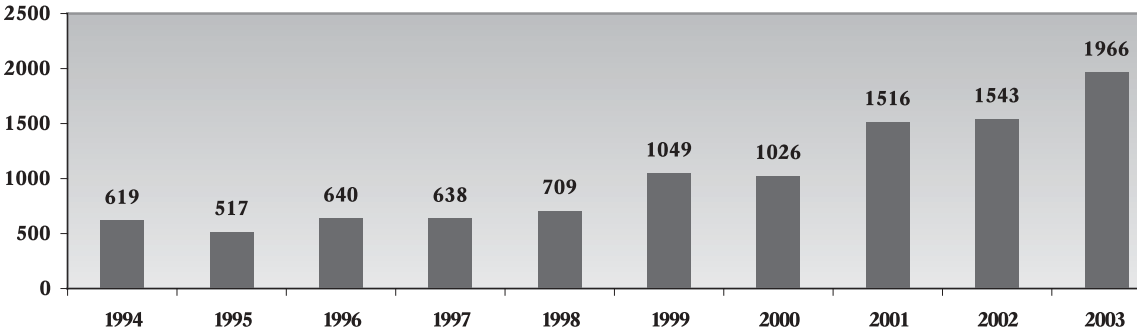


Figure 2. Applications received by the Chancellor of Justice in 1994–2003



Written applications received by the Chancellor of Justice in 2003 can be divided into four groups by their content:

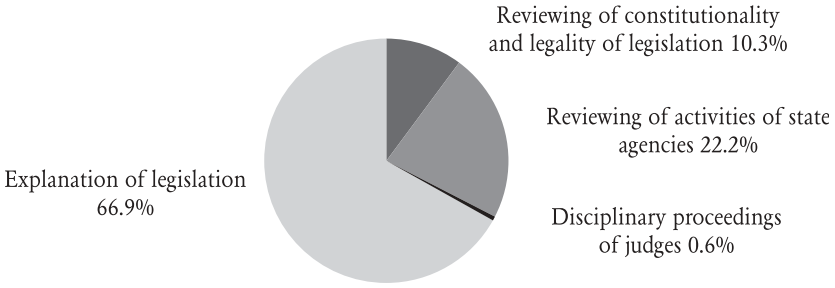
- applications asking to review whether legislative act was in conformity with the Constitution and the laws (202 applications, or 10.3% of the total number of applications);

- applications asking to review the legality of the activities of state agencies (437 applications, or 22.2%);

- applications asking for clarification of laws or other legislation or advice in solving a legal problem (1316 applications, or 66.9%);

- applications asking the commencement of disciplinary proceedings with regard to judges (11 applications, or 0.6%). After reviewing the activities of the judges no basis for initiating proceedings were found.

Figure 3. Applications received by the Chancellor of Justice in 2003, by content



2.2 Reviewing of conformity of legislative acts with the Constitution and the laws

There were 202 applications (i.e. 10.3% of the total number of applications) asking the reviewing of conformity of legislative acts with the Constitution and the laws.

- Reviewing of conformity of international conventions with the Constitution was requested in 3 applications.

- Reviewing of constitutionality of laws was requested in 110 applications. Most requests concerned the reviewing of the provisions of the Privatisation of Dwellings Act, the Taxation Act, the Social Welfare Act and the Code of Misdemeanour Procedure (4 applications with regard to each Act). As a result of the reviewing of constitutionality of laws, two laws were found to be in conflict with the Constitution and the Chancellor of Justice made a proposal to bring the laws in conformity with the Constitution. Also reports and memorandums were made to bring laws into conformity with the Constitution.

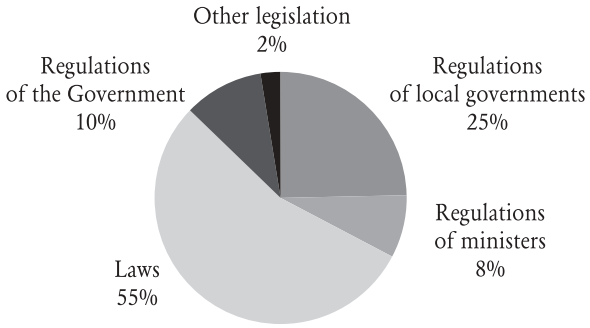
- Reviewing of the constitutionality and legality of regulations of the Government of the Republic was requested in 21 applications. No unconstitutional or illegal Government regulations were ascertained during the control.

- Reviewing of constitutionality and legality of regulations of Ministers was requested in 16 applications. In the course of control, two regulations were found to be in conflict with the Constitution and the laws.

- Reviewing of constitutionality and legality of regulations of local governments was requested in 50 applications. In the course of control, 13 local government regulations were found to be in conflict with the Constitution and the laws.

- Reviewing of constitutionality and legality of decrees of director generals of national boards was requested in two applications. In the course of control, no conflict with the laws was found.

Figure 4. Breakdown of applications by type of legislation



2.3 Reviewing of the legality of the activities of state agencies

Reviewing of legality of the activities of state agencies was requested in 437 applications, or 22.2% of the total number of applications. Of them, 243 applications were accepted for proceedings, and violations were ascertained in 53 cases. This makes up 21.8% of the total number of accepted applications. Among the ministries most complaints were against the activities of the Ministry of the Environment and the Ministry of Justice; among the executive agencies in the area of government of the ministries, most complaints were against the prison administrations and police establishments; among the boards, complaints were most numerous against the Citizenship and Migration Board; among inspectorates against the Financial Supervision Authority and among county governors against Valga county governor.

Thus, 437 applications were submitted for reviewing of the legality of activities of state agencies, of which:

1. 243 applications were accepted for proceedings (i.e. declared admissible), of which:

   - no violation was found in 190 cases

   - a violation was found in 53 cases

2. 194 applications were rejected, of which:

   - 69 applications were forwarded for review to other state agencies

   - a reply with clarification of legislation was given in 125 cases

State agency	Received aplica-tions	Rejected		Accepted	
		For-warded to other agencies	Explan-tory reply given	No vio-lation found	Finding of vio-lation
Area of government of the Ministry of the Environment	15	2	0	11	2
Ministry of the Environment	12	1		10	1
Land Board	3	1		1	1
Area of government of the Ministry of Justice	258	40	82	115	21
Ministry of Justice	7			6	1
Public Prosecutor's Office	2	1		1	
Prosecutor's Offices	6	3	3		
Prison administrations	243	36	79	108	20
Area of government of the Ministry of Education and Research	7	0	3	1	3
Ministry of Education and Research	6		2	1	3
Language Inspectorate	1		1		
Area of government of the Ministry of Economic Affairs and Communications	11	2	1	8	0
Ministry of Economic Affairs and Communications	3	1		2	
Consumer Protection Board	3			3	
Roads Administration	1	1			
Patents Board	1		1		
Communications Board	1			1	
Energy Market Inspectorate	1			1	
Estonian National Vehicle Registration Centre	1			1	
Area of government of the Ministry of Internal Affairs	92	17	34	27	14
Ministry of Internal Affairs	3		1	1	1
Citizenship and Migration Board	15	1	1	11	2
Border Guard Board	3	1		1	1
Security Police Board	1			1	
Data Protection Inspectorate	1			1	
Public Service Academy	1				1

Police authorities	68	15	32	12	9
Area of government of the Ministry of Defence	5	0	0	1	4
Ministry of Defence	2			1	1
Headquarters of the Defence Forces	3				3
Area of government of the Ministry of Foreign Affairs	6	0	0	4	2
Ministry of Foreign Affairs	2			1	1
Embassies and consulates	4			3	1
Area of government of the Ministry of Culture	1	0	0	0	1
Ministry of Culture	1				1
Area of government of the Ministry of Finance	8	6	1	1	0
Tax Board	6	5	1		
Customs Board	2	1		1	
Area of government of the Ministry of Social Affairs	4	0	0	4	0
Social Insurance Board	4			4	
Area of government of the Ministry of Agriculture	1	1	0	0	0
Veterinary and Food Board	1	1			
Other	29	1	4	18	6
National Archive Ida-Viru County Archive	1	1			
Iru Nursing Home	3		1	2	
Tallinn Ballet School	2			1	1
Financial Supervision Authority	3		1	2	
County governors	20		2	13	5
TOTAL	437	69	125	190	53

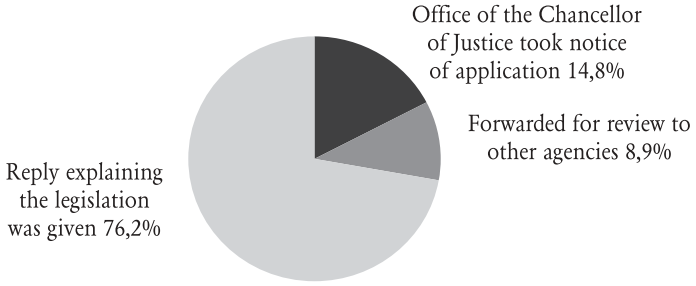
2.4 Explanation of legislation

Explanation of legislation was requested in 1316 applications, which is 66.9% of the total number of applications. Most questions concerned constitutional law, administrative law, criminal law and civil law.

Explanation of laws and other legislation and advice for solving legal problems was sought in 1316 applications, of which:

- a reply explaining the laws and other legislation was given to 1003 applications
- 118 applications were forwarded for review to other agencies
- the Office of Chancellor of Justice took notice of 195 applications accepted them for implementation

Figure 5. Replies to applications for explanation of legislation



2.5 Reception of persons

In 2003, 1032 persons came to the reception in the Chancellor of Justice's Office and his advisers in counties. Besides the Office of the Chancellor of Justice the reception of persons also took place in county representations in Tartu, Jõhvi, Narva and Sillamäe. In addition, the advisers of the Chancellor of Justice also received persons during their visits to county governments and city and rural municipality governments. The public was notified of the receptions through the mass media.

During the receptions most issues were raised in connection with administrative law (mostly in ownership reform cases), constitutional law and civil law.

Most people wanted explanation of legislation and legal advice but there were also cases which were accepted for proceedings. For various reasons, resolving of some of the issues was not in the competence of the Chancellor of Justice, for example, disputes between persons in private law.

If during the reception a necessity for submitting a written application arose, the reception adviser assisted the person with submitting it.

2.6 Conclusion

The number of applications received by the Chancellor of Justice – 1966 – has significantly increased in comparison with the previous years (1543 in 2002 and 1516 in 2001).

There has also been an increase in the number of applications for reviewing of the activities of state agencies – there were 437 such applications (310 in 2002). The biggest increase was among applications from detained persons – 243 applications (76 in 2002). Also the number of applications for explanation of legislation and legal problems has increased – 1316 applications (1010 in 2002).

Large part of the applications are requests for explanation of legislation and legal problems – 1316 applications, or 66.9% of the total number of applications (65.5% in 2002) – which is not directly in the competence of the Chancellor of Justice. There were also numerous applications concerning the following areas: court decisions – 132, ownership reform – 80, court proceedings – 51, education – 40, welfare – 35, pensions – 32, health care – 29.

The number of applications for reviewing of constitutionality and legality of legislative acts (202 applications, or 10.3% of the total number of applications) has decreased in comparison with the previous years (220 applications in 2002 – 14.3%; 227 applications in 2001 – 15.0%).

3. RIGHT OF THE CHILD TO EDUCATION AND OTHER RIGHTS OF THE CHILD

3.1 Introduction

Article 27 paragraph 4 and Article 28 paragraph 4 of the Constitution should be interpreted as meaning that the state has a particular duty to protect children. Inter alia, this means the obligation of the state to take measures so that children can actually exercise the rights given to them by the Constitution and other legislation.

For the development and well-being of the child, one of the most important rights of the child is to receive education. This right arises from the first sentence of Article 37 paragraph 1 of the Constitution. According to the second sentence of Article 37 paragraph 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. Therefore, it is essential that all children could have a possibility to acquire education without any obstacles.

In 2003, the Chancellor of Justice examined how the right to education is guaranteed to the child. He focused on the review of cases related to this right and also carried out analyses and inspections on his own initiative.

3.2 Review of applications

In 2003, the Chancellor of Justice reviewed over 50 applications relating to the right of the child to education and other rights of child. Many applications concerned admission to and exclusion from a kindergarten or school. Particularly problematic were the cases where the child did not attend the kindergarten of his or her district of residence. On the basis of people's applications it can be generalised that often local governments or schools establish additional criteria for the admission of children to kindergartens and schools or for their exclusion from there.

For example, one local government had established a regulation according to which a child could be excluded from a kindergarten if the local government unit of the child's residence was owing two months kindergarten fees to the local government in whose jurisdiction the kindergarten is located, even though the parent had fulfilled his or her payment obligation. Another local government had established that in order to be granted a place in the kindergarten the data concerning the parent and the child should be entered in the population register not later than by 31 December of the previous year. Children who were registered within the current year were included among those to be given the kindergarten place in the following year. This in essence meant an establishment of a one year's waiting period. In both cases the Chancellor of Justice found that the regulation was not in conformity with the Constitution or the laws and made relevant proposals for amendment of the regulation to the local government.

In the opinion of the Chancellor of Justice, county governors should improve supervision to avoid activities that violate the constitutional and legal right of the child to receive education. Applications concerning acquiring of education and other rights of the child have been described under the analyses of the following cases.

3.3 Reviews on the Chancellor's own initiative

The activities of the Chancellor of Justice in guaranteeing the rights of the child are to a large extent based on self-initiative. In addition to reviewing applications, the Chancellor of Justice on his own initiative also organised inspections to schools for children with special needs in Estonia in 2003 in order to examine how the rights of the child in these schools are guaranteed.

To get a comprehensive picture of the situation at special schools and to obtain information about the guaranteeing of the rights of children in these institutions, the Chancellor of Justice visited all the three special schools in Estonia: Tapa Special School, which is a boys school with Russian as the language of instruction; Puiatu Special School, which is a boys school with Estonian as the language of instruction, and Kaagvere Special School, which is a school for girls with both Estonian and Russian as the languages of instruction.

Placement of children in a special school is the strictest form of juvenile sanctions which can be applied on the basis of the Juvenile Sanctions Act. A special school is a closed institution where constant educational supervision of children is provided. Therefore the scrutiny of the guarantee of children's fundamental rights and freedoms is of particular importance because pupils' possibilities to ensure themselves the protection of their rights are limited in such institutions. On the basis of the inspection visits, the following generalisations can be made.

