CHANCELLOR OF JUSTICE

ANNUAL REPORT 2005 of the Chancellor of Justice

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

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

Tallinn 2006

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Dear reader,

In accordance with section 4 of the Chancellor of Justice Act, every year I submit an annual report of my activities to the Riigikogu. The present report covers the main cases concerning the constitutional review of legislation as well as the ombudsman's function for the protection of fundamental rights and freedoms in 2005.

According to the Constitution, the Chancellor of Justice is an independent guardian of constitutionality and supervisor of the protection of fundamental rights and freedoms of individuals. Such a status enables him to assess problems objectively and to protect people effectively from arbitrary measures of the state authority. By maintaining and developing a democratic society based on rule of law, European legal culture and equal treatment, I wish to promote honesty and transparency in the democratic process of decision making. By being an intermediary between the individual and the state I can stand for the legality of public authority and the principles of good governance, trying to increase confidence between the state and individuals, fairness and social security, and civic awareness.

2005 was the first full year of membership of the European Union for Estonia. This clarified positive aspects of the membership, as well as shortcomings in the implementation of the *acquis communautaire*. Transposition of EU law was not a completely painless process for Estonia. Similarly to other member states, the European Commission has initiated infringement proceedings for failure to implement directives in respect to Estonia. It would be worthwhile to debate whether the organisation of EU integration has been sufficient and whether an internal supervisory mechanism would be needed for the timely and correct transposition of EU directives in order to avoid infringement proceedings in the future.

2005 was also a year of reforms. In January 2005, the caregiver's allowance and rehabilitation service reform were launched. In 2005, the new Code of Civil Court Procedure and the Code of Enforcement Procedure were passed. This means that the state authorities are constantly required to explain the substance and effect of the new laws to the public, and the Chancellor of Justice has to analyse their implementation practice.

2005 was also special because, for the first time, among the legal community in Estonia the problem of the freedom of expression was sharply raised, both in connection with the political freedom of speech (prohibition of political outdoor advertising) and the freedom of speech on the Internet. Active debates on this topic apparently demonstrate the preparedness and will of the public to express their views, which, in turn, is a welcome sign of the development of civil society and its involvement in the decision making.

Already in 2004 the Chancellor of Justice received more than 2000 applications, and the number of applications also exceeded 2000 in 2005, which is a sign of the rising awareness of members of society of their opportunities to rely on the Constitution and defend their fundamental rights. Both on the basis of applications received from individuals as well as the Chancellor's own-initiative proceedings concerning acute topics in society, the Chancellor of Justice in 2005 focused on the problems of the protection of health, protection of personal data, right to education for pupils with disabilities, issues of social law and labour law, planning and building law, regulation of railway transport that may be hazardous to the lives of individuals and to national security, environmental law, and various other problems.

I hope this report will provide an independent review of the current situation of the legal order in Estonia for the Riigikogu and the legal community, and hopefully it will also contribute to making the Estonian legal order more human-centred and bringing it closer European traditions.

Yours sincerely,
Allar Jõks

Tallinn, 1st of September 2006

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INTRODUCTION

1. Historical overview

The institution of the Chancellor of Justice in Estonia was created in the 1938 Constitution. Its establishment was due to the need to guarantee the legality of the state authority and provide legal assistance to the President of the Republic. 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 watch over the legality of the activities of state agencies and other public institutions".[1]

The term of office of the first Chancellor of Justice of Estonia, Anton Palvadre, however, remained very short. After the occupation of Estonia by the Soviet Union in summer 1940, the institution of Chancellor of Justice was eliminated and Anton Palvadre himself was sentenced to death.

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

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

2. Estonian model of the institution of the Chancellor of Justice

The institution of the Chancellor of Justice in Estonia is not part of the legislative, executive or judicial branch, it is not a political or a law enforcement body. The institution of the Chancellor of Justice is individual and independent and it is established by the Constitution. 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 a report with an overview of his activities.

The Chancellor of Justice in Estonia combines the function of the general body of petition and the guardian of constitutionality. Such a combined competence is unique internationally.

According to the Constitution, the Chancellor of Justice is an official who reviews the legislation of general application of the state's legislative and executive powers and of local governments to verify its conformity with the Constitution and the laws.

The second important function entrusted to the Chancellor of Justice with the Chancellor of Justice Act passed on 25 February 1999 is the function of the ombudsman to verify that state agencies comply with the fundamental rights and freedoms of persons and the principles of good governance. With the amendment to the Act that entered into force on 1 January 2004 the Riigikogu extended the Chancellor's ombudsman functions even further – now the Chancellor of Justice also carries out supervision of local governments, legal persons in public law and persons in private law who exercise public functions.

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[1] Constitution 1938, § 47(2).

By exercising these closely related tasks, the Chancellor of Justice focuses on the review of compliance with the fundamental constitutional values – human dignity, democracy, rule of law, social state. 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 obtains when verifying the guarantee of fundamental rights. This is one of the reasons why the report containing an overview of the Chancellor of Justice's activities includes the most important cases of both constitutional review and the ombudsman's proceedings.

3. Functions, proceedings and tools of the Chancellor of Justice

The status of the Chancellor of Justice as an independent constitutional institution enables him to be free of departmental interests and assess objectively the compliance of legislation with the Constitution and whether persons exercising functions in public law respect the fundamental rights and freedoms of individuals. The Chancellor of Justice can react to actions that are not consistent with the general principles of democracy and rule of law, the Constitution, laws or other legislation, or the principles of good governance.

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

In connection with the Chancellor's competence concerning constitutional review, everyone has the right to turn to him with a request to verify the constitutionality and legality of a law or other legislative act.

Thanks to the Chancellor's competence as an ombudsman, 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 an application to the Chancellor of Justice asking him to verify whether a state agency or local government body, a legal person in public law, or a natural person or legal person in private law who is exercising public functions complies with the principles of guaranteeing fundamental rights and freedoms and good governance. The task of the Chancellor of Justice as an ombudsman is to protect people against arbitrary treatment by the state authorities.

Year by year the number of own-initiative analyses conducted by the Chancellor of Justice has increased. The Chancellor often verifies on his own initiative the protection of the rights and freedoms of persons who themselves cannot sufficiently defend their rights or whose liberty is restricted. For example, in 2005 the Chancellor and his advisers carried out verification visits to Orissaare Boarding School, Haapsalu Sanatorium Boarding School, and Pärnu and Tallinn Prisons.

The Chancellor of Justice has also publicly raised important issues that concern many people. In the present review period, for example, issues relating to the protection of persons data and the right of persons to the protection of health.

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

The Chancellor of Justice will also reject an application if a court judgment has been made in the matter of the application, the matter is concurrently subject to pre-trial complaint proceedings

or judicial proceedings (e.g. when a complaint is being reviewed by an individual labour dispute settlement committee or any other similar pre-judicial body). The Chancellor of Justice can not, and is not allowed to duplicate these proceedings. This principle derives from the premise that the possibility of filing an application to the Chancellor of Justice is not considered to be 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 lacks legal remedies or he or she cannot use the existing remedies for some reason (e.g. the deadline for filing a complaint to a court of law has passed).

The Chancellor of Justice may reject an application if the person can file an administrative appeal or use other legal remedies or if there are challenge proceedings or other non-compulsory pre-trial proceedings pending. In such cases the Chancellor's decision is based on the right of discretion, which takes into account the circumstances of each particular case.

The Chancellor of Justice may reject an 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 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 decides to accept an application for proceedings, he will inform the applicant and will mention the measures that he has taken or intends to take to resolve the application.

The proceedings conducted by the Chancellor of Justice are characterised by the freedom of choice of the form, and the principle of feasibility (appropriateness). The form and other details of the Chancellor's proceedings are determined by the Chancellor himself based on the principles of feasibility, effectiveness, simplicity, and speediness, trying to avoid excessive cost and inconvenience to others. The principle of the freedom of form is applied if the question of whether and how the proceedings must be conducted is not specified in law.

In addition to the above, the Chancellor of Justice also proceeds from an investigative principle. In other words, the Chancellor will ascertain the facts that are essential to the case under investigation. The Chancellor will carry out efficient and impartial proceedings in the course of which he has the right to collect information and documents relating to the case. The main procedural actions available to the Chancellor of Justice are requests for information and the hearing/recording of explanations and statements. If necessary, the Chancellor can also use other types of procedural measures, including requests for expert opinions.

If the Chancellor of Justice finds that a piece of legislation is in conflict with the Constitution or a law, he may propose to the body that passed the legislation (e.g. a Minister, or a local government council) to bring the legislation into conformity with the Constitution or the law, allowing a deadline of at least twenty days for this. If the legislation is not brought into conformity, the Chancellor has the right to make a request to the Chamber of Supreme Court Constitutional Review, to declare the legislation invalid.

The Chancellor of Justice can also make reports to draw the attention of legislators to various problems in legislation. For example, during the present reporting period the Chancellor drew the attention of the Riigikogu to constitutional problems in the legislation regulating outdoor advertising. Similarly, the Chancellor pointed out that the norms in the Labour Contract Act which allow to dismiss persons who have attained 65 years merely based on the age criterion are unconstitutional.

The Chancellor of Justice's ombudsman proceedings end with the statement of the Chancellor in which he expresses his opinion on whether the activities of the body subjected to supervision 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, change the administrative practice or interpretation of a norm, or to amend the norm itself. The last option is used if, in the course of the proceedings, it appears that the injustice arising from the case is not so much a problem of the application of the law but rather of the law itself. The Chancellor of Justice notifies the applicant and the relevant body in writing of his opinion. Although the recommendations of the Chancellor are not legally binding, the proposals made in the Chancellor's memorandum are almost always complied with. The Chancellor of Justice's opinion is final and it cannot be contested in court.

In addition to the supervision of the constitutionality of legislative acts and the function of the ombudsman, the Chancellor of Justice also exercises other tasks entrusted to him by law. The most important of them are: (a) submitting his opinion to the Supreme Court in constitutional review court proceedings, as provided for by the Constitutional Review Court Procedure Act, (b) initiating disciplinary proceedings with regard to judges, as provided for by the Courts Act.

Since 2004 the Chancellor of Justice also has a competence to settle discrimination disputes between private individuals. The Chancellor can settle such disputes only in the form of conciliation proceedings.

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 person or legal person in private law has discriminated against him or her on the grounds 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 does not have the right to initiate conciliation proceedings on his own initiative.

When the Chancellor of Justice decides to initiate conciliation proceedings to resolve a discrimination dispute, 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. The respondent can make a proposal for resolving the dispute. If the applicant consents to the respondent's proposal and such resolution ensures a fair balance in the rights of the parties, the Chancellor of Justice will conclude the proceedings. In the case of disagreement, a hearing is held with the participation of the parties or their representatives. If the applicant and respondent consent to the proposal of the Chancellor of Justice, the Chancellor will approve the agreement. Performance of an agreement approved by the Chancellor of Justice is mandatory to the parties. If the agreement is not performed within the term of thirty days or any other period specified in the agreement, the applicant or respondent may submit the agreement to a bailiff for enforcement. The parties have the right too terminate the conciliation proceedings at any time. If conciliation proceedings are terminated at the request of the parties, or the Chancellor of Justice has declared the failure of the parties to reach an agreement, the applicant has the right of recourse to a court or to an authority conducting pre-trial proceedings, as provided by law for the protection of his or her rights.

4. Structure of the Report

The following parts of the Report provide an overview of the activities that the Chancellor of Justice and his staff have carried out for the protection of fundamental constitutional principles and constitutional rights of persons in 2005. There is also an analysis of the wider problems that the Chancellor of Justice has begun to tackle. When the Riigikogu and other public authorities, as well as the general public, have acknowledged the problems it is possible to initiate relevant debates and targeted measures to strengthen legality and raise confidence in the state authorities.

The Report of the Chancellor of Justice is divided into three main parts.

The first part of the Report arises from Article 143 of the Constitution and section 4(1) of the Chancellor of Justice Act and contains an overview of the conformity of legislation passed by the state and local government authorities with the Constitution and the laws, and, in addition to the main fields dealt with by the Chancellor of Justice, it also contains a description of the constitutional review proceedings carried out by the Supreme Court, and the supervisory activities of the President of the Republic.

Part 2 of the Report explores the activities of the Chancellor of Justice in assessing the constitutionality of legislation and in guaranteeing the fundamental rights and freedoms of persons. The second part of the report, thus, provides a synthesis of the Chancellor's functions of constitutional review and his tasks as an ombudsman.

Part 2 of the Report is for the first time structured by areas of government of various ministries. The aim of such division is to show to the executive bodies, the parliament and the public in the areas of government of which ministries the Chancellor has found problems. The list of problems that have been highlighted, however, is not exhaustive and does not mean that there are no problems in the remaining areas of government. The Chancellor of Justice in his annual report can only describe those cases that come under his attention in one or another way.

The aim of informing the Government and the Parliament is to improve cooperation with the persons and bodies to whom the people have given a mandate to govern. The annual report provides an independent outsider's opinion to the Government and the Parliament, enabling them to take steps to raise the legitimacy of their activities and pointing to the need to improve the supervision mechanisms.

The aim of informing the public in a democratic country governed by a constitution is to provide feedback to the bearer of the highest state authority. Ministers have the highest political responsibility and the main tools for solving problems. The public has the right to be informed about problem areas in government and to know whose responsibility it is to find solutions to the problems.

In the light of the above principles, the second part of the report explores the main developments that have occurred in the area of government of all the ministries and the State Chancellery, and the proceedings that the Chancellor of Justice has initiated in respect to them. The different chapters begin with a brief description of the particular area of government, followed by summaries of proceedings based on applications or conducted on the Chancellor's own initiative.

Besides the areas of government of various ministries and the State Chancellery, the second part of the report also contains separate chapters concerning disciplinary proceedings against judges, proposals to bring criminal charges against judges (impeachment proceedings), and conformity with the principles of equality and equal treatment. At the end of Part 2 there is also a statistical overview of the proceedings conducted by the Chancellor of Justice in 2005.

Part 3 of the report contains a summary of the activities of the Office of the Chancellor of Justice during the reporting period, including its organisational development, public relations, and international cooperation.

At the end of the Report there are contact data of the Chancellor of Justice and the staff in his Office.

PART 1.

OVERVIEW OF THE CONFORMITY OF THE LEGISLATION PASSED BY THE STATE LEGISLATIVE AND EXECUTIVE AUTHORITIES AND LOCAL GOVERNMENTS WITH THE CONSTITUTION AND THE LAWS

I CONSTITUTIONAL REVIEW PROCEEDINGS OF THE SUPRME COURT

1. Introduction

According to Article 149 paragraph 3 of the Constitution, the Supreme Court is the highest court in the state which reviews court judgements by way of cassation proceedings, and it also serves as the court of constitutional review. Considering the importance of reasoning of the Supreme Court judgements, the Chancellor of Justice pays particular attention to constitutional review cases. According to Art 152 of the Constitution, the Supreme Court has the right to declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution. This provision grants the Supreme Court an extensive competence of final judgement about the constitutionality of a law or other legal act. In 2005, the Supreme Court received 37 requests for constitutional review, two of which were granted fully, two in part, and 21 were dismissed.

In 2005, the legislator extended the competence of the Supreme Court when it created a new legal institute of preliminary review in the system of judicial constitutional review.[2] Since 23 December 2005, the Riigikogu has the right to request in the phase of reading of the bill an opinion of the Supreme Court about the constitutionality of a bill of law required for the performance of a duty arising from the membership of the European Union (e.g. conformity of a bill that provides for the introduction of the euro instead of the Estonian kroon with Art 111 of the Constitution)[3]. The Riigikogu submits to the Supreme Court a question about the interpretation of the provisions of the Constitution in the light of the Bill for the Amendment of the Constitution and the European Union law. In essence, the Riigikogu asks for the Supreme Court's opinion about the compatibility of the Constitution with the EU law, i.e. about the interpretation of a constitutional principle or norm in the light of the EU law. This does not mean an assessment of the constitutionality of a specific bill. Although the law does not involve the Chancellor of Justice in these proceedings, pursuant to Art 141(2) of the Constitution he may participate in the reading of all the bills at the sessions of the Riigikogu with the right to speak; the Chancellor of Justice can also express his opinion in the proceedings in the Supreme Court about the interpretation of the Constitution and the EU law in combination. Since 23 December 2005 it is possible to distinguish between the Supreme Court opinions which are mandatory for everyone (former constitutional review decisions) and those which are not formally mandatory (opinions of the new preliminary review proceedings).

The following part provides an overview of major constitutional review decisions of the Supreme Court, which have to be taken into account in planning legislation to be in conformity with the Constitution.

2. Election coalitions in the local government council elections

(1) On 19 April 2005 the Supreme Court en banc granted partly the request of the Chancellor of Justice and declared § 70[1] of the Local Government Council Election Act, which prohibited participation of election coalitions in local government council elections, as invalid.

(2) Section 70[1] of the Act provided that the right to present election coalitions for registration to rural municipality of city election committees would end on 1 January 2005. Thereafter only political parties and individual candidates would have had the right to stand as candidates in local government council elections.

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[2] The Amendment Act of the Constitutional Review Court Procedure Act and of the Riigikogu Rules of Procedure Act that entered into force on 23 Dec 2005.

[3] See the Supreme Court Constitutional Review Chamber opinion of 11 May 2006, No. 3-4-1-3-06.

The Local Government Council Election Act disputed by the Chancellor of Justice had entered into effect on 6 May 2002. Unlike previous regulation, the new law allowed persons to stand as candidates in local government elections only in the list of political parties or as individual candidates. At the request of the Chancellor of Justice the Chamber of Supreme Court Constitutional Review declared the Act unconstitutional in July 2002 to the extent that it failed to allow election coalitions of citizens to participate in local government council elections. The Supreme Court noted that this constituted a restriction of the right to vote and stand as a candidate, which has a legitimate aim (increasing political responsibility) but which is disproportionate in the current "legal and social environment". [4]

The Riigikogu amended the Local Government Council Election Act on 30 July 2002, allowing also election coalitions of citizens to present lists of candidates alongside political parties. At the same time, a new provision (§ 70^1) was added to the Act, which provided that the right of election coalitions to present lists of candidates would end on 1 January 2005.

In the opinion of the Chancellor of Justice, the prohibition of election coalitions first and foremost harms the independence of local governments to decide local issues and restricts the representation of different interests. It also restricts excessively the electoral rights on local level because candidates have no real possibility to be elected unless they belong to a nationwide political party and stand as candidates in the list of the particular party. The right to vote is restricted disproportionately because limiting the participation in local elections to political parties does not ensure for voters a real choice between different lists.

In addition, the Chancellor of Justice believes that § 5(1) of the Political Parties Act is in conflict with Article 19 of the EC Treaty, according to which European Union nationals have the right to vote and be elected in local government elections of their place of residence under the same conditions as nationals of the respective member state. Based on this, Estonia is required to ensure that EU nationals have equal conditions with Estonian nationals for the exercise of their electoral rights on local level. The prohibition for foreigners to belong to political parties fails to guarantee equal opportunities, just as the right to run as an individual candidate fails to guarantee equal opportunities. In order to ensure the principle of equal treatment, it is, for example, possible to allow EU citizens to stand as candidates in the lists of election coalitions in local elections or to allow EU citizens belong to political parties for the purposes of local government council elections.

(3) The main issue was the constitutionality of the prohibition of election coalitions and the competence of the Chancellor of Justice to request that the Supreme Court declare the law invalid due to its conflict with the EU law.

(4.1) The Chancellor of Justice concluded that § 70^1 of the Local Government Council Election Act and § 1(1), first sentence § 5(1) and § 6(2) of the Political Parties Act are contrary to the Constitution and the EC Treaty to the extent that it is impossible to form election coalitions to participate in local government council elections or to establish political parties with less than 1000 members to decide and manage local issues where also EU citizens could be members.

Section 1(1) of the Political Parties Act defines a political party as a voluntary political association of Estonian citizens, aimed at expressing the political interests of its members and supporters and exercising state authority and local government, and which is registered pursuant to the procedure provided for in the Act. According to the first sentence of § 5(1) of the Act, an Estonian citizen with active legal capacity who is at least 18 years old can be a member of a political party. According to § 6 of the Act, a political party is registered if it has at least 1000 members.

According to § 1(1) of the Political Parties Act, a political party should be active both on the national

[4] Supreme Court Constitutional Review Chamber judgement of 15 July 2002, No. 3-4-1-7-02, p 15.

and local government level, which means a restriction on the programmatic freedom of political parties. Section 6(2) of the same Act provides for the minimum number of members that a political party should have, which means a restriction on the freedom of establishment. The above restrictions are imposed for a legitimate purpose – to increase political responsibility. However, such restrictions are not suitable, necessary and moderate in terms of the freedom of political parties set out in the Constitution, which protects the freedom of voluntary association of persons for non-profit oriented political goals if the persons have an interest in jointly seeking their aims in the form of a permanent organisation.

There is no need to guarantee political responsibility through nationwide political parties on the local level, because responsibility on local level differs from the national level. Responsibility on local level is based primarily on persons. In local elections it is also necessary to guarantee emphasis on local issues and the autonomy of local governments, which is endangered by allowing only nationwide parties to participate in local elections. The principle of representativeness of local councils should also be taken into consideration, including the possibility of participation of foreigners.

The aim of increasing political responsibility could also be achieved with measures that are less restrictive, such as election thresholds or the obligation to collect signatures of supporters, and therefore such restrictions in the Political Parties Act are unnecessary.

The restrictions imposed by the Act are also not moderate, because the aim of ensuring political responsibility is outdone by the damage that such restrictions cause to other democratic principles, first and foremost to the independence of local governments in solving local issues and the representativeness of local councils, which requires the representation of different interests.

(4.2) The Supreme Court in its decision first dealt with the restrictions on standing as a candidate in local council elections, secondly with the request of the Chancellor of Justice concerning Art 48 of the Constitution, and finally expressed an opinion with regard to granting the request of the Chancellor of Justice. The Supreme Court also analysed the competence of the Chancellor of Justice to verify the compliance of § 5(1) of the Political Parties Act with European Union law.

Art 156 (1) of the Constitution provides for the principles of general and uniform elections. The principle of general elections means primarily that no unjustified qualifications are imposed to restrict the active or passive electoral rights. The analysed laws do not contain such restrictions. The principle of uniformity of elections, in combination with the principle of equal treatment arising from Art 12 of the Constitution, means ensuring equal opportunities to candidates in the case of passive electoral rights both in respect to standing as a candidate or the possibility to be successful in elections.

As the proportional election system is used in local elections in Estonia, individual candidates and those running in lists of candidates are in a different situation. The opportunities of an individual candidate to get elected, in comparison with candidates who run on lists, are different because listed candidates can become elected on the basis of votes given to the whole list due to the possibility of transfer of votes, while individual candidates can only be elected on the basis of votes given personally to them. It is not reasonable or possible to compare individual candidates and candidates on political party lists in such a context. The principle of uniformity of elections requires that different groups of persons who wish to put up lists of candidates should have equal possibilities to stand for elections.

Imposing restrictions on standing as a candidate in local elections may interfere with the principle of autonomy of local government. Independent decision-making on local issues as provided for by Art 154 of the Constitution means the autonomy of local government, which is also a fundamental principle in the European Charter of Local Self-Government. According to the Constitution, local government is based on the idea of a community whose task is to solve problems in the community and organise the life of the community. If possibilities of representing community interests are made dependent on decisions made by nationwide political parties, it may endanger the representation of

local interests. The principle of autonomy of local government exists in the interests of decentralisation of public authority and to restrict and balance state authority. This is a constitutional value which should also be protected by the system of local council elections. The principle of independent decision-making means that members of local councils should be able to make their decisions independently of the central state authority and place local interests above others.

Based on the above considerations, the Supreme Court concluded that the system of local elections should guarantee an equal possibility to stand as candidates to groups of persons who have grown out of the local community as compared to groups who are simultaneously interested in exercising power throughout the country (e.g. political parties).

The Supreme Court continued to analyse the question whether the requirements on presenting a joint list of candidates are reasonable and whether they enable a group of citizens within one rural municipality or city to present an independent list of candidates. Pursuant to the restriction imposed by § 70^1 of the Local Council Election Act, only political parties can present lists of candidates for local elections. It was necessary to analyse whether the requirements for the establishment and operation of political parties allow a group of persons within a particular local government territory to present a list of candidates if they are united by common interests in deciding local issues.

The Supreme Court did not share the opinion of the Chancellor of Justice that based on § 1(1) of the Political Parties Act the aim of a political party should be the exercise of both state power and of local government, and that it is ruled out to recognise a political association of persons as a political party if its aim is to exercise self-government only within a single rural municipality or city. The interpretation of the provisions of the Political Parties Act does not lead to such a conclusion.

Although the court found that the Political Parties Act does not prohibit inhabitants of a rural municipality or a city to establish a political party to exercise local power, in practice it is impossible to establish a party for the purpose of presenting candidates in local elections and exercising of power within the territory of one single local government. The requirement of a thousand members provided for in § 6(2) of the Act, excludes even the establishment of one political party involving many local governments in Estonia, and in practice it is impossible in most local governments to establish a political party for exercising local power, let alone the possibility of emergence of different political parties within one local government. It is impossible for inhabitants of a single local government to present a list of candidates if they wish to represent autonomous interests of their community in local elections. The procedure of financing of political parties can also set obstacles to a successful candidacy of local community groups in local council elections, as there is a system of financing of political parties from the state budget and a prohibition of acceptance of donations from legal persons.

Based on the foregoing, the Supreme Court concluded that the rules of the Political Parties Act in combination with § 70^1 of the Local Government Council Election Act restrict the uniformity of electoral rights (in terms of the right to stand as a candidate) on local level and interfere with the principle of autonomy of local government.

Both the principle of local autonomy and the principle of equal right to stand as a candidate, however, are not absolute rules, the restriction of which would automatically lead to unconstitutionality. The principle of general and uniform elections and local autonomy are set out without a reservation subject to imposition by a law in the Constitution. The restriction of the rights arising from these principles is permitted if there is a constitutional value that is protected by the restriction, and if the restriction is necessary in a democratic society. In assessing the fundamental right to stand as a candidate and the restriction of the principle of local autonomy it is possible to use the same principles, i.e. assess the suitability, necessity and moderation of the restrictions based on their aim.

The Supreme Court agreed with the opinion of the Chancellor of Justice, the Minister of Justice and

the Constitutional Committee of Riigikogu constitutional affairs committee that ensuring of political responsibility, which is the aim of restriction of the right to stand as a candidate, is a constitutional value. This is a value arising from the general principle of democracy stipulated in Art 1 of the Constitution. The Supreme Court noted that, on the one hand, the principle of democracy requires that voters must have a possibility to choose between different electoral programmes and ideas, and the candidates and lists that represent them. For the functioning of democracy, it is important that different societal interests are represented in the local decision-making process as widely as possible. On the other hand, the principle of democracy also presumes that voters have a possibility to make an assessment of the activity of the members of the local council who are elected and whether they have complied with their election promises. The latter expresses the political responsibility of members of a council to their voters. The more permanent the composition of political forces that run in elections the clearer the political responsibility should be, because voters can express an assessment of the performance of promises given at elections only at the time of next elections.

Due to the requirements of the Political Parties Act, the organisation of political parties is stable and their activities are spread out within longer time periods, and thus it is easier for voters to assess the performance of different associations within a longer election period. Thus, the given measures are suitable means to achieve this objective.

Giving the right to present lists of candidates only to political parties in accordance with the Political Parties Act and the Local Government Council Election Act is, in principle, also a necessary tool to ensure political responsibility. It is not possible to point out specifically a measure that would be less restrictive in respect of the right to stand as a candidate and of local autonomy, and which would at the same time guarantee political responsibility with similar efficiency as giving the right to present lists of candidates only to political parties. The Supreme Court did not agree with the Chancellor of Justice, noting that the possibilities for ensuring political responsibility on local level, as mentioned in the Chancellor's request (i.e. election threshold and signatures of supporters), could increase political responsibility but it is not possible to claim that these measures would be equally efficient compared to giving the right to present candidates to political parties only.

In assessing the moderation of the restriction, it was necessary to take account of the intensity of the restriction of the right to stand as a candidate and of local autonomy, and the weight of these values as compared to the need to ensure political responsibility.

Restrictions on the exercise of electoral rights in local elections should be particularly considerable because the right to be elected and the principle of local autonomy are fundamental principles of democracy pursuant to the Constitution.

The restrictions provided for by the Local Government Council Election Act and the Political Parties Act are not made less intensive by the fact everyone retains the right to stand as an individual candidate, for the reason that in the case of a proportional election system the comparison of an individual candidate with a list would not be reasonable. This is also proved by election results – only a very small number of candidates are able to reach the simple quota required to be elected as an individual candidate. At the same time, if persons standing as candidates on a political party list collectively gain at least 5% of the votes, the list will receive all the compensation mandates, while all the votes given to individual candidates who did not reach the simple quota would simply be lost.

If only political parties were able to run in local elections this would endanger the representativeness of local government bodies. In this respect, the Supreme Court based its conclusions on the undisputed data presented by the Chancellor of Justice, according to which there were 14 local government units where no lists of political parties were presented in 2002. In 46 local governments only one political party was represented. The Estonian People's Party had put up a list of candidates in 159 local governments, while the Estonian Centre Party had a list in 157, and the Res Publica Union in 117 local governments. All the other political parties had presented their lists in less than 60 local

governments. Consequently, it is not guaranteed that voters in all local governments can choose between different lists.