Representatives of special schools were concerned about the fact that in giving the permission for the placement of pupils with the need for special education in these schools, courts have ignored the system of the academic year and school semesters, although such disregard has become less frequent in the recent time. What is most important is the period of placement in a special school determined by the juvenile committee, and the court only gives the permission for such placement. From the point of view of ensuring the obligation to attend school and the stability of the study process it is more effective when the school cycle is taken into account when sending a pupil to a special school, as this would make it possible to assess the pupil's performance on a regular basis and would improve the school's work. It should be taken into consideration that, due to the reasons of organisation of work at schools, the period of placement in a special school as a sanction should not become excessively long and consequently unjustified.

Probably the placement of pupils in special schools for unreasonable periods is one of the reasons why many pupils in special schools interrupt their studies. Many pupils in special schools use the possibility of extending their study period as this is one possibility to circumvent the problem but it is not a solution. If a pupil does not apply for an extension of the period of attending a special school, he or she would leave in the middle of the academic year. There are also problems with the fact that the period of placement of pupils in special schools is formally until the end of the academic year, i.e. until 31 August. This requirement makes it difficult for pupils to transfer to another school and it also keeps the places in school occupied.

In the placement of pupils to special schools, the list of medical contradictions established in the Minister of Social Affairs Regulation No. 44 of 31 June 1998 is also not always complied with. The Regulation establishes contradictions which rule out the possibility of placement of a minor in a school for children with special educational needs. A director of one of the special schools had a recent example of a pupil whom the school had referred to a psychiatric examination in a hospital a week after his arrival at the school. The boy was diagnosed with a disorder which is medically counter-indicative for attending a special school.

No effective follow-up activities are provided for young people released from special schools – there are no support persons; often the pupil's only possibility is to go back to the school where the problems initially started; often the staff of the special schools themselves (and not representatives of juvenile committees or local government social workers) help to find a suitable educational institution for the children. This problem needs more systematic and comprehensive treatment than before.

3.4 Analyses carried out on the Chancellor's own initiative

In addition to inspection visits and review of applications, and as a continued appreciation of the importance of a safe school environment, which was set as a priority in 2002, the Chancellor of Justice on his own initiative analysed the issues of mental health of school-children. In the previous year, in the context of the safe school environment the Chancellor focused on the relationship between pupils and on how adults can alleviate and prevent potential problems and conflicts. Now it is clear that this objective should be seen in a wider context in a more integrated manner, considering the different aspects of the school stress. The Chancellor of Justice reached this understanding on the basis of information about suicides among school-aged children and young people and in view of several cases of suicides of pupils that shocked the Estonian public last year. In two of the cases also the Chancellor of Justice was approached.

Each child is valuable and more efforts are needed to prevent juvenile suicides. First of all, everything depends on the family and on cooperation between all the people who are in touch with the child – the family members, teachers, social workers, psychologists, etc. However, if the support of the family to the child is insufficient, the school and the social welfare network must increase their efforts to stand up for the child. The Chancellor of Justice turned to the Minister of Education and Research and county governors with proposals to strengthen the social network and improve the school environment.

The Chancellor in his proposals emphasised the need to improve information exchange and strengthen cooperation between all persons who deal with the child, such as teachers, psychologists, social workers, doctors, parents and other participants in the social network. The Chancellor in his proposals also stressed the need for further training in psychology for teachers and the importance of school psychologists in creating a safe school environment. Teachers and psychologists should carry out regular studies to find out the safety and mental state of children, for example organise anonymous surveys to find out about the concerns of pupils, or carry out tests that help to determine the level of stress, emotional balance and self-assessment among pupils.

Representatives of county governments, as persons entrusted with the duty to exercise state supervision, should more extensively monitor educational activities at schools and also assess the internal atmosphere at schools and the safety of the school environment, in the creation of which the school director has the main role. Currently, inspectors mainly focus on the organisation of teaching and its quality at schools and other aspects which can be measured by means of statistical indicators and documents. However, according to § 48(1) of the Basic and Upper Secondary Schools Act, there should be state supervision not only over the tuition at schools but also over educational activities. The cases dealt with by the Chancellor of Justice also refer to the need to make the educational system more flexible, so that it would take into account the development of each child. In assessing the performance of children, it is more important to consider it as an integrated whole and not let an individual problem overshadow the general progress of a pupil in the process of schooling and education.

The Chancellor of Justice is pleased to note that the state is paying increasing attention to improving the school environment and increasing the mental well-being of children. For example, in the Regulation of 31 July 2003 of the Minister of Education and Research on "The procedure of state supervision and criteria for the assessment of schooling and education of children and management at schools" much more attention is paid to the school environment and the assessment of an individual approach to pupils. The Ministry of Social Affairs has prepared a basic document on the mental health which deals with the requirements of guaranteeing a mentally and physically safe school environment and provides guidelines for dealing with problematic situations. Mental health of children has also been dealt with in the Government's strategy of guaranteeing the rights of the child and its action plan for 2004.

The replies of county governments to the Chancellor of Justice's proposals to improving the school atmosphere show that also on the county level important steps have been taken to support, counsel and train local governments. The common goal is to make the school environment more child-friendly. Appreciation of a caring and safe school environment and raising the awareness of school violence as a problem among the members of the Riigikogu, the Government of the Republic and other institutions was a motivation to organise a debate on the topic of the situation of Estonian children and the protection of the rights of the child as an important national issue at the session of the Riigikogu on 27 January 2004.

4. RIGHTS OF PERSONS WITH DISABILITIES

According to Article 28 paragraph 2 of the Constitution, an Estonian citizen has the right to state's assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. Article 28 paragraph 4 of the Constitution requires that families with many children and persons with disabilities should be under the special care of the state. The wording of this provision clearly shows that the right to receive state's assistance in the case of old age, incapacity for work, loss of a provider and in the case of need are the subjective rights of every person. In addition, people with disabilities have the right to be under the special protection of the state.

Regardless of the fact that the Constitution does not explicitly state the extent to which such persons are entitled to the state's assistance, and considering the fact that the legislator has a wide margin of appreciation in guaranteeing fundamental social rights, in the case of disables persons the legislator is bound by the letter and the spirit of the Constitution and obligations arising from international treaties.

The state not only has an obligation to take care of disabled persons by providing them social services and paying them social benefits, but the state must also create possibilities for disabled people to cope with themselves independently. The care of the state may, for

example, be expressed in the development of a system of vocational training and labour market counselling, promoting access to employment and participation in society etc. The state should make great efforts to integrate people with disabilities in society.

In 2003, the Chancellor of Justice reviewed more than 20 cases relating to the rights of people with disabilities. On the basis of the applications received by the Chancellor, it can be generalised that one of the problems of the protection of disabled people is the superficial attitude of the executive authorities to them. There is also dissatisfaction in connection with the activities of social welfare institutions. The applicants find that they have been poorly treated in welfare institutions and that they cannot get relevant information and their opinions are not heard.

Like in the previous year, also in 2003 there were problems with the process of determination of the degree of severity of disability. On the basis of the current regulation, people with disabilities are not always guaranteed the rights arising from the principles of good governance in these proceedings. The Chancellor of Justice would like to outline the fact that in resolving the cases of disabled persons, state and local government agencies should strictly comply with the principle of good governance, for example take into account that in administrative proceedings a person should be subject to special treatment due to his or her disability.

The Chancellor of Justice would also like to emphasise that the state should create a system that functions in practice and that helps to rehabilitate people with disabilities to society. Currently there is a problem with the compensation of costs of rehabilitation of people with disabilities. The Chancellor of Justice made a proposal regarding this to the Minister of Social Affairs.

5. RIGHT TO THE PROTECTION OF HEALTH

According to Article 28 paragraph 1 of the Constitution, everyone has the right to the protection of health. This right in the system of fundamental rights has a meaning both as an independent fundamental right as well as a value for the protection of which other fundamental rights often need to be restricted. The state must take effective measures for the protection of people's health. Inter alia, the state has the obligation to take preventive steps for the protection of health, to establish a health insurance system and to guarantee everyone's right to medical assistance. Determining the exact substance of these rights is in the competence of the legislator, but it is important that the person's right to health is covered by such protection.

Like in the previous reporting period, also in the current reporting period the Chancellor of Justice dealt with applications relating to the protection of person's health and analysed the constitutionality of health related legislation. In 2003 the Chancellor of Justice reviewed approximately 30 applications relating to the right to health. The main reasons why persons applied to the Chancellor of Justice were related to the following problems:

- dissatisfaction with the calculation and payment of health insurance benefits;
- lack of clarity in the calculation of health insurance benefits;
- lack of clarity in the classification of medicines and food additives;
- lack of compliance with the duty of notification in the provision of the health care service.

In reviewing the people's applications and analysing the health legislation it appeared that there are insufficiencies with the implementation of the health legislation both in the activities of the Ministry of Social Affairs, the Estonian Health Insurance Fund and the direct providers of health care services. Often dissatisfaction of people is due to the lack of necessary information. Often the reasons for failure to notify lie in the lack of clarity of legal regulation.

Besides resolving applications, the Chancellor of Justice on his own initiative also analysed extensively the regulation of school health care. The right to health as stipulated in Article 28 paragraph 1 of the Constitution is a subjective right of every person. This was also recognised in the Supreme Court decision of 10 November 2003. Health is one of the most important fundamental social rights and it is particularly important to guarantee its protection in the case of children. Considering that children spend a large part of their time at school it is necessary to have a functioning school health care system.

More precisely, the Chancellor of Justice analysed the conformity of Regulation No. 51 of 24 August 1995 of the Minister of Social Affairs on "The organisation of school health care" with the Constitution and other legislation. The Chancellor of Justice also convened a roundtable on the topic "School health care – a concern for all and for no one?" where he asked for an overview of the problems and possible solutions of school health care. Attending the roundtable were representatives of the Estonian Association of Students Self-Governments, Estonian Teachers Association, Association of School Leaders, Estonian Society of Family Doctors, Estonian Society of Paediatricians, Estonian Nurses Association, Association of Estonian Cities, Association of Municipalities in Estonia, Union of Estonian Associations of Local Authorities, Ministry of Education and Research, Ministry of Social Affairs and the Riigikogu Social Affairs Committee.

On the basis of the analysis and the results of the roundtable, and considering the regulation on school health care provided in the Basic and Upper Secondary Schools Act, Vocational Educational Institutions Act, Organisation of Health Care Services Act and the Health Insurance Act and in their implementing legislation, the Chancellor of Justice concluded that the present organisation of school health care is not in conformity with the general health care system and its legal regulation. The notion of school health care is not clearly defined in legislation and its aim, general organisation, providers or services, financiers or supervisory bodies have also not been defined. School health care needs to be regulated with a law.

As a result of his supervision, the Chancellor of Justice found that in addition to the conflict between the guidelines for the organisation of school health care as approved with the Minister of Social Affairs Regulation No. 51 of 24 August 1995, in several schools in Estonia school health care services are not available for pupils. The Chancellor of Justice sent a memorandum to the Minister of Social Affairs who dealt with the problems ascertained in the course of the Chancellor's supervision. The Chancellor of Justice in his memorandum also underlined that school health care must be equally available to all children, regardless of the child's residence, number of pupils at school, location of the school or other circumstances. The Chancellor of Justice found that the central part of school health care – the school health care service – is not equally available for all children under the current legal regulation.

In reply to the memorandum, the Minister of Social Affairs submitted a detailed schedule for the drawing up and implementation of the school health care conception. The Minister of Social Affairs has also planned to submit the conception of school health care for approval to the Government on 1 October 2004 and the deadline for its implementation is 30 December 2005.

6. FREEDOM OF ENTERPRISE AND FREEDOM OF PROFESSION

6.1 Restriction of the freedom of enterprise and freedom of profession

Article 31 of the Constitution provides fro the right to engage in enterprise and Article 29 paragraph 1 for the right to freely choose one's area of activity, profession and place of work, i.e. the freedom of profession. In conformity with Article 9 paragraph 2 of the Constitution, the freedom of enterprise as well as the freedom of profession can extend to legal persons. Entrepreneurship is an activity which in general is aimed at receiving profit from the production or sale of goods, providing of services, disposing of property etc. The protection of the freedom of enterprise includes all activities and professions in the case of which a person offers goods or services on his or her behalf. Intervention in the freedom of enterprise may restrict or deprive a person of a possibility to earn a living with an activity. Often this is accompanied by a restriction of the freedom of profession. For example, being a taxi driver can at the same time be a person's activity, profession, place of work or entrepreneurship. Providing taxi transport services concerns both of these fundamental rights.

The Constitution gives the legislator wide powers for organising enterprise. In accordance with the second sentence of Article 31 of the Constitution, the law may provide for the conditions and procedure of the right to engage in enterprise. Similarly, a restriction clause in contained in the second sentence of Article 29 paragraph 1 of the Constitution. This is a fundamental right that is subject to restrictions by law, i.e. the legislator can restrict it by complying with all the material requirements arising from the Constitution, including the principles of proportionality, presumption of innocence, legitimate expectation and equality. When reviewing the constitutionality of the regulation of temporary driving licence established in the Traffic Act, the Chancellor of Justice found that the suspension of the person's driving rights in a foreign country before the entry into force of the decision imposing a penalty disproportionately restricts not only the fundamental rights established in Article 29 paragraph 1 and Article 31 of the Constitution but also the freedom of activity, right of ownership and freedom of movement. Suspension of the driving rights is a sanction imposed for committing of a misdemeanour and therefore it violated the presumption of innocence.

To restrict the freedom of enterprise as well as the freedom of profession, it is sufficient to have a reasonable justification which can arise from public interest or from the need to protect the rights of other persons. For example, the Chancellor of Justice reviewed the conformity of § 20 (6) clause 4 and (7) of the Fishing Act with Articles 11 and 31 of the Constitution and found that the prohibition imposed by the law on purchasing and selling of fish caught by recreational fishermen is a proportional measure to protect the fish resources and guarantee their more sustainable use.

From the formal legal point of view a general restricting clause means that the fundamental right can be restricted either by law or on the basis of a law. It is only required that the in the final stage the restriction imposed by the executive authority would be traced back to a delegating norm contained in the law. In the substantive law terms the law itself must conform to the principle of legal clarity. According to Article 13 paragraph 2 of the Constitution, the law shall protect everyone from the arbitrary exercise of state authority. This fundamental right is not guaranteed if the restrictions in the law are stipulated insufficiently or ambiguously. At the same time, preciseness may result in excessive rigidity, while the law should also be applicable if circumstances change. If all restrictions were described in detail in law then changes occurring in the relevant field would necessitate the constant changing of the law. Giving the executive authority the right to specify the details of restrictions can be justified with the aim of delegated legislation – to transfer to the executive authority the right to establish technical details of the norm and thereby guarantee flexible administrative activity

and prevent overburdening of laws with unnecessary regulatory detail. It should be kept in mind that issues which are important in terms of fundamental rights should be regulated in a law. The law does not need to contain detailed descriptions of all the restrictions but it should provide the framework in which the executive authority can specify the relevant provisions. The executive authority may not impose additional restrictions as compared to those provided for in the law.

6.2 Restrictions connected with permits and authorisations

The proceedings to review compliance with laws that were carried out during the reporting period and in which infringements of the freedom of enterprise or freedom of profession were ascertained, concern to a large extent authorisations provided licences established by law and regulations established in connection with them. The following section gives examples of the fishing permit, import and export licence for strategic goods, driving licence and taxi licence. Vehicle licence card also has the characteristics of an authorisation a licence because as without this transport of passengers for a fee is prohibited.

According to § 4(2) of the Commercial Code, the law may provide for activities for which an authorisation is needed or in which only certain types of operators may engage. Various permits and licences that local governments and state agencies issue on the basis of law are administrative acts in the meaning of law as they grant the right to behave in a manner that would be prohibited without the authorisation. In the meaning of the Code of Administrative Procedure, an authorisation is an administrative act, issuers of authorisations are administrative authorities and the procedure for authorisations is the administrative procedure. Therefore, provisions regulating administrative acts also extend to authorisations. But as authorisations are provided for in the laws regulating the particular area of activity and the authorisation procedure is a type of administrative procedure also special provisions apply.

According to currently effective law, different terms are used to designate various types of authorisations, for example authorisation, activity licence, operating licence, licence etc. However, for the protection of fundamental rights the problem is not so much related to terminological inconsistency rather than to the unclear delegating norms contained in specific laws and sometimes also the insufficient regulation of authorisations. If the law only provides for a requirement to have an authorisation and at the same time authorises the Government or a Minister to establish the conditions and procedure for issuing the authorisations, it will create a situation where the conditions and procedure for exercising the right to engage in enterprise are regulated by an act inferior to a law.

Often the law authorises the executive authority to establish the procedure for issuing authorisations. If the law does not provide a sufficient framework for the establishment of the procedure, the executive authorities tend to exceed the limits of the delegated powers. Often the regulations issued on the basis of delegating norms regulate not only procedural issues but also contain completely new substantive norms. For example, the Tallinn City Council with its Regulation No. 441 of 16 November 2000 on the "Procedure for Issuing Taxi Licences and Vehicle Licence Cards", in clause 3.4, limited the validity of the vehicle licence card to six months although according to the law the validity of the vehicle licence card had to be of the same length as the validity of the activity licence. The Narva City Council in its Regulation No. 35/19 of 22 August 2003, in clause 2.3, prohibited to use for the provision of taxi services vehicles that have more than 7 seats, including the driver's seat. The law does not contain such a restriction.

Restricting the freedom of enterprise can also be caused by the executive authority's failure to act, including failure to implement the delegating norm provided for by law. In the course of supervision proceedings carried out on the basis of an application by AS MSCA Reval

Maritime School, it was found that the Maritime Administration had refused to approve the curriculum for the training of boatmasters for the reason that the Government of the Republic had failed to establish the relevant regulation on the basis of the Maritime Safety Act.

7. RIGHT TO FREEDOM, INVIOLABILITY AND SAFETY OF PERSON

7.1 Introduction

One of the main objectives of the activities of the Chancellor of Justice as the guardian of fundamental rights of persons is to guarantee the protection of the freedom of persons and to review that fundamental rights and freedoms of persons are respected. Article 19 paragraph 1 of the Constitution gives everyone the right to free self-realisation. This provision expresses the general right to freedom. The scope of the general right to freedom – i.e. everyone's freedom to engage or not engage in any act – can be very wide and diverse. Examples of the realisation of the general right to freedom are hunting with a gun, riding a motorbike without a helmet, horse-riding in a forest, consumption of alcohol, etc. The Constitution has stipulated several specific rights to freedom (e.g. Art 29: right to freely choose one's area of activity, profession or place of work) and therefore the general right to freedom expressed in Article 19 is used when no specific right has been provided.

Limits of the right to freedom are provided for in Article 19 paragraph 2 of the Constitution, according to which everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. This means that the legislator can restrict the general right to freedom only by law. In accordance with the principle set out in Article 3 paragraph 1 of the Constitution, the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity with it. In restricting the right to freedom, particular attention has to be paid to this requirement.

One of the most important forms of expression of the right to freedom is the physical freedom of persons – i.e. security and safety of person. As a guarantee of this right, Article 20 of the Constitution stipulates that everyone has the right to liberty and security of person. The same provision gives an exhaustive list of cases when the Constitution allows to restrict the freedom of person. First of all, it is possible with the aim to prevent acts that are dangerous to society or to allow punishment for such acts (e.g. a person can be deprived of his or her liberty to execute a conviction or detention ordered by a court, or to bring a person who is suspected of an offence before a court of law). Physical freedom of a person can be restricted only in the cases and pursuant to procedure provided by law. It is prohibited for a state authority to deprive a person arbitrarily of his or her liberty. Physical liberty of a person is the precondition for the exercise of most fundamental freedoms. With the deprivation of liberty also other fundamental rights are restricted.

Due to the wide scope of protection of the general right to freedom, it is possible to interfere with this right in many areas of life and therefore a restriction my arise from any legal norm that regulates a person's activity, for example people's behaviour in public. More clearly distinguishable is the scope of protection of specific rights to freedom and their restrictions, such as limitation of physical freedom in power structures, first and foremost in the police. Right to freedom is considerably restricted in penal institutions, such as prisons or jails, as well as in the defence forces or in other places where persons' presence is compulsory.

7.2 General right to freedom and rules of public order

An example of the restriction of the general right to freedom would be the establishment of the rules of public order by local governments. Mostly rules of public order contain provisions that may regulate a very wide scope of the general right to freedom, ranging, for example, from people's behaviour in public or making of noise or begging or dumping of garbage to the use of indecent expressions and annoying of fellow citizens. Violators of the rules of public order can be punished in accordance with the procedure provided for in the Penal Code – either for the commission of a misdemeanour or a criminal offence.

There are problems with the requirement of a legal basis for the restriction of the right to freedom which arises from the Constitution. Rules of public order are established by a city or rural municipality council with its regulation, on the basis of Article 154 paragraph 1 of the Constitution which stipulates that all local issues are decided and managed by local governments who act independently on the basis of laws. Also § 6(3) clause 2 of the Local Government Organisation Act provides that a local government unit decides and manages those local issues which have not been given by law for someone else to decide and manage. Thus, local governments do not have a direct legal basis for restricting general rights to freedom.

It is also problematic that every local government has its own rules of public order. This increases lack of legal clarity in society because it lets competing public orders to apply in the territory of the same country. Persons have no reasonable possibility to understand the restrictions imposed on their behaviour and thus the possibility to observe them.

7.3 Police authorities

The aim of the activities of the police is to guarantee public law and order and security and to detect and prevent misdemeanours and criminal offences. Inevitably the police activities involve restriction of the right to freedom. It is, however, important to ensure that the restriction of the rights to freedom, similarly to restrictions of any fundamental freedoms, would be legal and necessary in a democratic society and that it does not distort the nature of the rights and freedoms restricted. Such a requirement is provided for in the second sentence of Article 11 of the Constitution.

Supervision over compliance with fundamental rights by the police has always been important in the work of the Chancellor of Justice. In 2003, the Chancellor of Justice received approximately 70 written applications relating to the activities of police authorities. In two cases it was found that interference in the sphere of freedom of persons by the police was not in conformity with the Constitution. More precisely, the Chancellor of Justice found infringements of fundamental rights in the cases related to the ascertainment of the state of intoxication and proceedings of an administrative infringement and calling of a person to the police for the taking of statements. In several cases the Chancellor of Justice had to admit that complaints against the activities of the police may have been caused to a large extent by the ambiguity of the legislation regulating the work of the police.

Similarly to the previous years, many applications relating to the work of the police contain complaints about the proceedings of criminal cases, first of all with regard to criminal proceedings involving the guarantee of person's rights. Such issues are also raised in many applications against the activities of the prosecutor's office as the body supervising the legality of criminal proceedings. The Chancellor of Justice received approximately ten such applications in 2003. Very often people turn to the Chancellor of Justice when the court proceedings are pending or when a court decision has entered into force. It means people complain against the activities of the court. In such cases, the Chancellor of Justice is often

forced to note that he lacks the competence to resolve such applications. The Chancellor of Justice Act prohibits the Chancellor to process an application if a court decision in the same case has entered into force or if pre-trial complaint or court proceedings are pending.

The Chancellor of Justice's activities in this field have shown the continuation of problems throughout the years and therefore the field will remain under special attention of the Chancellor also in the future. With regard to the issues concerning the work of the police the Chancellor of Justice often turned to the Minister of Internal Affairs because the guaranteeing of internal security and the protection of public order are within the competence of the Ministry of Internal Affairs, and also the Police Board and the Security Police Board are bodies under the area of government of the Ministry. The competence of the Ministry of Internal Affairs also includes drafting of legislation in these fields. The Minister of Internal Affairs has constantly recognised the need to improve the quality of legislation regulating the work of the police in order to improve the protection of fundamental rights. The Chancellor of Justice considers that his aim in this field in the nearest years is to draw the attention of the Ministry of Internal Affairs to problems, so that within his competence the Chancellor can be of assistance in organising the regulative base in this field.

7.4 Protection of the rights of prisoners, persons under arrest and detainees

Prisoners and persons under arrest are deprived of their liberty to execute a conviction by a court. Detainees are deprived of their liberty first of all with the aim to guarantee the criminal proceedings with regard to them. Deprivation of a person's liberty to execute a conviction and to guarantee the criminal proceedings is one of the most extensive restrictions of fundamental rights that the Constitution and laws allow.

Execution of imprisonment and preliminary detention (custody pending trial) are very burdensome for a person. Therefore the Chancellor of Justice reviews particularly carefully that the application of measures with regard to prisoners and persons under arrest and detainees would not restrict their rights more than is allowed by law.

Prisoners and detainees submitted 243 applications against the activities of the prisons that execute imprisonment and preliminary detention in 2003. In the case of 128 applications the Chancellor of Justice started proceedings to control the legality of the prison's activities and compliance with the principle of good governance. In 20 cases an infringement or occurrence of maladministration by the prison was ascertained. In addition to prisons, in their applications to the Chancellor of Justice prisoners, persons under arrest and detainees also complained against the jails which are under the area of government of the Ministry of Justice or under police prefectures.

The applications received from prisoners, persons under arrest and detainees in 2003 also concerned removal of personal belongings, application of additional security measures, imposition of disciplinary punishments, living conditions, guaranteeing the coping of persons and organisation and availability of medical assistance in penal institutions.

In the second part of his report in 2002, the Chancellor of Justice raised problems that state agencies had had in replying to applications of detained persons. Also in 2003, in the proceedings started on the basis of applications received by the Chancellor of Justice, it appeared that state agencies had violated law in replying to detained persons' applications. Due to infringements found in the course of the proceedings the Chancellor of Justice made a proposal to the Minister of Justice to take measures in order to avoid infringements in replying to applications submitted by detained persons in the future.

In the course of the proceedings in 2003 it was found that prisons had problems with the compliance with the requirements of the Administrative Procedure Act. In several cases the

Chancellor of Justice found that prisons were violating the obligation to justify an administrative act. In connection with the violations of the Administrative Procedure Act the Chancellor of Justice sent a memorandum to the Minister of Justice and to Tallinn Prison.

The proceedings of the Chancellor of Justice revealed a problem that often an act inferior to a law had been used as a legal basis for taking measures to restrict the rights of prisoners and detainees. In 2003 the Chancellor of Justice made two proposals to the Minister of Justice to stop taking fees without a legal basis from prisoners and detainees for various acts in prisons. Prisons base their activities on legislation lower than laws because the Imprisonment Act regulates many issues in very general terms and insufficiently and delegates the establishment of a more general regulation to the Minister of Justice. It is also doubtful whether such a solution is in conformity with the principle of legality. In the future, besides reviewing the legality of the activities of prisons and police prefectures there is also a need for a more effective reviewing of whether relevant legislation is in conformity with the laws and the Constitution.

During the meeting of the Chancellor of Justice with the Council of Europe Commissioner for Human Rights Alvaro Gil-Robles on 30 October 2003 the rights of prisoners, persons under arrest and detainees were also discussed. During his visit from 27 to 30 October the Human Rights Commissioner also visited Rakvere jail and Maardu Prison. The commissioner in his report of 12 February 2004[10] criticises the conditions of detention in Rakvere jail which in his opinion are far from satisfactory. The report also mentions the widespread incidence of tuberculosis and HIV and access to legal assistance as problems in penal institutions.

7.4.1 Inspection visits to penal institutions

7.4.1.1 Inspection visits to Narva and Kohtla-Järve jails

At the end of 2002, the Chancellor of Justice received a number of applications from persons detained in some jails in Ida-Viru County, complaining about poor living conditions in the jails. The Chancellor considered it necessary to send his adviser to supervise the situation in the jails.

On 8 January 2003 the adviser of the Chancellor of Justice in Ida-Virumaa visited the jail of Narva Police Prefecture in Narva. The cells used by the police prefecture are located in the third floor of the Narva Police Prefecture building. The jail is also used by the customs, border guard and the rescue services who also have a competence to detain persons.

During the inspection visit no overpopulation of the jail was noted. According to the police prefect, up to 68 persons can be placed in the jail if all sanitary requirements are followed. The written register of detained persons kept in the jail showed that there were 49 persons in the jail at the time of inspection and 4 more persons were expected to arrive during the day. At other times the number of detained persons in the jail had been up to 60. According to police officials, the cells have normal ventilation. In each cell it is possible to wash oneself and use the toilet.

It appeared that the jail is in compliance with the principles provided in § 12 and 90 of the Imprisonment Act and § 3 of the internal regulations of the jail, according to which arrested persons have to be kept separately. The written register of detainees showed that men and women, adults and minors were kept in separate cells.

[10] Available in the Internet at http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_country/Estonia/index.asp#TopOfPage (16.07.2004)

According to § 45(1) of the Imprisonment Act, there has to be a window in the living quarters that guarantees sufficient lighting of the room. In one of the cells there was no window and in other cells there was almost no natural light (the window panes were dim). In all the cells there was artificial light round the clock.