The possibility to be included on a list of a political party even without being a member of the party does not significantly reduce the intensity of the restriction of the right to stand as a candidate, because it is not guaranteed that a political party would be willing to include such persons on their lists.

Based on the above, the Supreme Court concluded that the restriction of the right to stand as a candidate, as well as restriction of local autonomy, is intensive. The court noted that, although the need to ensure political responsibility is a constitutional value, it is not a primary value deriving from the principle of democracy. Apart from political responsibility there is another requirement in the Estonian political system in order to ensure the functioning of democracy, which requires that different societal interests should be represented as widely as possible in political decision-making.

Therefore, in today's legal and social environment in Estonia the aim of ensuring political responsibility does not justify the restriction of the principle of local autonomy and equal right to stand as a candidate in local council elections. Section 6(2) of the Political Parties Act and § 70^1 of the Local Government Council Election Act, which prevent inhabitants of a local government to present lists of candidates independently, are unconstitutional in their combined effect.

Art 48 para 1 of the Constitution gives the legislator the right to define what a political party is and the right to provide for more specific requirements for the registration of an association as a political party, thus developing the concept of a political party as an institute of law. Of course, the legislator may not define a political party arbitrarily. The court emphasised that in view of the particular importance of political parties in political life the rules set out by the legislator in respect to political freedom of association in the form of political parties should be reasonable. It should also be kept in mind that the more extensive the special rights granted to political parties the stronger the justification of the requirements for the establishment of political parties should be.

Unreasonable restrictions for the registration and operation of political parties would be first and foremost of the kind that significantly prejudice the establishment of political parties, considering that political parties have been given extensive rights in the political system. One of the most important special rights granted to political parties is the right of participation in elections. As other persons and organisations have no possibility to present lists of candidates, it would, for example, not be reasonable if the establishment of a political party was made dependent on the arbitrary decision of the executive authority or if the restrictions on the establishment of a political party would be so strict as to make the establishment of a party practically impossible.

As was mentioned above, the Supreme Court did not agree with the opinion of the Chancellor of Justice that § 1(1) of the Political Parties Act is an obstacle to the operation of political parties on local level only. Hence, there is no conflict with Art 48 of the Constitution.

Based on Art 48 of the Constitution, the Chancellor of Justice also disputed § 6(2) of the Political Parties Act. As was explained above, the Supreme Court was of the opinion that the requirement of at least a thousand members to register a political party unconstitutionally restricts the right to stand as a candidate and the autonomy of local government, considering that political parties are the only associations that can present lists of candidates in local elections. If the legislator also guarantees the possibility of participation in local elections to other associations or guarantees the possibility of registration of political parties that operate on local level, the requirement of a thousand members for nationwide political parties could be considered as justified.

In principle, the legislator has various possibilities how to eliminate the unconstitutional situation. The unconstitutional situation that has arisen in combination of the provisions that the Chancellor of

Justice disputed could also be eliminated in other way than repealing § 70[1] of the Local Government Council Election Act and allowing election coalitions of citizens to participate in elections, while observing the principles of the right to stand as a candidate, local government autonomy and freedom of association. In local government units with a small number of inhabitants, allowing presenting of candidates only on lists of political parties would not be constitutional even if the requirement of a thousand members were reduced ten times. Even with the requirement of a hundred members it might not be possible in many local governments to establish several local political parties.

In view of the above, and considering the time left until local elections, the Supreme Court found that based on the principle of legal certainty it would not be sufficient to declare the unconstitutionality of the combined effect of § 70[1] of the Local Government Council Election Act and § 6(2) of the Political Parties Act, and declared § 70[1] of the Local Government Council Election Act invalid.

It is not conceivable that the right to stand as a candidate and the principle of local autonomy would be guaranteed in elections in October 2005 by declaring § 6(2) of the Political Parties Act invalid and providing for a smaller number of members for the registration of a political party, because the Political Parties Act gives rise to a number of additional requirements for the establishment of political parties. It would not be possible in many local governments for persons interested in deciding local issues to comply properly and in time with these requirements before the upcoming elections. It is also not conceivable that the legislator would restructure the whole system of local council elections or that during the time left until elections local government units would merge to be of the size that would enable their inhabitants to comply easily with the requirements for the establishment of political parties.

(4.3) Pursuant to § 2 of the Constitutional Amendment Act and Art 48 of the Constitution, as well as the principle of equal treatment, the Chancellor of Justice considered § 5(1) of the Political Parties Act to be contrary to Art 19 of the Treaty establishing the European Community and the EU Council Directive 94/80/EC of 19 December 1994 that implements this article.

The Supreme Court found that regardless of references to the provisions of the Constitution, in essence the Chancellor of Justice disputed § 5(1) of the Political Parties Act based on European Union law.

Neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act give the Chancellor of Justice the competence to request that the Supreme Court should declare laws invalid for the reason that they are contrary to EU law. Neither the Constitution nor EU law require the existence of a constitutional review procedure for bringing national law in line with EU law – there are other various possibilities for this.

The legislator is competent to decide whether it wishes to regulate the procedure of annulling Estonian legislation that is in conflict with EU law, just like it can choose whether it grants the Chancellor of Justice the right to verify compliance of domestic legislation with EU law.

Admitting that EU law has supremacy over Estonian law, the Supreme Court expressed the opinion that in view of the case law of the European Court of Justice[5] this means supremacy of application, i.e. national law that is in conflict with EU law should be set aside in the particular dispute. There is no requirement of the existence of an abstract control procedure on the national level. Thus, the Supreme Court was of the opinion that the court cannot review the request of the Chancellor of Justice to the extent that the Chancellor was requesting the annulment of § 5(1) of the Political Parties Act, relying on Art 19 of the EC Treaty and Directive 94/80/EC.

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[5] The Supreme Court referred to joined cases C-10/97 until C-22/97, *Ministero delle Finanze v. IN.CO.GE.'90*, [1998] ECR I-6307.

3. Belonging of members of the Riigikogu to local government councils

(1) On 14 October 2005, the Chamber of Supreme Court Constitutional Review decided to grant the request of the President of the Republic and declared as unconstitutional the Riigikogu Internal Rules Act Amendment Act, according to which persons had the right to be simultaneously a member of the Riigikogu and of a local government council.[6]

(2) On 27 March 2002, the Riigikogu passed the Local Government Council Election Act amending the Riigikogu Internal Rules Act and the Local Government Organisation Act. The Acts were amended so that as of 17 October 2005 it would be prohibited for members of the Riigikogu to belong simultaneously to a local government council and vice versa.

On 12 May 2005, the Riigikogu passed the Riigikogu Internal Rules Act Amendment Act which was to enter into effect on 17 October 2005. With the amendment, second sentence of § 6(2) of the Riigikogu Internal Rules Act that was to enter into effect on 17 October 2005 was omitted. According to this section, upon the election of a member of the Riigikogu to a rural municipality or city council his or her mandate as a council member would be suspended. The Amendment Act also annulled § 7(2) clause 3 of the above Riigikogu Internal Rules Act, according to which a member of the Riigikogu may not be a member of a rural municipality of city council during his or her mandate.

The President of the Republic found that the disputed Act was contrary to the following constitutional principles:

- principle of the autonomy of local government, which presumes that the activities of a council in deciding local issues should proceed first of all from local circumstances and that members of a local government council can pass decisions independently of the central government, placing local interests above others;
- principle of separation and balance of powers, which is aimed at preventing excessive concentration of power. The personal level of separation of powers has been violated if one and the same person exercises simultaneously the functions of two branches of power;
- principle of non-reconcilability of positions, which, inter alia, is aimed at ensuring the possibility for members of the Riigikogu to focus on the performance of their tasks as members of parliament.

In March 2005, the Chancellor of Justice sent a report to the Riigikogu in which he proposed not to pass § 1(12) of the Bill for the Amendment of the Local Government Organisation Act (bill 407 SE) and not to amend the Riigikogu Internal Rules Act to the extent dealing with the belonging of the members of the Riigikogu to local government councils. The Chancellor of Justice relied on the same above-mentioned arguments.

(3) The main issues were whether the disputed amendment in its substance was in conformity with the Constitution and whether the entry into effect of the amendment immediately before the elections was permissible.

(4.1) In the opinion of the President of the Republic, the principle of autonomy of local government arising from Art 154 of the Constitution and from the European Charter of Local Self-Government presumes that the activities of local councils in deciding local issues should proceed primarily from local circumstances and that members of local government councils can pass decisions independently of the central government, placing local interests above others.

The aim of the principle of separation and balance of powers stipulated in Art 4 of the Constitution

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[6] Supreme Court Constitutional Review Chamber judgement of 14 Oct 2005, No. 3-4-1-11-05.

is to prevent excessive concentration of power. Considering that the activities of local government councils in implementing local administration can be seen as an exercise of the executive power, then in deciding and organising issues that the law has entrusted to local governments a member of the Riigikogu who also belongs to a local council would be exercising executive power in a way that is contrary to the principle of separation and balance of powers.

Simultaneous exercise of different power functions by one and the same person is not in conformity with the principle of non-reconcilability of positions provided for in Art 63 of the Constitution, which is also aimed at ensuring the possibility for members of the Riigikogu to concentrate on the performance of their functions.

(4.2) In the opinion of the Chancellor of Justice, provisions that allowed simultaneous membership of both representative bodies was contrary to Art 154 para 1 of the Constitution which stipulates the principle of autonomy of local government.

If members of the parliament can also participate in deciding local issues in local government councils, there might be a situation where national interests rather than local needs are given priority in deciding local issues, and this may reduce the independence of local governments.

Concurrent membership of a local council and the Riigikogu affects the stability of the representative bodies, considering both the reconcilability of workload in these bodies and the effects arising from the changing political power lines.

Working as a member of a local government council by a member of the Riigikogu should be interpreted as holding another public office in the meaning of Art 63 para 1 and Art 64 para 2 clause 1 of the Constitution. Hence, the provisions that allow simultaneous membership of both representative bodies is contrary to Art 63 para 1 and Art 64 para 2 clause 1 of the Constitution. These constitutional provisions give rise to the principle of non-reconcilability of positions, which means a prohibition of granting concurrently two different positions of authority to one and the same person and which is aimed at the prevention of a conflict of interests. This principle should also help to ensure that members of the Riigikogu can perform their function as representatives of people (Art 1 para 1 and Art 56 para 1 of the Constitution) based on a free mandate (Art 62 of the Constitution), observing their conscience and the interests of the whole country. The second aim of the prohibition on reconcilability of positions is to ensure that members of the Riigikogu can dedicate to their parliamentary work.

In view of the division of power between three branches, local government activities in the wider sense constitute an exercise of the executive power. In particular when deciding the performance of duties imposed on local governments by the state, the local government council is functionally part of the state's executive power – the relations and supervision that emerge between the state and local government in the exercise of state power are similar to relations that develop within the state's administrative organisation. Thus, work as a member of a local government council by a member of the Riigikogu should be interpreted as work in another public office.

Concurrent membership of a person in both representative bodies is also not in conformity with the principle of personal separation of powers arising from Art 4 and 14 of the Constitution. In a situation where a civil servant simultaneously performs functions that in essence may be contradictory to each other and seeks to achieve opposing aims, a conflict of interests may arise which may lead to lapses in the performance of one's duties. Considering the status of members of the Riigikogu as representatives of the whole nation, as opposed to members of local councils who represent interests and rights of inhabitants of a particular local government, and the principle of a free mandate of members of the Riigikogu to act in accordance with their conscience and in the interests of the state, the need to avoid the conflict of interests through personal separation of powers becomes particularly important. Such a double mandate (mandate as a member of the Riigikogu and mandate

as a member of a particular local government council) is not possible without the emergence of a conflict of interests.

(4.3) The Supreme Court in its judgement first considered it necessary to analyse the situation. This was for the reason that for the implementation of the amendments introduced to the Riigikogu Internal Rules Act in 2002, in the same year amendments were also made in the Local Government Organisation Act which had to enter into effect at the same time, i.e. 17 October 2005. According to § 19(2) clause 11 of the Local Government Organisation Act, mandate of a member of a local government council had to be suspended for the period of performance of the mandate as a member of the Riigikogu until the termination of the person's mandate as a member of the Riigikogu. On 12 May 2005, the Riigikogu, however, amended § 19(2) clause 11 of the Local Government Organisation Act and omitted from the provision the words "member of the Riigikogu" and consequently the provision was to regulate only the suspension of the mandate of a member of a local council who becomes a member of the Government of the Republic. The President of the Republic proclaimed the amendment on 25 May 2005 and it entered into effect on 17 October 2005, regardless of the result of the dispute pending in the Supreme Court.

In the opinion of the Supreme Court, the above mentioned amendment of the Local Government Organisation Act was not an obstacle to deciding the dispute in the court, because the amendments made in 2002 and 2005 concerning members of the Riigikogu were only of organisational character. The court was of the opinion that the right of a member of the Riigikogu to perform simultaneously the functions of a member of a local government council depended on the constitutionality of the Act that the President of the Republic decided not to proclaim on 30 May 2005.

The amendment that the President failed to proclaim would mean an important change in election law. Therefore, it was necessary to analyse whether the introduction of such an important amendment immediately before the elections was permissible. The Supreme Court had to solve a similar problem in connection with important legislative amendments immediately before the local government council elections in 2002.[7]

The Act that the President of the Republic disputed and that amended the principle introduced in the Act of 2002 was passed on 12 May 2005. It was due to enter into effect on 17 October 2005. Local government council elections were to take place on 16 October in the same year. According to § 35(1) and (2) of the Local Government Council Election Act, the registration of candidates begins on the 60th day prior to the date of elections.

Considering that the Riigikogu significantly changed the election rules three months before the start of the local government council election process, the conformity of the amendment with the principle of democracy arising from Art 10 of the Constitution had to be analysed, as well as whether the provisions contained a reasonable deadline for the implementation of the amendments.

The Constitution does not explicitly provide for a prohibition to make substantial changes in the election rules immediately before the elections. Changes in the rules immediately before the elections which can significantly affect election results in favour of one or another political force are not democratic. In the present case the amendments made shortly before the elections were clearly aimed at strengthening the position of political forces represented in the parliament in local elections as compared to political parties outside the parliament, election coalitions and individual candidates. This is not in compliance with the principle of democracy. Based on the principle of democracy, there should be no situation where ruling political forces immediately before the elections make substantial changes in their favour in the election rules that were known to everyone several years before the elections.

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7 Supreme Court Constitutional Review Chamber judgement of 15 July 2002, No. 3-4-1-7-02.

The Supreme Court considered it important to emphasise that it cannot prescribe what a reasonable time for making substantial changes in election rules would be. However, the Court was of the opinion that it was clearly too late to introduce a change in election rules that should enter into effect at a time when a judicial dispute about the constitutionality of the provisions that restrict the electoral rights and that the President of the Republic had decided not to proclaim could still be pending pursuant to the Constitutional Review Court Procedure Act. Both the candidates as well as voters should have time to familiarise themselves with new rules and decide their behaviour accordingly. A minimum requirement in changing election rules should be that a law introducing a substantial change should be passed with a consideration that it enters into effect well in advance of the elections.

The Supreme Court also refuted the claim that members of the Riigikogu who run in local elections on 16 October 2005 have a legitimate expectation to assume the duties of a member of a local council alongside their duties as a member of the Riigikogu if they get elected. According to the Court's opinion, there is no such expectation because already in 2002 an amendment to the Act was introduced to prohibit such reconciliation of positions and the unproclaimed law which is subject to a judicial dispute about its constitutionality cannot give any such legitimate expectation. On the contrary, in the Court's opinion the disputed legislative amendment created a situation of legal ambiguity in which neither the candidates nor voters know if members of the Riigikogu who get elected may combine their duties as members of the Riigikogu and as members of local councils.

(5) On 14 October 2005 the Supreme Court expressed an opinion that the amendment to the Act would have meant a substantial change in election law and is thus not permissible immediately prior to elections. In passing the law the Riigikogu failed to take account of the principle of legal clarity. Local government elections were held on 16 October 2005.

II SUPERVISORY ACTIVITIES OF THE CHANCELLOR OF JUSTICE

1. Introduction

The constitutional review activities of the Chancellor of Justice in 2005 are described in two parts – as an overview of proposals and reports made to the Riigikogu, and as an analysis of legal problems in respect to various fields.

The constitutional review of legislation is launched by applications received from individuals or on the Chancellor's own initiative. If a conflict is found in a law, the Chancellor of Justice can make a proposal to the Riigikogu on the basis of Art 142 para 1 of the Constitution and § 17 of the Chancellor of Justice Act to bring the law into conformity with the Constitution within 20 days. In the case of disagreement with the Chancellor's proposal, the Chancellor makes a request to the Supreme Court to declare the respective act invalid. The second possibility available to the Chancellor of Justice is to make a report to the Riigikogu on the basis of Art 139 para 2 of the Constitution in order to draw attention to problems in the law after having analysed the conformity of the provisions with the constitutional principles.

In 2005, the Chancellor of Justice made two proposals to the Riigikogu (cf. one proposal in 2004), which concerned the areas of health insurance and misdemeanour procedure. In both cases, the Riigikogu admitted the existence of a conflict with the Constitution and complied with the Chancellor's proposals.

In 2005, the Chancellor of Justice also made seven reports to the Riigikogu (four reports in 2004). The problem raised in the report of 17 March 2005 (belonging of a member of the Riigikogu to a local government council) found a solution conforming to the Chancellor's opinion as a result of the constitutional review proceedings initiated by the President of the Republic in the Supreme Court. A positive solution was also found to the issue of renewal of a deadline for submitting of a claim in misdemeanour procedure, and to the issue of protection against dismissal of workers who are 65 years old or older. The remaining issues are still pending in the Riigikogu.

There is a good tradition in the annual reports of the Chancellor of Justice to deal in detail with certain problems and describe them in the form of brief articles relating to the respective areas. As a rule, these issues have been under the increased focus of the Chancellor of Justice during the reporting year. In this year's report, five problems were chosen for more detailed examination, ranging from health care to the transport hazardous goods on railway. The common denominator for the articles presented in the report are legal shortcomings, although by substance the problems are different. In some cases the problem is long-term (processing of personal data, health protection) and the respective area was under the close attention of the Chancellor of Justice already in previous years. At the same time, new areas are also dealt with, which, due to increased public interest, have given rise to a large number of applications addressed to the Chancellor of Justice and the solving of which revealed various legal shortcomings (e.g. in the areas of construction and planning). The report also contains an analysis, which, in a way, is a caution for the future (hazardous cargo on railways and the prevention of large-scale accidents).

2. Proposals and reports to the Riigikogu, and opinions of the Chancellor of Justice

2.1 Protection against dismissal of workers who are 65 years or older

Cases No. 6-1/050451 and 10-2/051399

(1) The Chancellor of Justice analysed the constitutionality of § 86 clause 10 and § 108 of the Employment Contracts Act (as at 1 January 2005) based on the application of two persons.

(2) Section 86 clause 10 of the Employment Contracts Act provides that an employer can prematurely terminate both fixed-term and open-ended employment contracts due to the age of an employee. Section 108 of the Act specifies the above clause and states that an employer has the right to terminate an employment contract on grounds provided for in § 86 clause 10 if an employee has turned 65 years old and has the right to a full old-age pension.

The applicants were of the opinion that § 86 clause 10 and § 108 of the Employment Contracts Act were contrary to Art 12 of the Constitution which stipulates equal treatment of comparable persons. The applicants requested that the Chancellor of Justice should initiate proceedings to bring the relevant provisions of the Employment Contracts Act into conformity with the Constitution.

The Chancellor of Justice submitted a request for information to the Minister of Social Affairs within the constitutional review proceedings concerning § 86 clause 10 and § 108 of the Employment Contracts Act.

(3) The main issue in the proceedings was whether § 86 clause 10 and § 108 of the Employment Contracts Act were in conformity with the Constitution.

(4) First sentence of Art 12 para 1 of the Constitution guarantees everyone's equality before the law. The Supreme Court has repeatedly noted that the first sentence of Art 12 para 1 of the Constitution should also be interpreted as meaning the quality of law-making, i.e. laws must treat all people in a similar situation in a similar manner.[8] If legislation treats persons in comparable situations differently, there should be a justification for such unequal treatment. If there is no proper justification, unequal treatment is not permissible under the Constitution.

The legislator has mostly considered it necessary to guarantee a high level of protection against dismissal to workers. In view of this aim, employers can normally dismiss a person only when it is justified for substantial reasons related to the employee (e.g. non-conformity of the employee's skills or health to the requirements of the particular work; disloyalty of the employee) or due to the economic situation of the undertaking (e.g. elimination of the particular job position, liquidation of the company).

Under § 108 of the Employment Contracts Act, workers who are 65 years and older and have the right to a full old-age pension have no high-level protection against dismissal, which would allow to dismiss them only for substantial reasons. According to § 108 of the Act, en employer can dismiss an employee who is 65 years or older and has the right to a full old-age pension without a reasoned justification merely based on two formal criteria provided for in § 108 of the Act.

As a result of the provisions in § 86 clause 10 and § 108 of the Act, persons who are 65 years and older and have the right to a full old-age pension have weaker protection against dismissal than other employees. Consequently, such persons are treated differently in comparison to other employees.

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[8] See e.g. Supreme Court en banc judgement of 17 March 2003, No. 3-1-3-10-02.

Next, the Chancellor of Justice assessed whether, in the case of termination of an employment relationship, employees who are 65 years and older and are entitled to a full old-age pension are actually in a comparable situation with employees who do not meet the above-mentioned two conditions and who are covered by the protection against dismissal. If persons 65 years and older and entitled to a full old-age pension are not in a comparable situation with persons under the age of 65 in the case of termination of an employment contract then there is no unequal treatment because only comparable persons have to be treated equally.

Having analysed the norms of the Employment Contracts Act, the Chancellor of Justice concluded that a high level of protection against dismissal also extends to persons under the age of 65 who are entitled to a full old-age pension. In the opinion of the Chancellor of Justice, employees under the age of 65 and over the age of 65 who are entitled to a full old-age pension are in a similar situation in the case of termination of an employment relationship: all employees who are entitled to a full old-age pension, regardless of their exact age, are considered to be elderly people who are guaranteed a regular income until the end of their life in the form of a full old-age pension upon the termination of their employment relationship.

In view of the foregoing, the Chancellor of Justice concluded that § 86 clause 10 and § 108 of the Employment Contracts Act place comparable groups of persons in an unequal situation in terms of protection against dismissal: the legislator has decided to provide a higher level of protection against dismissal to one group (persons under the age of 65 who are entitled to a full old-age pension) while no such protection is provided to the other group.

According to the Constitution, there must first be a goal that justifies such unequal treatment. If there is no such justifiable goal, unequal treatment is not constitutional.

It was not clear from the explanatory memorandum to the Employment Contracts Bill[9] or the transcripts of the proceedings of the bill[10] why the protection against dismissal was reduced for employees who are 65 years old and are entitled to a full old-age pension in comparison to the protection afforded to younger persons who are entitled to a full old-age pension.

The Chancellor of Justice deliberated that a wish to regulate the labour market could be a reason for such unequal treatment. The respective provisions of the Employment Contracts Act facilitate access to employment for younger persons: it is easy for employers to dismiss older persons and replace them with younger employees. However, the Chancellor of Justice had no indisputable basis to conclude that the Estonian labour marked was in need of such regulation.

The Minister of Social Affairs from whom the Chancellor of Justice asked for an explanation why persons at the age of 65 were deprived of a high level of protection against dismissal admitted in his letter of 7 June 2005 to the Chancellor of Justice that there was no legitimate aim to justify depriving employees above the age of 65 of a high level of protection against dismissal. Finding support from the claim of the Minister of Social Affairs, the Chancellor of Justice concluded that there was no justifiable reason to deprive persons at the age of 65 and older of a higher level of protection against dismissal.

Article 12 of the Constitution, as was explained above, does not allow to treat people in a comparable situation differently, unless there is sufficient reason to do so. In view of the above analysis, the Chancellor of Justice concluded that § 86 clause 10 and § 108 of the Employment Contracts Act were contrary to the Constitution.

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9 Explanatory memorandum to the Employment Contracts Bill. Available in the State Archives.

10 Transcript of the proceedings in the Supreme Council of the Republic of Estonia on 9 March and 15 Apr 1992. Available in the State Archives.

(5)The Chancellor of Justice subsequently made a report to the Riigikogu asking the parliament to discuss immediately the reasons for the existence of § 86 clause 10 and § 108 of the Employment Contracts Act. The Chancellor said that if the Riigikogu found that there was no objective justification for depriving persons over the age of 65 of the high level of protection against dismissal, it would have to bring § 86 clause 10 and § 108 of the Act immediately into line with the Constitution and extend the principle of high level of protection also to persons over the age of 65.

On 8 February 2006, the Riigikogu passed an amendment to the Employment Contracts Act and declared § 86 clause 10 and § 108 of the Act invalid.

2.2 Prohibition of political outdoor advertising

Case No. 6-1/050905

(1) The Chancellor of Justice received an application with a request to verify the conformity of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act with the Constitution to the extent that they prohibit completely political outdoor advertising during the active campaign period and provide for a liability for a violation of restrictions on political outdoor advertising.

(2) On 9 June 2005, the Riigikogu passed the Amendment Act of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act. All the above Acts were amended with a provision that prohibits political outdoor advertising during the active campaign period and provided for liability for the violation of the prohibitions to persons commissioning, intermediating, producing, publicly presenting or displaying and transmitting such advertising.

Section 51 of the European Parliament Election Act, § 61 of the Local Government Council Election Act and § 51 of the Riigikogu Election Act stipulate: "Advertising of an individual candidate, political party or a person standing as a candidate on a political party list, [election coalition or a person standing as a candidate on an election coalition list], or their logo or other distinguishing sign or programme on a building, installation, on the outside or inside of a means of public transport or taxi, and other types of political outdoor advertising is prohibited during the active campaign period."

Section 71^1 of the European Parliament Election Act, § 67^2 of the Local Government Council Election Act and § 73^2 of the Riigikogu Election Act provide for liability for a violation of restrictions on political outdoor advertising:
"(1) Violation of restrictions on publication of political outdoor advertising is punishable by a fine of up to 300 units.
(2) The same act if it was committed by a legal person is punishable by a fine of up to 50 000 kroons.
(3) The following persons are liable for failure to comply with the restrictions on publication of political advertising pursuant to the procedure provided for in the present Act:
1) person commissioning the advertising, if the advertising that they commissioned violates the requirements or restrictions imposed on advertising by this Act, except in the cases provided for in clauses 2 and 4 of this subsection;
2) intermediary or producer of the advertising if their activities violate the requirements or restrictions imposed on advertising by the Act;
3) person publicly presenting, displaying or transmitting the advertising if their activities violate the restrictions imposed on the publication of advertising by this Act;
4) persons mentioned in clauses 1-3 of this Act collectively for the publication of the advertising if their activities violate the requirements or restrictions imposed on advertising by this Act and if it is not possible to ascertain their individual liability.
[…]."

(3) In this case it was necessary to find an answer to the question whether the provisions prohibiting political outdoor advertising during the active campaign period and the norms that provide for liability for the violation of restrictions on political outdoor advertising are constitutional.

(4) The provisions prohibiting political outdoor advertising during the active campaign period and norms that provide for liability for the violation of these restrictions contained in the disputed Acts may restrict several fundamental rights: freedom of enterprise stipulated in Art 31 of the Constitution, right of ownership in Art 32, and political freedom of speech covered by the freedom of expression in Art 45. The restrictions may also interfere with electoral rights (on national level Art 57 and 60 of the Constitution, on local level Art 156 of the Constitution) and the fundamental right of political parties (2nd sentence of Art 48 para 1 of the Constitution). These provisions may also interfere with other fundamental rights, e.g. the right of self-realisation in Art 19 para 1 and the freedom of contract covered by the general right to liberty.

(4.1) According to Art 31 of the Constitution, Estonian citizens have the right to engage in enterprise. "The scope of protection of the freedom of enterprise as the general right to liberty are restricted if they are unfavourably affected by a public authority."[11] Restrictions on outdoor advertising affect unfavourably the freedom of enterprise (at least among media companies). The freedom of enterprise is a fundamental right with a simple reservation subject to imposition by a law, which can be restricted by a law that provides for the conditions and procedure for the use of this right.

According to Art 32 para 2 of the Constitution, everyone has the right to freely possess, use and dispose of his or her property. Restrictions on political outdoor advertising interfere with the right of owners of buildings, means of public transport, taxis and other means that can be used as carriers of outdoor advertising to freely decide the possession and use of their property. The right of ownership in terms of restrictions is a fundamental right with a simple reservation subject to imposition by a law, and its restriction shall be provided by a law; the Constitution also specifies that property shall not be used contrary to public interests.

Fundamental rights with a simple reservation subject to imposition by a law can be restricted by the legislator only for the aim of public interests which are not contrary to the Constitution. It is allowed to restrict fundamental rights if it is formally and substantively lawful.

Formal constitutionality of the restriction of fundamental rights presumes first of all compliance with the requirements of competence, form and procedures provided for by the Constitution, secondly the guarantee of legal clarity arising from Art 13 para 2 of the Constitution, and thirdly compliance with the general reservation subject to imposition by a law arising from 1st sentence of Art 3 para 1 of the Constitution.

In the present case the Riigikogu passed restrictions on advertising in accordance with procedural rules by adopting a law, which is published in the State Gazette. As the procedural rules were observed in the form of a law, it was necessary to analyse only the conformity of the provisions prohibiting political outdoor advertising with the principle of legal clarity.

Art 13 para 2 of the Constitution gives rise to the principle of legal clarity or comprehensibility of legislation, which includes the assumption that "[l]egal norms have to be sufficiently clear and comprehensible, so that individuals can predict the behaviour of public authorities with certain probability and regulate their own conduct accordingly. A citizen "must be able – if necessary, with appropriate advice – to foresee, to a reasonable degree in the given circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable (see the European Court of Human Rights judgement of

[11] Supreme Court Constitutional Review Chamber judgement of 6 March 2002, No. 3-4-1-1-02, p. 12.

27 October 1978 in the case *Sunday Times v. the United Kingdom*)."[12] "[I]nsufficient regulation in providing for restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary exercise of state authority"[13] and is thus contrary to Art 13 para 2 of the Constitution. "It is particularly important to have legal clarity with regard to acts that may entail criminal law consequences."[14]

The principle of legal certainty is also related to the principle of parliamentary reservation or essentiality that is part of the general reservation subject to imposition by law, according to which the legislator has to decide all the issues that are essential from the point of view of fundamental rights. The Supreme Court has referred to the European Court of Human Rights judgement in the case Malone v. the United Kingdom, where it was noted that the law must ""[…] indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference "."[15] "The procedure for the restriction of rights and freedoms, determined by law and made public, allows for the freedom of discretion and ensures the possibility to avoid abuses of power. The absence of a detailed legislative regulation and its non-publicity, however, deprives persons from the right to informational self-determination, to choose their behaviour and to defend themselves."[16]

The applicants found that the provisions prohibiting political outdoor advertising were not of sufficient legal clarity and contained ambiguous concepts ("outdoor advertising" and "other political outdoor advertising"). It has been left to the implementer of the law to define these concepts. They also complained that in practice the legislative acts of local governments regulating advertising are usually observed, i.e. legislation which by its legal effect is hierarchically below laws.

The disputed Acts do not define directly the concepts of outdoor advertising or political outdoor advertising, while giving a list of examples what could constitute such, yet eventually leaving the substance of the concept open: "Advertising of an individual candidate, political party or a person standing as a candidate on a political party list, [election coalition or a person standing as a candidate on an election coalition list], or their logo or other distinguishing sign or programme on a building, installation, on the outside or inside of a means of public transport or taxi, and other types of political outdoor advertising is prohibited during the active campaign period."[17] The concept of political outdoor advertising is also not defined in other laws. The concept of outdoor advertising is used (and also defined), however, in legislation of local governments regulating advertising practices (e.g. Tallinn City Council regulation of 12 December 2002 No. 73 approving the "Procedure for allowing the use of a surface of a building owned by the Tallinn city for advertising activities" clause 4.7). The general definition of advertising is provided for by the Advertising Act (in § 12(1) clause 8 and § 21(2) clause 2 the concept "outdoor advertising" is also used without defining it).

The election laws do not contain an exhaustive definition of (political) outdoor advertising and the election laws also do not contain a delegating norm for local governments to define it (its permissibility would also be constitutionally questionable). Consequently it constitutes an undefined legal concept.

A legal concept is undefined when the legal norm only very generally defines the abstract elements which are prerequisites for a legal consequence. The abstractly defined material content of a norm

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12 Supreme Court en banc judgement of 28 Oct 2002, No. 3-4-1-5-02, p. 31.

13 Supreme Court Constitutional Review Chamber judgement of 12 Jan 1994, No. III-4/A-1/94.

14 Special Panel of the Supreme Court judgement of 28 Feb 2002, No. 3-1-1-117-01, p.12.

15 Supreme Court Constitutional Review Chamber judgement of 20 Dec 1996, No. 3-4-1-3-96, p 1.

16 Supreme Court Constitutional Review Chamber judgement of 12 Jan 1994, No. III-4/A-1/94.

17 § 5^1 of the European Parliament Election Act, § 6^1 of the Local Government Council Election Act and § 5^1 of the Riigikogu Election Act.

needs to be specified in each particular case. This means that prior to the application of a norm containing an undefined legal concept the norm has to be interpreted – the content of the concept needs to be delineated and given measurable characteristics, so that it could be linked to specific actual circumstances.[18] In interpreting undefined legal concepts, the special character of a particular field (in this case, e.g., the importance of the fundamental rights to be restricted – freedom of speech, electoral rights etc), guidelines given by the legislator (in this case, e.g., the illustrative list presented in the provisions) have to be taken into account and appropriate methods of interpretation (grammatical, etc) have to be used.[19] In the particular case the provisions of local government regulations can be of assistance. The latter, however, cannot be seen as providing binding and exhaustive definitions.

Undefined legal concepts are used in legislation with the aim to ensure flexibility of regulation and its relevance to a variety of actual situations. At first sight, an attempt to lay down very specific details for all situations by legislation might seem necessary and correct. Sometimes, however, this could prove extremely difficult or even impossible. Excessively detailed regulation will not necessarily meet all the needs and developments of law and society. Instead, it could hamper the achievement of a fair result in a particular case. Therefore, in the opinion of the Chancellor of Justice, the use of undefined legal concepts cannot be criticised. Of course, the permissibility and necessity of the use of undefined legal concepts also depends on the particular field that is being regulated.

In order to protect the implementers of laws, to avoid attempts of exerting influence and unnecessary accusations against the executive (and also judicial) authority for interference in the election procedure, leaving extensive right of discretion or scope of assessment in the election laws is undesirable in the opinion of the Chancellor of Justice. Leaving limited discretion and scope for assessment might, however, be possible. Problems could primarily arise from linking undefined legal concepts to sanctions under penal law.

The legislator has provided for a sample list of objects that should be understood as "political outdoor advertising". The cases that are not on the list should be interpreted in the light of the norms listed as examples. Definitely, the importance of the fundamental rights to be restricted in a democratic society, the purpose of the restrictions and the idea of the law that derives from this should also be taken into account. Principally the concept of political outdoor advertising should be interpreted narrowly because otherwise the result would lead to unreasonable restrictions of fundamental rights which would undemocratically hamper the free distribution of opinions and information. Nevertheless, more detailed regulation of penal norms should be considered.

A legal act cannot be seen as unconstitutional if, with reasonable effort, individuals can determine the applicable behavioural guidelines through interpretation. The Supreme Court has considered it important to ascertain the legislator's wish in order to find out the effective legal norm, and different

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[18] K. Merusk. Administratsiooni diskretsioon ja selle kohtulik kontroll. [Administrative discretion and its judicial review] Tallinn 1997, pp 68-70.

[19] See, e.g., Supreme Court Constitutional Review Chamber judgement of 13 June 2005, No. 3-4-1-5-05, points 16 and 20: "An undefined legal concept is a legislative tool the legislator uses when it withdraws from issuing detailed instructions in the text of law and delegates the authority to specify a norm to those who implement the law. As undefined concepts are created by the legislator, their substance has to be determined with the help of the guidelines and aims expressed by the legislator. Thus, [*an undefined legal concept*] must be defined through the purpose of the particular delegating norm, i.e. we should endeavour to find out the aim of the legislator in authorising the local governments […] In exercising the competence arising from the delegating norm a local government has to bear in mind the need to balance different interests, values and rights, as well as the proportionality of restrictions imposed on fundamental rights by legislation issued on the basis of delegated authority."

methods of interpretation need to be used to do this.[20] The Supreme Court has also emphasised that "in case of different possibilities of interpretation, interpretation that is in conformity with the Constitution should be preferred to interpretations that are not in conformity with the Constitution. The Supreme Court has no ground to declare a norm invalid for reasons of unconstitutionality if the norm can be interpreted in conformity with the Constitution. Preference should also be given to interpretation that guarantees the highest level of protection of various constitutional values."[21]

The preconditions for substantive legality of a restriction are the existence of a legitimate purpose of the law and the observance of the principle of proportionality arising from the 2nd sentence of Art 11 of the Constitution. Conformity of a restriction to the principle of proportionality is checked on three levels: suitability and necessity of the measure and its proportionality in the narrower sense, i.e. its moderation. The precondition for substantive legality of a restriction is also its compliance with the principle of legitimate expectation.

Explaining the purpose of restrictions on political outdoor advertising, the explanatory memorandum of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act[22] pointed to the need to avoid gigantomania that had occurred in practice both in terms of the size and scope of the means used to display advertising. This, in turn, would contribute to the achievement of the following aims:[23]

- reduce the costs of election campaigns (incl. increasing the transparency of financing of political parties, as the wish to conceal campaign costs would be smaller);
- reduce the relative importance of money in achieving power, which would better ensure the equality of candidates;
- increase the proportion of political argumentation in election campaigns (it would force candidates to provide more substantive information);
- liberate the public space (there would be no longer election posters the size of a whole building or arbitrary sticking of posters on walls of buildings and fences);
- reduce the resentment of the public towards political advertising and politics in general caused by outdoor advertising used during elections.

The last two of the above mentioned aims are inextricably connected with each other – liberation of the public space (aim No. 4), in turn, helps to avoid potential negative emotions of the public due to outdoor advertising and decrease the potential resentful attitude of the public towards political advertising and politics in general due to massive outdoor advertising during elections (aim No. 5).

The above aims could be considered legitimate, as they are all related to the general principles of election law and thus, in one or another way, can be traced back to principles of democracy (Art 1 and 10 of the Constitution), which should be considered an extremely important constitutional value. The aims used as a basis for the imposition of restrictions on political outdoor advertising are

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20 Supreme Court Administrative Law Chamber judgement of 6 Nov 2003, No. 3-3-1-72-03, points 15 and 16: "At the same time, a text of law is only a starting point for finding out the intention of the legislator and the substance of the legal norm based on it. In further specifying the intention of the legislator, classical methods of interpretation, such as teleological, systematic, historical, or, if necessary also other additional arguments of interpretation have to be used. The necessity of the use of such methods of interpretation is not limited to situations where the text of a provision is ambiguous. The use of other methods of interpretation is also necessary and justified where the text of a provision is at first sight clear, but justified doubts arise whether the legislator's intention was actually aimed at the kind of result that was reached through grammatical interpretation. The use of other methods of interpretation might lead to a result where the intention of the legislator, and thus also the meaning of the provision, could be considerably different from the result that was reached through linguistic interpretation. But even then it does not amount to *contra legem* interpretation, because actually the effective legal norm cannot be equated with the text of the law (i.e. the provision). Thus, the need to use constitutional arguments in interpretation does not always mean that a text of law that does not meet the legislator's intention should in any case be declared as unconstitutional and should be disapplied."

21 Supreme Court en banc judgement of 22 Feb 2005, No. 3-2-1-73-04, p. 36.

22 The explanatory memorandum of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act as at 30 June 2005, No. 620 SE, available on the Internet at http://www.riigikogu.ee.

23 Similar aims were pointed out in one or another form in the course of debates of the above bill, as well as in the debates of other bills concerning restriction of election advertising mentioned in point 67.

thus legitimate. Restriction of fundamental rights subject to imposition of a simple reservation by law (freedom of enterprise, right of ownership) is definitely permissible for these aims.

The threshold of the criterion of suitability is low – any measure which is at least a step towards the desired aim should be considered suitable. As in the present case it is not possible to claim that the means chosen – i.e. complete prohibition of outdoor advertising – does not allow to achieve any of the above-mentioned aims, the measure should be considered suitable.

Next, the necessity of the measure should be assessed. A possible alternative measure that would help to achieve the above-mentioned aims, while being equally efficient and less burdensome, might be the restriction of political outdoor advertising instead of prohibiting it.

When the bill was presented, the aim was not to prohibit outdoor advertising completely but only to restrict it. The allowed scope of outdoor advertising and the right of local government to determine the places and conditions for displaying political outdoor advertising were provided for, with an obligation to ensure equal possibilities for candidates.

Such regulation is in principle possible but could have entailed various problems, including constitutional problems. For example, the use of this solution would raise an issue whether the local government has the right to determine the relevant areas only with regard to municipal property or could also restrict the use of private property (in view of the fundamental rights subject to imposition of reservations by law, the latter could prove to be unconstitutional). Local government regulations in this field would cause problems in national elections in connection with potential unequal treatment of candidates, etc.

Thus, the above solution might not prove appropriate. Of course, the constitutionality of the restriction (not prohibition) of outdoor advertising would depend on particular regulation and it is possible that it would be stipulated in a way that is fully in conformity with the Constitution.

Another option might be imposing a maximum threshold on election campaign expenses, or a more precise regulation as to the extent, types of advertising channels and the total cost which should not be exceeded when promoting candidates and their views.[24] Before the establishment of a more precise regulation, naturally a comprehensive legal analysis is needed.

Providing for a maximum threshold for the expenses of election campaigns could be more effective in terms of the achievement of the aims as well as less restrictive of fundamental rights. Definitely, the constitutionality of the imposition of a maximum limit for election campaign expenses would depend on the scope of the particular limit. The option of the imposition of a maximum limit of election campaign expenses is also used in other countries.[25] A reference to such an approach is also made in the Council of Europe Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Art 9).[26]

Thus, the necessity of the chosen method – prohibition of political outdoor advertising – for the

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[24] These solutions were suggested, e.g., by Ü. Madise; see also Ü. Madise. Erakondade rahastamise põhimõtted. [Principles of financing of political parties]. Special edition of *Juridica* "Law of political parties", 2003, p. 44.

[25] See Council of Europe Parliamentary Assembly political affairs committee report of 4 May 2001 "Financing of political parties" Appendix 1, "Financing of political parties in comparative perspective", accessible at http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/documents/workingdocs/doc01/edoc9077.htm. The report explores the practice of different states in compensating and limiting election campaign expenses, e.g. in the United Kingdom, Belgium, France a strict maximum limit for election expenses is established.

[26] *Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns* (Adopted by the Committee of Ministers on 8 Apr 2003 at the 835th meeting of the Ministers' Deputies), Art 9: „States should consider adopting measures to prevent excessive funding needs of political parties, such as, establishing limits on expenditure on electoral campaigns."

achievement of the above aims is questionable. There can be measures which are less restrictive of the freedom of enterprise and right of ownership while guaranteeing more strongly the achievement of the desired aims.

In assessing the moderation of the measures, the Chancellor of Justice admitted that the above mentioned aims of prohibiting political outdoor advertising are important and are carried by the idea of strengthening democracy.

Reduction of the proportion of election campaign expenses and the money that is spent would help to guarantee the transparency and legitimacy in the process of achievement of public power. The above aims also reinforce the formal equality of candidates and persons putting up candidates (incl. political parties), which is an inseparable part of election law. This requirement arises from the principle of uniformity of elections (Art 60 para 1 and Art 156 para 1 of the Constitution) which requires equal possibilities for standing as a candidate in elections and for achieving success in elections.[27]

The Supreme Court has emphasised that "[t]he principle of democracy presumes that voters have a possibility to make a choice between different electoral programmes and ideas, and the candidates and lists of candidates that represent them. For the functioning of democracy, it is important that different societal interests are also […] represented as widely as possible in the process of political decision-making."[28] Hence, efficient activities to inform voters with the aim to raise their awareness and measures aimed at more active participation in elections, which should in turn contribute to increased representativeness (representation of different interests in society) of representative bodies[29], are extremely important and necessary for the reinforcement of democracy.

In view of the latter aspect, it should also be stressed that activity of voters during elections in Estonia has been low: in 2004, 26.83% of voting-age population voted in the elections of the European Parliament, in 2003, 58.24% voted in the elections of the Riigikogu, and in 2002 52.5% voted in the local government council elections.[30] Therefore, it is extremely important to avoid continued alienation of people from power, decreasing voter turnout and the insufficient representativeness of representative bodies that results from this.

At first sight it seems that the prohibition of political outdoor advertising will, indeed, help to reduce election campaign expenditure and the proportion of money in achieving political power, and will force candidates to engage more in substantive campaign work. Considering the increased financing of political parties from the state budget, excessive spending of the taxpayer's money on advertising is not justified (criticism of "filling the pockets" of private advertising companies) if the achievement of the expected positive aspect – having better informed voters – tends to be questionable, sometimes even having an opposite negative effect (see aim No. 5). Restrictions on advertising would reduce the candidates' need for money, thus also limiting their mutual "competition in terms of advertising"[31]. Advertising has been one of the largest items of expenditure during election campaigns.[32]

Considering that only one form of advertising (outdoor advertising) is prohibited by the law, it is

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27 See also, e.g., Supreme Court Constitutional Review Chamber judgements of 15 July 2002, No. 3-4-1-7-02, p. 19; 1 Sept 2005, No. 3-4-1-13-05, p 16; Supreme Court en banc judgement of 19 Apr 2004, No. 3-4-1-1-05, p. 16.

28 Supreme Court en banc judgement of 19 Apr 2005, No. 3-4-1-1-05, p. 26.

29 The principle of representativeness of a representative body as a constitutional value has been dealt with in the following judgements: Supreme Court Constitutional Review Chamber judgement of 4 Nov 1998, No. 3-4-1-7-.98, p. IV; 15 July 2002, No. 3-4-1-7-02, p. 20 ff; Supreme Court en banc judgement of 19 Apr 2005, No. 3-4-1-1-05, p. 32 ff.

30 Data of the National Election Committee; available on the Internet at http://www.vvk.ee/.

31 Ü. Madise. Erakondade rahastamise põhimõtted. [Principles of financing of political parties]. Special edition of *Juridica* "Law of political parties", 2003, p. 44.

32 Reports of election campaign expenditure of political parties are available on the homepage of the National Election Committee at http://www.vvk.ee/.

probable that political outdoor advertising will transfer to other advertising channels. As a result, electoral campaign expenditure may remain at the same level but the use of other means of advertising (broadcasting, printed media, internet, direct mailing) may increase. Outdoor advertising campaigns may also shift time wise to an earlier period before the prohibition begins; this was also confirmed by the time prior to local government elections in 2005. It is not possible to give an unequivocal answer to the question whether outdoor advertising is more expensive or cheaper, a more limited resource or not, affecting the behaviour of voters to a larger or smaller extent, in comparison with other forms of advertising (e.g. television is probably the most limited resource but it is also the medium with the largest audience[33]). It is clear that prohibition of only one form of advertising does not necessarily contribute considerably to the reduction of election campaign expenditure.

It is also not certain that prohibition of political outdoor advertising will force candidates to engage considerably more in the provision of more substantive information to their voters. Although outdoor advertising emphasises visual information (display of photos, slogans, etc) rather than oral information, the advertising distributed in the printed media, on the Internet and by direct mailing is not necessarily very different from this.

Prohibition of political outdoor advertising immediately before the elections, during the "high season" of electoral outdoor advertising, indeed liberates the public space in the period prior to elections. Alienation of the people from power and the drop in voter turnout are a problem in Estonia, and therefore all the measures which help to increase voter turnout are extremely necessary. Arguably, massive outdoor advertising in public space has become the object of resentment by the public and has increased people's negative attitude to elections and to politics in general.

Nevertheless, the effectiveness of prohibition of political outdoor advertising for the achievement of the above aims is questionable. First, the prohibition of political outdoor advertising may result in the shift of advertising to an earlier period and/or its increase in other advertising media. Such reorientation may in essence mean that the public space is "occupied" simply in an earlier period and the advertising that so far was not disturbing in one advertising channel may become excessively disturbing in another channel. Secondly, it is not possible to ascertain for certain and to predict whether the prohibition of outdoor advertising will affect voter turnout or not. Potential negative attitude to something, including outdoor advertising, is also very subjective.

Based on the above considerations, it is not certain that the chosen method is an effective measure for reducing election campaign expenditure and the proportion of money in achieving political power. This measure will also not necessarily force candidates engage in more informative work, liberate considerably the public space or increase voter turnout through the avoidance of public resentment of political outdoor advertising.

Of course, the final assessment of the efficiency of the measure depends first and foremost on practice – decisions made by campaign organisers and the behaviour of voters. Outdoor advertising is characterised by the fact that, unlike other methods of information distribution (e.g. radio, television, newspapers), it is not possible to avoid or regulate it according to a person's own wish because the public space surrounds all of us and it cannot be avoided. Outdoor advertising is in a sense the most imposing form of advertising and it can create restrictions which are not conceivable in the case of other forms of advertising.

In the explanatory memorandum to the Bill of Amendment of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act it was explained that "[t]he adoption of the bill will somewhat reduce the earnings of advertising companies because their income from organising election campaigns will decrease. However, considering the frequency

[33] See TNS EMOR 12 Dec 2003: „Tele-ekraan avaliku arutelu areenina" [TV as a forum for public debate] (based on the survey of indicators of the television auditorium by TNS Emor); accessible at http://www.emor.ee/arhiiv.html?id=1138.

of elections in Estonia and the general economic growth, the restrictions imposed by this law will not have a significant effect on the activities of advertising companies or consequent decreased employment in the advertising industry."[34]

As was mentioned above, the survey organised in the period 15 January until 1 March 2003 showed that the proportion of outdoor advertising was fairly large in election advertising – 38%; the volume of outdoor advertising in price list in the surveyed period was 73% of the total outdoor advertising. Thus, it is not possible to agree with the claim contained in the above explanatory memorandum, because the prohibition on advertising affects significantly the market to the detriment of companies engaged in outdoor advertising, depriving them of the potential income. The resource that is freed up may shift to other advertising channels. All advertising media and the companies dealing with them are not directly comparable in terms of the effect of advertising, the scope of the auditorium, the volume of the resource etc. It is also impossible to predict exactly the behaviour of candidates. Nevertheless, it is clear that the measure may result in unequal treatment of advertising companies. Interference with the freedom of enterprise is intensive.

It concludes from the foregoing that the prohibition of political outdoor advertising interferes with important fundamental rights – the right of ownership and freedom of enterprise. Although the aims for which the fundamental rights are restricted are important, the limited efficiency of the measure in achieving the aims should be taken into account. The chosen measure – complete prohibition of political outdoor advertising during the active campaigning period – could also prove to be disproportionate in the narrower sense. In other words, it is questionable whether this measure is moderate.

It is also questionable whether the prohibition of outdoor advertising is in conformity with the principle of legitimate expectation. The substance of the principle of legitimate expectation is not an assumption that any legal norm and the rights and freedoms arising from it would be valid for an indefinite period. Nevertheless, in amending the regulation, sufficient *vacatio legis* needs to be given so that the addressees of the norm have sufficient time to familiarise themselves with the rights and duties provided for by the law and to change their behaviour and way of life accordingly. "Sufficiency or reasonableness can be assessed by taking into consideration the character of the relevant legal relationship, the extent of the change of the relationship and the corresponding need for readjustment by the addressees of the norm, as well as evaluating whether the change in the legal environment was predictable or unexpected."[35]

Thus, in this case it is of decisive importance to find an answer to the question whether the amendment of the disputed laws caused an unconstitutional violation of the legitimate expectation of the persons commissioning, producing or intermediating political outdoor advertising (i.e. the expectation that there would continuously be no restrictions). It should also be kept in mind that pursuant to Art 108 of the Constitution a law enters into effect on the tenth day after its publication in the State Gazette, i.e. as a rule the Constitution considers *vacatio legis* of nine days to be acceptable. Therefore, there have to be substantial and serious reasons for declaring an act unconstitutional due to the necessity of a longer period of entering into effect.

When answering the criterion of "sufficient time", it should be taken into account that the laws do not prohibit political outdoor advertising in general but only during the period of active election campaigning. According to § 6(3) of the Local Government Council Election Act, the period of active election campaigning is considered to be the time beginning from the last day of registration of candidates (the same is provided for in § 5(3) of the European Parliament Election Act and § 5(1) of the Riigikogu Election Act). In the case of local government council elections in 2005 the last

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[34] The explanatory memorandum to the Bill of Amendment of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act, as at 30 June 2005, No. 620 SE, accessible at http://www.riigikogu.ee.

[35] Supreme Court Constitutional Review Chamber judgement of 2 Dec 2004, No. 3-4-1-20-04, p. 26.

day of registration of candidates was 11 September. Considering that the law entered into effect in accordance with the general procedure, the restriction became applicable only from the given moment.

Next it needs to be taken into account that the amendments are related to the election rules which concern primarily the adopters of the law themselves: their activity in organising election campaigns (consequently, of course, affecting advertising companies and other potential candidates who are not represented in the Riigikogu). This is not the first and only attempt to restrict election advertising. For example, the Riigikogu also processed several bills competing with the present one and trying to regulate restrictions concerning political outdoor advertising:

- The Pro Patria Union parliamentary group initiated a bill 234 SE for the amendment of the election laws and of the Referendum Act to limit the expenditure on political advertising and electoral campaigns, and bill 235 SE for the amendment of the Advertising Act and the Broadcasting Act;
- Bill 593 SE for the amendment of the Broadcasting Act and the Political Parties Act, initiated by members of the Riigikogu Jaanus Marrandi, Sven Mikser, Olev Laanjärv, Mark Soosaar, Liina Tõnisson, Harri Õunapuu, Peeter Kreitzberg and Robert Lepikson.

In the absence of more precise information, it is difficult to assess to what extent the prohibition of outdoor advertising requires readjustment on the part of political parties, election coalitions and individual candidates who intend to run in elections. If the potential candidates had already prepared a detailed election campaign, the amendment of the rules definitely requires certain adjustments in the plans. The problem, however, is not an excessive one, considering that there were three months until the elections from the adoption of the law.

There can be problems with booking of advertising space and contracts which have been concluded for the production of advertising posters etc., because the restrictions force the parties commissioning political outdoor advertising to withdraw from the contract (and there is also a question whether the amendment could be regarded as *force majeure* in the meaning of § 103 of the Law of Obligations Act). The Chancellor of Justice lacked information whether any such contracts had been concluded and whether the contracts contained any legal remedies for the creditors in case the other party withdrew from the contract, whether the service providers have had to turn down other potential customers due to the pre-existing bookings for the production and display of advertising, and were unable to find new customers after the initial customers withdrew from the contract and would consequently incur damage. The Chancellor also lacked information whether any bookings for other advertising channels had been made; for potential candidates who had put their stakes on outdoor advertising this could mean a lack of possibilities to introduce their views and would lead to possible unequal treatment. Confidentiality of the existence and substance of contracts made it impossible to ascertain the relevant information.[36]

As the above issues are of decisive importance in assessing the conformity of the amendment with the principle of legitimate expectations, the Chancellor of Justice was unable to reach a final conclusion. Its ascertainment would be possible in the framework of a particular judicial constitutional review case by verifying the constitutionality of the law when the case is being heard by the court (2nd sentence of Art 15 para 1 of the Constitution).

(4.2) With the prohibition of political outdoor advertising, the freedom of expression arising from Art 45 para 1 of the Constitution is restricted because the freedom of expression includes all forms of expression: everyone has the right to freely disseminate ideas, opinions, beliefs and other information

[36] During the second reading of the bill, Evelyn Sepp referred to the existence of such contracts and the fact that companies have admitted that they could suffer damage. See the transcript of the Riigikogu session on 8 June 2005, Bill for the Amendment of the European Parliament Election Act, the Local Government Election Act and the Riigikogu Election Act (620 SE), continuation of the second reading; available on the Internet http://www.riigikogu.ee.

by word, print, picture or other means. The freedom of expression includes the freedom of speech which is considered the cornerstone of a democratic state. Through the freedom of speech, the plurality of opinions is guaranteed both in general in dealing with problems of society as well as on a more specific level in exercising political freedoms. "The freedom of communication is one of the preconditions for the functioning of a democratic society […]."[37] "The principle of the freedom of speech is an indispensable guarantee of a democratic society and thus one of the most important social values."[38] This is a qualified fundamental right subject to imposition of a reservation by law, i.e. it can be restricted by law for the protection of public order, morality, or rights and freedoms, health, honour and good name of other persons. Such fundamental rights can also be restricted if this is necessary due to other constitutional values or other fundamental rights.

As was said above, fundamental rights can be restricted if this is formally and substantively legitimate. Previously, the conformity of the law to the requirements of formal legality was discussed and the aims from which the legislator proceeded in imposing the restriction were explained.

The Chancellor of Justice came to the conclusion that the right to the freedom of expression, which is a qualified fundamental right subject to imposition of a reservation by law, can be restricted for the above aims as they fall under the clauses "public order" and "the protection of the rights and freedoms of other persons". Moreover, according to the generally recognised principle, qualified fundamental rights subject to imposition of a reservation by law can also be restricted if this is required by other fundamental rights or other substantive constitutional principles. The above aims can be linked to constitutional values.

The conclusion that was reached above in connection with the right of ownership and the freedom of enterprise, i.e. the chosen measure is not particularly effective for the achievement of these aims, is also valid in connection with the restriction of the right to freedom of expression.

At first sight it might be claimed that the prohibition of outdoor advertising is not an intensive interference with the freedom of expression. The advertising is not prohibited but only restricted, and only during a relatively short period of time – during the active campaigning period. At other times, political outdoor advertising is allowed. The European Court of Human Rights has emphasised, however, that this does not considerably limit the intensity of the restriction of the freedom of speech – the period preceding the elections is particularly important because it is a "[…] critical period when the minds of voters are focused on their choice of representative."[39] Thus, because the potential impact of political advertising is stronger in the period before the elections, the above argument does not reduce considerably the intensity of the restriction of the freedom of expression.

At first sight, the limited intensity of the restriction of the freedom of expression is also demonstrated by the fact that only one channel of transfer of information is prohibited. Other possible channels can still be used for the expression of political interests and communicating them to voters. Regardless of whether outdoor advertising is the least used type of advertising, its proportion in election advertising is relatively large – the results of surveys organised in the period 15 January until 1 March 2003 showed that it was 38%.[40] (The share of outdoor advertising in the Estonian media advertising market was only 6.6% among different types of media in 2004, in 2003 the turnover from outdoor advertising made up 6.2% of the total turnover of the media advertising market.)[41]

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37 Supreme Court Civil Law Chamber judgement of 5 Dec 2002, No. 3-2-1-138-02, p 9.