As a shortcoming it was also found that it was impossible to use the possibility to be in fresh air, which is guaranteed by § 15(1) clause 4 of the internal rules of the jail. According to the chief superintendent, there is no technical or material possibility for this (the number of staff in the jail is not sufficient).

On 19 February 2003, an adviser of the Chancellor of Justice visited the jail of Ida-Viru county police prefecture in Kohtla-Järve. Eleven cells at the disposal of the prefecture are located in the basement floor of the three-storey building of Ida-Viru Police Prefecture.

The jail is heavily overpopulated. According to the chief inspector up to 27 persons can be placed in the jail in accordance with the sanitary requirements. The written register of detained persons, however, showed that there were 53 persons in the jail at the time of the inspection and on 18 February 2003 there had been 56 persons in the jail. At other times, there had also been up to 60 persons in the jail. In accordance with the sanitary requirements, there can be up to 6 persons in a cell, on 13 February 2003, however, there were 14 persons in one cell.

Due to the overpopulation of the cells, it is difficult for persons kept there to take care of their hygiene needs in accordance with § 9 of the internal rules of the jail. According to the chief inspector 8 persons per day can wash themselves. The principles of keeping arrested persons separately from prisoners, as required by § 12 and 90 of the Imprisonment Act and § 3 of the internal rules of the jail, are not observed. The written register of prisoners showed that there were prisoners and detainees in the same cell. Men and women and adults and minors were placed in different cells.

According to § 17(2) clause 6 of the internal rules of the jail, arrested persons are prohibited to smoke if another person in the same cell fails to agree with this. Smokers and non-smokers are kept together in the same cells.

According to § 45(1) of the Imprisonment Act, there must be a window in the living quarter that guarantees sufficient lighting of the room. In all cells, there is poor ventilation, there are no windows and there is also no natural light. There is artificial light in the cells round the clock. Such conditions are not in conformity with the requirements of executing preliminary detention, arrest or administrative arrest as prescribed in § 156 of the Imprisonment Act.

In the opinion of the Chancellor of Justice, such a situation in Ida-Virumaa jails causes degrading treatment of detained persons which in prohibited according to Article 18 of the Constitution.

The Chancellor of Justice and representatives of international organisations who have visited Estonia have drawn the attention of the Minister of Internal Affairs to the need to guarantee quickly the protection of fundamental rights of persons in police jails and comply with the requirements for the conditions of detention. The Minister of Internal Affairs has admitted that problems exist but he has referred to the lack of money – there have been continuous requests for allocation of money from the state budget but no funds have been given – and to the fact that the building of the planned prison in Jõhvi (which will also include a preliminary investigation department) makes it unreasonable to start extensive renovations of jails.

7.4.1.2 Inspection visit to Tartu Prison

On 6 February, in connection with the visit of the representatives of the office of the Finnish ombudsman to Estonia, a joint visit of the officials of the Office of the Chancellor of Justice and representatives of the Finnish ombudsman's office to Tartu Prison was held. The Ministry of Justice Deputy Secretary General for Prisons also participated in the visit. The aim of the inspection visit was to supervise how the rights of prisoners and detainees are ensured in the new Tartu Prison and to demonstrate to Finnish colleagues the new level in the Estonian criminal execution system – a transfer from the camp type prisons to a cell-based prison like Tartu Prison.

The interest of Finnish colleagues in Tartu Prison was also due to the fact that Tartu Prison was built in parallel with the Vantaa Prison in Finland and it is interesting for Finnish colleagues to observe how the new type of penal institution is functioning in Estonia. For the Finnish colleagues it was both an introductory visit as well as an inspection with the aim to get acquainted with the situation in the prison and with how the representatives of the Office of the Estonian Chancellor of Justice arrange such visits.

As usual, prior to the inspection a comprehensive questionnaire was sent to the prison, to which the prison also provided extensive replies. These were used as the basis for the main issues to be dealt with during the inspection.

Tartu Prison is a penal institution in the area of government of the Ministry of Justice. In the prison there are both prisoners convicted by the court as well as detainees in connection with pending criminal proceedings. Tartu Prison was opened on 15 November 2002 and the first inmates had been brought to the prison on 16 October 2002. The prison covers a territory of 10 ha and consists of the administrative building, living quarters of prisoners, living quarters of detainees, sports facility. In addition, there is a maintenance building and a church. There are 175 cells for prisoners in the prison, one of the cells is for disabled persons. There are two places in each cell. There are 340 cells for persons under preliminary investigation, and one of the cells is a cell for disabled persons.

There are approximately 800 inmates in the prison, 500 of them are prisoners and 300 are detainees. There is a general education school in the prison and in the nearest years a vocational school will be opened. There is also a church with three chaplains. 86 prisoners are employed in the prison, it is also possible to do maintenance work for the prison's own purposes. The joint stock company Estonian Prison Industry has been established which offers woodwork and sorting of combs and nails.

During the inspection visit there was a meeting with the management of Tartu Prison and a tour of the prison territory was made. Officials of the Office of the Chancellor of Justice also organised a reception of prisoners and detainees.

One of the reasons for the inspection visit to Tartu Prison was that the Chancellor of Justice had received a disproportionately large number of letters from this prison. The main problem raised in the letters is that in the opinion of inmates unjustified restrictions have been imposed on them that do not exist in other prisons. The regime in Tartu Prison is relatively strict as compared with the so-called camp type prisons and therefore it makes compliance with the provisions of the Imprisonment Act easier. Applicants also raised problems in connection with access to legislation and reply to their applications.

During the inspection visit it appeared that the management of Tartu Prison has not noted any significant violations by the prison staff. Probably the reason is that it is a recently opened prison whose staff is composed of persons who have not worked in the prison system earlier. There have been a few instances when an inmate attacked a prison official and some

persons have also come under the attention of prison officials in connection with narcotic substances.

It was noted that there is a problem with employment of inmates although measures have now been taken to improve the situation.

During the inspection visit, meeting rooms for personal visits, the social department, medical department, sports facility, church and living quarters of prisoners and detainees were visited. The rooms were new, with modern furnishing and pleasant looking.

Representatives of the Chancellor of Justice also organised a reception of inmates in the prison. Some inmates spoke on behalf of the whole group, for example on behalf of their section. Finnish colleagues noted that this is a sign that the criminal hierarchy typical of camp type prisons has been partly broken in Tartu Prison. A written application from one inmate was received. Altogether 11 prisoners and one detainee came to the reception.

Inmates complained about the coping difficulties in the prison. There is not much employment and, in accordance with the Imprisonment Act, large deductions from the inmates' income are made to the release fund and to cover the civil claims. Inmates also complained about access to health care services (dental care is available only for a charge), as well as the charge taken for the security stickers and inspection of electronic equipment which inmates are allowed to use. Several complaints were made in connection with prison employment (unclear bases of remuneration, working conditions etc). There were also complaints about the food – inmates emphasised that the food itself was good but too monotonous and there were not enough sweets and spices. Some other problems were also raised. Several problems were solved on the spot by explaining the substance of legislation, other problems were promised to be brought to the attention of the prison management and proceedings were decided to be started in connection with others.

In conclusion, it can be said that on the basis of the inspection visit the following problems of inmates were found:

- Poor material condition of inmates which is due to insufficient employment possibilities and making of deductions from payments in accordance with the law.

- Health issues. Some health care services are provided for money available on the person's account. But due to lack of money on the account, many people have no access to some services (e.g. dental care). There is no legal basis for taking money for health care services.

- The legality of various charges taken from inmates in Tartu Prison is questionable – e.g. charge for the inspection of electronic equipment or charge for the safety seal of a bag for keeping the inmate's personal belongings in the storage.

- The procedure of reviewing of applications and the procedure of disciplinary proceedings needs to be specified.

- More attention needs to be paid to drawing up of documents in the prison. Documents must be drawn up in accordance with the law (e.g. in the case of employment of a person or imposing a punishment). The inmate must be informed of the documents in accordance with the prescribed procedure.

- To review whether the restrictions provided for in the internal rules of the prison are in conformity with the Constitution and the laws.

The minor problems that had been raised were discussed with the prison management (monotonous food, inmates do not get newspapers on the same day, manner of searches, etc). Later feedback from inmates confirmed that several problems were promptly solved (e.g. the issue of food, information about remuneration for work etc).

On the basis of the information gathered during the inspection visit, proceedings were started to review the legality of the charge taken for the inspection and security stickers of electronic equipment and the legal basis for providing health care services for a charge. The analysis showed that the prison had violated the rights of inmates. A proposal was made to the Minister of Justice to adjust the regulation and to compensate the damage to persons from whom charges had been taken unjustifiably. This is what the Ministry also did later.

7.4.1.3 Inspection visit to Maardu Prison

On 28 April 2003 the Office of the Chancellor of Justice made a planned inspection visit to Maardu Prison. Maardu Prison houses juveniles and young persons held in custody and, accordingly, the aim of the visit was to review how the fundamental rights and freedoms are respected, primarily considering their young age.

Maardu Prison is an institution for the serving of preliminary detention and execution of punishments where there are mainly juveniles and young persons held in custody in connection with pending criminal proceedings. There are few adult prisoners who do general maintenance work in the prison. The prison is located in Maardu town and it has been rebuilt from the former jail and therefore it is located in the same building. There are approximately 130 inmates in the prison. There are average 70 juveniles held and 50 young adults who are held in custody. Five adult prisoners are employed in maintenance work in the prison.

Prior to the inspection visit a comprehensive questionnaire was sent to the prison to which detailed replies were received. These were the basis for the main issues dealt with during the visit. Involved in drawing up the questionnaire and conducting the visit were the relevant officials of the third department of the Office of the Chancellor of Justice who deal with solving the complaints of prisoners and detainees and officials of the first department who deal with supervision over compliance with the rights of minors and children.

During the inspection visit a meeting and discussion was held with the director of Maardu Prison and the head of the social department and a tour of the prison territory was made. Officials of the Office of the Chancellor of Justice organised a reception of inmates and talked to psychologists and teachers at Maardu Prison.

The Chancellor of Justice has received relatively few applications from Maardu Prison. There have been some complaints about the medical treatment possibilities and quality of food and there have been problems with the forwarding of applications to prison officials and the use of the state language in communicating with prison officials.

At the meeting with the prison management it was noted that Maardu Prison has had problems due to the fact that persons who are transferred there have been in prisons and jails with different regimes. There are also difficulties with the rule that adult inmates are allowed to smoke while minors are not.

In a prison which houses mainly juvenile persons held in custody the topic of education is particularly important. During the inspection visit there was a meeting with the staff of the social department of the prison and the director of Vocational Secondary School No. 5 which provides educational service to the prison. It appeared that tuition has been provided in the prison for two years now but there are problems with it. For example, in a preliminary investigation prison there are people of different ages and of different level of education and

different behaviour and they need to be kept separately in the interests of criminal proceedings and security. What makes things difficult is also the fact that detainees spend a relatively short period in Maardu Prison. In the interests of quality of education, in the near future tuition in Maardu Prison will be provided by Maardu Upper Secondary School. The main aim of education offered at Maardu Prison is to maintain or create a habit in young men to attend school and to make their schooling easier already during the serving of a sentence. With support from the PHARE programme, in-service training of teachers has been organised and study materials have been purchased. Due to the limited conditions, only general education is provided in Maardu Prison as it is currently impossible to provide vocational training that would comply with the necessary requirements.

During the inspection visit, officials of the Office of the Chancellor of Justice organised a reception of inmates. Altogether 24 inmates and one prison official came to the reception. The following problems were raised by inmates:

- Organisation of keeping hygiene articles. It is not guaranteed that instead of his own hygiene articles an inmate would not get someone else's articles which may be infected with bacteria, as the hygiene articles are kept by the prison officials and sometimes they get mixed up.

- Ventilation in the cells is poor, particularly in summer.

- It is somewhat difficult for detainees to get information: legislation on imprisonment rules or explanatory materials about it are not easily accessible and officials themselves are unable to explain the rules of preliminary detention. There have been cases when guards have used indecent expression in communicating with inmates.

- Adult inmates have not been able to use the sports hall despite the promises given to them.

- For many persons the place of serving the future imprisonment is problematic. Inmates were interested in the extent to which they can themselves choose the place of future imprisonment.

These problems were later also discussed with the prison management who admitted that the use of indecent expressions or inability to explain the rules of detention are mainly caused by the low level of education of some prison officials or the unsuitability of their education for prison work. It is difficult to organise training of prison officials as the officials attending the training would be excluded from the normal work regime for a long time. The attention of the prison management was also drawn to the problem of daily living conditions and the management promised to take relevant measures. No further applications regarding these problems have been received from Maaru Prison and hopefully this is a sign that the management has solved the problems.

7.4.1.4 Inspection visit to Murru Prison

On 27 October 2003 a planned visit of the Office of the Chancellor of Justice to Murru Prison was held. The aim was to ascertain how fundamental rights and freedoms of inmates are guaranteed in the biggest camp type prison in Estonia.

Murru Prison is an institution in the area of government of the Ministry Of Justice intended for executing the imprisonment of adult male persons. The prison is located in Murru borough in Harju County and the prison territory covers 14 ha. On the day of the inspection visit there were 1514 prisoners. The prison has a capacity of 1660 persons but in that case the floor space per one inmate would be smaller than required by law.

Prior to the inspection visit a written questionnaire was sent to the prison to which detailed replies were given. This was used as the basis for preparatory information for the visit. Participating in the inspection visit was member of the Riigikogu Constitutional Affairs Committee Avo Üprus who was given access to all the material.

In 2003 the Chancellor of Justice received relatively few complaints from Murru Prison considering the number of inmates there. There were only about twenty complaints. Many of the problems raised in the complaints are not caused by the activities of the prison management, for example restrictions on correspondence and communication with the outside world which are imposed by law and the internal rules of the prison. Complaints dealt with disciplinary punishments, security problems and searches, and in some cases assistance for transfer to another prison was sought. More serious complaints were related to the conditions in the punishment cells and locked cells and the activities of the armed squad of the prisons. The Chancellor of Justice has received significantly fewer complaints from Murru Prison than from large preliminary investigation prisons like Tallinn Prison and Tartu Prison.

During the inspection visit a meeting with the director and other members of the management of Murru Prison was held and a tour of the prison territory was conducted. Officials of the Office of the Chancellor of Justice also organised a reception of prisoners and detainees.

At a meeting with the prison management it was noted that the prison has become obsolete both materially and in terms of the atmosphere, and it is also overpopulated. Despite this the prison has a potential – on the condition that after the building of new penal institutions and modernisation of the old ones there will be significantly less people in this prison. There is a considerable problem with employment in the prison. The company Prison Industry has been unable to start any significant production in the prison and therefore the problem of employment is still topical.

The number of prisoners who are acquiring education is very small. As of 2005, the educational service will be provided by Tallinn Adult Education Centre. The management considered it necessary that only those who wish will attend the classes. Quality is preferred to quantity.

During the tour of the prison the representatives of the Chancellor's Office had to note that the prison buildings are not in conformity with modern requirements. Some rooms – punishment cells and locked cells – are in a poor state of repair and overpopulated. There is no storage for keeping the personal belongings of inmates and therefore there is no adequate control over personal belongings. Also the prison canteen was visited and it was noted that this, too, did not meet modern requirements. This has been confirmed by precepts of health protection authorities, but due to lack of money the canteen has not been renovated.

Altogether 31 persons came to the reception. 23 of them were received on 27 October 2003 and the remaining persons during the follow-up visit on 3 December 2003. There were very many complaints concerning criminal procedure. The inmates were explained that the Chancellor of Justice does not have competence to review court decisions. There were also many complaints in connection with the wish for transfer to another penal institution. Some persons complained about the quality of health care service and the application of disciplinary punishments and security measures. These persons were promised a written reply within one month. Two written applications were received. With regard to complaints of other persons, explanatory comments were given or problems were brought to the attention of the prison management. With regard to transfer to another prison, it was explained that this is a decision to be made by the Ministry of Justice Deputy Secretary General for Prisons which is made on the basis of a request by the director, and the Chancellor of Justice cannot interfere in this decision unless there is a compelling reason.

In sum, the most important problems in Murru Prison were the following:

- Insufficient medical assistance and complaints about access to health care services.

- There is no storage for personal belongings and consequently no control over persons belongings.

- In the 9th living quarter (section of punishment cells and locked cells) cells are overpopulated. Due to the lack of space, it is impossible to keep separately the persons who a serving a disciplinary punishment in the cell and those who are kept in locked cells for security reasons.

- The prison canteen needs to be renovated quickly.

- Employment possibilities in the prison are small.

Most of the problems are caused by lack of financing. The prison is relatively overpopulated and therefore it is difficult to solve the problems of transfer of prisoners. Officials of the Chancellor of Justice found that the relationship between the prison management and prisoners was good and with the little money the management has done efficient work to improve the living conditions of prisoners. In the opinion of the Chancellor of Justice investments to Murru Prison are needed quickly to be able to comply with statutory requirements in the prison.

8. PROTECTION OF PERSONAL DATA AND THE RIGHT TO RECEIVE INFORMATION

8.1 Introduction

Article 26 of the Constitution guarantees everyone's right to the inviolability of private and family life. In information society an integral part of this is the protection of personal data. Considering that the development of information and communication technology has made it possible to violate privacy from a distance, i.e. without the person's physical presence, more attention should be paid to new threats arising in information society.

Article 26 of the Constitution is a fundamental right that is subject to qualified reservations provided by law. A decision to restrict the protection of private life cannot be made merely according to the principle of weighing of interests. Any restriction can be justified only for the protection of health, morals, public order or rights and freedoms of other persons, or to combat a criminal offence or apprehend a criminal offender.

On the other hand, Article 44 of the Constitution protects everyone's right to freely obtain information disseminated for public use. The Constitution also stipulates the duty of state agencies to provide information about their activities. Open society, transparency of government and efficient fight against corruption require free movement of information. The legislator can restrict freedom of information only in the case of compelling interests. Often a balance has to be found between the following two fundamental rights: everyone's right to inviolability of private life may not be sacrificed to freedom of information; the right to privacy, however, cannot become a universal shield against the dissemination of information which is of interest to the public.

In 2003 the Chancellor of Justice received more than 50 applications concerning the right to information. Less than ten applications were concerned with the protection of personal data, the remaining complaints concerned restrictions of access to information. Thus, the

number of complaints about public information was significantly higher. The Chancellor of Justice also started proceedings on his own initiative. The number of complaints concerning the protection of personal data was not big but unfortunately this is not necessarily a sign of the lack of any problems – the relatively limited knowledge of the public about the right to privacy may hide a number of violations existing in reality.

The main problem in connection with the right to information is the combined application of several laws (Personal Data Protection Act, Public Information Act, Reply to Petitions Act etc). Several state agencies whose work is regulated by special laws, for example the prosecutor's offices and courts, refused to comply with the requests for information on the basis of the Public Information Act. They found unjustifiably that the Public Information Act was not applicable to them. Problems with the application of laws were also caused by the distinction between a request for information and an application, which in turn gave rise to violations of the requirements provided in the Public Information Act.

Several cases concerned the balance between the protection of privacy and freedom of information. It had to be decided to what extent civil servants have to share information containing personal data with the public (incl. the media). There were several cases when a state agency unjustifiably refused to allow access to information and thus unlawfully restricted everyone's right to information. There were also some examples to the opposite: state agencies disclosing personal data which the law prohibited to disclose. However, there were more examples of the first kind – state agencies inadvertently applying restrictions of access to information at their disposal, i.e. making public information confidential.

The resolved cases clearly showed that the cause of violations was insufficient knowledge of the laws. The Public Information Act has now been in force for more than three years and therefore the novelty of requirements cannot be brough as an excuse. The violations of officials are rather a sign of the lack of training about the right to information. The legal regulation of the field is sufficiently detailed and clear and therefore more emphasis should be given to the training of officials to improve the situation.

In addition to conventional proceedings with regard to applications, the Chancellor of Justice can also draw attention to problems on his own initiative. In several fields there are problems which need more detailed analysis, and it is also absolutely essential to have a public debate on the topic of the right to information.

8.2 The protection of personal data

8.2.1 Disclosure of personal data in the register of court decisions

The Chancellor of Justice on his own initiative started proceedings to review whether the requirements of inviolability of private life have been complied with in disclosing of court decisions.

On the web page at http://kola.just.ee/ there is a publicly accessible database of court decisions and court statistics that is administered by the Ministry of Justice. Through an Internet search system the register provides access to all published court decisions from 1 October 2001. The texts of the decisions contain the data of the participants to the proceedings in an unchanged form, incl. names, personal identification codes, addresses and other identification data. The court decisions also contain facts of the case. For example, on 23 September 2003, three court decisions could be found under the search term rape. The decisions contained names of the victims as well as detailed descriptions of the criminal offences committed with regard to them. In one case, the victim was a minor. It was also possible to have access to court decisions describing cases of violence. For example, the descriptions of bodily injuries

and other sensitive details were disclosed. The search system also enables to find cases on the basis of the person's name.

In these proceedings, the Chancellor of Justice had to find an answer to the question whether the publication of court decisions in an unchanged form in the Internet is in conformity with the constitutional right of persons to the inviolability of their private life.

Article 26 of the Constitution protects the inviolability of everyone's private life. An inseparable part of it is the right to the protection of one's personal data. The inviolability of private life of an individual can be significantly damaged by distributing data about him or her. Therefore, disclosure of personal data without the person's consent is allowed only if there is a legal basis for this and there are compelling interests that justify the disclosure. On the basis of § 28(1) clause 29 of the Public Information Act, decisions of Estonian courts that have entered into force are published in the register of court decisions. It should also be taken into account that § 26 of the Constitution contains a fundamental right that can be subject to qualified reservations provided by law. Restrictions of the protection of the inviolability of private life cannot be justified with the simple principle of weighing of interests, because any restriction can be justified only for the protection of health, morals, public order or rights and freedoms of other persons, or to prevent a criminal offence or apprehend a criminal offender.

The requirement of inviolability of private life imposes a serious duty on the state to justify exhaustively any use of personal data, i.e. the content of the data, the extent and form of processing must be justified. Every data protection operation must have a clear legitimate aim and only as many data can be used as is necessary to achieve the particular aim. In the case of court decisions the state may also not disclose the person's name more than is necessary. Naturally, the court decision with all the personal data must be accessible to participants in the proceedings or to other entitled persons. In all other cases, total individualisation is superfluous.

The disclosure of court decisions serves primarily the aims of transparency of the functioning of courts and legal clarity. Disclosure also has a statistical and educational function. These legitimate aims, however, can also be achieved without such an extensive interference in the private life of parties to the proceedings when court decisions are disclosed fully but without personally identifiable data.

Standards of personal data protection apply both with regard to victims as well as criminal offenders. In the case of victims, there is definitely no need for the disclosure of the data in the Internet which would outweigh the interest of the subject of data to the protection of their private life. Offenders also have the constitutional right to the inviolability of their private life. In addition, in justifying the restriction of this fundamental right, the effect of the disclosure of personal data on the re-socialisation of the offenders needs to be taken into account, as well as negative prejudices or a threat of revenge.

In conclusion, the general disclosure of court decisions together with personal data is not justifiable, as it would amount to the infringement of the inviolability of private life. The current practice of disclosure of court decisions in Estonia needs to be changed quickly to bring it into conformity with the requirements of the Constitution and to be able to comply with the duty to protect the private life of persons as assumed by international human rights treaties to which Estonia has acceded.

The Chancellor of Justice sent a letter to the Minister of Justice in which he referred to the inconsistency with the Constitution of the disclosure of court judgements in the present form. In his reply the Minister of Justice stated that the court decisions in the cases of rape mentioned by the Chancellor of Justice are no longer available in such a form in the Internet

and the Ministry of Justice was preparing a circular to the courts in which it was going to draw the attention of the courts to the need to consider the requirement of inviolability of private life when disclosing court decisions.

8.2.2 Providing access to the data in the population register

An applicant who was a legal person in private law turned to the Chancellor of Justice stating that the Ministry of Internal Affairs and the Data Protection Inspectorate had illegally refused to allow him access to the data of the population register.

The applicant sent a request to the chief processor of the population register (the Ministry of Internal Affairs) requesting access to the data in the population register. For carrying out background studies, access was requested almost to the whole range of data of the population register. As access was requested to the data of more than a hundred persons, the Ministry of Internal Affairs forwarded the request to the Data Protection Inspectorate on the basis of the Population Register Act. The Data Protection Inspectorate refused to give its approval for access to the data because the applicant had mentioned several aims for the processing of the data and they could not be clearly defined. Therefore, the Inspectorate could not make a conclusive assessment of the applicant's interest. The Ministry of Internal Affairs forwarded the refusal to the applicant.

As several commercial companies had earlier been given access to the data of the population register, including a company operating in a similar field with the applicant, the applicant turned to the Chancellor of Justice with a request to review whether the Ministry of Internal Affairs and the Data Protection Inspectorate had complied with the requirement of equal treatment.

In reply to the enquiry of the Chancellor of Justice, the respondents explained that the other companies had been granted access to the population register on different conditions than would have been granted to the applicant. The other applicants who had received a positive reply to their requests had clearly identified which data and for which specific purpose they were requesting. In the opinion of the respondents, the justified interest of the recipients of the data outweighed the need for the protection of privacy of individuals and the protection of their personal data.

The Chancellor of Justice compared the applicant's request with the requests of the companies who had been given permission to use the data of the population register.

All the five companies had requested data to a smaller extent than the applicant and they had been given a very limited permission. Four of the comparable companies also did not get any data from the population register that they did not have before, i.e. they only got data to check the data already available to them. Also in the case of the fifth company the disclosure of data was justified considering the circumstances. If the applicant's request had been granted he would have received all the existing data from the population register, knowing previously only for example the person's name. In addition, the aims of data processing of the applicants were different: the companies that had been given the permission needed the data to review the accuracy of the personal data that had been given to them when concluding contracts, for collecting debts and bringing cases to court for the settlement of disputes of tenancy. The applicant had stated carrying out of background studies as the aim of processing of the data, which in essence would have meant the collection of personal data.

In this case, an answer had to be found to the question whether the Ministry of Internal Affairs and the Data Protection Inspectorate had treated the applicants equally in granting them access to the population register. In connection with the first main question, also an

assessment of the formal legality of administrative acts of the Ministry of Internal Affairs and the Data Protection Inspectorate had to be given.

According to Article 12 paragraph 1 of the Constitution, everyone is equal before the law. The meaning of this fundamental right to equality is that laws must be applied to everyone in an impartial and uniform manner. If the law provides that a legal person can be a liable or entitled subject, also uniform application of those laws must be guaranteed. In this regard, it should be concluded that the general right to equality also applies to legal persons in accordance with Article 9 paragraph 2 of the Constitution.

The general right to equality, however, does not mean that all persons must be treated identically. It is only required that they should be treated equally. Thus, not any unequal treatment is contrary to the Constitution. In order to identify unconstitutional unequal treatment, it should first be clarified whether the persons concerned are comparable to each other, and secondly, whether they have been treated similarly.

In the present case all comparable subjects were profit-making legal persons who wished to have access to the population register for commercial purposes. All of them filed a request in accordance with the law and all the requests needed the approval of the Data Protection Inspectorate because access was requested to the data of more than 100 persons. All of the applicants were given a positive answer, except the present applicant.

It had to be clarified whether the different treatment was justified. Considering the above-mentioned factual variations – scope of data categories, disclosure of new data and aims of data processing – it had to be concluded that the refusal to grant access to the applicant was legal in substantive terms. Justifications for different treatment of the companies were due to the substance of the requests and the scope of the permission to be granted. There was no request that was similar to the applicant's and nobody had been previously granted the type of access as sought by the applicant. Thus, the decisions of the Ministry of Internal Affairs and the Data Protection Inspectorate were not contrary to the first sentence of Article 12 paragraph 1 of the Constitution.

Section 56 of the Code of Administrative Procedure provides for the requirement of justification of an administrative act: both the factual as well a legal circumstances have to be given and also the considerations on which the administrative body based its act should be mentioned in the justifications of an administrative act that has been made on the basis of discretion.

In the present case, both the Ministry of Internal Affairs as well as the Data Protection Inspectorate had to justify their decisions. As the administrative acts to be passed were based on discretionary right, both administrative bodies were required to justify their discretionary decisions. This is particularly important considering that in the case of administrative acts made on the basis of discretion the legislation usually does not provide for clear criteria for decision-making. Therefore, these criteria must be contained in the administrative act itself in order not to compromise the transparency of the decisions, to avoid making arbitrary or unjustified decisions and not to weaken the individual's position in communicating with the state.

Previous procedural practice demonstrated that the Ministry of Internal Affairs as well as the Data Protection Inspectorate had failed to justify the decisions of granting as well as refusing to grant the requests. In the above cases the administrative acts did not contain arguments on the basis of which the legitimate interests of the applicants were considered to be justified or on the basis of which the permission for access was refused.