38 Supreme Court Criminal Law Chamber judgement of 26 Aug 1997, No. 3-1-1-80-97, p 1.

39 ECHR judgement of 19 Feb 1998 in the case *Bowman v. the United Kingdom*, p. 45.

40 TNS Emor survey of advertising contributions ADEX (15 Jan – 1 March 2003) distinguishes between the volume of election advertising by types of media. The survey was presented at the end of the explanatory memorandum to the bill 593 SE for the amendment of the Broadcasting Act and the Political Parties Act submitted by members of the Riigikogu Jaanus Marrandi, Sven Mikser, Olev Laanjärv, Mark Soosaar, Liina Tõnisson, Harri Õunapuu, Peeter Kreitzberg and Robert Lepikson. Available on the Internet http://www.riigikogu.ee.

41 TNS Emor 21 March 2005 "Estonian media advertising market grew approximately 10%"; available on the Internet http://www.emor.ee/arhiiv.html?id=1313; 23 May 2004 "Baltic media advertising market 2003"; available on the Internet http://www.emor.ee/arhiiv.html?id=1187.

In view of the fact that one of the arguments used to justify the prohibition of political outdoor advertising was the avoidance of the potential resentment of the public and their consequent disappointment in politics, it should be emphasised that the European Court of Human Rights has noted that the freedom of expression under Art 10 of the Convention is applicable "[…] not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[42] The reasons of restrictions imposed on political freedom of speech must be particularly solid.[43]

According to the assessment of the Chancellor of Justice, thus, the interference with the freedom of expression is intensive. Freedom of expression which is restricted through the prohibition of political outdoor advertising is a substantial fundamental right and therefore there have to be particularly solid reasons for imposing restrictions on it. Although the aims for which the fundamental right is restricted are important, in view of the small efficiency of the measure (complete prohibition of political outdoor advertising during the active campaign period) with regard to the achievement of its aims, it could prove to be disproportionate in the narrower sense.

(4.3) The restriction of political outdoor advertising also interferes with the right to vote enshrined in Art 57, 60 and 156 of the Constitution, which is the main tool through which the public can participate in deciding issues of society (incl. participation in the exercise of state authority in the meaning of Art 1 para 1 and Art 56 clause 1 of the Constitution). Through outdoor advertising, candidates can communicate their ideas and opinions to the electorate (interference with the passive electoral right) and election advertising is also a source of information for the public on the basis of which they can make specific election decisions (interference with the active electoral right).

As the exercise of electoral rights can be seen as the main aim of the fundamental right of political parties alongside the general freedom of self-realisation, restrictions on political outdoor advertising during the active campaign period also interfere with the fundamental right of political parties arising from 2nd sentence of Art 48 para 1 of the Constitution, more specifically the freedom of operation of political parties which is part of the above right. Provisions that allow restrictions of the fundamental right of political parties are contained in Art 48 para 2-4, Art 30 para 2, Art 124 para 3 and Art 130 of the Constitution.

All fundamental rights (incl. those with or without a qualified reservation subject to imposition by law) can be restricted if this is required by other constitutional values or any other fundamental right. Thus, for example, the Supreme Court has noted that the principle of democracy does not rule out "reasonable restriction" of subjective electoral rights.[44]

As was explained above, fundamental rights can be restricted if this is formally and substantively legal. Above, the conformity of this Act with the requirement of formal legality was also discussed in more detail, and the aims of the legislator in imposing the prohibition were listed.

The Chancellor of Justice came to the conclusion that the electoral rights and the fundamental right of political parties can be restricted for the aims that were described in the explanatory memorandum to the bill and during the debates of the bill, as the aims can be linked to constitutional values.

The conclusion that was reached above in connection with the right of ownership and the freedom of enterprise as to the suitability and necessity of the measure, as well as the conclusion reached in

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42 ECHR judgement of 7 Dec 1976 in the case *Handyside v. the United Kingdom*, p. 49.

43 ECHR judgement of 23 Apr 1992 in the case *Castells v. Spain*, p. 42. About the prohibition of political advertising on television, see also ECHR judgement of 28 Sept 2001 in the case *VgT Verein gegen Tierfabriken v. Switzerland*.

44 Supreme Court Constitutional Review Chamber judgement of 15 July 2002, No. 3-.4-1-7-02, p. 21.

analysing its moderation, i.e. the chosen measure is not particularly effective for the achievement of these aims, is also valid in connection with the restriction of the electoral rights and the fundamental right of political parties.

In assessing the moderation of the measure, the Chancellor of Justice noted that in the particular case the interference with the freedom of expression grows into a fairly intensive interference with the electoral rights and the fundamental right of political parties, as it hampers candidates and political parties in introducing their views and voters in receiving information for making the necessary decision. And all this prior to the elections, during the so-called "high season".

The European Court of Human Rights has said that although, as a rule, the principle of free elections and freedom of expression go hand in hand, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions of a type which would not usually be acceptable in other circumstances (e.g. to ensure the equality of candidates).[45] It has to be admitted that also in the present case the protection of formal equality arising from the principle of uniformity is one of the arguments for the prohibition of political outdoor advertising and consequent restriction of political freedom of speech. As was explained above, the efficiency of the chosen measure for achieving the desired aim is however questionable.

Electoral rights and fundamental right of political parties which are restricted through the prohibition of political outdoor advertising are substantial fundamental rights and, therefore, there have to be particularly solid reasons for imposing restrictions on them. The aims for which fundamental rights are restricted are important. However, considering the limited efficiency of the measure (complete prohibition of political outdoor advertising during the active campaigning period) in achieving the aims, it could also prove to be disproportionate in the narrower sense.

(4.4) There have also been doubts that restrictions on political outdoor advertising simultaneously restrict the freedom of public assembly. In the opinion of the Chancellor of Justice, political outdoor advertising and public assemblies cannot be equated. The Chancellor of Justice has also stressed repeatedly[46] that, similarly to the concept of political outdoor advertising, the implementer of the law has to interpret the concept of public assemblies narrowly, considering the importance of the fundamental rights to be restricted and the purpose and spirit of the Public Assemblies Act.

Based on the foregoing, the Chancellor of Justice came to the conclusion that the conformity of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act with the Constitution is questionable to the extent that they prohibit completely political outdoor advertising during the active campaign period and provide for a liability for a violation of restrictions on political outdoor advertising to persons commissioning, intermediating, producing, publicly presenting, displaying or transmitting the advertising.

(5) The Chancellor of Justice sent a report on this subject to the Riigikogu. The Chancellor decided to draw the attention of the parliament to problems relating to provisions prohibiting political outdoor advertising, and decided to abandon the possibility of making a proposal in the meaning of Art 142 para 1 in favour of making a report in the meaning of Art 139 para 2 for the following reasons.

First, the 10th composition of the Riigikogu convened for a regular session on 12 September 2005, i.e. at the time when the restriction of political outdoor advertising had already entered into effect. Considering the time that it would take the Riigikogu to make a possible amendment to the Act, it

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45 ECHR judgement of 19 Feb 1998 in the case *Bowman v. the United Kingdom*, p. 43.

46 On 7 July 2002 in the Riigikogu, replying to the interpellation of the members of the Riigikogu A. Herkel and J. Leppik concerning the Falun Gong case; in June 2005, replying to the written question of the member of the Riigikogu Eiki Nestor concerning the demonstration organised by the animal protection organisation PETA.

is clear that it was not possible to prevent the consequences of the prohibition in autumn 2005.

Second, the Chancellor of Justice stressed that it was a problem that required calm, balanced and detailed analysis in order to guarantee the conformity of the rules with the Constitution. After the making of a proposal by the Chancellor of Justice, the body that passed the act has 20 days to bring it into conformity with the Constitution. Considering the tension of the period preceding local government elections and the nature of the topic (political (election) advertising), such a short period might not be sufficient to reach a reasonable and balanced constitutional solution.

Third, the specific nature of the issue needs to be taken into account. Primarily, regulation of political advertising concerns the activities of the parties that are represented in the parliament. Therefore, the Chancellor of Justice concluded that the parties themselves should find an agreement concerning the preconditions for the permissibility of advertising. Naturally, the solution should be compatible with the constitutional norms, as state authority can be exercised only in conformity with the Constitution (1st sentence of Art 3 para 1 of the Constitution). Constitutional institutions and other branches of power should give the legislator an opportunity to correct its mistake that is contrary to the Constitution.

Fourth, the Chancellor of Justice noted that the verification of the constitutionality of the above provisions in the framework of a specific constitutional review case is also not ruled out.

In September 2005, a meeting of the constitutional affairs committee of the Riigikogu was held, where the representatives of all the parliamentary groups admitted the existence of the problems highlighted in the Chancellor's report. It was decided to return to the issue after the local government council elections in October.

In February 2006, the Chancellor of Justice asked the President of the Riigikogu to inform him whether and how the Riigikogu intended to bring the disputed laws into conformity with the Constitution. After the Chancellor's request, the constitutional affairs committee of the Riigikogu discussed the issue.[47]

2.3 Situation in police jails in the East Police Prefecture

Case No. 7-2/050729

(1) The Chancellor of Justice decided to address the Riigikogu constitutional affairs committee to draw their attention to the situation in police jails in Narva and Kohtla-Järve in the jurisdiction of the East Police Prefecture.

(2) On 20 and 21 September 2004. the Chancellor of Justice made a verification visit to the East Police Prefecture's jails in Narva, Kohtla-Järve and Rakvere.[48] On 2 December 2004, the Chancellor forwarded his conclusions and proposals for improving the situation to the Ministers of Internal Affairs and Justice. On 20 May 2005, the Chancellor asked the Minister of Internal Affairs information about the implementation of his proposals. As the information in newspapers and the applications received by the Chancellor of Justice indicated that the situation in Narva and Kohtla-Järve jails had not improved, the Chancellor contacted the Riigikogu constitutional affairs committee on 16 November 2005.

(3) In his address to the Riigikogu constitutional affairs committee, the Chancellor of Justice dealt

[47] State of affairs on 15 June 2006.

[48] See the Chancellor of Justice Report 2004, pp. 145-151.

with the issues of overpopulation and unacceptable living conditions in Narva and Kohtla-Järve jails.

(4.1) According to § 156(1) of the Imprisonment Act, jails are custodial institutions which are staff units of police prefectures, organising the imposition of custody pending trial and arrest. According to § 86(1) of the Act, imprisonment of up to three months is also served in a jail. Thus, persons who are serving an arrest or up to 3 months' imprisonment are also placed in a jail (§ 3 of the Act), as well as detainees, i.e. persons who are not yet convicted but have been taken into preventive detention within criminal proceedings (§ 4 of the Act).[49]

The Chancellor of Justice is of the opinion that, without any exception, all persons under arrest and detainees should be guaranteed at least 2.5 m^2 of floor space, as is prescribed by § 6(6) of the Minister of Justice Regulation No. 72 of 30 November 2000 approving the "Internal prison rules". Based on the minimum floor space prescribed for detainees and prisoners in jails, Narva jail has a maximum capacity of 55 persons and Kohtla-Järve jail 32 persons.[50]

During the verification visit in September 2004, 67 persons were held in Narva jail, i.e. each person had 2.07 m^2 of floor space. In Kohtla-Järve jail, 49 persons were held, and there was only 1.65 m^2 of floor space available per one detainee. Thus, during the verification visit, Narva and Kohtla-Järve jails were overpopulated and no required minimum space was guaranteed to detainees. Due to overpopulation, it was not possible to keep minors and adults separately in the jail, as required by § 12(1) clause 1 of the Imprisonment Act.

According to the information obtained during the preparation of the visit, more than 55 persons were held in Narva jail on total 36 days in July and August 2004. Based on the information in the register of detainees in Kohtla-Järve jail, two persons had spent one month or longer and six persons two months or longer in the jail. Based on the register, at the time of the verification visit the person with the longest duration of stay had been in the Kohtla-Järve jail for three months and three days.[51]

In July and August 2004, there were more than eight persons simultaneously staying in Narva jail who were persons under arrest in the meaning of § 3 of the Imprisonment Act. The remaining persons were detainees and convicted persons who were waiting for transfer to prison. During the verification visit, there were only two arrested persons in Narva jail. In Kohtla-Järve jail, only detainees and convicted persons who were waiting for their transfer to prison were held at the time of the visit. Based on the above, it is concluded that overpopulation in Kohtla-Järve and Narva jails is caused primarily by detainees (in the meaning of § 4 of the Imprisonment Act) who are staying in jail for a longer period.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has criticised overpopulation in Narva and Kohtla-Järve jails. In its latest report on the visit that took place in September 2003, the CPT notes that in many cases overpopulation in jails exceeded the levels noted by the CPT in 1997 and 1999.[52]

The Minister of Justice Regulation No. 55 of 29 November 2000 on "The placement plan" regulates to which prisons persons in respect to whom preventive detention has been applied should be placed.

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[49] In addition, based on § 152(1) of the Police Act, intoxicated persons who due to intoxication might present a danger to themselves or to other persons or fall victim to a crime can be taken to a police jail.

[50] Based on the recommendation of the CPT, according to which every detainee should be guaranteed 4 m2 of floor space, Narva jail has a capacity of maximum 34 persons and Kohtla-Järve jail 20 persons.

[51] The Imprisonment Act does not provide for how long a person can be placed in a jail.

[52] Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 30 Sept 2003. Strasbourg 2004, p 14, footnote No. 18. Accessible at http://www.cpt.coe.int.

After the visit to the East Police Prefecture's jails, the Chancellor of Justice made a proposal to the Ministers of Internal Affairs and Justice to assess in cooperation whether changing of the placement plan would allow to place in prison more detainees who are serving their custody pending trial in Narva and Kohtla-Järve jails if preventive detention has been imposed on them by the Ida-Viru County Court and Narva City Court.

The Minister of Justice replied that he did not consider changing of the placement plan necessary or feasible. He promised to continues cooperation with the Ministry of Internal Affairs to alleviate the situation and to inform the Chancellor of Justice about the results. By the time of contacting the Riigikogu constitutional affairs committee, the Chancellor of Justice had not received information whether and in which form there was cooperation to reduce overpopulation in the East Police Prefecture's jails and what were the results.

The only measure to reduce overpopulation about which the Minister of Internal Affairs notified the Chancellor of Justice was the request sent to the Ministry of Justice on 23 December 2004 to transfer 82 persons in jails to prisons as an extraordinary measure: as a result, 27 persons were transferred from jail to prison.

Since 2003, the Minister of Internal Affairs has repeatedly mentioned the construction of the new Viru Prison as a solution to problems in Narva and Kohtla-Järve jails. A jail with a capacity of 150 persons is planned to be included in the prison. The Chancellor of Justice has pointed out that due to the seriousness of the problem of overpopulation its solution cannot be delayed until the new jail is built, as presumably it will not be taken into use before 2007.

Based on an article in the daily *Eesti Päevaleht*[53], jails were also overpopulated in July 2005. According to the press representative of the Police Board who answered the journalist's questions, there were 60 persons in the Kohtla-Järve jail and 69 persons in the Narva jail in the days prior to the interview. Thus, every detainee in the Narva jail had 2.01 m^2 of floor space and in the Kohtla-Järve jail only 1.35 m^2 of space available. Based on the capacity of Kohtla-Järve jail estimated according to the required floor space per detainee (32 places), there were almost twice as many persons in the jail than is allowed.

(4.2) Narva jail is located on the upper (third) floor of the police station. In summer, the sun warms the tarred flat roof and the temperature in the cells is high. Insufficient ventilation is unable to cope with the rise of temperature. Although § 45(1) of the Imprisonment Act clearly requires the existence of a window in each cell, not all cells in the Narva jail have windows and during the verification visit also artificial light was also dim.

Cells of the Kohtla-Järve jail are in the basement of the constable post. There is no ventilation in the cells facing the street. Many cells have no window and the existing windows are made of dim blocks of glass which do not ensure adequate lighting.

Most of the cells in both Narva and Kohtla-Järve jails were uncleaned and in an unsanitary condition. To illustrate the living conditions, the latest CPT report on Narva and Kohtla-Järve jails could be quoted: "The unpartitioned lavatories - where persons were obliged to relieve themselves in the direct presence of their cellmates - exacerbated the effects of the very poor ventilation, rendering the already dank air nauseating."[54]

According to § 90(1) and § 7(2) of the Imprisonment Act, cells in jails have to ensure continuous visual or electronic surveillance of the detainees and arrested persons. In some cells in the Kohtla-

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53 M. Ojakivi. Enamik arestikambreid eeluuritavaid tuubil täis. [Most jails packed with detainees pending trial.] Available on the Internet http://www.epl.ee.

54 Reference 52, point 26.

Järve jail the persons held in them could unscrew the bulbs and thus make the whole cell dark. In the Kohtla-Järve jail it is not possible to electronically monitor the persons in the cells and, therefore, the police officers have no way of checking the activities of the persons in them when the cell is darkened. This endangers the security of persons in the cells because it is not always possible to detect an incident of violence in a dark cell. Opening of the door of a dark cell also poses a security threat to police officers

In addition to the Narva and Kohtla-Järve jails, in the course of processing of applications the Chancellor of Justice has also obtained information about unsanitary living conditions in the Kuressaare jail. The CPT in its reports has also criticised the conditions in other jails that were not mentioned above.

Persons under arrest and detainees are held 24 hours a day in the cells that are in the conditions as described above.[55] Although § 93(5) and § 55(2) of the Imprisonment Act stipulate that persons under arrest[56] and detainees should be able to spend at least one hour a day in the open air if they wish, in most jails it is not possible as there are no walking yards for this.[57] During its last visit, the CPT noted that even when a jail had a walking yard, staff shortages were cited as reasons for not granting outdoor exercise to detainees.[58]

The Minister of Internal Affairs Regulation No. 71 of 1 December 2000 on the "Internal rules for jails", in section 23, provides that persons under arrest have the right to a short-term visit of up to two hours once a week and detainees for a visit of up to three hours once a month. If a jail is overpopulated, it is difficult to comply with this requirement. For example, the visiting room in Kohtla-Järve jail accommodates one couple at a time, and therefore persons detained in Kohtla-Järve jail are allowed only one 15-minute visit a month.[59] Persons held in jails also lack an opportunity to communicate with their close ones by telephone.

In his opinion issued following the verification visit, the Chancellor of Justice made several proposals to the Minister of Internal Affairs which, in the Chancellor's view, would allow to improve considerably, and with moderate costs, the conditions of detention in jails. The Minister of Internal Affairs was asked to implement the Chancellor's proposal in all jails where the relevant problems exist. During the follow-up control it was found that the Ministry of Internal Affairs and the Police Board had implemented the Chancellor's proposals only partly.

In Narva jail, ceiling lamps were installed in all cells as an additional source of light, but due to the lack of funds, it is not possible to make improvements in artificial lighting in all jails.[60] The Minister of Internal Affairs assured the Chancellor of Justice that in all jails in Estonia detainees are ensured the opportunity to read national daily newspapers. On 2 November 2005, the Police Board submitted amendments to the 2005 budget to the Ministry of Internal Affairs, according to which 520 000 kroons would be allocated for the repair of the ventilation system in Narva jail.

According to the Minister of Internal Affairs, however, due to low ceilings in the jails of the East Police Prefecture, it is not technically possible to implement measures against unauthorised black-out of lighting by detainees in cells. Based on information available to the Chancellor of Justice, still

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55 Based on § 86(2) and § 90(1) of the Imprisonment Act.

56 According to § 86(1) of the Imprisonment Act, the provisions of Chapters 1, 2, 6 and 7 of the Act together with the specifications provided for in Chapter 4 apply to the imposition of arrest and up to 3 months' imprisonment. Thus, the provisions of these chapters concerning prisoners should also be applied in respect to persons under arrest.

57 According to the letter of the Minister of Internal Affairs to the CPT on 13 Jan 2004, there are walking yards only in Jõgeva, Järva, Rapla and Viljandi jails.

58 Reference 52, point 28.

59 This refers to short-term visits (e.g. with family members) in the meaning of § 24(1) and § 94(1) of the Imprisonment Act. In Kohtla-Järve jail, there is a separate room where detainees can meet in private with their lawyer.

60 First and foremost in the West Police Prefecture's jails.

no other methods of monitoring of persons besides visual observation are used in Narva and Kohtla-Järve jails. Although phone company Elion Ettevõtted AS agreed to install card phones in jails of the East Police Prefecture, it could not be done because the police prefecture did not find sufficient financial resources for this. Card phones are also lacking in jails of all the other police prefectures.[61]

The Chancellor of Justice agreed with the CPT's opinion that resolute and sustained action, founded on a solid, properly-resourced strategy, is needed to improve the conditions of detention in jails in Narva and Kohtla-Järve, as well as elsewhere.[62]

In his letter of 5 March 2004, the Minister of Internal Affairs promised to send to the Chancellor of Justice a copy of the national action plan for the improvement of living conditions in jails, which also provides for the elimination of problems noted by the CPT and for the development of jails in general. Sending of the plan was later postponed and after repeated enquiries the Minister of Internal Affairs in his letter of 10 June 2005 informed the Chancellor that the Ministry had not yet drawn up the action plan for the improvement of living conditions in jails.

According to the Minister of Internal Affairs, the Police Board has eliminated deficiencies pointed out in the CPT report which required small investments (lack of bedclothes and personal hygiene articles, access to newspapers), and in this respect the conditions in jails have improved. Funding for real estate projects that require large-scale investments is applied for within the state budget strategy for 2006-2009. The Minister of Internal Affairs also set up a committee to draft engineering specifications for jails, in order to ensure that all the renovated and new jails will meet the requirements of the CPT.

According to the state budget strategy for 2006-2009, improvement of the poor conditions in jails[63] is one of the priorities in the area of government of the Ministry of Internal Affairs. Within the strategy, guaranteeing of human rights of detainees and bringing jails into conformity with the CPT requirements is also planned.[64] However, according to the explanatory memorandum to the state budget bill there were no investments planned in the area of government of the Ministry of Internal Affairs for improving living conditions in jails in 2006.[65] In the state budget 2006 there are no investments planned for building or renovating jails, nor small-scale investment projects such as preparations for installing card phones.

Art 18 of the Constitution and Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibit inhuman, cruel or degrading treatment or punishment. The European Court of Human Rights has repeatedly emphasised that Art 3 of the Convention enshrines one of the fundamental values of a democratic society. This contains a complete prohibition of torture and inhuman or degrading treatment or punishment, and its applicability does not depend on particular circumstances or the behaviour of the victim of such treatment.[66]

After its visit in 2003, the CPT came to the conclusion that the cumulative effect of the execrable material conditions and the impoverished regime applied to all detainees held in Narva and Kohtla-Järve jails (and in other jails where similar conditions of detention prevailed) amounted to inhuman and degrading treatment.[67]

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61 In some jails, persons under arrest are allowed to use their mobile phone that they had to deposit when they came to serve their punishment, and can make calls in the duty officer's room upon the permission of the administration.

62 Reference 52, point 32.

63 State budget strategy 2006-2009, Tallinn 2005, p. 156. Accessible at http://www.fin.ee.

64 Reference 63, p 158.

65 Overview of the economic situation of the state and of the main objectives of the Government of the Republic. Explanatory memorandum to the state budget bill 2006. Tallinn 2005. Overview of the investments planned in the area of government of the Ministry of Internal Affairs is on p. 562 ff. Investment plans in the Police Board are on p. 564 ff.

66 ECHR judgement of 6 Apr 2000, case No. 26772/95 *Labita v. Italy*.

67 Reference 52, point 7. ECHR often relies on the assessments of the CPT in the ascertainment of inhuman and degrading treatment.

According to the practice of the ECHR, the absence of an intention to treat a person in an inhuman or degrading manner does not exclude the violation of the prohibition of such treatment. If the state does not take steps to improve unacceptable conditions of detention it demonstrates a lack of respect towards a person.[68] The ECHR in its judgment of 8 November 2005[69] ordered Estonia to pay compensation for the violation of Art 3 of the Convention. Inhuman and degrading treatment in the above case was also due to unacceptable conditions of detention in Jõgeva jail.

Based on the foregoing, it is clear that the state should improve the situation of persons held in jails (first of all in Narva and Kohtla-Järve). Probably it is not possible without investments into the jails, and this might require the amendment of the existing investment projects and reduction or rescheduling of investments intended for other purposes. Acknowledgement of the problem is a first step towards the improvement but it is not sufficient to solve the problems. The Chancellor of Justice welcomed the budgetary amendment of the Police Board in 2005, but was also of the opinion that it was not sufficient to solve all the problems in jails.

The Chancellor of Justice was of the opinion that a systematic action plan was required to improve the situation in jails. The current lack of financial resources should not be an obstacle to planning future activities or to requests for funds. Drafting of engineering specifications for jails is necessary but without systematic investments from the state budget it would only be another document that allows to conclude that the situation in jails is not in conformity with the requirements.

The Chancellor of Justice believes that solving of some problems (first of all reduction of overpopulation) requires cooperation between the Ministries of Justice and Internal Affairs. It is also necessary to analyse whether the situation of persons in jails could also be improved by amending the Imprisonment Act and other relevant legislation.

(5) The Chancellor of Justice made a proposal to the Riigikogu constitutional affairs committee to discuss whether and how the committee could help to solve the problematic situation of persons in jails.

On 26 January 2006, the constitutional affairs committee discussed the problems and possible solutions with the Chancellor of Justice, the Minister of Internal Affairs and the Director General of the Police. The constitutional affairs committee emphasised the need to draw up an action plan for solving the problems, because not all the problems will be solved with the completion of the Viru Prison. The committee also decided to address the Minister of Justice with a request to analyse possibilities to change the implementation of the placement plan for prisons and amend the rules for the substitution of punishments.

The Ministry of Internal Affairs in its letter of 24 March 2006 informed the Riigikogu constitutional affairs committee that funds for the improvement of the situation in jails are planned in the Ministry of Internal Affairs development plan for 2007-2010,[70] which was approved on 14 March 2006. The development plan clearly highlights the problem of a continuously poor situation in jails and their non-compliance with the CPT requirements. To bring the situation into conformity with the requirements, new jails need to be built and it also requires large-scale and long-term investments. Based on the development plan of the Ministry of Internal Affairs, the following news jails and large-scale renovations are planned:

- Jõhvi jail in a new complex together with the Viru Prison; Rakvere jail and Kuressaare jail (estimated time of completion January 2008);
- Narva jail, Jõgeva jail and Võru jail (estimated time of completion January 2009);
- North Police Prefecture's jail (estimated time of completion January 2011).

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68 ECHR judgement of 19 Apr 2001, case No. 28524/95 *Peers v. Greece*.

69 ECHR judgement of 8 Nov 2005, case No. 64812/01, *Alver v. Estonia*.

70 Accessible at http://www.sisemin.gov.ee/.

The Minister of Internal Affairs stressed that the planned actions for bringing living conditions in jails into conformity with the requirements of the Constitution and the European Convention of Human Rights will be possible only if the necessary funds will be allocated.

The Minister of Justice in his letter of 13 March 2006 to the Riigikogu constitutional affairs committee explained that on 13 February 2006 a meeting was held in the Ministry of Justice with the participation of the Director General of the Police Board to discuss possibilities for the optimum use of prisons and jails. It was agreed that, in order to reach the best result, contact persons are appointed for effective exchange of information between agencies to coordinate the use of the existing places of detention. The Ministry of Justice has also offered assistance with the transfer service to the Police Board, in order to transfer persons from overpopulated jails into less populated ones.

The Minister of Justice did not consider it necessary to change the existing placement plan for prisons, as it allows an extraordinary transfer of detainees and prisoners from one prison to another with the permission of the Deputy Secretary General of the Ministry of Justice and it does not restrict the placement of detainees to the Tartu or Tallinn Prison. The Minister of Justice did not express his opinion with regard to the rules for the substitution of punishments.[71]

3. Analysis of problems by different areas of government

3.1 Guarantee of the right to the protection of health

Art 28 para 1 of the Constitution stipulates: "Everyone has the right to the protection of health." The Constitution in itself does not define precisely the extent of this right or the state's duties in the exercise of the right. In defining the fundamental right to the protection of health, we can rely on various international conventions and framework documents which Estonia has acceded to.[72] According to the World Health Organisation's definition, health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.[73] Although the definition might seem overly ambitious at first sight, it has to be noted that this is an aim which should be kept in mind in defining the person's right to the protection of health. Accordingly, the right to the protection of health means that the state is required to guarantee to persons the protection of health to the extent and on the level which, in the final stage, allows everyone to achieve a state of physical, mental and social well-being. In addition to treatment as a means for the elimination of a disease, the state should also guarantee access to prevention and possibilities for the restoration of coping ability and ability to work for persons.

In guaranteeing the right to the protection of health, the state is required to proceed strictly from one of the basic constitutional principles – the principle of equality stipulated in Art 12. According to this provision, everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. Hence, persons have the right not to be subjected to unequal treatment. On the other hand, the principle of equality is also binding on the legislator, obliging it to find at least one reasonable basis to justify any legalised case of unequal treatment.[74] In certain

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71 As at 15 June 2006.

72 UN International Covenant on Economic, Social and Cultural Rights which Estonia acceded to in 2002; the Revised European Social Charter which Estonia acceded to in 2000; Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, to which Estonia is a party since 2002, etc.

73 Preamble to the constitution of the World Health Organisation. Accessible at http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&record={9D5}&softpage=Document42.