The Chancellor of Justice sent a memorandum to the Ministry of Internal Affairs and the Data Protection Inspectorate, pointing out the formal deficiencies in the administrative acts. The Chancellor also made a proposal to the Minister of Internal Affairs to consider the amendment of the Population Register Act so that only one institution would be competent to decide the disclosure of data in the population register. In accordance with the general logic of maintaining databases the competent body would be the chief processor, or the Ministry of Internal Affairs.

In his reply to the Chancellor of Justice, the Minister of Internal Affairs explained that a draft of amendment of the Population Register Act has been drafted which, in accordance with the view of the Chancellor of Justice, gives the right of deciding access to the register only to the chief processor.

8.2.3 Disclosure of data collected in a taxation case

A person filed a complaint to the Chancellor of Justice against the director of Viljandi Tax Board in connection with the disclosure of data collected in a tax case.

On 8 May 2004, an article "Indirect control of taxes is becoming tighter" was published in the business daily *rip ev*. It was said in the article that the Tax Board has the right to determine the sum of the tax also by assessment, first of all in the case of taxpayers who live beyond the means their declared income. As an example, the article contained a case from Viljandi and quoted the director of Viljandi Tax Board who had refused to reveal to the journalist the name of the person whom the example concerned but at the same time the director disclosed data about the person's economic situation and relationship that had been collected in connection with the taxation case.

The Chancellor of Justice forwarded the application to the Minister of Finance who is competent to solve such issues, as the law provides that the Minister of Finance is the person who is entrusted with the task of carrying out supervisory control over the legality and purposefulness of the activities of the Tax Board and tax officials.

It had to be assessed whether the director of Viljandi Tax Board was entitled to disclose to the journalist information about the person's economic situation and relationships that had been collected for the purposes of taxation.

According to Article 44 of the Constitution, everyone has the right to freely obtain information disseminated for public use. All state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law and information intended exclusively for internal use. The grounds and procedure for declaring information for internal use are regulated in the Public Information Act.

Tax secrecy is an institute which establishes the prohibition of disclosure of data in the meaning of Article 44 of the Constitution and it is provided for in Chapter 4 of the Taxation Act (§ 26-30). The first sentence of § 26(1) of the Taxation Act establishes the following principle: "The tax authorities and officials and other staff thereof are required to maintain the confidentiality of information concerning taxable persons, including business secrets and information subject to banking secrecy, which is obtained by the authorities, officials or other staff in the course of reviewing the correctness of taxes paid, making an assessment of taxes, collecting tax arrears, conducting proceedings concerning violations of tax law or performing of other duties (hereinafter tax secrecy)." According to the explanatory memorandum to the law, the aim of tax secrecy is to protect the privacy of persons: " Unlike the

general principle applicable in administrative procedure, according to which the administrative proceedings are public, in taxation proceedings the prohibition of disclosure of data is a rule. Taxation proceedings are a specific type of administrative proceedings characterised by the disclosure of details of private life to the officials who conduct the proceedings, and because the Constitution provides for the protection of privacy the need for disclosure of information should be strongly justified and the grounds for the disclosure of taxation data must be specifically provided for by law. Tax secret includes any information concerning the taxable person which has become known to the officials of the tax authorities and their other staff in the course of exercise of their duties and which they are required not to disclose to other persons according to law.

Exceptions to the tax secrecy are provided in § 26(2) of the Taxation Act, according to which information subject to tax secrecy may only be disclosed with the written permission of the taxable person or in the cases specified in §§ 27-30 of the Taxation Act. This includes information concerning the residency of a taxpayer (subsection 3 clause 3), the size of tax arrears and overpaid amounts of tax (subsection 1 clause 4), the size of tax arrears to be paid in instalments and the duration of the schedule for payment of the tax arrears (subsection 1 clause 5), the judgment in a tax dispute or the decision adopted in the adjudication of a challenge against which an action is not filed during the term for filing an action with a court (subsection 1 clause 6) and information concerning the submission of or failure to submit a tax return by a taxable person (subsection 1 clause 8).

The director of Viljandi Tax Board did not directly disclose any personal data to the journalist but considering the small size of the town and detailed description of the person's contacts, those familiar with the situation could identify the relevant person on the basis of the data.

The Minister of Finance in the course of supervisory control found that although the director of Viljandi Tax Board had not behaved unlawfully it was not justified or necessary to present the description of the case to the journalist. In the case of identification of the persons described in the case, it endangered the inviolability of the person's privacy and the protection of personal data.

In connection with this case, the management of the Tax Board promised that it will draw the attention of all local tax authorities to the need to observe the duty provided for in § 26(1) of the Taxation Act and to refrain from disclosing any data that can later be interpreted as disclosure of the tax secret.

9. FREEDOM OF RELIGION AND CONSCIENCE

9.1 Introduction

In his activities for the protection of fundamental rights and freedoms of persons and as a guardian of the Constitution, the Chancellor of Justice has also had to deal with several issues concerning the freedom of religion and the separation of the state and the church in general.

Article 40 of the Constitution of the Republic of Estonia stipulates: "Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious societies. There is no state church. Everyone has the freedom to exercise his or her religion, both alone and in community with others, in public or in private, unless this is detrimental to public order, health or morals."

Article 40 of the Constitution thus provides for the principle of freedom of religion. First of all, the freedom of religion means the right to belong or not to belong to a certain religion and the right to abandon or change one's religion. The state's activities which are aimed at influencing people's religious beliefs by interfering in the religious behaviour of persons through legislation or other measures should be seen as a restriction of the freedom of religion. In combination with the principle of equal treatment that prohibits discrimination also on the basis of religious belief, one of the main restrictions of the freedom of religion is giving preference to one religious belief over another.

The second sentence of Article 40 paragraph 2 of the Constitution which says that "there is no state church" also establishes the principle of separation of the state and the church. The principles which is based on an understanding that the state should be neutral in religious matters is, however, interpreted with varying strictness. In the strictest sense, the separation is manifested in the fact that it is not allowed to support religion or religious societies or expose religious symbols in a public place. Similarly, it would not be justified to invest public money into manifesting religious beliefs. This view is based on a premise that the taxpayer is not obliged in any way to finance the promotion of a religious worldview.

Nowadays, however, the separation of the state and the church is often understood in much more lenient terms. In many countries there is no official state church or there is no church that has been granted a special status, but still an important and special role of a certain church in the country's traditions is recognised; and the state also often cooperates closely with the church. Nowadays, such an approach is not considered a violation of the principle of separation of the state and the church. The statement in the Estonian Constitution that "there is no state church" does not mean that any cooperation between the state and the church is absolutely ruled out or that the state may not subsidise religious societies in any way. It is, however, more difficult to answer the question to what extent the state could cooperate with religious societies or subsidise them or give preferences to certain religions.

In recent years, the issues of the separation of the state and the church and, in connection with this, also the issues of the freedom of religion have received increasing attention in society. Representatives of several religious denominations have expressed their views in the media on various topics. For example, one of the important topics in the media was the debate about religious education at schools, i.e. whether national curricula should provide for the teaching of religion and whether this subject can be made mandatory for pupils. There has also been a debate in the media about whether cooperation between the state and the church is justified at all in the light of the Constitution.

The Chancellor of Justice has considered it useful to approach the problems in this area in a wider context, without focusing on individual issues arising from single applications. The Chancellor has cooperated with the Religious Affairs Department of the Ministry of Internal Affairs whose tasks include organising issues related to religious societies in the country. The Chancellor of Justice has considered it necessary to involve local and international experts in the analysis of the legal base of this field. Yet many of the issues in this field tend to remain outside the sphere of the Constitution and a debate and agreement in society is needed to find an answer to them.

Among problems that the Chancellor has had to deal with in connection with the freedom of religion, one could first mention the introduction of religious education at general education schools and the use of Christian terminology in the legislation on religion. The Chancellor of Justice has also received applications in connection with the prevalence of Christian holidays in the official calendar, the exercise of the freedom of religion in the defence forces, property of the church in the process of the ownership reform, and taxation of the lands under sacred groves of the people of Taara faith and earth faith. However, only in one case the Chancellor

found a contradiction with the Constitution and took steps to resolve it. This does not mean that there are no problems in this field and that the Chancellor will not pay attention to it in the future.

The Chancellor of Justice has not received any applications asking to review the constitutionality of the introduction of religious education at schools. According to § 4(4) of the Education Act, the study and teaching of religious education is voluntary. The Chancellor of Justice still analysed the issue to a certain extent and formed his preliminary opinion. The Chancellor thinks that the introduction of a subject dealing with religious knowledge at all levels of school does not necessarily amount to the restriction of the freedom of religion. It would be a restriction if the state made the religious education based on particular religious beliefs compulsory at school. At the same time, the Constitution does not prohibit to supplement the curriculum with a compulsory subject that contains the neutral study of various religious beliefs, including the world's largest religious denominations. Study which deals with the origin of religions and their fundamental principles can be seen as part of the general cultural studies and an advanced study of such a subject at state schools should not cause any constitutional problems.

It is also reasonable that the state should not guarantee an absolutely equal treatment of all the world religions in the educational syllabus. In the context of the Estonian cultural space, definitely the inclusion of Christianity in the syllabus is justified, but it should also be considered that the treatment of the fundamental truths of Christianity should not become predominant. Such a danger may arise because the persons qualified in the field of religion have mostly Christian background. If religious education is going to be a compulsory subject the state should accompany it with an effective control to guarantee that its tuition at state and local government educational institutions would be balanced.

Another issue that the Chancellor of Justice dealt with and also found a contradiction with the Constitution was the preference of Christian terminology in the laws on religion.

9.2 Use of own names of religious societies

The applicant asked the Chancellor of Justice to review whether the regulation in the Churches and Congregations Act was in conformity with the Constitution.

On 12 February 2002, the Riigikogu passed the new Churches and Congregations Act that entered into force on 1 July 2002.[11] An important change compared to the previous Act[12] was the procedure of registration of religious societies. In connection with this, § 7(1) of the Churches and Congregations Act provides: "The name of a religious association shall be written in Latin letters and include the corresponding word "*kirik*" [church], "*kogudus*" [congregation], "*koguduste liit*" [association of congregations] or "*klooster*" [monastery] and shall clearly differ from the names of other legal persons entered in the register in Estonia and shall not be misleading with regard to the objectives, scope of activity or legal form." In accordance with § 31(1) of the Act, religious associations registered with the Ministry of Internal Affairs for the entry of which in the register no application has been submitted by 1 July 2004, or whose application for entry in the register submitted within the specified term has been refused are deemed to have undergone compulsory dissolution.

A representative of the *Taara- ja Maausuliste Maavalla Koda* (the community of Taara and earth believers) turned to the Chancellor of Justice and referred to the deadline of re-registration set at 1 July 2004 and the possible compulsory dissolution in the case of failure to reregister.

[11] RT I 2002, 24, 135.

[12] RT I 1993, 30, 510; 1994, 28, 425.

He claimed that the words, *church, congregation, association of congregations* or monastery have a Christian background and therefore the obligation to use them in the official name of a religious society violates the freedom of religion of the members of the *Taara- ja Maausuliste Maavalla Koda* and the principle of equal treatment.

In this matter, an answer had to be found to a question whether the provisions of the Churches and Congregations Act that require the use of the words *church, congregation, association of congregations or monastery* in the official name of a religious society, making the registration and continuing legal existence of the society dependent on their use, is in conformity with the constitutional principle of the freedom of religion and the principle of equal treatment of religious societies.

According to Article 40 paragraph 1 of the Constitution, everyone has the right to the freedom of conscience, religion and thought. According to Article 12 paragraph 1 of the Constitution everyone is equal before the law. Article 9 paragraph 2 of the Constitution stipulates that fundamental rights also extend to legal persons in so far as this is in conformity with the general aims of legal persons and the nature of such rights and freedoms.

The collective freedom of religion provided in Article 40 of the Constitution also protects religious associations in the organisation of their internal matters, including deciding under which name they wish to exercise their freedom of religion and to be recognised by the state (the principle of autonomy of religious societies). The applicant found that for certain religious societies it is unacceptable to use Christian terminology on religious grounds.

The fact that these terms have a Christian connotation in the Estonian language sphere was also recognised in the analysis conducted by the Estonian Language Institute. Considering the fact that in general minority religions, particularly in the Occident, wish to distinguish themselves clearly from Christianity, the imposition of the above requirement on such societies is a severe restriction of the freedom of religion. The justification that the use of the words *church, congregation, association of congregations* and *monastery* help to distinguish religious societies from other non-profit associations is not sufficient to restrict the constitutional right to the freedom of religion. The requirement of clear distinction between the names can also be fulfilled in other ways which are less restrictive on the freedom of religion. Favouring of Christian forms of names on the level of law is not appropriate in a country recognising the separation of the state and the church and it is not in conformity with the principle of equal treatment of religions.

The provisions of the Churches and Congregations Act that require the use of the words *church, congregation, association of congregations* and *monastery* in the official names of religious societies, making the registration and continuing legal existence of the religious society dependent on the use of the particular form of name, is not in conformity with the constitutional principle of the freedom of religion or the principle of equal treatment of religious societies.

The Chancellor of Justice informed the Religious Affairs Department of the Ministry of Internal Affairs about the problem. In April 2004 the Government of the Republic initiated a draft (335 SE) for the amendment of the Churches and Congregations Act, allowing religious societies to use their historically developed own names as official names and extending the deadline for the registration of religious societies. The Riigikogu passed the draft of amendment of the Churches and Congregations Act on 28 June 2004 and it entered into force on 10 July 2004.

10. THE RIGHT TO THE INVIOLABILITY OF FAMILY LIFE

The Constitution stipulates everyone's right to the inviolability of private and family life. The same is provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms which stipulates the duty of respect for everyone's family and private life. Inviolability of private and family life contains different though partly overlapping spheres of protection.

In 2003 people turned to the Chancellor of Justice on 39 occasions either at receptions or through applications with questions that to a certain extent were related to the family life of persons.

The right to the protection of the inviolability of family and private life involves both active and passive duties for the state. It means that, on the one hand, the state must refrain from interfering in the private and family life of persons and, on the other hand, the state should take measures to enable people to enjoy their private and family life without interference. Primarily, there are violations in connection with the latter part when the state has not established necessary procedures or does not guarantee their functioning so that a person could take legal steps in connection with their private and family life.