74 M. Ernits. Kommentaarid §-le 12. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Comments to Art 12. Constitution of the Republic of Estonia. Commented edition.] Tallinn 2002, comments 1-6.3 to Art 12.

cases, the state is obliged to strive towards guaranteeing the factual equality of persons in addition to legal equality.

3.1.1 General problems of the Estonian health care system

Currently, approximately 94% of the population in Estonia is covered by health insurance. This means that 6% of the persons are only entitled to emergency medical care, ambulance service and certain psychiatric care as paid by the state. It is worrying that the number of uninsured persons has remained unchanged for several years.[75]

But even insured persons can have difficulties with the exercise of the right to the protection of health. In Estonia, persons' own participation in the payment of health care expenses makes up a record 24% of the total expenditure on health care.[76] This, however, means that a large number of people have no access to the necessary health service, medicines or aid due to financial reasons.

In addition to the above, the person's residence has also become a decisive factor in access to health care services – in areas farther from the centre the use of health care services is considerably more difficult. In Estonia, the main focus in the protection of health is on treatment, to the detriment of prevention and rehabilitation. Due to the lack of prevention and weak post-treatment rehabilitation, treatment itself falls under more pressure and, as a result, because of the scarcity or resources, the fundamental right to the protection of health might not be fully guaranteed.

The WHO in its arguments has also repeatedly pointed out shortcomings in the Estonian health care system, stressing both the legal, but mainly factual, inequality in the guarantee of the right to the protection of health. According to the WHO survey,[77] in the period 1995-2002 the persons' own participation in covering the total costs of health care doubled. In 2002, approximately 1.5% of the population fell under the poverty line due to extensive own participation in health care, and 7% of the population spent more than 20% of the money left over from their living expenses on health. The problem of uninsured persons has also been pointed out repeatedly.[78] In the opinion of WHO experts, uninsured persons should be integrated into the health insurance system in order to ensure early access to health care services, not only when the need for emergency medical care appears. The WHO has also emphasised the importance of prevention in the health protection system.[79] Experts have noted that prevention services are provided similarly to health care services and therefore access to prevention services is also unequal, being for example dependent on whether the person is covered by health insurance. Experts have also pointed out that the legislation regulating the activities of family physicians is too strict, which may deteriorate access to health care on the primary level.[80]

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75 Sotsiaalsektor arvudes 2004. Sotsiaalministerium. [Social sector in numbers. Ministry of Social Affairs] Tallinn 2004, p. 49.

76 Eesti Tervishoiustatistika 2003. Sotsiaalministeerium. [Estonian health care statistics 2003. Ministry of Social Affairs.] Tallinn 2005, p. 228.

77 J. Kutzin/A. Couffinhal. *Health Financing in Estonia: Challenges and Recommendations*. WHO Regional Office for Europe, Health Systems Financing. Copenhagen 2005, p. 2.

78 J. Kutzin/A. Couffinhal (reference 77), p. 2; also R. Atun. *Advisory Support to Primary Health Care Evaluation Model: Estonia PCH Evaluation Project, Final Report*. WHO Regional Office for Europe 2004, p. 88.

79 A. Couffinhal. *Health System Financing in Estonia: HSF Working Document, Health Systems Financing Programme*. WHO Regional Office for Europe 2005, p. 17.

80 R. Atun. *Advisory Support to Primary Health Care Evaluation Model: Estonia PCH Evaluation Project. Final Report*. WHO Regional Office for Europe 2004, p. 87.

3.1.2 Activities of the Chancellor of Justice in guaranteeing the right to the protection of health

In 2005, the Chancellor of Justice paid close attention to the right of persons to the protection of health. The focus of attention was on the equality of access to the protection of health. Equality was analysed both from the legal and factual angle.

The main problem from the legal aspect is the limited range of persons who have access to state-financed health services. Currently, approximately 6% of the Estonian population is not covered by health insurance. This figure has been stable for several years.[81] The organisation and requirements of the provision of health care services, and the procedure for its management, financing and supervision is provided for by the Health Services Organisation Act. According to § 6(1) of the Act, every person on the territory of Estonia has the right to receive emergency care, whereas pursuant to the Health Insurance Act emergency care provided to uninsured persons is financed from the funds of the state budget on the basis of an agreement between the Ministry of Social Affairs and the Estonian Health Insurance Fund. Pursuant to § 16 of the Health Services Organisation Act, all persons on the territory of Estonia are guaranteed access to emergency medical services (ambulance service), and in accordance with § 19 of the Act, emergency medical services are financed from the state budget through the Ministry of Social Affairs. Pursuant to § 11 of the Act, general health services provided to insured persons are financed from the funds allocated for health insurance from the state budget, while uninsured persons themselves pay for the general health services. The same principle is reflected in clause 3 of the "Procedure for the payment of provision of general health services to persons who are not on service lists of family physicians", approved by the Minister of Social Affairs Regulation No. 115 of 29 November 2001, according to which uninsured persons and persons not on service lists of family physicians themselves have to pay for the general health services, and for the provision of emergency care to these persons family physicians are paid from the state budget funds in accordance with the agreement between the Ministry of Social Affairs and the Estonian Health Insurance Fund.

In addition to the above, based on § 19 of the Psychiatric Assistance Act, the expenses of the provision of emergency psychiatric care to persons who are not covered by health insurance, of care for and rehabilitation of persons who are declared disabled due to a mental disorder, expenses relating to carrying out forensic psychiatric examinations, to psychiatric examinations to determine fitness to serve in the Defence Forces and psychiatric treatment of persons committed to a psychiatric hospital by the courts shall be covered from the state budget.

It should thus be concluded that persons not covered by health insurance are currently guaranteed access only to state-financed emergency aid, ambulance service and certain types of psychiatric assistance. For other types of health care, including general health services, uninsured persons have to pay themselves.

According to Art 10 of the Constitution, the state should guarantee to everyone the possibility to lead a life that respects their human dignity. It should be kept in mind that in guaranteeing this fundamental social right the state is obliged to take active steps in the interests of persons. It has to be said that during 15 years (since the regaining of independence) the state has not found solutions how to guarantee the equality of persons in the exercise of their fundamental right to the protection of health. It has to be taken into consideration that the majority of non-insured persons are long-term unemployed who therefore also lack the possibility to make expenses for the preservation of their health from other sources. The statistics also demonstrate that persons among lower-income groups or persons without income are in need of hospital treatment more often than other persons.[82]

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[81] Sotsiaalsektor arvudes 2004. Sotsiaalministerium. [Social sector in numbers. Ministry of Social Affairs] Tallinn 2004, p. 49.

[82] M. Jesse et al. *Health care systems in transition – Estonia 2004*. WHO 2004, p. 131.

The reason for this could be the fact that persons who have no access to general health services are not diagnosed with diseases in the early, curable stage and as a result they end up at the doctor only when the disease has become acute needing immediate medical care or ambulance service. Thus, on the one hand, pain and suffering is caused to people that could be avoided if diseases were diagnosed in time by the general practitioner and, on the other hand, this causes additional expenses for the state due to emergency care and ambulance services provided to uninsured persons whose diseases have progressed.

The Chancellor of Justice raised the problem before the Minister of Social Affairs. The Minister admitted that the health insurance system does not currently allow guaranteeing equal treatment and protection of health to all persons, regardless of their financial and social status or other factors. By implementing the system of gradual increasing of health insurance coverage the Minister has promised to guarantee health insurance on equal conditions to all persons as of 2007. The Chancellor of Justice welcomes this decision and, besides the elimination of an unconstitutional situation, it would raise Estonia's international reputation as a country respecting fundamental rights.

In assessing the possibility of factual implementation of the right to the protection of health, the Chancellor of Justice focused on pinpointing regional differences. Currently there is a process of concentration of health service providers into centres (in case of special medical care often only to county centres), which entails additional time and financial expenses for persons who live farther away from the centres. For example, in Valga, Võru and Põlva counties the average number of out-patient receptions per person is half smaller than in Tallinn and Tartu, but also lower than the Estonian average that is 5.86 receptions per year.[83]

An important factor for people with smaller income is the problem of travel expenses for visiting a doctor far from their residence. The fact that there is no compensation of travel expenses in connection with obtaining access to health services could restrict the opportunities of less secured persons to access health care, and could eventually lead to an increase of medical costs due to the treatment of diseases that have reached an advanced stage. Besides the restrictions occurring because of the lack of material resources, a problem is also physical availability of medical services to persons who due to the nature of their diseases cannot independently visit doctors far away from their home. Currently there is no national system to provide assistance with transport to persons who need to go to regular health examinations or scheduled operations. The situation where persons living farther away from centres have no access to out-patient medical assistance due to physical or financial reasons is not compatible with the territorial and social aspect of the principle of equal treatment arising from Art 12 of the Constitution.

The Chancellor of Justice has repeatedly drawn the attention of the Minister of Social Affairs to the fact that people's access to health care services is considerably worse in the country's peripheral areas than in centres. The Chancellor hopes to see developments in the guarantee of equal rights of persons in the exercise of the right to the protection of health in 2006.

Territorial disparities are also evident in guaranteeing emergency medical services (ambulance services) in different counties in Estonia. According to the definition of the Health Services Organisation Act, emergency medical service is an out-patient health service for initial diagnosis and treatment of a life-threatening disease, injury or poisoning and for the patient's transport to hospital if necessary. Thus, a low level of access to emergency medical services poses a direct threat to the people's lives. The difference of the time that it takes an ambulance brigade to reach a person in need of assistance in different places is worrying. In outlying areas, the reaction time to a call could be up to half an hour even in the case of D-priority calls, i.e. when the person's condition is life-threatening. In cities

[83] Accessible at http://www.sm.ee/est/pages/index.html.

the ambulance can reach the person in the same situation within six minutes.[84] Such an extensive differentiation based on residence is inadmissible, as eventually it significantly affects a person's right to the protection of health. To solve the problem, an emergency medical services action plan needs to be drawn up in the near future, which would distribute ambulance service areas more evenly throughout Estonia and would ensure an effective protection of health.

3.1.3 Conclusion

In conclusion, it should be noted that despite successful implementation of the health care system reform in Estonia and launching of the primary level of health care based on family physicians, it is now utmost time to turn the focus from the system to people. The aim of reforms and the operation of the health care system should be the guarantee of fundamental rights, in particular the right to the protection of health. Currently, there is still legal and factual inequality in the exercise of this right. It should be kept in mind that health is an extremely important value, without which the exercise of many other fundamental rights and the successful development and functioning of society becomes impossible. It is important to guarantee access to health services to all persons regardless of their social status or other factors. At the same time, access to health services guaranteed to people has to be real. People living in peripheral areas must have equal opportunities to take care of their health. It is therefore necessary to eliminate obstacles that cause differences in the availability of health care: e.g. by the provision of transport compensation, free transport of persons, regular visits of special and general doctors to outlying areas or through other measures.

3.2 Processing of personal data in the state's databases

Issues of the protection of personal data have been one of the priorities of the Chancellor of Justice for a few years. When taking a look on the year 2005, it has to be noted that this rapidly developing area needs continued attention. Often processing of personal data (incl. collection of data) is such a natural part of the operation of the state that it is hardly noticed. It seems self-evident that a person's each contact with the state should be recorded and data should be stored in databases, so that it would be easy to use the data even several years later, to compare them with other databases, etc. Indeed, extensive databases and modern data processing tools make the work of officials and politicians considerably easier. Unfortunately, it is not recognised that the processing of personal data interferes with fundamental rights of persons, for which very clear authorisation from the legislator is needed pursuant to our Constitution.

Already in the annual report of 2003-2004, the Chancellor of Justice highlighted the issue of the collection on personal data by the state, as in several cases the state demanded data from persons without a clear legal basis.[85] Unfortunately, it has to be said that there are still shortcomings in the legal regulation of the collection of personal data. One widespread problem, which the Chancellor of Justice has had to deal with repeatedly, is the insufficient legal basis, i.e. the delegating norms to authorise the executive agencies to maintain databases containing personal data. As in a democratic constitutional state the executive authority can only function to the extent that it has been authorised by the legislative power, the creation of a proper legal basis for registers is first and foremost the task of the legislator, i.e. the Riigikogu.

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[84] Ambulance service activity standard LOOTUS 2000. Accessible at http://www.kiirabi.ee/.

[85] Chancellor of Justice Report 2003-2004, p. 43.

3.2.1 The problem and the fundamental rights relating to it

The practice of the Chancellor of Justice demonstrates that the Estonian state maintains large and important databases about persons. The necessity of maintaining a register, its objectives, the scope of data to be collected and other details relating to such register are determined by the executive authority (usually the Government or a Ministry) almost completely according to their discretion. On several instances, the Government has decided on its own initiative to change the objectives of a register and to expand considerably the list of data to be entered in the register (e.g. the national criminal procedure register and the national register of Estonian citizens liable to service in the defence forces). By adopting such practice, we risk a situation where individuals lose any control of which agencies collect data about them and what kind of data is collected, and the executive authority has a complete freedom for increasingly detailed monitoring of persons. In view of the threats of information society, in the opinion of the Chancellor of Justice it is particularly important that the state should remain within the limits provided for on the level of law.

With regard to data protection, the Chancellor of Justice has always emphasised that any processing of personal data concerns fundamental rights of persons. Processing of personal data usually interferes with the person's right to the inviolability of private life, which is guaranteed by Art 26 of the Constitution, but also Art 19 and the general right to liberty could prove to be relevant, as the latter gives rise to the right to informational self-determination of persons. There could even be a possibility to recognise a separate fundamental right to the protection of personal data based on Art 10 of the Constitution.[86]

Often, the issue of constitutionality of processing of personal data is approached from the material angle, i.e. seeking substantive justifications for the collection and use of data and assessing whether all the data are needed for the achievement of the particular objective. However, in the case of the issue of the delegating norm which is the focus of the present analysis, the main attention is on the formal correctness of the state's activities. In the proceedings concerning the state's databases there has rarely been a dispute of whether the collection of particular data was necessary. Almost always the planned activity has had a legitimate aim. The problem, though, has been that no such activity was provided for the executive authority on the level of a law. In other words, the situation is as if the legislator "forgot" to give the executive authority those important duties.

The requirement that an interference with a fundamental right has to be in conformity with the Constitution also in the formal sense means, first of all, that it is the legislator's task to decide all the important issues, which in the case of fundamental rights is the extent of their restriction.[87] The law must provide with sufficient clarity the extent and manner of implementation of the right of discretion delegated to the executive authority.[88] In other words, the executive authority can only do what it has been delegated to do by law. The Supreme Court has also dealt with the principle of legal basis, and has emphasised that the procedure for the restriction of rights and freedoms determined by law guarantees the possibility to avoid abuses of power. Ambiguous regulation deprives persons of the possibility to choose appropriate behaviour and to protect themselves if necessary.[89] This also means that the Government cannot, on its own initiative, fill gaps or regulate areas which are actually the object of law-making.[90]

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86 See I. Pilving. Õigus isikuandmete kaitsele. [Right to the protection of personal data] – Juridica 2005, p. 535.

87 K. Merusk jt. Kommentaarid §-le 3. – Justiitsministeerium. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Comments to Art 3. Constitution of the Republic of Estonia. Commented edition.] Tallinn 2002, comment 2.3 to Art 3.

88 Ibid.

89 Supreme Court Constitutional Review Chamber judgement of 12 Jan 1994, No. III-4/A-1/94, p. 4.

90 Supreme Court Constitutional Review Chamber judgement of 12 Jan 1994, No. III-4/A-1/94, p. 4.

Definitely, the requirement of formal constitutionality of interference with fundamental rights also concerns the principle of legal clarity – a law that restricts a fundamental right has to be formulated with sufficient precision and have clear wording.[91]

All the above is also applicable to the collection of personal data. As processing of personal data endangers fundamental rights of persons, it can only be done within the framework prescribed by the legislator. If it is not clear from the law for what purposes and to what extent the state collects personal data, such activity is not in conformity with the constitutional requirements in the opinion of the Chancellor of Justice.

3.2.2 Examples of the legal basis of registers necessary for the state

In 2005, the Chancellor of Justice dealt with the issue of the legal basis of several registers necessary for the state, incl. statutes of the criminal procedure register, the national register of Estonian citizens liable to service in the defence forces) and the register of prisoners, persons under arrest and detainees (detainee register) and their compatibility with the Constitution.

3.2.2.1 National criminal procedure register

In the case of the criminal procedure register, the Government wished to add to the register a large amount of personal data about persons who have participated in criminal proceedings – besides the personal identification data also data about citizenship, mother tongue, residence, education, family status, income, main activity etc. Taking a look at the list of data, it is clear that based on such information it is possible to obtain a detailed profile of a person, and, consequently, interference with the fundamental right is relatively intensive.

The delegating norm in the Criminal Procedure Code, however, is very laconic: "The national criminal procedure register shall contain information about criminal cases dealt with by investigative bodies, prosecutor's offices and courts." The legislator has not specified what data are collected in the criminal procedure register. There are also no provisions about the purposes of keeping the register, on the basis of which it would be possible to determine at least indirectly what kind of data needs to be collected.

In the case of the criminal procedure register, it is interesting to note that prior to the planned changes it was only a procedural register of an ancillary nature which contained mostly facts about procedural measures. Based on the documents connected with the bill introducing the changes, it was possible to deduce that the additional data was needed for statistical purposes. According to the drafters of the bill in the Ministry of Justice, however, there was another purpose for the extension of the composition of data – to expand gradually the scope of the register, so that eventually the register would become an electronic version of the criminal case file. This aim, though, was not reflected even in the documents related to the bill. Thus, the purpose of keeping the register was completely dependent on the discretion of the executive authority. The legislator might have even not been aware of such an extensive interference with fundamental rights.

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[91] About legal clarity, see: M. Ernits. Kommentaarid §-le 13. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments to Art 13. Constitution of the Republic of Estonia. Commented edition.] Tallinn 2002, comment 5 to Art 13; Supreme Court en banc judgment of 28 Oct 2002, No. 3-4-1-5-02, p. 31.

3.2.2.2 Register of Estonian citizens liable to service in the defence forces

The situation in the case of the register of Estonian citizens liable to service in the defence forces is similar to the criminal procedure register – the law laconically provided for a delegating norm to keep records of Estonian citizens who are liable to service in the defence forces, but the register that was actually created on the basis of the provision, contains a detailed overview about every person liable to service in the defence forces. Inter alia, the register contains data about the family status, children, residence, education, job, skills, etc. Moreover, the register also includes a number of sensitive data about the persons' health.

The register of persons liable to service in the defence forces also lacked a clear aim provided for by law. Section 3(7) of the Service in the Defence Forces Act only stipulated that "Records of persons liable to service in the defences forces are kept […] in the national register of Estonian citizens liable to service in the defence forces[…]." In view of the Chancellor of Justice, such working cannot be considered a sufficient authorisation to collect detailed data about persons. Similarly to the previous case, here the law also fails to specify for which purposes the collected data are used and definitely the phrase "record keeping" cannot be understood to allow the collection of whichever data about persons.

3.2.2.3 National register of prisoners, persons under arrest and detainees

In the case of the so-called detainee register the same dangerous tendencies appear even more sharply. The detainee register is an extremely detailed database which gives a very good profile of a person, his or her qualities and relationships. It could even be claimed that it constitutes the most extensive interference in the context of the collection of personal data which the Chancellor of Justice has ever seen in his practice. Some examples: besides the facts reflecting a person's stay in a place of detention the register also contains a very precise description of the person (photographs, description of special identifying features), data about the relationships of the detainee (name of the person in relationship, type of relationship, beginning and end of the relationship), data about the contacts of the detainee (name of the person in contact, type of contact, type of relationship, result of the contact), large amount of medical data (incl. HIV status), results of the psychological test, data about religious conviction, education, profession, employment, and personal belongings. It should also be pointed out that, inter alia, the register contains "incidents" that have occurred with the detainee, while the law does not use or define such a concept.

Undoubtedly, in the case of persons in places of detention, the necessity to take account of their special situation prevents them from leading a full-scale private life, and it should also be emphasised that in view of the aims of imprisonment the collection of all these data could actually be justified. But it has to be said that in such a situation not much is left of the inviolability of private life or the right to informational self-determination and, thus, even more so the law should very clearly regulate the use of such data.

The delegating norm of the detainee register is particularly vague. Section $5^1(1)$ of the Imprisonment Act provides that a state database shall be maintained in order to process information concerning prisoners, persons under arrest and detained persons. The delegating norm does not clarify the purpose of processing of personal data. It is, however, clear that "processing of data" itself cannot be the purpose of the processing. The provisions of the Act also fail to clarify what kind of personal data will be collected, i.e. how extensive the interference with the fundamental right is. Coming back to the above-mentioned example of the registration of incidents – without a legal basis, the Government has created a type of a registered event which could have a negative effect on the situation of the detained person. For example, a negative attitude may arise towards prisoners who have participated in several incidents, and this could affect decisions made with regard to the persons. The executive authorities decide completely on their own what to do with these kinds of data.

3.2.3 Conclusion

In a situation where the executive authority changes the aims of the interference based on a laconic authorisation in law and constantly expands the scope of the interference, it cannot be definitely claimed that the law has provided sufficiently clear and defined guidelines for interference with the fundamental right. When approaching the problem from the point of view of an individual as the holder of the fundamental rights, it should be noted that a person who reads the law cannot get a sufficiently clear picture of what kind of data the register could contain about him or her and how the data will be used.

It is dangerous to go along with an interpretation according to which it is sufficient for the legitimisation of the processing of personal data to have a vague authorisation on the level of a law for collecting data about one or another phenomenon into the register, without specifying what aspects of the phenomenon and for what purposes need to be reflected in the database. From the point of view of the protection of fundamental rights it is extremely important that personal data should be processed to the smallest possible extent and for the achievement of specific objectives which are determined in advance. Acceptance of an abstract general authorisation would go astray of the requirement of purposefulness and minimality and would make it practically impossible to supervise the lawfulness of the collection of personal data.

Therefore, in the above cases the Chancellor of Justice has clearly emphasised that in the case of registers in which personal data are processed the legislator should define with sufficient clarity who and for what purposes will be using the data, and, as far as possible, set limits to the collection of data. The purpose of the collection of personal data can never be the collection itself or any other similar definition. The legislator, on the level of the law, should outline the needs for which personal data are collected and the needs should always be connected to the obligations imposed on the processor of the data by law. For example, in the case of health data the purpose of their collection is to guarantee medical assistance to persons. The purpose of the collection of statistical data about criminals could be the making of criminal policy decisions. The purpose of the disclosure of data about an escaped prisoner could be informing of the public about a threat or obtaining the assistance of society in catching the criminal, etc. Thus, the purpose of the use of data should always be determined through the desired result, not just by mentioning the fact of the collection and processing of data.

Determining the purpose on the level of the law is closely linked to defining the extent of data processing as an interference with the fundamental right. If the law makes it clear what the purpose of data processing is, it is also possible to assess whether all the collected data are actually needed to achieve the intended aims. Definitely, it is not always possible for the legislator to determine the exact composition of the data by the law. It is often a task of a very technical nature which can be most competently carried out by the agency that will actually be using the data. Moreover, such details can change and it would be unreasonably burdensome to make a new legislative amendment every time. Hence, it is necessary to find solutions which would not make the legal bases of keeping a register too rigid, but would at the same time impose tangible limits on the activities of the executive power. A solution might be to define potential wider data categories on the level of the law (if this is possible), so that it is clear about what aspect of a given phenomenon or situation the data are collected.

Besides the fact that defining of the purposes and extent of the processing of personal data by the legislator is required for the functioning of the state in compliance with the constitution, hopefully the specification of delegating norms also has a disciplining effect. It would motivate the state authority to consider more carefully the reasons for the collection of data. Could the particular aims be achieved without personal data? And if the collection of data proves to be necessary, which are the arguments that justify it? Then it also becomes clear whether processing of every particular data category is justified. This reduces the scope for abuses, and processing of personal data also becomes considerably more transparent for the subjects of data.

3.3 Problems in the planning and building law

Another priority area of the Chancellor of Justice in 2005 was planning and building law. Issues of city planning and construction received considerable attention in the public debate throughout the year, and the Chancellor of Justice received a large number of applications about it. In the context of the increasingly vibrant real estate market, often contradictory interests of developers, real estate owners, local inhabitants, environment protectors and of the general public emerge, and the main responsibility in balancing them falls on local governments. In his supervisory proceedings the Chancellor of Justice has to take into account the fact that the legislator has given local governments an extensive discretion in planning issues, and thus the Chancellor of Justice has no competence to interfere in the substance of planning decisions, nor resources or procedural mechanisms to deal with numerous contradictory interests in this area. However, on the basis of cases that the Chancellor of Justice has dealt with, some observations about the general problems in the system can be made, e.g. problems of administrative capacity of local governments or insufficient, ambiguous or conflicting legal regulation. The following part offers an overview of some of the more serious problems that the Chancellor of Justice has found.

3.3.1 Planning procedure: involvement of the public and persons concerned

Section 1(2) of the Planning Act stipulates the aim of planning, which is to ensure the conditions that take into account the needs and interests of as many members of society as possible in the shaping of a sustainable and balanced spatial development, special planning, land use and construction. The implementation of the aim of the law takes place mainly in the process of the planning procedure in which the keyword is publicity. The principle of publicity of the planning procedure is aimed at ensuring the involvement of all interested persons in the procedure and giving them an opportunity to protect their interests.

In the case of involvement of people in the planning procedure, particularly important is the duty to inform the public and persons concerned. Based on an application, the Chancellor of Justice conducted proceedings in a case where information about the detailed plan reached the local population only after the plan had been adopted. Then it was found that the local government had failed to comply with the duty to organise a public presentation of the plan. The result was a situation where the rights of village people as interested persons had been violated, while owners of plots of land had developed a legitimate expectation that it would be possible to build the planned houses in the area of the adopted detailed plan. Such situations can be caused both by the failure of local governments to act, or the lack of interest or initiative on behalf of the persons concerned, or also the fact that the duty to inform, as it is provided in the Planning Act, is insufficient in the current form. In any case, it is clear that the more explanations and information the local government provides in the course of processing of the plan, the less arguments and criticism against the plan by the persons concerned and the general public there will be later.

The following analysis focuses on the issue whether the current regulation of the Planning Act guarantees sufficient consideration of different interests in the planning procedure, or whether the duties of local governments in respect to the provision of information about the plan should be specified or supplemented by the law. The analysis concerns mainly the procedure of detailed planning.

As a tool for the involvement of the public in the planning procedure, the Planning Act provides for the requirement of informing the public about the initiation of the plan, the public display of the plan and informing about the place of the public hearing in a regularly published local or county newspaper or a national daily newspaper. As concerns the public display and place of a public hearing, the local government is also obliged to post a notice in a publicly used building or place

in a village or settlement in addition to publication of information about the public display and place of the public hearing.[92] The Administrative Procedure Act distinguishes the involvement of the public (interested persons) and of third parties (whose interests are also legally protected, i.e. whose interests the plan could concern). The Planning Act, which regulates a special type of administrative procedure, however, in general does not distinguish between the involvement of the public and third parties, i.e. it does not provide better protection to third parties, with whose rights the plan can interfere, than it provides to the general public. For example, the Planning Act does not provide for the involvement of the neighbours of the planned plot of land as third parties, except in the case of processing of an open detailed plan by simplified procedure, when the local government can replace the requirement of publication of the plan with a consultation with neighbours. Such a situation is different from the regulations applicable in many other Nordic and European countries where it is considered self-evident that information about the content of the plan, the place of its public display and public hearing is sent by post to neighbours of the plots that are subject to the detailed plan, because the future planning could directly affect their way of life, legal obligations, health or value of the real estate. Only sufficient informing of the people whose rights the detailed plan directly affects will guarantee them the right to be heard.

Section 40 of the Administrative Procedure Act provides for the right to be heard. According to this, before issuing an administrative act, an administrative authority shall grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form. According to the Act, besides the persons to whom the administrative act is addressed, the right to be heard also extends to persons whose rights or duties the act or measure may concern. Extension of the right to be heard to third parties would constitute an important element in the adoption of a European tradition of good governance. A special case of the right to be heard is the legal institution of open proceedings, which is regulated in the Administrative Procedure Act. The aim of open proceedings is to extend the right to be heard to an unlimited number of persons in justified cases.[93] Planning procedure is a special type of open proceedings.

The provisions on open proceedings in § 47(2) clause 2 of the Administrative Procedure Act also provide for the separate involvement of third parties in addition to the public, stating that an administrative authority shall notify by post of the commencement of open proceedings the persons whose rights the administrative act may restrict. Thus, an indispensable component in guaranteeing the right to be heard is the provision of necessary information to parties to the proceedings, so that they could submit their opinions and objections.

Involvement of the public in the planning procedure is regulated on the level of the Planning Act. It guarantees informing of the public through media channels and display of the notice in a publicly used place in a village or settlement, display of the plan and a public hearing, the right of persons to submit proposals and objections, as well as the duty of the organiser of the planning procedure to reply to the objections. The situation is, however, different in respect to persons whose rights can be directly affected by the plan, first of all neighbours whose plots are bordering on the land subject to planning.[94] Informing of third parties in the planning procedure is not only a means for guaranteeing

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92 In practice, the duty of display of the planning notice is often not complied with and local governments consider the duty to have been complied with if the planning notice was displayed in the rural municipality or city government building.

93 K. Merusk. Menetlusosaliste õigused haldusmenetluse seaduses. [Rights of participants to the proceedings in the Administrative Procedure Act.] – Juridica 2001, pp. 519-528.

94 It can be debated whether the general rules on open proceedings in the Administrative Procedure Act, which provide for informing third parties by post, are also applicable to the planning procedure. Nevertheless, § 46(1) of the Planning Act stipulates that open proceedings are organised in the cases provided for by law. Logically, this presumes a reference in the special law to the provisions of open proceedings in the Administrative Procedure Act. The Planning Act does not refer to the Administrative Procedure Act (except as concerns administrative measures for the implementation of the plan that has been already adopted). The planning procedure is also a sufficiently specific type of open proceedings to assume that all the mandatory stages for the organisation of the planning procedure are provided for in the special law that regulates it. Thus, considering the *lex specialis* relationship of the laws and the relatively detailed nature of the Planning Act, preference should be given to interpretation that the current planning regulation in Estonia does not impose on local governments the duty to provide to third parties in the planning procedure more effective guarantees for being heard than to the public by their direct notification.

the right to be heard but also an indispensable measure in the achievement of the aim of the Planning Act. One of the aims of the planning procedure is to solve differences of opinion in connection with the plan, and to achieve a balanced solution that takes into consideration interests of different people and of the public. The local government exercises discretion in deciding the adoption of the plan. According to § 4(2) of the Administrative Procedure Act, the right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion and the general principles of law, taking into account relevant facts and considering legitimate interests. For the ascertainment of essential facts, however, persons concerned should be involved in a way that is most likely to guarantee their notification of the intended planning. Direct notification of the persons concerned is therefore necessary for drawing up a legitimate planning solution. Only this way the local government can ensure sufficient information for making the best possible decision. According to the current Planning Act, local governments are not required to send information about the commencement of the planning, its substance, public display and the public hearing to concerned persons by post. Therefore, it can be claimed that in respect to planning as a special type of open proceedings the legislator provides for regulation which, in comparison with the general rules of the Administrative Procedure Act, protects the rights of third parties to a smaller extent.

Section 16 of the Planning Act regulates cooperation in the preparation of plans. According to subsection 1, owners of immovables located in and residents of the planning area and other interested persons shall be involved in the preparation of comprehensive and detailed plans. This provision allows an interpretation, according to which already in the stage of preparation of a plan it is necessary to ask the opinion of persons whose rights the plan could concern. At the same time, no binding procedural steps for local governments are stipulated. Considering the general wording of the norm and the fact that usually plans are not drawn up by the local government itself but by a person who is interested in the establishment of the planning, it is easy to believe that § 16(1) of the Planning Act in its present form is purely declarative.

If the opinion is that the duty of informing third parties about the planning procedure by post arises from the general provisions on open proceedings in the Administrative Procedure Act, such a duty should be explicitly expressed in the Planning Act. Already at the time of commencement of the planning, the local government has to define the range of persons whom the planning might concern. A counterargument could definitely be the increased workload of the body conducting the proceedings of the planning due to the need to identify the persons concerned and to send them information. However, it would be feasible to involve already in the initial phase of the planning persons who probably have the strongest interest and objections to the plan, in order to avoid doing unnecessary work and disputes in the course of public display, during public hearings or, in the worst case, after the plan was adopted. Moreover, in the case of the majority of detailed plans the range of persons concerned is easily identifiable, as they are mostly the owners and inhabitants of plots bordering the land subject to planning. The potential effect of the planning on adjacent plots should in any case be considered important, not marginal. Definitely, the Planning Act should provide for the notification of third parties by post about the commencement of the planning, public display and public hearing, as well as the establishment of the plan. The notice should also explain the general content of the planning intent and of the ongoing planning procedure and the established plan.

3.3.2 Imposing of building restrictions with regard to built-up areas of environmental and cultural value as an object of regulation of the plan

The idea of one of the keywords of the planning process that was already mentioned above, i.e. balancing, extends not only to balancing the interests of various persons and groups. Through planning, the right balance between the needs of development and preservation also has to be found. For the preservation of the historically developed living environment it is necessary to establish the conditions and procedures in city planning and building that guarantee an effective protection and have a sufficiently legitimate degree.

The protection of built-up areas of environmental and cultural value is mainly regulated by the Planning Act, but also by the Building Act. The relevant provisions are laconic and give priority to the planning autonomy of local governments. The law proceeds from the premise that local governments are competent to decide what, where and how should be planned based on local building traditions, environment and public interest. According to § 8(3) clause 6 and § 9(2) clause 11 of the Planning Act, provisions for the protection and use of built-up areas of cultural and environmental value are established by a comprehensive plan and, if necessary, by a detailed plan. According to § 19(4) clause 4 of the Building Act, a local government shall determine in the building regulation for the city or rural municipality the principles and requirements of the planning and building in parts of a city or rural municipality, including built-up areas of environmental and cultural value occupied by construction works. According to § 5 of the Planning Act, the relevant local government shall establish the building regulation for a rural municipality or city in order to establish the general principles and rules for planning and building in the rural municipality or city or in its parts.

In view of the above provisions, it could be noted that legal regulation concerning built-up areas of environmental and cultural value allows different interpretations. First, the Planning Act provides that the establishment of the conditions of protection and use of built-up areas of environmental and cultural value is an object of regulation of a comprehensive plan or a detailed plan; secondly, however, pursuant to the Building Act, the principles and requirements of the planning and building in built-up areas of environmental and cultural value can be established; and thirdly, the Planning Act allows to establish the general principles and rules for planning and building in the rural municipality or city or in its parts. As the laws use undefined legal concepts, such as "principles and requirements of planning and building" and "general principles and rules of planning and building", which are not fully compatible with each other, such regulation can lead to considerably different interpretations as to where and to what extent conditions of protection, requirements, principles and rules in respect to built-up areas of environmental and cultural value can be established. In imposing restrictions on planning, however, the framework provided for by the spirit and purpose of the Planning Act should be respected.

The Chancellor of Justice considered it necessary to intervene in the predominant practice in Tallinn to establish the land use related building requirements in respect to areas of environmental and cultural value with building regulations. In building regulations for Nõmme and Pelgulinna districts the Tallinn City Council provided for detailed rules in respect to land use, protection and building conditions in areas of environmental and cultural value, including details such as the built-up percentage of a plot, percentage of green area on the plot, number of storeys in buildings on the plot, maximum heights and other criteria. The Tallinn City Planning Department was also preparing a similar building regulation for Kassisaba district. The Chancellor of Justice in his opinion proceeded from the premise that specific land use and building restrictions on registered real estate can only be imposed as a result of organising a planning procedure.

The Planning Act is based on a general principle expressed in § 3(3) which states that binding land use conditions in respect to a specific immovable property can only be imposed by a plan – on the basis of an adopted detailed plan where preparation of a detailed plan is mandatory, and on the basis of an adopted comprehensive plan in all other cases. Restrictions established by a comprehensive plan serve as a basis for the preparation of a detailed plan. A measure that legitimises planning related land use and building restrictions is the planning procedure as established by law. Provisions of a building regulation and the procedure of its adoption, however, do not guarantee comparable protection of the rights of persons and consideration of their interests. It should be pointed out that in the adoption of a building regulation the local government does not have to organise planning proceedings which are required for the establishment of a detailed plan; first and foremost this concerns the procedures for the involvement of the public. In processing the plan, the local government undertakes to consider the necessity of reviewing or amending the plan based on the opinions presented during the public display and public hearing, as well as ask the approval of the plan by relevant administrative bodies. Unlike a plan, a building regulation cannot be contested in the administrative court (§ 26 of the

Planning Act). A building regulation is also not subject to supervision by a county governor (§ 23(1) clause 2 of the Planning Act), individuals or groups of persons have no subjective right to make a proposal for the initiation or amendment of the regulation (§ 10(1) of the Planning Act). Thus, it is important to distinguish between the purpose and legal character of a planning regulation and a plan.

"General principles and rules of planning and building" and "principles and requirements of planning and building" as provided for in the Planning Act and the Building Act, that deal with the building regulation, should be seen as concepts that allow to regulate the general foundations of the protection of built-up areas of environmental and cultural value, to define the concepts of the relevant areas and the priorities of their protection. Specific restrictions, such as the number of storeys, percentage of building up the area, materials to be used, etc. have to be established by a comprehensive plan in accordance with § 8(3) clause 6, and if necessary by a detailed plan in accordance with § 9(2) clause 11 of the Planning Act.

It should also be noted that the concept of building regulation is currently regulated in parallel by two Acts, which is probably due to the splitting of the Planning and Building Act in 2003. Laconic provisions of the Building Act and the Planning Act are partly overlapping and, on the other hand, allow partly different and conflicting interpretations. Nevertheless, regardless of whether the delegating norm that determines the object of regulation of a building regulation is contained in the Building Act or the Planning Act, or in both, it must be clear to the local government what, for what purpose and to what extent can be regulated in a building regulation. The current provisions, however, unfortunately do not provide such clarity.[95]

3.3.3 Restrictions in building law. The conditions of granting a building permit. Effectiveness of enforcement measures in construction supervision.

The Chancellor of Justice in his proceedings has noticed that local governments impose conditions that are not based on law in granting building permits. For example, as a precondition for the issuing of a building permit, applicants have been asked to conclude a contract with a water company for connection to the water system, or complete the facilities outside the borders of the plot which are required by the detailed plan. In imposing building law related restrictions as a precondition for issuing a building permit, the provisions and meaning of the Building Act and the purpose of the building permit have to be taken into account. Definitely, a precondition for issuing a building permit cannot be the requirement to implement solutions which, in essence, are actually part of the building project.

Building law related restrictions constitute an interference with the right of ownership of persons – a person cannot freely use the thing owned by him or her. The main tool for establishing building restrictions is a building permit – an administrative act which is aimed at verifying the conformity of the designed building and planned construction works with building norms, plans, health protection, fire safety, environmental and other requirements already before the start of the construction work.[96] A building permit is issued to the person by local government on the basis of an application and building project. The building project has three aims – on the basis of it, the local government assesses the safety of the potential building, it is a basis for actual construction, and on the basis

[95] This conclusion can be reached not only by reading the provisions of the Planning Act and the Building Act, but also the building regulations adopted by local governments, which do not generally distinguish between architectural and construction related additional conditions in respect to buildings, or principles and requirements of planning and building, and impose specific restrictions on real estate under architectural and construction related additional conditions, disregarding the fact that construction related and architectural additional conditions are meant to specify the detailed plan if necessary, and not to serve as its basis. The majority of the provisions in building regulations are also a mere repetition of the provisions of laws.

[96] Supreme Court Administrative Law Chamber judgement of 14 May 2002, No. 3-3-1-25-02, p. 12.

of it supervision over the compatibility of the building in the construction process and after its completion is assessed. A local government is also required to take into consideration the rights of third parties, such as neighbours or owners of communication projects, in the process of issuing a building permit. The local government should exclude disproportionate interference with the rights of neighbours and ensure the consent of the owners of the utilities, so that the future building is connected to the existing utilities. Thus, if the applicant for a building permit submits a relevant request, a building project which corresponds to the detailed plan or the conditions of design, if the project does not violate the rights of third persons, and guarantees a proper completion of the building, and the applicant pays the state fee, the local government has no basis to refuse from issuing a building permit.

Yet the Chancellor of Justice has had to investigate a case where a local government demanded that, as a precondition for receiving a building permit, applicants should conclude a contract with a monopolistic water company under the terms dictated by it, which also included the payment of fee for connection to the water line and ruled out the possibility to negotiate the terms, thus restricting the freedom of contract of the applicants. It also deserves to mention, as an example, a case where a local government building regulation provided for a requirement, according to which a building permit would not be issued before the applicant built the roads that were required by the detailed plan but which were outside the borders of the particular plot. The Building Act provides for a possibility that, upon agreement of the parties, the obligation of building the facilities required by the detailed plan can be imposed on the applicant of the building permit, but such an obligation can only be based on an agreement between the applicant of the permit and the local government, and definitely the advance performance of the obligation cannot be the precondition of the issue of the building permit. Local governments have justified the imposition of the above mentioned requirements with the need to ensure the performance of the obligations set out in the building permit or with a risk that once the permit has been issued the person might not perform the obligations that he has assumed. Guaranteeing of the construction that complies with the building project, however, is the primary aim and function of construction supervision by local governments. Once an agreement for the building of a facility required by the detailed plan has been concluded between the local government and the applicant of the building permit, there are legal remedies under contract law to ensure the performance of obligations. This leads to a justified question whether local governments actually use the above method to limit their efforts in carrying out construction supervision after the issuing of the permit or whether the enforcement measures in the Building Act are not sufficient to ensure compliance with building requirements. In the following part, the factual and legal functioning of enforcement measures in the Building Act is analysed based on the applications that the Chancellor of Justice has dealt with.

The Chancellor of Justice received a complaint from an applicant who complained that, contrary to what was allowed in the detailed plan, a block of flats was being built on the neighbouring plot instead of a small house. In its reply to the Chancellor of Justice, the Tallinn City Government noted that a precept had been issued to the developer to bring the building into compliance with the building project and the detailed plan, the developer had been punished with a fine, and a penalty payment had also been imposed on five occasions.

Based on the current legal regulation and predominant practice, it can be claimed that demolition of a building or part of it, instead of substitutive enforcement, is an exception, rather than a rule. Therefore there has emerged a trend that a building permit is retroactively granted to illegal buildings that have been constructed without a permit or in violation of the permit (i.e. they are legalised retroactively). The Building Act provides for the demolition (liquidation) of a building only in the case of buildings that were erected without a building permit and pose a danger to the life and health of people. The Building Act does not directly provide for partial demolition of a building if the building permit exists and the building is not dangerous to the life and health of people, even though the scope of building allowed by the permit was considerably exceeded. The provisions of the Building Act are also not sufficient for the demolition of a building that was erected without a permit and

that is dangerous to people, or at least such provisions are not sufficiently carefully phrased. Section 40(2) of the Building Act provides that the owner of a building constructed without a legal basis shall demolish the building by the date, in the manner and under the conditions prescribed by the corresponding precept. At the same time, the provisions regulating precepts issued by construction supervision officials do not include a precept for the demolition of a building that was constructed without a permit.[97] Thus, the Building Act establishes a peculiar legal construction, where a person is obliged to demolish a building erected without a building permit if such a precept is made, but the law does not provide for the possibility to issue such a precept. Demolition of an unlawful building is also not supported by the case law of the Supreme Court, according to which the demolition of an unlawfully constructed building is not reasonable and would constitute a too extensive interference with the fundamental right.[98]

The existing legislative gap can be overcome through interpretation when applying, in conjunction, § 61(4) clause 3 of the Building Act, which allows an official exercising construction supervision to oblige a person to perform acts necessary for the continuation of building, and § 2(6) clause 5, according to which demolition works also constitute building. Construction supervisory officials can also make a precept to bring a building into conformity with the project, which, in the case of a building that exceeds the allowed scope, would mean its partial demolition. Based on the principle of legal basis stipulated in Art 3 of the Constitution, restrictions of fundamental rights must have a clear mandate by law. Moreover, such an intensive interference as demolition of a building has to be explicitly provided for and it must have an unambiguous legal basis.

The Building Act provides for the possibility of the use of substitutive enforcement if the person fails to demolish the building by the prescribed deadline. In practice, however, the organisation of substitutive enforcement is an extremely resource-demanding measure for the local government; for example, bringing a building in which the number of permitted storeys has been exceeded into compliance with the requirements would require the demolition of the upper floor(s) and installation of a new roof, which means extensive financial expenditure, staff and time required for drawing up a new design and implementation and organising a public procurement procedure.[99] Complete demolition of a building would require drawing up of a demolition project. Therefore, in practice local governments only use penalty payments in these situations.

Based on the above example, it can be concluded that even repeated imposition of penalty payments does not necessarily provide a result. The Building Act provides for the maximum amount of 10 000 kroons for a penalty payment. Considering the actual cost of buildings and the high real estate prices, the effectiveness of such a penalty is doubtful. It should also be taken into account that 10 000 kroons is the maximum penalty payment. In applying the penalty measure, however, the principle of proportionality has to be observed, and thus at least initially it is not justified to impose the maximum penalty. The maximum fine that can be imposed for a failure to comply with a precept is 18 000 for natural persons[100] and 500 000 kroons for legal persons. Construction is a sensitive industry, and degrees of punishment and enforcement measures should therefore follow the actual developments on the market, in the present case the exponentially increasing real estate prices, in order to remain serious and effective.

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97 § 61(4) of the Building Act stipulates, *numerus clausus*, a list of requirements the performance of which an official exercising construction supervision can demand in a precept.

98 Supreme Court Administrative Law Chamber judgements of 26 Nov 2002, No. 3-3-1-64-02 and 14 May 2002, No. 3-3-1-25-02, p. 25; and ruling of 8 Apr 2004, No. 3-3-1-13-04.

99 Pursuant to § 2(7) clause 2 of the Public Procurement Act, public procurement shall be organised in accordance with the procedure provided for in the Act, if the expected cost of the procurement contract for construction works exceeds two million kroons.

100 According to the Building Act, the failure by a natural person to perform the duties of the owner of a building and the unauthorised construction of a building is punishable by a fine of up to 300 units.

3.3.4 Conclusion

Problems related to planning and building can be divided in two: (a) Limited administrative capacity of local governments and the scarcity of resources to perform extensive, urgent and complicated tasks required by the planning and building activity. The need for increasing the competence should also be emphasised; (b) To understand several negative tendencies, reasons should be sought in legal regulation. It has to be noted that the main legislative acts in this field (the Administrative Procedure Act, the Planning Act and the Building Act) do not function as a harmonised system and allow conflicting interpretations. The legislator should pay particular attention to the relationship between the Planning Act and the Administrative Procedure Act in respect to provisions regulating open proceedings and the involvement of third parties. It is also important to eliminate discrepancies and conflicts between the Building Act and the Planning Act, which have remained there after the splitting of the previously common Act to regulate this field. In terms of the functioning of the law, the Building Act needs to be reviewed, in particular as concerns the application of enforcement measures; the amount of the penalty payment and levels of punishments need to be revised to correspond to the current economic situation.

PART 2.

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

I INTRODUCTION

The second part of the report of the Chancellor of Justice will provide a summary of the activities of the Chancellor in the protection of fundamental rights and freedoms in the past year.

For the first time, the overview is structured according to areas of government. The following chapter deals with the main developments within the areas of government of all the ministries and the State Chancellery, and the proceedings that the Chancellor of Justice has conducted regarding those areas. The main shortcomings that were detected and proposals made by the Chancellor of Justice shall be presented in a summarised form.

The Chancellor of Justice conducts proceedings on the basis of applications or on his own initiative. The Chancellor's approach is problem-centred and tries to avoid excessive formalities. If the Chancellor finds that an activity of a state or local government body or official has violated a person's rights or if the adopted legislation is incompatible with the Constitution, he will have to react within his competence. In addition to solving the particular problem, it is also important to ascertain the roots of the problem and reactions to it. The aim of the present overview is to inform the executive agencies, the parliament and the public about the problems that have been found in the area of government of different ministries. Ministers are those who bear the political responsibility and hold the main levers to solve the problems. The pubic must know what the problem areas are and who are those responsible in the government.

The analysis of the areas of government contains a brief description of the particular area and a summary of the main proceedings that were conducted either on the basis of applications or on the Chancellor's own initiative. Shortcomings in the activities of public authorities are highlighted and proposals are made for avoiding the mistakes. With the summary of the proceedings, the Chancellor of Justice suggests specific solutions to problems or possibilities how to find the solutions. It will also be mentioned how the supervised agency, person or body has complied with the proposals and recommendations of the Chancellor of Justice that were presented in the previous report.

The present section deals with the issues that have risen in the process of supervision proceedings carried out by the Chancellor of Justice and that concern the conformity of legislation with the Constitution and the laws, as well as ensuring of constitutional rights and freedoms. Thus, the overview is a synthesis of the Chancellor's function of constitutional review and the ombudsman's activities. Such a combined approach is justified, because the overall objective of both forms of supervision is to ensure the protection of fundamental rights and freedoms of individuals. There are frequently cases where it is found during the proceedings that the infringement of a fundamental right was not due to the incorrect application of the law but due to the incompliance of the underlying norm with the Constitution. The process of verification of the activities of supervised bodies may reveal gaps in legislation or provisions that are hardly implementable in real life, which is something that might not be identified in the course of a purely formal constitutional review.

In 2005, the Chancellor of Justice received 2043 applications, and 751 persons came to the reception of the Chancellor or his advisers. Based on the problems identified on the basis of applications and receptions, the Chancellor initiated 1666 proceedings of cases. Proceedings of a case involve measures and the creation of documents for resolving the problems related to the case. Applications of persons concerning one and the same issue are joined into one proceeding. The Chancellor of Justice initiates proceedings either on the basis of applications or on his own initiative. During the reporting period, there were 57 own-initiative proceedings, i.e. 3.4% of the total number of proceedings.

247 proceedings, or 14.8%, dealt with the verification of the conformity of legislation with the Constitution and laws. In most cases, the constitutionality of laws was verified. In the course of preliminary review, the Chancellor of Justice examined 122 items on the agenda of the Government of the Republic, and made remarks about the items on 61 occasions.

There were 372 ombudsman proceedings, making up 22.3% of the cases, aimed at the verification of the legality of activities of the state, local government, other legal persons in public law, or private persons, bodies or agencies performing public functions. In 88 instances, the Chancellor of Justice expressed criticism and made recommendations with the aim to eliminate violations or improve administrative practice.

In 941 instances, or 58% of the cases, the Chancellor of Justice did not initiate substantial proceedings for various reasons, and provided an explanation to the applicant. The main reasons for rejecting an application were the lack of competence of the Chancellor or the failure of the applicant to use other effective legal remedies. In his proceedings the Chancellor observes the principles of non-duplication of competencies and effectiveness. As a rule, the Chancellor does not initiate proceedings if the applicant can use other remedies to achieve a more effective result.

The remaining proceedings were concerned with the submission of opinion to the Supreme Court in constitutional review cases, disciplinary supervision of judges, conciliation proceedings, proceedings for the deprivation of the immunity of members of the Riigikogu, and other activities arising from laws.

By areas of governments of different ministries, the majority of applications were concerned with the Ministry of Justice (397 proceedings, 305 of them regarding prisons), the Ministry of Social Affairs (132 applications) and the Ministry of Internal Affairs (131 applications, 61 of them regarding police authorities). By areas of law, most proceedings were initiated in connection with criminal enforcement proceedings and imprisonment law. Another important area included issues of social welfare and social insurance law, and ownership reform. These areas have been traditionally the most frequent in the proceedings of the Chancellor of Justice over the years.

It should be emphasised that the applications received by the Chancellor of Justice are dealt with on the basis of the principles of the freedom of choice of the form and feasibility. The Chancellor of Justice himself chooses these procedural means which are necessary to ensure an effective and impartial investigation. As a result of supervision, proposals for bringing the legislative act into conformity with the Constitution and the laws were made in eight instances, a report to the Riigikogu was submitted in four instances, a request to the Supreme Court for declaring a legislative act invalid was submitted in one case. In 24 instances, a proposal was made to an agency to eliminate a violation, in 59 cases an agency under supervision was issued a recommendation for guaranteeing fundamental rights, and in five cases the Chancellor of Justice made a proposal for compliance with the principles of lawfulness and good governance. The addressees complied with almost all the recommendations and proposals of the Chancellor of Justice.

In addition to the analysis of the areas of government of various ministries and the State Chancellery, the following overview also contains separate chapters on the initiation of disciplinary proceedings against judges, a proposal to bring criminal charges (impeachment proceedings) and compliance with the principles of equality and equal treatment. These are the main supplementary competencies of the Chancellor of Justice in addition to his two main functions of constitutional review and the ombudsman's proceedings.

In the following section, all the above-mentioned areas of government will be analysed in more detail on the basis of general explanations and case studies. General descriptions of the areas of government are followed by summaries of cases (proceedings) and verification visits. A selection of cases has been made, highlighting cases in which the Chancellor of Justice found serious infringements in the course of supervision proceedings. The cases are presented according to a similar structure, in order to make following the text easier for the readers. The main structure of the text consists of the following parts: (1) introductory sentence; (2) facts; (3) main legal issue; (4) legal justification, and (5) the result. The description of the verification visits is somewhat different from the above structure and is presented as follows: (1) brief description of the facts; (2) suspicion of a violation; (3) brief description of the violation found, and legal assessment; (4) the result.

II AREA OF GOVERNMENT OF THE MINISTRY OF EDUCATION AND RESEARCH

1. General outline

The area of government of the Ministry of Education and Research includes the planning of the state's education, research, youth and language policy and, in connection with this, the organisation of pre-school, basic, general secondary, vocational secondary, and higher education, as well as hobby education and adult education, research and development activities, youth work and special youth work, and preparation of bills in the relevant areas.

Most of the applications received by the Chancellor of Justice regarding the area of government of the Ministry of Education and Research in 2005 were concerned with the duty of the state and local governments to make education accessible to all persons.

The right to education is stipulated as a fundamental right in the 1st sentence of Art 37 para 1 of the Constitution. According to the 2nd sentence of Art 37 para 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. Art 37 para 2 stipulates the duty of the state and local governments to maintain the requisite number of educational institutions in order to make education accessible to everyone. It can be concluded from this provision that the right to education is a subjective right of all persons, which is accompanied by the duty of the state and local governments to ensure that the right to education can be exercised both in legal terms and in reality. Based on Art 37 para 5 of the Constitution, the state has a duty to exercise supervision over the provision of education.

In many cases, violation of the fundamental right to education is due to ambiguity or lack of legal regulation.

The Chancellor of Justice drew the attention of the Minister of Education and Research to insufficiencies in the Basic and Upper Secondary Schools Act to the extent that concerns the duty of local governments to ensure necessary conditions for acquiring basic education for children with special needs. The Minister promised to eliminate the insufficiencies pointed out by the Chancellor of Justice in 2006.

The Chancellor of Justice also carried out supervision over the compliance of the legislation of local governments with the Constitution and the laws. The Chancellor of Justice addressed the Kasepää rural municipality council with a proposal to bring into conformity with the law the local council regulation that obliged parents who are permanently residing in the municipality's territory and whose children were attending children's institutions in another municipality to pay a 400-kroon participation fee to the bank account of the Kasepää Rural Municipality Government. On the basis of the proposal of the Chancellor of Justice, the Kasepää municipality council annulled retroactively the obligation that had been imposed on parents.

On his own initiative, the Chancellor of Justice focused on the issues of persons with special needs to acquire education. During the reporting period, the Chancellor of Justice visited the Paide Vocational School, Vana-Vigala Technical and Service School, Orissaare Boarding School and Haapsalu Sanatorium Boarding School.

In 2004, the Chancellor of Justice made a verification visit on his own initiative to the Türi Coping School. As the deadline given for the elimination of problems that were found fell under the present reporting period, the results of the follow-up procedures of that verification visit are analysed.

2. Access to basic education for children with disabilities

Case No. 7-1/051145

(1) The applicant raised an issue whether laws guarantee access to education for children with disabilities.

(2) The applicant asked the Chancellor of Justice to assess whether the applicant's 11-year old child, who was in need of 24-hour care, was guaranteed the possibility of exercising the right to education and the protection of health in Tallinn. Who would have to pay the child's tuition fee in a private school, in the case of non-existence of a public school meeting the child's needs, was also being asked.

(3) The main issue is whether laws guarantee sufficient access to basic education for children with disabilities.

(4) According to the 1st sentence of Art 37 para 1 of the Constitution, everyone has the right to education. This constitutional provision also gives rise to the principle that it should be possible to acquire education within reasonable distance from home or via modern technological means. In order to make it possible in reality for everyone to exercise their right to education at a school within reasonable distance or via modern technological means, the legislator is also bound by the 1st sentence of Art 12 para 1 of the Constitution which provides for the general fundamental right to equality. In accordance with the Supreme Court judgement of 3 April 2002, both the legislator and the implementer of the law must take it into consideration.[101]

According to § 19(1) of the Basic and Upper Secondary Schools Act, a school is required to ensure study opportunity for each child subject to the obligation to attend school who resides in the service area of the school. Not all schools are able to guarantee education to all children in their service area in accordance with the child's special needs, because the school might lack the necessary physical environment, appropriately qualified teachers, teaching aids, etc. In view of these actual needs, the legislator has provided in § 21(1) of the Basic and Upper Secondary Schools Act, that rural municipality and city governments shall allow children with special needs to attend the school of their residence under the conditions established by the Minister of Education and Research. If suitable conditions are not found, disabled children and children, who need special support, have the right to attend the nearest school, which meets the requirements. Thus, the legislator has proceeded from the 1st sentence of Art 12 para 1 of the Constitution: children with special needs also have the right to receive education that meets their capabilities and in the conditions that are suitable to them.

The Minister of Education and Research, however, has never laid down such conditions. Therefore, in the opinion of the Chancellor of Justice, by taking into account the needs of the child, it has to be decided separately in each case whether the school of the child's residence has the conditions that meet the child's special needs. This means that "the existence of appropriate conditions" has to be assessed on the basis of whether the child is able to acquire education in the particular school. For example, in the case of a child with a physical movement disability and a slight mental disability, this usually means, that the learning environment should be adapted to the child's movement needs and the teaching should be based on a simplified national basic school curriculum.

Local governments should find alternative opportunities for the provision of education to the child only when the school of the child's residence lacks the necessary conditions. The alternative opportunities should also take into account the interests of the child: the school should not be

[101] Supreme Court Constitutional Review Chamber judgement of 3 Apr 2002, No. 3-4-1-2-02, p. 17.

located at unreasonable distance from the child's residence, the child cannot be forced to study at home only for the reason that the physical environment at the school close to the child's residence does not meet the special needs or the school is a private school and the local government would have to pay tuition fee to the school.