New requirements in connection with the regulation of legal measures concerning family life arise from the increasingly intensive movement of persons between countries, as this has increased the number of families formed by persons living in different countries and having different citizenship and their need for actions in connection with their families. The state should make available to persons the possibility of registration of marriages and births of children, but also the divorce of marriages.

Currently, for example, under Estonian law it is complicated or sometimes virtually impossible for persons who stay abroad to divorce their marriage or for a father who is not married to the mother to adopt a child. The Chancellor of Justice sent a memorandum to the Ministries of Justice and Internal Affairs but the ministries did not consider it necessary to deal with the problem. Therefore, the Chancellor of Justice sent a memorandum to the Government of the Republic, so that in cooperation with the ministries the Government would ensure the amendment of the legislation.

Another level is the effective application of the existing norms. In one case there was a problem with the interpretation of an international treaty by a vital statistics office. In another case, it was refused to register a marriage of an applicant who had turned to the vital statistics office. The refusal was justified with the domestic law of a foreign country, although Estonian international private law provisions did not require the application of foreign law. Such violations could be avoided through the training of officials of the vital statistics offices on issues which may rise in connection with the citizens and residents of other countries.

An error of officials was also involved in the case where a wrong personal identification code was entered on the birth certificate of a child. To avoid such mistakes in the future, the Ministry of Internal Affairs included in its work plan the need to provide necessary software to hospitals that provide obstetrics services.

PART III

OFFICE OF THE CHANCELLOR OF JUSTICE

1. PUBLIC RELATIONS

1.1 Relations with other institutions

In 2003, the working relationship of the Chancellor of Justice with other constitutional institutions and various organisations, target groups and cooperation partners continued. There was also close cooperation with the Riigikogu, particularly with the Constitutional and Legal Affairs Committees, and with the Government of the Republic and agencies under its area of government. There was also cooperation with the State Audit Office and together the Penal Code was audited as a planned activity.

The Chancellor of Justice intensified exchange of information and cooperation with local governments during the past year. Information days and meetings were held in several counties – Pärnumaa, Raplamaa and Viljandimaa. There was an extensive inspection visit to Ida-Viru county government. At the meetings with local government officials, the Chancellor of Justice explained his activities and the competence given to him by law, he also analysed the problems found in local government legislative acts and activities of local governments and received information from local government representatives about the legal issues and situations that need to be solved.

Relations with the third sector have become increasingly important. In December 2002, the Chancellor of Justice sent letters to many non-governmental organisations in which he asked for their opinion about the problems that impede the development of the Estonian state. The Chancellor analysed the replies and took them into account in developing and drawing up his objectives and development plan in 2003.

In cooperation with the third sector, local government associations, the Ministry of Social Affairs and the Ministry of Education and Research, extensive preparations began in the field of school health care for guaranteeing the health of pupils and for organising a roundtable on school health.

In 2003, there was also continued cooperation with the relevant agencies, local governments, experts and the third sector in planning and carrying out follow-up activities in the framework of the school violence project.

In developing legal opinions and drawing up expert opinions there was continued cooperation with the University of Tartu Law Institute. There was also continuation of a good tradition to organise information days for students of the University of Tartu and describe the possibilities of traineeships at the Office of the Chancellor of Justice.

During Christmas 2003, the Office of the Chancellor of Justice organised the traditional internal charity fund-raising among its staff to send Christmas presents to children at orphanages. Orphanages have also been given old but still functional computers that are no longer used in the Office of the Chancellor of Justice.

1.2 Relationship with the media

In 2003, the Chancellor of Justice continued observing the principle of open communication with the public and the media. The aim is to make the institution of the Chancellor of Justice more understandable and bring it closer to people, to raise awareness of the activities of the Chancellor of Justice in society, to raise people's knowledge of their rights and to explain them the possibilities how they can protect their rights.

At the end of 2003, guidelines for communication with the public were approved in the Office of the Chancellor of Justice, which are aimed at an open, professional and qualitative communication with the media and the public. Legal correctness and impartiality must also be ensured while providing the media quickly with information. In 2003, the communication strategy and the guidelines for the crisis committee were prepared.

A comprehensive national media monitoring survey for the Office of the Chancellor of Justice was commissioned from the ETA news service and it is available daily for the staff of the Office.

According to the monitoring survey, there 938 instances of media coverage of the activities of the Chancellor of Justice and the topics directly related to this, from news to detailed articles, in 2003. Among the media, there were news agencies, online channels, information newsletters, daily and weekly and county newspapers, magazines and main news programmes on television and radio. Approximately a thousand instances of coverage per year can be considered a remarkable result and a sign of considerable interest in the topics dealt with by the Chancellor of Justice.

Approximately ten longer articles and interviews by the Chancellor of Justice on important topics in society were published in 2003. In his articles and interviews the Chancellor of Justice explored in more detail the following topics: problems of the political parties law, informational self-determination and data protection and the need for a charter of informational rights, constitutional rights of persons and the activities of the Chancellor of Justice in protecting them, poverty as a constitutional problem, reform of the defence forces in the light of the Constitution, the role of the Chancellor of Justice in the protection of the rights of the child, Estonian independence and the European Union, political corruption, mental health of pupils, and the unconstitutionality of interests on tax arrears. The tasks and competence of the Chancellor of Justice were also introduced in the local media.

The range of topics covered and an open communication with target groups, the public and the media brought much recognition to the Chancellor of Justice in 2003.

In 2003, the Chancellor of Justice was granted the title of the Friend of the Taxpayer. The Association of Municipalities in Estonia considered the Chancellor of Justice worthy of the title of the Friend of Local Governments in 2003. The UNICEF Estonian National Committee gave the Chancellor of Justice the UNICEF Bluebird Award. The Estonian Union for Child Welfare and the Youth Forum of the Estonian Association of Students Self-Governments gave the Chancellor of Justice the title of the most child-friendly social figure. In terms of recognition, 2003 was a remarkable year for the Chancellor of Justice. No other high public official or non-politician at one time in their years of activity has received so many titles signifying openness, trust and humanity.

Openness and understandable and continuous explanation of his activities in the media is also confirmed by pubic opinion surveys. If in 2001, 47% of the surveyed people trusted the Chancellor of Justice, in 2003 the figure had risen to 67%.

The number of complaints to the Chancellor of Justice has constantly risen, which is partly a result of explaining the Chancellor's work. However, the number of complaints that are beyond the competence of the Chancellor has remained the same. This refers to the continued need for open communication and explanation of the work and new tasks of the Chancellor of Justice, and shows that the Chancellor has chosen the right path for opening up his office and for communicating with the public, the media and the target groups.

1.3 Public relations within the Office of the Chancellor of Justice

In 2003, the new homepage of the Chancellor of Justice was completed (http://www.oigus-kantsler.ee) which was an important step forward in organising both internal and external communication. The new homepage was given a new visual identity and a new structure in terms of content. There is more information about the work of the Chancellor of Justice and necessary material. More attention has been paid to the logical structure of the homepage and to the use of clear and comprehensible Estonian language. The homepage of the Chancellor of Justice has received praise from many citizens for its comprehensibility, user-friendliness and easy access to materials. In making the homepage more accessible to people, an important feature is the possibility to use the homepage for asking questions, expressing opinion and submitting applications to the Chancellor of Justice. Since 2003, "Event of the Week" in connection with the Chancellor's activities is published on the front page of the homepage. In addition, an up-to-date English version of the homepage was created and both the Russian and English versions of the homepage were revised.

In 2003, improving of the internal relations in the Office of the Chancellor of Justice was started. For this, information exchange within the Office and between departments was promoted in the Intranet and the distribution of important express information, or "Weekly information", between departments was started.

The development of the new symbols of the Chancellor of Justice and his Office was started. A new logo and an emblem and official gifts of the Chancellor of Justice were designed.

Communication and the sense of cooperation between different departments and the staff based throughout Estonia have been facilitated by annual sportive summer and winter days. In 2003, for the first time the staff of the Office of the Chancellor of Justice participated in the interministerial football and basketball tournament organised by the "Kalev" sports society.

2. INTERNATIONAL RELATIONS

2003 was a busy year in international communication for the Chancellor of Justice. The Chancellor organised three international conferences, hosted several European counterparts and other high-level foreign guests, continued work as a full member of the International Ombudsman Institute (IOI) and completed a joint project "Enhancing the administrative capacity of the Office of the Chancellor of Justice through strategic planning and improvement of process management" with the British Local Government Ombudsman.

In 2003 the Chancellor of Justice also initiated a cooperation project with the United Kingdom in the framework of the Phare Twinning Light programme for 2004.

2.1 Relations with international organisations

The Chancellor of Justice has been a full member of the International Ombudsman Institute since 2001. In 2003 cooperation within the IOI continued. The Chancellor of Justice attended the annual meeting of the voting members of the IOI European Region in Nicosia. The

conference approved the report of the board of directors of the IOI, debated the amendment of the statutes of the IOI European Region and a cooperation agreement with the European Ombudsman for the publication of the Newsletter of Ombudsmen.

Since 2003, Head of the first department and adviser Eve Liblik as the representative of the Estonian Chancellor of Justice participates in the work of the Council of Europe Advisory Committee on Equality between Women and Men.

2.2 Relations with the chancellors of justice and ombudsmen and other high-level officials

Relations of the Chancellor of Justice with chancellors of justice, ombudsmen and other high-level public officials of foreign countries intensified in 2003. Among others, the Chancellor of Justice hosted the Ombudsman of Bosnia and Herzegovina Frank Orton, Ombudsman of Kyrgyzstan Bakir Uulu Tursunbai, Chancellor of Justice of Finland Paavo Nikula and European Ombudsman P. Nikiforos Diamandouros.

At the beginning of February, the Deputy Ombudsman of the Finnish Parliament Ilkka Rautio visited the Chancellor of Justice. During the visit the development of further cooperation between the institutions of the Estonian Chancellor of Justice and the Finnish ombudsman was discussed, a visit to Tartu Prison was made and a meeting was held with Tartu county governor and police prefect. In Ilkka Rautio's opinion, Tartu Prison is fully in accordance with European standards, both in terms of the building as well as preparedness and motivation of the staff. The biggest problem in Mr Rautio's opinion is the social solitude and lack of contacts with the outside world among prisoners.

In February, the Chancellor of Justice received a visit from another European counterpart – ombudsman of Bosnia and Herzegovina Frank Orton. During his visit, Mr Orton explained the work of the ombudsman in Bosnia and Herzegovina and learned about the institution of the Estonian Chancellor of Justice. Also the possibilities of cooperation between the Estonian Chancellor of Justice and the ombudsman of Bosnia and Herzegovina were discussed.

In spring, the Chancellor of Justice received a visit of a delegation of high-level Mongolian public officials and Vietnamese parliamentary deputies. They learned about the work of the Chancellor of Justice in fighting against corruption and about the model of the Estonian Chancellor of Justice.

Lord Chancellor of the United Kingdom, Lord Irvine, visited the Chancellor of Justice in May. During the meeting, the Chancellor of Justice Allar Jõks gave an overview of the institution of the Estonian Chancellor of Justice and of the protection of human rights in Estonia. Director of the Office Egle Käärats explained the judicial reform in Estonia. Lord Chancellor noted during the meeting that the institution of the British ombudsman significantly differs from the Estonian institution and expressed surprise about the extensive competence of the Estonian Chancellor of Justice.

Bakir Uulu Tursunbai who assumed office as the first ombudsman of Kyrgyzstan in December 2002 visited the Estonian Chancellor of Justice at the beginning of August. The ombudsman of Kyrgyzstan noted that, as the first institution of this kind established in Central Asia, the ombudsman of Kyrgyzstan has a lot to learn from the experience of the Estonian Chancellor of Justice. He noted that the biggest difference between the competence of the Estonian Chancellor of Justice and the Kyrgyzstan ombudsman is the competence of the Kyrgyzstan ombudsman to have a court decision reviewed if he finds that there were mistakes in the court proceedings.

The Chancellor of Justice of Finland Paavo Nikula who visited Estonia in September was acquainted with the Estonian environment protection legislation and discussed with Allar Jõks the problems of Estonian and European Union legislation. The Finnish Chancellor of Justice also met with the Estonian President Arnold Rüütel and the Minister of the Environment Villu Reiljan. He also visited the island of Hiiumaa and learned about the organisation of environment protection there.

Mr Nikula is one of the most recognised specialists in the field of environment protection in Europe who also participated in the drafting of the European Union Charter of Fundamental Rights.

European Ombudsman P. Nikiforos Diamandouros visited Estonia on 11 and 12 September as the first stop of his European information tour to the countries that were to join the EU in 2004. The aim of the visit was to explain to the citizens of the ten accession countries their rights and to distribute information about the competences of the European Ombudsman and the possibilities of submitting complaints to him. During his visit, the European Ombudsman met with the President of the Republic of Estonia, the Prime Minster, chairman of the Riigikogu Constitutional Affairs Committee, head of the European Union Delegation to Estonia and the Chancellor of Justice, and he held a public lecture in the National Library on "Democracy, accountability and the institution of ombudsman".

The European Ombudsman solves complaints filed against the European Union institutions if person' rights or freedoms have been violated by an individual act or measure. Complaints can be lodged by citizens of all the Member States and foreigners resident in these states.

In October the Chancellor of Justice was visited by the Council of Europe Human Rights Commissioner Alvaro Gil-Robles. The aim of the Commissioner's visit was to review the human rights situation in Estonia. The Chancellor of Justice gave an overview to the Commissioner about the statistics of applications lodged to him in 2002–2003 and the main problems relating to the protection of fundamental rights and freedoms.

On the basis of the visit of the Council of Europe Human Rights Commissioner a report on the situation of the protection of human rights in Estonia will be made.

Most important foreign visits of the Chancellor of Justice

At the beginning of March, the Chancellor of Justice attended the conference of Central and Eastern European countries in London on "Combating corruption in Central and Eastern European countries". The topics discussed at the conference were the role of governments and parliaments in the fight against corruption and the possibilities for financing political parties.

In July, the Chancellor of Justice made a working visit to Bosnia and Herzegovina at the invitation of the ombudsman Frank Orton. The aim of the visit was to introduce to the ombudsman's office the Estonian experience in developing the Chancellor of Justice institution. During the visit Allar Jõks met with the Minister of Justice of Bosnia and Herzegovina Slobodan Kovač and the Minister of Defence Bariša Čolak. The Chancellor also visited the constitutional court of Bosnia and Herzegovina and met with its chairman Mato Tadić and the chairman of the Supreme Court Martin Raguž.