At the same time, it should be admitted that it is not possible to find an explicit duty of the local government to pay a tuition fee for the teaching of a person with special needs in a private school in the current legislation. This duty can be derived from the 2nd sentence of § 17(5) of the Basic and Upper Secondary Schools Act, according to which local governments together with schools shall monitor the performance of the obligation to attend school and create conditions for the compliance therewith. If no appropriate conditions have been created, the person should be given an opportunity to study elsewhere free of charge at the expense of the local government.

(5) The Chancellor of Justice addressed the Minister of Education and Research to draw the attention to the insufficiencies in the Basic and Upper Secondary Schools Act with regard to the following issues:

1) whether and under what conditions a private school can be understood to be the school that meets the necessary conditions and is closest to the person's residence;
2) whether a counselling committee has the right to advise a private school, incl. a particular private school, to a parent;
3) if a pupil is able to study at school with other pupils, but in the local government of his or her residence no appropriate school is found that meets the pupil's needs, can the local government refuse to pay the tuition fee of a private school that is located on the territory of another local government, if the pupil can be taught by way of home schooling;
4) if a pupil is able to study at school with other pupils, but the school that meets his or her special needs and is closest to his or her residence is a private school, can the local government refuse to pay the tuition fee of the private school, if there is a municipal school on the territory of the same local government where the pupil could study according to his or her special needs;
5) if a pupil is able to study at school with other pupils, but the closest municipal or state school that meets the pupil's special needs is actually far away from the local government of the pupil's residence (e.g. a pupil living in Tartu should go to school in Saaremaa), can the local government refuse to pay the tuition fee of a private school for the reason that there exists a municipal or state school where the pupil could study in accordance with his or her special needs;
6) if the local government is obliged to pay the tuition fee in the cases mentioned in points 3, 4 and 5, to what extent and under what conditions is it required to do so (should the local government provide for the conditions and procedure for the payment of the tuition fee, so that deciding the payment of the fee would be on a uniform basis and the local government could not arbitrarily favour a private school of its preference);
7) if in the case of studying in a state school mentioned in point 3, or in the case of larger local governments also point 4 or 5, the pupil also has to use the boarding facilities of the school, because the school is located far from the pupil's residence or the pupil's daily transport is not possible due to his or her special needs, does the parent have the right to demand compensation of the cost of boarding facilities from the local government;
8) if in the municipal school of the pupil's residence it is possible to provide education that corresponds to the pupil's special needs, but there are no appropriate conditions suitable for the pupil's needs in the boarding facilities of the school, does the parent have the right to demand the payment of the tuition fee of a private school which also has boarding facilities suitable to the pupil's needs (and if yes, to what extent would it be paid);
9) if a particularly gifted pupil is also considered to be a pupil with special needs, could the local government be required to pay the tuition fee of a private school, if the closest school that meets the pupil's special needs is a private school;
10) should a relevant amendment act of the Basic and Upper Secondary Schools Act be drafted to resolve the issues mentioned above?

The Minister in her reply explained that she had preliminary plans to prepare an amendment act of the Basic and Upper Secondary Schools Act in 2006 to solve the problems raised by the Chancellor of Justice.

3. Verification visit to the Orissaare Boarding School

Case No. 7-2/051612

(1) In 2004, the Chancellor of Justice received an application from the Estonian Union for Child Welfare, dealing with the violation of the rights of children in the Orissaare Boarding School. The Union for Child Welfare pointed out the fact that there were problems with accessibility of psychiatric assistance in the school. The Chancellor of Justice verified the situation in written proceedings and found that psychiatric assistance to children was not guaranteed.

On 19 January 2005, the Chancellor of Justice sent a memorandum to the Health care Board, the Minister of Education and Research and the Minister of Social Affairs and drew their attention to the following problems: it is necessary to specify the school's role in the organisation of psychiatric assistance; there is no qualified staff in the school, supervision over the quality of psychiatric treatment provided to children with mental disorders has been insufficient; there is no common understanding of who should cover the costs of medicines, therapies and visit fees for children with special needs who attend the school.

According to the information available to the Chancellor of Justice, the situation had not changed by October 2005. Thus, the Chancellor organised a verification visit to the school on 4 October 2005.

The Orissaare Boarding School is a state basic school within the area of government of the Ministry of Education and Research for pupils with mental disorders who are subject to obligation to attend school. According to the school's statutes, the aim of the school is to create the conditions and opportunities for pupils so that they can study and develop in accordance with their needs, can acquire basic education and comply with the obligation to attend school, and to support the development of the personality of pupils and create preconditions for raising the social competence of pupils through a support network suitable for pupils.

(2) The Chancellor of Justice verified whether the Orissaare Boarding School had guaranteed the right of children with special needs to receive education in accordance with their needs and whether psychiatric assistance was accessible to children with mental disorders.

(3.1) Problems with the competence of teachers

Pupils with special needs require a different approach in comparison with ordinary pupils, and therefore only properly trained specialists are competent to provide education to such pupils.

In § 23 of the Minister of Education and Research Regulation No. 65 of 26 August 2002 on the "Qualification requirements for teachers" it is provided that teachers at schools or classes of pupils with physical, speech, sensory or mental disabilities or disorders should have higher or vocational education as special education teachers and should have completed a special education course of at least 320 hours.

During the verification visit it was found that not a single teacher in the Orissaare Boarding School complied with the requirements of the above Regulation. There was a lack of specially trained and qualified teachers and specialists at school. According to the director, there were no teachers with higher education in special education working at the school. It had also been impossible to offer

in-service training of 320 hours in special education to teachers, because no sufficient financial resources had been allocated for this from the state budget.

The situation where the state does not allocate sufficient financial means to a state basic school in order to guarantee compliance with the requirements is unacceptable. As none of the teachers in the Orissaare Boarding School comply with the qualification requirements necessary for work with pupils with special needs, it is doubtful whether the school can implement the aims provided for in its statutes, i.e. to create the conditions and opportunities for pupils so that they can study and develop in accordance with their needs, can acquire basic education and comply with the obligation to attend school, and to support the development of the personality of pupils and create preconditions for raising the social competence of pupils through a suitable support network.

(3.2) Problems with individual curricula

With the Regulation No. 61 of 8 December 2004 the Minister of Education and Research approved the "Procedure of studying pursuant to an individual curriculum". An individual curriculum is a curriculum drawn up for a pupil with special educational needs, which creates preconditions for study and development in accordance with the pupil's abilities. In view of the specific nature of the Orissaare Boarding School, an individual curriculum needs to be drawn up for most pupils.

During the verification it was found that none of the pupils in the Orissaare Boarding School had been prepared an individual curriculum. Individual curricula had not been prepared despite the fact that in the opinion of the director of the school they would be necessary for many pupils. According to the director, the reason why no individual curricula had been prepared was insufficient knowledge of special education issues among teachers. The lack of individual curricula is one of the major substantive problems in the Orissaare Boarding School.

If a pupil is not capable to study in accordance with the national curriculum, but the school does not initiate the preparation of an individual curriculum, there are no conditions created for the pupil to study and develop in accordance with his or her abilities. The failure to prepare an individual curriculum, regardless of the fact that it is necessary for the pupil's development due to his or her special needs, is a restriction of the right to education stipulated in Art 37(1) of the Constitution.

The state is required to guarantee that everyone (including persons with special needs) have an opportunity to acquire education. In this school, the problem is to a large extent due to the lack of qualified staff.

(3.3) Possible problems in connection with the representation of children's interests at the meetings of the teachers' council where expulsion from school is discussed

From the minutes of the meetings of teachers' councils it was found that, at many meetings where the issue of expulsion of a pupil from school was discussed, none of the parents or a representative of the child protection service were participating.

According to § 27 of the Minister of Education and Research Regulation No. 10 of 16 June 1994 on the "Approval of the procedure for the admission of pupils to basic school and upper secondary school, transfer from one school to another, leaving the school and expulsion from school", that was effective at the time of the verification visit, a pupil who was subject to obligation to attend school could be expelled with the decision of the teachers' council if the pupil regularly infringed the internal rules of the school, ignored generally recognised norms of behaviour and morals, or had been imposed a criminal punishment. A parent and a representative of the child protection service had to attend the relevant meetings of the teachers' council. The decision of the teachers' council to expel a pupil who was subject to obligation to attend school entered into effect after its approval by the child protection service and the executive body of the local government on the condition that an

opportunity to continue education until the completion of basic education or until the attainment of 17 years of age had been found for the pupil.

If neither a parent nor a child protection worker participate at the meeting of the teachers' council where the expulsion of the pupil is discussed, the interests of the child might not be sufficiently protected and consequently the right of the child to education could be infringed.

The Minister of Education and Research Regulation No. 52 of 6 December 2005 on the "Procedure for the admission of pupils to basic and upper secondary school, transfer from one school to another, leaving the school and expulsion from school", § 10(5) that entered into effect on 16 December 2005, repealed the Minister of Culture and Education Regulation No. 10 of 1994 on the "Approval of the procedure for the admission of pupils to basic and upper secondary school, transfer from one school to another, leaving the school and expulsion from school".

According to § 52(6) clause 2 of the Minister of Education and Research Regulation No. 52 of 16 December 2005, it is not allowed to expel a pupil who is in the age of compulsory school attendance and is acquiring basic education. Thus, on the basis of the new regulation that entered into effect on 16 December 2005, the right to education for pupils in the age of compulsory school attendance who acquire basic education is better guaranteed than on the basis of the regulation that was still in effect at the time of the verification visit.

(3.4) Problems in connection with the readmission of pupils to their former school

Upon verification it was found that some former schools refused to readmit pupils who were currently studying at the Orissaare Boarding School.

According to § 21(4^1) clause 5 of the Basic and Upper Secondary Schools Act, when it is no longer necessary for a pupil to attend a sanatorium school or a school for pupils with special needs, the pupil has the right to continue his or her studies in his or her former school. Thus, after there is no longer need to study at the Orissaare Boarding School, a pupil has the right to return to his or her former school. Schools have no legal basis to refuse from readmitting the pupils.

Refusal to readmit a pupil is a violation of the pupil's right to education stipulated in Art 37 para 1 of the Constitution.

(3.5) Engagement of children for work prohibited for them

Upon verification it was found that the Orissaare Boarding School did not comply with the health protection requirements established for schools in the Minister of Social Affairs Regulation No. 109 of 29 August 2003. According to § 10(4) of the Regulation, pupils cannot be engaged for work involving the cleaning of toilets and washing of floors, lighting and windows.

Upon verification it was found that pupils were engaged for washing of floors in the boarding facilities. During conversations with representatives of pupils' self-government, it was also found that pupils were also made to wash floors as a punishment.

As § 10(4) of the Minister of Social Affairs Regulation of 29 August 2003 explicitly stipulates that pupils cannot be engaged for washing of floors, the school is required to comply with this norm.

(3.6) Problems with accessibility of psychiatric assistance

As the Orissaare Boarding School is a basic school intended for pupils with mental disorders who have special needs, it is necessary to ensure the accessibility of psychiatric assistance in the school.

Upon verification it was found that there was no doctor or psychiatrist in the school for children with mental and behavioural problems. According to the director, only pupils from Saare County received psychiatric assistance, others needed to go back to their homeplace to receive treatment. The majority of the pupils in the Orissaare Boarding School are not from Saare County.

Accessibility of psychiatric assistance to pupils with special psychiatric needs has to be guaranteed in the Orissaare Boarding School. Otherwise, the fundamental right of pupils to the protection of health is violated.

(3.7) Compliance with the requirements of health protection

It is necessary to guarantee decent living conditions acceptable with regard to human dignity of pupils. During the verification visit to the school, it was found that the living conditions both in the school and in the boarding facilities were very poor. Visits to teaching and living quarters showed that the school was in need of repairs.

During conversations with the representatives of pupils' self-government it was found that in winter it is very cold both in the classrooms and the living rooms. Both the living rooms and teaching rooms were cold during the verification visit (4 October 2005). It appeared that washing opportunities in the boarding facilities were insufficient. There was only one shower for boys and there was enough hot water only for the first ones to take the shower and all the other boys had to wash with cold water. Pupils also claimed that some of them have received an electric shock while taking the shower. Beds where children sleep were hard, 40 years old and had been used in old people's nursing homes before they were brought to the boarding school.

Neither the studying nor living conditions in the Orissaare Boarding School meet the health protection requirements, and studying and living in such conditions poses a risk to the health of pupils.

(4) Upon the verification of the Orissaare Boarding School it was found that many of the above-mentioned problems are specific to the particular school, and the school management in cooperation with the Ministry of Education and Research quickly needs to take steps to solve the problems. But there were also general problems related to the insufficiency or ambiguity of legal regulation.

In order to draw attention to the deficiencies and problems found during the verification visit, the Chancellor of Justice sent a memorandum to the Minister of Education and Research, the Minister of Social Affairs, the Saare County Governor, and the director of the Orissaare Boarding School.

The Chancellor of Justice asked the Minister of Education and Research to carry out state supervision over schooling and educational activities in the Orissaare Boarding School and to take necessary steps for training the staff at school, so that children who need it would have an opportunity to study on the basis of individual curricula.

The Chancellor of Justice advised the Minister of Education and Research and the Minister of Social Affairs to specify the role of schools for children with special needs in the provision of psychiatric assistance. The Chancellor also asked the ministers in cooperation with the Saare County Governor to ensure that children with special needs attending the Orissaare Boarding School are guaranteed access to psychiatric assistance.

The Chancellor of Justice in his memorandum to the Minister of Education and Research mentioned that the state should allocate sufficient resources to the school, so that it is possible for the school to comply with the precepts of the Health Protection Inspectorate. Otherwise, the health of children attending the Orissaare Boarding School is endangered.

In his address to the director of the Orissaare Boarding School, the Chancellor of Justice asked to eliminate immediately the risk of an electric shock in the shower room. The Chancellor also asked the director of the school to comply with the regulation of the Minister of Social Affairs and not engage pupils for the washing of floors. The Chancellor noted that if there are problems with the readmission of pupils by their former schools, a specific case should be brought to the attention of the Ministry of Education and Research with a request to verify compliance with the education legislation.

In her reply to the Chancellor of Justice, the Minister of Education and Research explained that officials of the Ministry had carried out state supervision in respect to the Orissaare Boarding School at the beginning of 2005. As a result, a precept was made to the director of the school to prepare individual curricula for pupils by 1 December 2005 at the latest. The Minister promised to cooperate with the school and verify compliance with the precept. The Minister said that a new deputy head teacher had been hired whose tasks involve assisting of teachers with the preparation of individual curricula. The Minister assured that, if necessary, the Ministry of Education and Research and the Ministry's School Network Bureau would also assist in the preparation of individual curricula for pupils.

The Minister said that there were plans to renovate the schoolhouse in order to improve the studying and living conditions. The School Network Bureau has submitted terms of reference to the State Real Estate Company for the renovation of the Orissaare Boarding School.

The Minister also informed that an agreement with the Kuressaare and Pärnu Hospital had been reached to guarantee psychiatric first aid to improve the accessibility of psychiatric assistance to children. Since November 2005, there is also a part-time nurse at school. According to the Minister, the Ministry of Education and Research and the Ministry of Social Affairs agreed that a joint working group would be formed in 2006 to work out suitable solutions for guaranteeing medical assistance in schools for children with special needs.

In his reply to the Chancellor of Justice, the Minister of Social Affairs admitted that there was no clear legal regulation for the provision of health services in schools for children with special needs. The Minister said that there were plans to start joint work with the Ministry of Education and Research, the Estonian Health Insurance Fund and the representatives of special schools in January 2006 in order to solve the problems raised by the Chancellor of Justice.

The Minister of Social Affairs promised that he would prepared necessary regulations for the provision of optimum school health service and medical care in schools for children with special needs in 2006, also defining the duties and responsibilities of different parties, i.e. special schools, the Estonian Health Insurance Fund, providers of health services and the social system.

The Saare County Governor in his response explained that studying conditions at the Orissaare Boarding School would improve. In addition to the renovation of the schoolhouse, building of a new sports facility had been started, which the pupils of the boarding school would be able to use in the future for their physical education classes and for sporting during their free time.

The director of the Orissaare Boarding School in her response also explained that pupils were no longer engaged for works prohibited by § 10(4) of the Minister of Social Affairs Regulation No. 109 of 29 August 2003.

The director also explained that the preparation of individual curricula had been started at the school. The director also noted that after the verification visit of the Chancellor of Justice, there is better cooperation with the former schools of pupils and with the counselling committee, and that two pupils have already had an opportunity to continue studies in the school at their homeplace.

The director also said that an opportunity for pupils to receive psychiatric first aid and emergency medical care from the Kuressaare Hospital had been organised as a result of cooperation between the school and the Pärnu Health Insurance Fund.

III AREA OF GOVERNMENT OF THE MINISTRY OF JUSTICE

1. General outline

The area of government of the Ministry of Justice includes the coordination of legislative drafting, the systematisation of legislation, the management of the professional activities of the courts of first and second instance, the Prosecutor's Office, prisons, and of legal assistance, and legislative drafting according to the competence of the ministry, and deciding the extradition of a citizen of a foreign state or a stateless person to a foreign state.

The following is the analysis of the activities of the Ministry of Justice in 2005 and an overview of the proceedings conducted by the Office of the Chancellor of Justice in reviewing the activities of the Ministry of Justice.

1.1. Legislative drafting

The competence of the Ministry of Justice includes the coordination of legislative drafting within its own area of government as well as general coordination of legislative drafting to achieve the uniformity of legal policy and its development on the basis of uniform principles. This implies the analysis of the tendencies of current legislation and making proposals to ministries through approval of drafts as well as in the form of proposals. When introducing the uniform principles of legislative drafting it is also important to ensure the harmony between the European Union law and Estonian law, and uniform use of legal terminology. The Ministry of Justice has progressively assumed a leading role in organising the language management, unifying the use of terminology of draft legislation and systematisation of legal terms. In this context the seminar entitled "Estonian and European legal concepts: coherence and differences", organised by the Ministry on 1 November 2005, deserves to be highlighted.

In relation to Estonia's membership in the European Union the competence of the Ministry in shaping both European and Estonian law has increased. An eloquent example of a representative of the Ministry having been involved in all stages of legislative drafting since bringing up of problems until moulding proposals for solution into a legal act could be the establishment of the Fundamental Rights Agency of the European Union. It is in the interests of Estonia to participate in such processes from the moment a problem arises and to shape and express clear positions concerning different possible solutions.

One of the most important priorities for the Ministry of Justice is to review the rules governing the protection of public information, state secrets and personal data. For that purpose work-groups for each area were set up, involving data protection specialists both from the Ministry and outside. The Office of the Chancellor of Justice was represented in the work-group by Tiina Ilus, the adviser to the Chancellor of Justice. The prepared draft was submitted for approval on 3 May 2006.[102]

In 2005 the Chancellor of Justice conducted the proceeding of an application where the applicant contested the activities of a vital statistics office because it had refused to issue a certificate concerning the absence of circumstances hindering marriage when the applicant wanted to marry a person of the same sex in a foreign state. Pursuant to the Family Law Act a certificate to the effect that under Estonian law there are no circumstances hindering the marriage of the person in a foreign state is issued to an Estonian resident. Before the issue of the certificate the applicant's right to marry the

[102] The Bill of Amending the Public Information Act and Related Acts, accessible at http://eoigus.just.ee

desired person under Estonian law is established. In the course of the proceeding the issue of legal clarity and applicability of several provisions of international private law emerged.[103]

1.2. Penal law and procedure

In 2005 there was the change of Ministers. This resulted in the Ministry's change of priorities and principles on the basis of which to seek solutions. The change of direction brought about by the change of Ministers is most clearly observable in the developments of criminal policies. Ken-Marti Vaher, the Minister of Justice until 13 April 2005, wished to implement more severe penal policies which, allegedly, corresponded better to the sense of justice of the people.[104] Minister Rein Lang is of the opinion that there are too many prisoners in Estonia and that it is necessary to find ways to reduce the number of prisoners and to find alternatives to punishments (e.g. community service, release on parole subject to probation supervision, electronic surveillance system, etc).[105]

The preferences of the Ministry of the Internal Affairs and Ministry of Justice turned out to be the fight against crime committed by and against minors (especially crimes of violence and sexual offences where the victims are children) and against organised crime (primarily drug-related crime, trafficking in persons and money laundering).[106] They proceeded from the principle that these are the types of crime that most acutely invade the foundations of society and sustainability of the state and thus require in-depth tackling. In the long perspective, attending to crimes committed by or against the young people will prove the most effective approach. The growth of a new generation of criminals can most effectively be prevented by paying attention to the young before they turn into fully fledged offenders. Criminal proceedings with regard to a minor should be speedy and take into account the interests of the minor.

The Chancellor of Justice supports the fundamental choices of the Minister and points out that, first of all, pre-trial investigation with regard to a minor should, as a rule, be conduced within four months since the identification of the suspect. Secondly, the taking into custody of a minor can only serve as a measure of last resort, in the cases of most serious crimes, and even then the procedural acts have to be performed as fast as possible. Pursuant to Art 27 para 4 of the Constitution the legislator shall guarantee the protection of the child. The Republic of Estonia Child Protection Act establishes a general principle that it is prohibited to treat or punish the child in any way which otherwise endangers his or her mental or physical health. Next, it is essential to create actual mechanisms to ensure that the punishments and sanctions applicable to minors are effective, yet as lenient as possible and considerate of their development.

Bearing in mind the unique feature of minors as a very sensitive group it is gratifying to recognise that the prosecutor's office and the police have made significant progress in this field within the recent couple of years (specialised bodies conducting proceedings have been employed). The prosecutor's offices have been more active in terminating proceedings with regard to minors (predominantly the matters are referred to juvenile committees) and the courts have more often started impose alternative sanctions. As a rule, in 2005 there were no bodies at courts, conducting proceedings, that would be specialised in minors. The setting up of our regional courts as of 1 January 2006 created preconditions for considerable progress in courts and, if necessary, for the judges to specialise in certain fields.

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[103] „See Part II section X 3.2. Certificate of the absence of circumstances hindering marriage.".

[104] Coalition agreement of Union for the Republic -- Res Publica, the Estonian Reform Party and the Estonian People's Union for 2003 – 2007. Accessible at http://www.valitsus.ee.

[105] T. Sildam. *Lang soovib vangide kiiret vabastamist* (Lang wants quick release of prisoners) - *Postimees* 7 June 2005.

[106] The developments of criminal policies in 2005 were introduced by Minister Rein Lang in his report to the Riigikogu on 22 Nov 2005. Accessible at http://www.riigikogu.ee.

In 2005 the Ministry prepared and on 15 March 2006 the Riigikogu subsequently passed the Courts Act and the Code of Criminal Procedure Amendment Act. The aim of the Act is to allow for expedited procedure in criminal proceedings within 48 hours since the person is taken into custody or interrogated as a suspect. Expedited procedure can be applied only to the crimes in the second degree if the subject of proof and facts are clear. More speedy procedure in the cases of simple offences guarantees to the person a trial which, considering the nature of the act committed, is conducted within a reasonable time both for the victim and the accused, and helps to economise procedural expenses.

One of the main issues during the preparation of the bill was whether the constitutional rights of the suspect are protected in such a speedy procedure. Proceeding from Art 21 of the Constitution everyone who is deprived of his or her liberty shall be informed promptly of the reason for the deprivation of liberty and of his or her rights and the person suspected of a criminal offence shall be given the opportunity to choose and confer with counsel. Pursuant to the Act, in order to guarantee the rights of defence of the suspect, the participation of the defence counsel in expedited procedure is mandatory beginning with the interrogation of the person as a suspect. The Chancellor of Justice supports the underlying premise of the expedited procedure, because it is important to avoid overloading the law enforcement agencies as the fundamental rights of persons may be damaged in the final stages due to excessive workload. The right to appropriate trial within reasonable time is guaranteed through effective case management ant this is in conformity with the principle of effective remedy embodied in Articles 13-15 of the Constitution and article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In 2005, on the basis of an application submitted, the Chancellor of Justice conducted the proceeding of the question of whether the situation where refusal to restore the term for filing an appeal against the decision of a body conducting extra-judicial proceedings can not be contested by way of appeal against court ruling is constitutional. The Chancellor of Justice is of the opinion that the contested regulation infringes upon the general right of recourse to the courts, arising from the first sentence of Art 15 para 1 of the Constitution, in conjunction with Art 24 para 5, which provides for the right of appeal to a higher court against the judgment in a case pursuant to procedure provided by law. The Chancellor of Justice analysed the issues raised in the application and found that the referred restriction of the right of appeal was not proportional in the narrow sense. On 14 October 2005 the Chancellor of Justice made a proposal to the Riigikogu to bring the pertinent regulation of the Code of Misdemeanour Procedure into conformity with the Constitution. Corresponding amendment was passed on 19 April 2006.

1.3. Court administration and court procedure

On 20 April 2005 the Riigikogu passed the new Code of Civil Procedure, prepared by the Ministry of Justice, which entered into force on 1 January 2006. The new Code is necessary for updating the regulation of court procedure, for making the court procedure more effective, economical and transparent for the participants in the proceedings, thus enhancing the confidence of the citizens towards the current legal order and the system of administration of justice. To achieve this aim the number of unnecessary disputes concerning procedural law is decreased by restricting the right to file appeals against court rulings. The need to guarantee and enhance the legal certainty of the Republic of Estonia in court proceedings, where the judge is primarily an impartial mediator and an adviser competent in law, is equally important.

Simultaneously with the legislative proceeding of the new Code of Civil Procedure, amendments to Code of Administrative Court procedure were also drafted. The bill aims at making court proceedings more flexible and effective, more simple and accessible for the participants in the proceedings. A prerequisite of speeding up court proceedings is the decrease of courts' work-load, which is achieved

through the merger of territorial jurisdiction of courts. The bill was finished in 2005, was introduced to the Riigikogu legislative procedure on 6 March 2006, and passed on 14 June 2006.

The new procedural codes are seconded by the amendments to the Courts Act, which entered into force on 1 January 2006, establishing four County Courts and two Administrative Courts in lieu of the former 16 County and City Courts and four Administrative Courts, respectively. In a larger judicial body the use of judicial resources is more flexible. This enables to balance the work-load of judges as well as the duration of proceedings. Also, in a larger court the judges have a possibility to specialise in a narrower field (e.g. on cases related to minors or public procurement cases), as a result of which the quality of the administration of justice improves. The merger of territorial jurisdiction of courts entails, in certain cases, the possibility to choose the courthouse where the dispute is to be resolved. The newly formed County and Administrative Courts function in several courthouses, situated at the locations of the former first instance courts. Thus, justice is still administered as close to the people as possible.

The development activities of the Ministry with regard to making court judgments and rulings accessible electronically is essential for the simplification of the work of courts, for making it smoother and more efficient. Both, the register of judicial decisions (called KOLA in Estonian) that functioned between 2001 and 2005, and the information system of courts (called KIS) that started functioning in 2006, are efficient tools for judges as well as for other bodies conducting proceedings who require various information concerning judicial decisions.

The Bailiffs Act, which created a basis for the professional activities of bailiffs as independent persons holding an office in public law, entered into force on 1 March 2001. Since the entering into force of the Act the Chancellor of Justice has been receiving applications alleging that bailiffs have not performed their duties satisfactorily. The main problem is that prior to the execution of a claim a bailiff has not ascertained all facts of the particular case and the execution of a claim has resulted in excessive difficulties for the financial situation of the debtor and his or her family. It appeared from the descriptions set out in applications that in practice there incidents when several bailiffs are simultaneously executing one and the same claim. For example, in one case as many as three bailiffs were conducting proceeding of one and the same matter, two of them even seized the applicant's bank account. Furthermore, in the applications people described cases where bailiffs, when executing claims, had not taken into account all circumstances related to debtors, including the fact that the manner of executing a claim should not be too burdensome. On two occasions the Chancellor of Justice made a proposal to the Minister of Justice to amend the form of enforcement notices so that its content, the amount of claims and the rights of debtors concerning the choice of manner of execution and the possibilities to contest it would be more readily understandable to the debtors. It is welcome that, as one of the measures for the improvement of the activities of bailiffs, an amendment to the Bailiffs Act entered into force on 1 January 2006, pursuant to which the level of a bailiff's education must meet the requirements set to the judges.

The Chancellor of Justice has constantly received applications, which reveal that people are not aware of the role of the courts and the executive power (Ministry of Justice) in the administration of justice and in managing the issues outside the scope of administration of justice. The Ministry has received complaints against the activities of judges during judicial proceedings, the resolution of which is not within the competence of the Ministry, due to the independence of courts. Subsequently, people have had recourse to the Chancellor of Justice and have expressed their resentment and opinion that the Ministry had failed to investigate the matter and had thus committed a violation of law. In such cases the Chancellor of Justice has considered it important to explain to applicants the meaning of independence of courts and the role of the executive power.

1.4. Prison law

Most of the applications submitted to the Chancellor of Justice regarding this area of government in 2005 were again related to issues of imprisonment. As the deprivation of liberty amounts to a very intensive interference with fundamental rights and the interference inevitably acts in combination with restrictions on other fundamental rights, the activities of prisons are under a special scrutiny of the Chancellor of Justice. Among other things, this is expressed in regular visits to prisons. In 2005 the Chancellor of Justice and the advisers to him visited the Tallinn Prison and the Pärnu Prison.

Like in previous years, in the proceedings conducted in 2005, the Chancellor of Justice also repeatedly had to draw the attention of prisons to the violations of the Administrative Procedure Act.