In October, the Chancellor of Justice participated as an expert in the seminar "Ombudsman's institution in South-Russia: the problems of creation, experience of cooperation with government institutions and development perspectives", organised in Astrahan in Russia in cooperation of the Council of Europe and St Petersburg "Strategy" Centre for Research in Humanities and Politics. The Chancellor of Justice held a 30-minute speech on the model of the institution of the Estonian Chancellor of Justice.

In November, the Chancellor of Justice attended the 8th roundtable meeting of European ombudsmen in Oslo, organised in cooperation of the Norwegian ombudsman and the Council of Europe Human Rights Commissioner. At the meeting four main topics were discussed: access to public information, rights of national minorities, legal status of detained persons and the competence of the ombudsman's institution and the courts. The Estonian Chancellor of Justice moderated the discussion on the topic "Legal status of detained persons".

2.3 Conferences and seminars

"Political party and/or election coalition"

In cooperation of the Estonian Chancellor of Justice and the German Foundation for International Legal Cooperation, on 15–16 May an international scientific conference "Political party and/or election coalition" was held in Tallinn. The aim of the conference was to discuss topical problems in connection with Estonian political parties and election law and to offer some solutions as a result of the debate. The presentations at the conference were focused on three ranges of topics – the notion of a political party in the Constitution and in the Political Parties Act, election coalitions of citizens and the principles of financing of political parties.

Presenters at the conference included, for example, Professor Dr Jörn Ipsen of the University of Osnabrück, Professor of public law Dr Uwe Volkman of the University of Mainz, Chancellor of Justice Allar Jõks, Chief Justice of the Supreme Court Uno Lõhmus, adviser of the Riigikogu Constitutional Affairs Committee Ülle Madise and Professor Kalle Merusk of the University of Tartu.

On the basis of the topical articles and presentations of the conference the Juridica Publishers in cooperation with the Office of the Chancellor of Justice published a special issue.

1st conference of chancellors of justice and ombudsmen of Nordic and Baltic countries

On 11–12 June the Chancellor of Justice organised the first conference of chancellors of justice and ombudsmen of Nordic and Baltic countries in Tallinn which was dedicated to the 65th anniversary of the establishment of the institution of the Estonian Chancellor of Justice and the 10th anniversary of its reestablishment. The conference discussed the role of the ombudsman and the chancellor of justice in the supervision of legality of the activities of the police and in the protection of the rights of the child. A financial contribution to organising the conference was made by the Nordic Council of Ministers.

The conference convened ombudsmen and chancellors of justice from Nordic and Baltic countries, ambassadors of the participating countries and several representatives of the Estonian state authorities and international organisations. Attending the conference was also Jacob Söderman who was the European Ombudsman in 1995–2003.

3rd seminar of ombudsmen and chancellors of justice of the Baltic Sea countries

On 29 August, the Chancellor of Justice Allar Jõks hosted the third seminar of ombudsmen and chancellors of justice of the Baltic Sea countries held in Tallinn in the framework of Estonia's presidency of the Council of Baltic Sea States. Topics discussed at the seminar included the efficiency of the institution of the chancellor of justice and of the ombudsman and the possibilities of its measurement, the powers given to the institution of the chancellor of justice and the restriction of the powers. Keynote speakers were the Chancellor of Justice Allar Jõks and the Deputy Ombudsman of the Republic of Poland Jerzy Swiatkiewiecz. The moderator of the seminar was the Council of Baltic Sea States Commissioner Helle Degn.

2.4 International cooperation projects

In February 2003, the six-month project "Enhancing the administrative capacity of the Office of the Chancellor of Justice through strategic planning and improvement of the process management" was completed. The project had been launched in 2002 in cooperation with the British Local Government Ombudsman. In the final stage of the implementation of the project, the Estonian Chancellor of Justice was visited by the British Local Government Ombudsman's adviser Rob Stay on 18-20 February. During the visit Rob Stay introduced to the officials of the Chancellor of Justice the experience of strategic planning of the British Local Government Ombudsman and the principles of conducting the proceedings of applications.

In 2003, the Chancellor of Justice initiated a five-month project "Developing the administrative capacity of the Chancellor of Justice and his Office", to be implemented within the Phare Twinning Light programme in cooperation of Estonia and the United Kingdom by 2004. The aim of the project is to raise the administrative capacity of the officials of the Office of the Chancellor of Justice in solving complaints of discrimination. In the framework of the project, training on discrimination issues in European Community law will be organised for the officials. Ten officials will go on study visits to Northern Ireland to get acquainted with the experience of the institutions conducting conciliation proceedings and solving complaints of discrimination, and to familiarise themselves with the work of European Union institutions. Guidelines for conciliation proceedings will be drawn up and relevant literature will be procured for the library of the Office.

3. DEVELOPMENT ACTIVITIES OF THE OFFICE OF THE CHANCELLOR OF JUSTICE

The aim of the development of the Office of the Chancellor of Justice is to become the best public sector organisation by 2007 and to serve as an example for other institutions.

In 2003, the development of the Office was successful and full of changes: the Chancellor of Justice approved the mission, vision and objectives of the Office in the development plan for 2003-2007, the new structure of the Office created at the end of 2002 became functional, preparations for moving the Office of the Chancellor of Justice to a new location were completed, and the information system of the Office was updated.

3.1 Mission, vision and objectives of the Office in the development plan for 2003–2007

On 21 May the Chancellor of Justice approved the development plan of the Office of the Chancellor of Justice for 2003–2007 which was prepared as a result of joint debates among the officials of the Office. The document sets out the mission, vision and objectives of the Chancellor of Justice until 2007, the fundamental values and principles of the activities of the Office and the directions of the development of the activities of the Chancellor of Justice and his Office until the end of 2007.

The mission of the Chancellor of Justice

- The Chancellor of Justice is an independent guardian of the basic principles of the Constitution and the protector of fundamental rights of individuals.

- The activities of the Chancellor of Justice are aimed at giving everyone a sense of security that the Estonian state authorities comply with the duties arising from the principles of human dignity, freedom, equality, democracy and the rule of law and social justice.

- The activities of the Chancellor of Justice contribute to the achievement of legitimacy of the legal order and to an effective resolution of challenges facing the legislator, and will guarantee to the public an impartial assessment of the situation of basic constitutional principles and fundamental rights in the country.

The fundamental values of the Office of the Chancellor of Justice are professionalism, dedication and pluralism. The Office of the Chancellor values highly employees who have good professional knowledge and skills and who engage in regular self-improvement, who are responsible and dutiful, loyal and motivated. Readiness for cooperation and plurality of opinions are highly regarded in the Office of the Chancellor.

Vision of the Chancellor of Justice until 2007

- The goal of the Chancellor of Justice as the bearer and promoter of the idea of the state based on social justice is to increase through his activities social security, trust between the state and the citizen and to guarantee justice in a democratic state.

- The goal of the Chancellor of Justice as the bearer and promoter of the idea of the rule of law is to guarantee that implementers of public power and providers of public services would effectively comply with the principles of legal certainty, legality of public administration and good governance.

- The goal of the Chancellor of Justice as the bearer and promoter of the idea of democracy is to ensure that the democratic mediation of the power would be fair and clear, and that the mediation of the power would also be verifiable.

The development plan of the Chancellor of Justice for 2003–2007 is based on the mission and vision of the Chancellor of Justice and it is the basis for the achievement of the activities and objectives of the Chancellor. The development plan for the activities of the Chancellor of Justice determines:

1) the objectives of the activities;

2) the manner of achieving the objectives;

3) the areas of initiative;

4) organisational development.

3.2 Structure and composition of staff of the Office of the Chancellor of Justice

At the beginning of 2003, the new structure and composition of staff of the Office that had been approved at the end of 2002 became effective, and also the new statutes of the Office and structural units entered into force. In addition to the General Department, also three departments for the main activities were created whose competencies are divided pursuant to the areas of government of ministries:

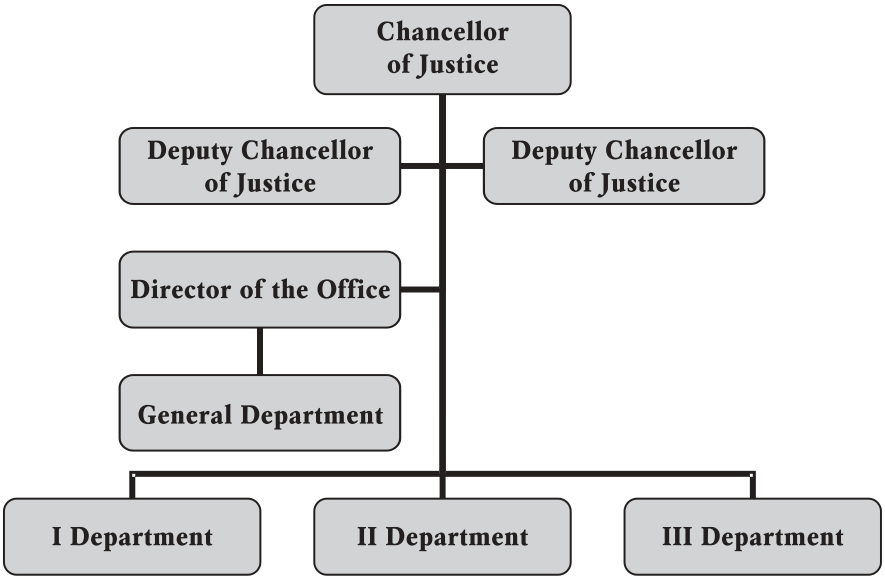
- the area of activity of the first department includes all matters which according to law fall under the area of government of the Ministry of Social Affairs, the Ministry of Education and Research, the Ministry of Culture and their subordinate agencies and other units;

- the area of activity of the second department includes all matters which according to law fall under the area of government of the Ministry of Economic Affairs and Communications, the Ministry of Agriculture, the Ministry of Finance, the Ministry of the Environment and their subordinate agencies and other units; as well as issues within

the competence of the Bank of Estonia, the Financial Supervision Authority and the State Audit Office;

- the area of activity of the third department includes all matters which according to law fall under the area of government of the Ministry of Internal Affairs, the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of Justice and their subordinate agencies and other units; as well as issues within the competence of the Prime Minister, Ministers without portfolio and the State Chancellery; initiating of disciplinary proceedings with regard to judges and cases which do not belong in the area of activity of the first or the second department.

On 31 December 2003, there were 43.5 staff positions in the Office, 23 of them were positions of higher officials, 16 senior officials, 2 junior officials and 2.5 support staff.



3.3 New premises of the Office of the Chancellor of Justice

Since the regaining of independence the offices of the Chancellor of Justice were located in hired premises at Tõnismägi Street 16 in Tallinn. In connection with the constant development of the functions and activities of the Chancellor of Justice the number of staff has also increased. These premises became too small and were no longer in conformity with the occupational health and safety requirements. To improve the situation, preparations were started in 2003 to move the Office of the Chancellor of Justice to more suitable premises.

On 1 January 2004, the Chancellor of Justice received new offices in the building at Kohtu Street 8 in Tallinn. There is enough space for a staff of 60 persons which covers the need of the Office of the Chancellor of Justice currently and also in the longer-term perspective. New premises are in conformity with the occupational health and safety requirements and improve the possibilities for the reception of persons turning to the Chancellor of Justice.

The construction of the building at Kohtu Street 8 was completed in 1814. The building belonged to the owner of Mõdriku and Rägavere manor Reinhold August von Kaulbars and it was designed by Tallinn city architect Carl Ludwig Engel. The building is in the Empire style. On the pediment of the facade of the building there is a motto in Latin: “With good wishes and blessing of the ancestors”. Remarkable are the stucco décor and the back facade

with a porch with six Ionian columns at the Pikk Jalg Street. In 1850 the Tsar's Adjutant General count Alexander von Benckendorff became the new owner of the building. His coat of arms is displayed on the front door of the right wing of the building. In 1871 the ownership of the house was transferred to Vera von Stenbock and in 1899 to baroness Natalie von Uexküll, the owner of Kose-Uuemõisa manor. The latter still owned the house in 1904. Since 1920 the building has housed various ministries, for the longest period the Ministry of Finance. An artistic marble fireplace, stylish stucco décor and Empire-style doors have preserved in the building.

3.4 Updating of the information systems of the Office

An information system is only useful if the Office also has technical possibilities for the modern use of IT, if the staff have been given the possibility to acquire the skills for using the possibilities of IT and if they have developed a habit of using all the possibilities of the system. The application of information technology in the interests of good governance means saving of costs, the provision of a rapid and accessible public service, clarity and comprehensibility of administration and more focus on the citizen.

The information system of the Office did not meet today's requirements in terms of hardware or software. For updating the information system several important changes were made in the Office in 2003. An agreement between the Office and the Ministry of Justice was implemented for joining the information system of the Ministry of Justice and for the provision of the service of administration of information systems. In the interests of the development of the Office's computers, the Office gave up the ownership of the hardware and software and concluded an agreement for hiring them.

As a result of the changes:

- the Office is able to use up-to-date information technology solutions (access to databases, electronic information exchange and document administration, cross-use of databases);

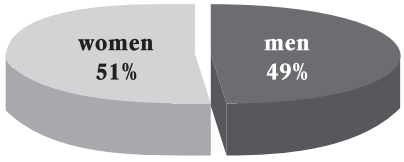
- the Office is making maximum use of information technology solutions of the public sector without making additional investment to the development of the systems;

- prudent and purposeful use of the budgetary resources is ensured.

4. PERSONNEL STATISTICS

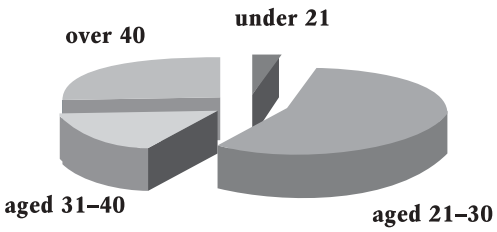
On 31 December 2003, there were 35 officials employed in the Office, 17 of them were men and 18 women. In 2003, 11 new officials were hired and 6 officials quit work. The staff of the Office increased by 6 persons in a year.

Staff of the Office of the Chancellor of Justice, by gender 31.12.2003



2.9% of the officials of the Office were under 21 years old, 54.3% were aged 21-30, 17.1% were aged 31–40 and 25.7% were aged over 40.

Staff of the Office of the Chancellor of Justice, by age 31.12.2003



30 officials in the Office had higher education and 5 had secondary or secondary vocational education. 12 officials were attending a higher educational institution (including postgraduate education) or other educational institutsion.

6. CONTACTS

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