For example, the Murru Prison violated the obligation to inform the imprisoned persons of the probable time of issue of an administrative act. The obligation to inform of the reasons for not complying with the stipulated term, if it is impossible to issue an administrative act within the period prescribed, was violated. Furthermore, the Ämari Prison had not delivered to an imprisoned person an administrative act restricting the person's rights. Also, during the visit to the Tallinn Prison and examining the documents several violations of the Administrative Procedure Act were found, such as insufficient references to the factual and legal bases of administrative acts in the motivation part of the acts. The difficulties in complying with the Administrative Procedure Act may be contingent on the insufficient knowledge of prison officers in the field of administrative procedure. That is why the intention of the Tallinn Prison to offer its officers further training in administrative procedure is very welcome. As the problems related to the implementation of the Administrative Procedure Act are similar in other prisons, it would be expedient for the solution of the problem if the Ministry of Justice organised a coordinated and systematic training course for all prison officers who have to adhere to the Administrative Procedure Act. Besides, the Chancellor of Justice is of the opinion that when settling challenges and exercising supervisory control the Ministry of Justice should more thoroughly check the compatibility of prisons' administrative acts and procedures to the Administrative Procedure Act.

Pursuant to Art 3 para 2 and Art 11 of the Constitution, rights and freedoms may be restricted only on the basis of grounds and pursuant to the procedure provided by law. This principle applies, without exceptions, to the fundamental rights of all persons and the prisons, too, have to observe it when restricting the rights of prisoners and detainees. Each prison has its own internal rules, the purpose of which is to apply the provisions of the Imprisonment Act and other legislation regulating imprisonment to the specific circumstances of the prison.

Last year the Chancellor of Justice identified some provisions in the internal rules of the Murru Prison and the Tallinn Prison, which give rise to restrictions of the rights of the imprisoned persons that were not in conformity with the Imprisonment Act. In addition to the prisons concerned the Chancellor of Justice also forwarded his opinion to the Ministry of Justice, who has to approve the internal rules of prisons. It is important to check whether the restrictions established by internal rules have a legal basis.

In a proceeding initiated on the basis of an application by an imprisoned person the Chancellor of Justice established also that regulation No 72 of the Minister of Justice of 30 November 2000 entitled "Internal rules of prisons" was in conflict with the law. Under the rules of the regulation, the list of items permissible in a punishment cell without a legal basis restricts the imprisoned persons' right to correspondence and, thus, their right to the inviolability of their family and private life. As the Minister of Justice promised to solve the problem in the course of amending the Imprisonment Act, prescribed in the work schedule of the Government for the second half of 2005, the Chancellor of Justice did not make a proposal to bring the provision into conformity with the Constitution. The deadline for preparing the bill amending the Imprisonment Act was postponed into 2006. In 2006

the Chancellor of Justice shall conduct a follow-up proceeding of the matter and shall check whether in the process of amending the pertinent legislation the list of items permissible in a punishment cell is brought into conformity with the Constitution.

In addition to the aforesaid and on the basis of applications against the activities of prisons submitted in 2005, the Chancellor of Justice established violations related to the release of detainees from jails, placing imprisoned persons into escort cars, remuneration for work when on probation, disciplinary proceedings against imprisoned persons, conformity of cells with the requirements, use of force by armed squads, guaranteeing to detainees the right to the confidentiality of messages, prohibition on detainees to use certain calling cards and the use of data in the national register of prisoners, detainees and persons under arrest.

The development trends of criminal policies until 2010 establish that the Ministry of Justice shall develop preconditions allowing the majority of persons punished by imprisonment to serve the sentence in prisons meeting modern requirements. In the end of 2005 there were approximately 3500 imprisoned persons and approximately 1000 detainees in Estonia. The Tartu Prison is presently the only cell-type prison meeting modern requirements, where about 550 persons are serving their sentences and 350 are being held in custody. The majority of the imprisoned persons are held in the camp-type prisons built between the sixties and the eighties of the previous century, where the breaking of criminal sub-culture and the application of imprisonment with the objective of re-socialising the offenders, consistent with modern understanding, is very difficult. The prison officers, too, often have to work in working premises that do not fully guarantee their safety when exercising supervision over the prisoners. It is understood that the construction of new prisons is an undertaking that demands time and resources, yet the Ministry of Justice must continue to act in the name of creating prisons that are conductive to re-socialisation of inmates and providing safe working environment to prison officers. The next new prison – the Viru Prison – has been planned to be put into service by the end of 2007.

In 2005 the Ministry of Justice prepared an action plan for decreasing the number of prisoners. The action plan concentrates on three main fields in the coming years – shortening the imprisonment, decreasing the proportion of prison sentences and expulsion of criminal offenders of foreign states from Estonia. In these three areas of activity several measures have been planned, such as wider use of the possibility to release on parole, guarantee of coercive treatment to drug addicts and the analysis of the possibilities to use electronic surveillance. Hopefully, the action plan will help to resolve the problem of overpopulation of prisons, the problem the Chancellor of Justice has repeatedly pointed out. On 31 May 2006 a pertinent bill was initiated in the Riigikogu, aimed at expanding the possibilities for release on parole and re-admission into society under reinforced surveillance, especially through electronic surveillance. The bill also aims at increasing the proportion of substitutive punishments.[107]

In its judgment of 26 May 2005[108] the Administrative Law Chamber of the Supreme Court analysed whether a representative of an imprisoned person has the same privileges in an administrative court procedure as prescribed by the Imprisonment Act for the criminal defence counsel in criminal proceedings. The imprisoned person had addressed the Chancellor of Justice with the same problem but due to the pending judicial proceedings the Chancellor of Justice had to terminate his proceedings without giving his opinion on the issue. The Administrative Law Chamber of the Supreme Court found that the unequal treatment of a representative and of a criminal defence counsel is justified by the fact that in criminal and misdemeanour matters the level of interference with fundamental rights is much higher than in administrative matters. Nevertheless, the Administrative Law Chamber pointed out that if there is a reasoned need, the visits of the representative should be allowed in addition to the minimum number of visits established in § 24(1) and (2) of the Imprisonment Act.

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[107] The Bill Amendments to the Probation Supervision Act, the Imprisonment Act, the Penal Code Implementation Act and the Code of Criminal Procedure as at 15 June 2006, No. 923 SE, accessible at http://www.riigikogu.ee.

[108] Judgment No. 3-3-1-21-05 of 26 May 2005.

A problem related to the one described above was examined by the Administrative Law Chamber of the Supreme Court in its judgment of 10 June 2005[109], where it analysed who should be regarded as a criminal defence counsel for the purposes of the Imprisonment Act. Pursuant to the judgment it is clear from § 74(2) of the Code of Criminal Procedure that in principle the status of a defence counsel can not be regarded as having terminated until there is a legal possibility to submit any ordinary or extraordinary appeal to a court in the interest of the person being defended. Its also proceeds from the aforementioned provision of the Code of Criminal Procedure that in addition to performing direct defence functions the counsel is obliged to provide other legal assistance necessary to the person being defended. Thus, the persons who have been legally authorised and wish to provide other legal assistance – in the above meaning – to imprisoned persons, should also be regarded as defence counsels and not as representatives.

In its judgment of 9 June 2005[110] the Criminal Chamber of the Supreme Court argued that if a court ruling and a court judgment simultaneously exist as a basis for holding a person in custody, the judgment prevails over the ruling and that in such a situation the custodial institution must, without delay, start the execution of the court judgment which has entered into force and transfer the person held in custody under the regime of imprisonment, in compliance with the conditions provided for in the Imprisonment Act.

Some judgments of the European Court of Human Rights relate to Estonian prisons or have some effect on the rights of imprisoned persons in Estonia.

In the judgment of *Hirst v. the United Kingdom*[111] the European Court of Human Rights dealt with the issue of the right to vote of persons serving a prison sentence. After a thorough analysis (including assessment of international human rights documents and the practice of different countries) the Court came to a conclusion that total deprivation of all imprisoned persons of the right to vote is not in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Pertinent provisions of the Riigikogu Election Act, the Local Government Council Election Act, the European Parliament Election Act and the Referendum Act provide for the restriction of the right to vote in regard to all persons who have been convicted by a court and are serving their sentences in custodial institutions. The Chancellor of Justice pointed out the above referred judgments to the Riigikogu Constitutional Committee and started a proceeding for the review of compatibility of Estonian election Acts to the Constitution and to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

By its judgment of 8 November 2005[112] the European Court of Human Rights ordered that Estonia should pay compensation to an imprisoned person due to the violation of Article 3 of the Convention. Inhuman and degrading treatment was ascertained due to the conditions of detention in the Jõhvi jail and in the former Tallinn Central Prison in 1996 – 1999. The activities of the latter were terminated already in 2002, yet in the building of the Tallinn Central Prison the Central Hospital of Prisons and later the Tallinn Prison medical ward continued their activities. The detention of persons in that prison ended on 1 July 2005 when the imprisoned persons undergoing in-patient treatment in the Tallinn Prison medical ward were relocated to the building of the former Maardu Prison.

[109] Judgment No. 3-3-1-30-05 of 10 June2005.

[110] Judgment No. 3-3-3-55-05 of 9 June 2005.

[111] Judgement of the ECHR of 6 Oct 2005 No. 74025/01, *Hirst v. the United Kingdom*

[112] Judgement of the ECHR of 8 Nov 2005 No. 64812/01, *Alver v Estonia*

1.5. Legal assistance

On 1 March 2005 the State Legal Aid Act entered into force, prescribing the categories of legal aid ensured by the state and the conditions and procedure for the receipt of such legal aid. The Chancellor of Justice considers it essential that no one's rights should go undefended in judicial proceedings due to the fact that the person does not have necessary financial means for legal assistance. State legal aid is provided by advocates, who are members of the Bar Association and have the knowledge and skills to better guarantee the rights and interests of persons. The Chancellor of Justice has repeatedly received applications describing situations where people can not afford to have their rights protected due to insufficient financial means. Although the majority of cases relate to the question of legal aid in a concrete matter and this is not within the Chancellor of Justice's competence, the Chancellor, nevertheless, considered it necessary to inform the applicants of the possibilities of receiving state legal aid. Bearing in mind that information about laws and the possibilities people have should be accessible in a simple and easy manner to everybody, the Ministry prepared an information handout about state legal aid; if necessary, the Chancellor of Justice can enclose the handout with his replies to people. The Chancellor of Justice also organises regular meetings with the representatives of the Estonian Bar Association and the Ministry of Justice, to discuss the actual problems of access to legal aid.

Very often the applications submitted to the Chancellor of Justice revealed the fact that the Chancellor of Justice is seen as an additional supervisory body or the fourth court instance. The Chancellor of Justice has been addressed during pre-trial investigation as well as during judicial proceedings, whenever a person was dissatisfied with the activities of the body conducting the proceedings (official, police officer, prosecutor, judge). Applications were also submitted when all three court instances had been exhausted and the person was not happy with the final result. The Chancellor of Justice refused to examine most of such applications on the merits and only investigated a few procedures performed by bodies conducting the proceedings, or procedures that were outside the scope of administration of justice and against which the applicants could not appeal through ordinary channels of appeal.

2. Prison law

2.1. Failure to inform an imprisoned person, who applied for a directive to be issued, of exceeding the deadline

Case No 7-4/1674

(1) The Chancellor of Justice received an application from a prisoner who complained that the Murru Prison had not responded to his application in a timely manner.

(2) It appeared from the copy of directive of the Murru Prison of 14 December 2004, appended to the application, that on 18 October 2004 the prisoner had submitted an application for transfer to the open prison ward of the Murru Prison. It appears from the copy of an earlier directive of the Murru Prison director concerning the same issue, dated 20 October 2004, that the prisoner had submitted the application which served as the basis for the directive already on 1 September 2004.

The Chancellor of Justice addressed the Murru Prison director with the request for information necessary for the resolution of the matter. It appears from the director's response that the applicant had submitted the application, which served as the basis for the referred directives, directly to the Murru Prison director. The date of application indicated in the directives is the date of receipt of the request by the Murru Prison. The particular directives were issued more than one month after the submission of applications, because the increased work-load and structural changes had prevented the preparation of the directives in a timely manner. It was for the same reasons that the prisoner was

not informed of the probable time of issue of the directives. By the time of the director's response the problems had already been solved and responses to applications were given within the prescribed term.

(3) To resolve the application, it was necessary to answer the question whether the failure to inform of the reasons for exceeding the term for responding to applications and of the probable time was lawful.

(4) Pursuant to § 23(1) of the internal rules of prisons[113] the prisoner of a maximum-security prison shall submit an application for transfer to an open prison or to an open prison ward of a maximum-security prison to the director of an open prison or to the director of a maximum-security prison with an open prison ward. Pursuant to § 23(3) of the internal rules of prisons the director of an open prison or the director of a maximum-security prison with an open prison ward shall decide within one month since the receipt of an application from a prisoner whether to submit a pertinent request to the deputy secretary general of Prisons' Department of the Ministry of Justice.

The directives of the Murru Prison director, by which the submission of the request for transfer to an open prison to the deputy secretary general of Prisons' Department of the Ministry of Justice was decided, were issued considerably later than one month since the receipt of the application by the Murru Prison.

Pursuant to § 1^1 of the Imprisonment Act, the provisions of the Administrative Procedure Act apply to administrative proceedings prescribed in the Act and to administrative proceedings prescribed on the basis of the Act, taking account of the specifications provided for in the Act. § 41 of the Administrative Procedure Act establishes that an administrative authority shall promptly give notice of the probable time of issue of the administrative act or taking of the measure and, if an administrative act cannot be issued or a measure cannot be taken within a prescribed term, indicate to the imprisoned person the reasons for failure to comply with the prescribed term.

The Murru Prison director had, in the matter at issue, violated the requirement of § 41 of the Administrative Procedure Act, because he did not inform the prisoner that the submission of the request for transfer to an open prison to the deputy secretary general of Prisons' Department of the Ministry of Justice could not be decided within the prescribed term and did not give notice of the probable time of taking the decision or the reasons for failure to comply with the term.

The Chancellor of Justice was of the opinion that the referred circumstances did not justify the violation of § 41 of the Administrative Procedure Act, because informing the person, who has submitted an application serving as a basis for an administrative procedure, of the failure to comply with the prescribed term, of the reasons for the failure and of the probable time of taking the decision does not require thorough preparation and is not as resource-consuming as to render a prison incapable to comply with the requirement.

(5) The Chancellor of Justice made a proposal to the Murru Prison director to take measures to guarantee that should it prove impossible to comply with a procedural term, the person whose application initiated an administrative procedure will be given notice of the failure to comply with the prescribed term, the reasons for the failure and the probable time of making a decision. According to the Murru Prison director, henceforth, all measures shall be taken to avoid overrunning the prescribed terms. Also, the requirement prescribed in § 41 of the Administrative Procedure Act shall be complied with.

[113] Regulation No. 72 of the Minister of Justice of 30 Nov 2000.

2.2. Confidentiality of messages of an imprisoned person

Cases No 7-4/380 and 7-4/522

(1) A man and a woman, held in custody in the Tartu Prison, submitted an application to the Chancellor of Justice, complaining that their correspondence had been confiscated and read.

(2) The prison cell of the woman in custody was searched and the letters sent to her by the man in custody were confiscated. Later the correspondence was returned to the woman but she was of the opinion that the letters had been read, as later one of the prison officers had made jeering comments in regard to the content of the letters.

On the basis of the application the Chancellor of Justice commenced a proceeding and requested information from the Tartu Prison. The prison replied that, pursuant to the search report, prohibited items had been taken from the woman held in custody, namely 30 letters. Pursuant to the letter of explanation, appended to the response of the prison, the prison officers did not read the taken letters, but the letters had the characteristics of prohibited correspondence – they were folded and bore the cell numbers. The prison concluded that the letters might have been exchanged between the inmates, in violation of the established rules, i.e. not through postal services.

(3) To resolve the application it was necessary to answer the question of whether the right of a person held in custody to secrecy of correspondence had been violated.

(4) Pursuant to § 1(2) of the Regulation No. 72 of the Minister of Justice of 30 November 2000, entitled the "Internal rules of prisons", the provisions concerning imprisoned persons also apply to persons held in custody, unless otherwise provided for by the Imprisonment Act or the internal rules.

§ 68(1) of the Imprisonment Act establishes that in order to discover prohibited items or substances, prison officers have the right to search prisoners, their personal effects, dwellings, non-work rooms, other premises and the territory of the prison. Prison officers have no right to spoil personal effects or read the letters of imprisoned persons.

§ 96(1) of the Imprisonment Act establishes that persons in custody have the right of correspondence and that correspondence shall be effected pursuant to the procedure provided for in the internal rules of the prison. Chapter 10 of the internal rules of the prison regulates correspondence and the use of telephone. The right to correspondence consists of the right of persons in custody to receive letters from any person and to send letters to any person.

In the present matter there is no violation of § 43 of the Constitution, because the letters had already reached their addressee and therefore were no longer "sent or received by commonly used means", but there is a violation of § 26 of the Constitution, which establishes the right of every person to the inviolability of private and family life. This is a general right to private life. This includes, primarily, the inviolability of the intimate sphere, covering the reading of correspondence already delivered to a person. Pursuant to § 26 of the Constitution state agencies, local governments, and their officials shall not interfere with family or private life of any person, except in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence, or to apprehend a criminal offender. The Tartu Prison considered that the letters had the characteristics of prohibited correspondence and confiscated these from the person in custody. However, prison officers have no right to read the letters of persons in custody, because such interference is permissible only in the course of surveillance. Consequently, the prison had no legal basis for interfering with private life of persons and this amounts to an infringement of the inviolability of private life of the person in custody.

Pursuant to § 48 of the internal rules of prisons the person in custody shall give his or her letter in an open envelope to the prison officer in charge of correspondence, who shall check the contents of the envelope and make an entry of the surname and family name of the person in custody and the date of the submission of the letter in the journal of correspondence. Section 18.6 of the Tartu Prison internal rules established that a specialist of the accounts department shall register all received letters in the registry cards (letters addressed to agencies and persons are registered on different cards) and shall forward the letters to the general department for posting. Proceeding from the aforesaid the prison has the possibility to check – on the basis of the correspondence registry cards – whether concrete persons have exchanged letters or not.

Pursuant to § 100(1) of the Imprisonment Act disciplinary sanctions may be imposed on persons in custody for the wrongful violation of the requirements of this Act, internal rules of the prison or other legislation. § 101(1) of the same Act establishes that the provisions of § 64 of the Imprisonment Act apply with regard to the conduct of disciplinary proceedings and imposition of disciplinary sanctions. Pursuant to § 64(2) of the Imprisonment Act a prisoner shall be immediately informed of the disciplinary offence. The prisoner has the right to make statements concerning the offence of which he or she is accused. When the woman in custody was suspected of a disciplinary offence of having allegedly effected prohibited correspondence, she should have been informed of the suspicion immediately and given a possibility to make statements. This was not done, yet the letters were confiscated. As a rule, the aim of confiscation is to get to know the content of the message.

During the resolution of the matter it did not become clear who might have read the letters after the confiscation. Anyway, the fact that there was a possibility that the correspondence of inmates had been read and that the officers were impolite towards the person in custody because of that and, as a matter of fact, had abused their rights, is condemnable.

The Chancellor of Justice found that the initial confiscation of the letters was not unconstitutional, yet the possible reading of the letters was impermissible and violated the rights of the person in custody. Also, the impolite behaviour of prison officers towards persons in custody is condemnable.

(5) The Chancellor of Justice made the following proposals to the director of the Tartu Prison:

1. When letters having the characteristics of prohibited correspondence are confiscated upon a search it must be ensured that officers do not read the letters, except in the cases and pursuant to procedure provided by law.

2. To improve the monitoring of behaviour of prison officers towards imprisoned persons and, if need be, take additional measures to prevent impolite behaviour or even misuse of official position in regard to imprisoned persons.

As the information gathered during the proceeding gave rise to the suspicion that the prison officers had committed an offence when reading the letters of persons in custody, the Chancellor of Justice, on the basis of § 35^4 of the Chancellor of Justice Act, informed the State Prosecutor's Office of the fact. The Lõuna Circuit Prosecutor's Office, competent to decide on the proceedings, did not commence a criminal procedure due to the lack of basis and sent the materials to the Ministry of Justice for ascertaining the possible fact of disciplinary offence. The Tartu Prison informed the Chancellor of Justice that it did not establish the violation of the right of the person in custody.

2.3. The right of persons in custody to make phone calls with *Voicenet* calling card and at the expense of replier

Case No 7-4/726

(1) The Chancellor of Justice got an application from a person in custody who complained that in the Pärnu Prison he was not allowed to make phone calls with *Voicenet* calling card and at the expense of the replier.

(2) The owners of ordinary phone cards usable in pay-phones can use the calling time within the limits of purchasing price and it is not possible to subsequently add the calling time. Additional calling time can be added to *Voicenet* calling cards via Internet by any person who knows the relevant passwords.

The Chancellor of Justice addressed the Pärnu Prison with a request for information necessary for the resolution of the application. According to the response from the Pärnu Prison, only AS Elion Ettevõtted phone cads were sold in the Pärnu Prison shop both to prisoners and persons in custody and persons in custody could not, through the Pärnu Prison, purchase *Voicenet* calling cards.

The response set out two reasons why the prison does not allow persons in custody to obtain, through the prison, *Voicenet* calling cards and make phone calls with *Voicenet* calling card and at the expense of the replier.

Firstly, the use of *Voicenet* calling cards enables the persons in custody to derogate from the provision in § 96(2) of the Imprisonment Act, pursuant to which costs related to the use of telephone shall be borne by the person in custody.

Secondly, pursuant to § 58(3)9) of the Regulation No. 72 of the Minister of Justice of 30 November 2000, entitled "Internal rules of prisons", persons in custody are allowed to use calling cards purchased in maximum-security prisons through the mediation of the prison. The Pärnu Prison drew the attention to the fact that until 23 December 2001 persons in custody had been allowed to own a calling card without the additional requirement of "purchased in maximum-security prison through the mediation of the prison", but the wide-scale use of forged cards by imprisoned persons and persons in custody forced the issuer of the norm to take steps enabling to diminish the possible damage caused to AS Elion Ettevõtted.

(3) The main issue in the case was whether the Pärnu Prison acted lawfully when prohibiting persons in custody from making phone calls with *Voicenet* cards at the expense of the replier.

(4) Art 19 of the Constitution gives rise to the general right to liberty. The object of protection of Art 19 para 1 of the Constitution is legal freedom. Legal freedom consists of the permission to do and omit to do what a person wishes. The freedom to decide is protected irrespective of the weight of the chosen activity from the point of view of self-realisation.[114] The scope of protection of the right to freedom is infringed when the freedom is adversely affected by public authority.[115]

The freedom of a person to choose how to pay for his or her phone calls is within the sphere of protection of Art 19 para 1 of the Constitution. The Pärnu Prison has prohibited persons in custody to pay for their phone calls by *Voicenet* calling card and at the expense of replier, and has thus restricted the right of persons in custody to choose how to pay for their phone calls. The restriction

[114] M. Ernits. Kommentaarid §-le 19 – Justiitsministeerium. Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Comments on Art 19. – Ministry of Justice. Commented edition of the Estonian Constitution] Tallinn 2002, comment 3.1.

[115] Supreme Court Constitutional Review Chamber judgment of 6 March.2002, No. 3-4-1-1-02, § 12.

adversely affects the freedom of choice of persons in custody. Thus, the referred prohibition of the Pärnu Prison infringes upon the general right to liberty of the persons in custody.

Pursuant to the first sentence of Art 11 of the Constitution the rights and freedoms may be restricted only in accordance with the Constitution. Pursuant to the first sentence of Art 3 para 1 of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Thus, for interference of the state with fundamental rights to be lawful, a basis arising from law is required. On the basis of Art 19 para 2 of the Constitution everyone is obliged, in exercising his or her freedoms, to observe, inter alia, the law.

In its response the Pärnu Prison justified the prohibition to make phone calls with *Voicenet* calling cards and at the expense of replier with the fact that the referred methods enabled persons in custody to circumvent the provisions of § 96(2) of the Imprisonment Act. Reference was also made to § 58(3)9) of the internal rules of prison, established on the basis of § 15(2) of the Imprisonment Act, on the basis of which a person in custody in a maximum-security prison is allowed to have a phone card purchased through the mediation of the prison. The Chancellor of Justice was of the opinion that the two justifications were interrelated – if we presume that making phone calls at the expense of other persons is unlawful in the case of persons in custody, the prison could not sell other phone cards enabling this, either. Consequently, these two justifications have to be examined in their conjunction.

Firstly, the Chancellor of Justice examined whether § 96(2) of the Imprisonment Act gives rise to the basis for prohibiting the persons in custody from using the above referred method of making phone calls. To interpret § 96(2) of the Imprisonment Act it is necessary to compare how imprisonment and custody pending trial are regulated.

In regard to imprisoned persons § 28(2) of the Imprisonment Act establishes that costs related to a prisoner's use of telephone shall be borne by the prisoner. Unlike in the case of persons in custody, § 44(2) of the Imprisonment Act stipulates that only 30% of the funds deposited on the personal account of a prisoner shall be reserved for the use of the prisoner inside the prison, 50 per cent shall be reserved for the satisfaction of civil claims and 20 per cent shall be deposited as a savings fund to be handed over to the prisoner on release. The aim of the regulation is to ensure that the damage caused by a criminal offence is compensated for as quickly and as fully as possible and that there is a savings fund upon release.

Pursuant to § 44(1) of the Imprisonment Act, a prison administration shall ensure that the wages and other funds paid to a prisoner are transferred to the internal personal account of the prisoner. An imprisoned person has no right to receive things from outside the prison either by parcel or in any other manner. Pursuant to § 48(1) of the Imprisonment Act a prisoners may, through the mediation of the prison, buy foodstuffs, toiletries and other items out of the funds deposited in their personal accounts. Proceeding from the aforesaid a prisoner must purchase things out of the funds previously deposited in his or her personal account, from which deductions for the satisfaction of civil claims and for the savings fund have been made.

Every person knowing the relevant passwords can make advance payments to *Voicenet* calling cards. Neither does the prisoner pay for his or her calls out of the funds in the respective personal account when making a phone call at the expense of the replier. When making phone calls with the *Voicenet* card or at the expense of replier a prisoner can obtain calling time without paying for it out of the funds deposited in his or her personal account. Thus, funds out of which the deductions established in § 44(2) of the Imprisonment Act could be made are not received on the account.

That is why § 28(2) of the Imprisonment Act has to be interpreted to mean that a prisoner is obliged to pay for his or her phone calls out of the funds deposited in his or her personal account and reserved for the use of the prisoner inside the prison. The basis for prohibiting the prisoners to use

Voicenet calling cards and calling at the expense of replier arises from the systematic interpretation of § 28(2) of the Imprisonment Act in conjunction with § 44(1) and (2).

Art 22 para 1 of the Constitution establishes the principle of presumption of innocence, pursuant to which no one shall be presumed guilty of a criminal offence until a conviction by a court against him or her enters into force. Consequently, a provision of law serving as a basis for the restriction of the rights of imprisoned persons does not allow the restriction of the rights of persons held in custody.

Neither does a provision regulating the legal status of a person in custody, which is worded similarly to a provision regulating the legal status of an imprisoned person, necessarily have the same meaning as the provision in regard to a prisoner and does not necessarily justify the restriction of fundamental rights of persons in custody to the same extent.

There is no valid regulation concerning persons in custody, analogous with the provisions of § 44 of the Imprisonment Act: a prison administration has no obligation to ensure that the funds received by a person in custody are transferred to his or her internal personal account and the deductions provided for in § 44(2) of the Act are not made out of the funds on the personal account of a person in custody. § 65 of the internal rules of prisons establishe that a person in custody may use his or her personal account in the full amount.

Thus, § 96(2) does not have the same meaning as § 28(2) of the Imprisonment Act, which serves as a basis for prohibiting the use of *Voicenet* calling cards and calling at the expense of replier in conjunction with § 44(1) and (2) of the Imprisonment Act.

Pursuant to the Explanatory Memorandum to the Imprisonment Act the purpose of custody pending trial is detention of an accused or an accused at trial to guarantee the conduct of proceedings or avoid commission of new criminal offences.[116]

§ 96(2) of the Imprisonment Act must be interpreted in the context of custody pending trial. On the basis of § 96(3) of the Imprisonment Act it is allowed, if necessary to ensure the conduct of criminal proceedings, to restrict the right of a person in custody to the use of telephone; if this is not the case, then there is no need – bearing in mind the purpose of custody pending trial – to impose an obligation of the person in custody to pay for calls out of the funds on his or her internal account, and a method of payment for phone calls can not be excluded solely because the covering of the costs out of the internal personal account of a person in custody is not guaranteed.

On the basis of the aforesaid the Chancellor Justice was of the opinion that § 96(2) of the Imprisonment Act does not establish a ground to prohibit persons in custody from making phone calls with *Voicenet* calling cards and at the expense of replier. § 96(2) of the Imprisonment Act only gives rise to the conclusion that a person in custody has no right to make phone calls at the expense of the state.

Next, the Chancellor of Justice examined whether § 58(3) clause 9 of the internal rules of prisons established a ground for prohibiting the methods of making phone calls at issue.

The referred provision prohibits to own phone cards which are not purchased through the mediation of the prison. This does not entitle a prison to prohibit persons in custody from making phone calls at the expense of replier.

Neither the Imprisonment Act nor the internal rules of prisons establish that persons in custody are prohibited from owning telephone cards other than those of AS Elion Ettevõtted. If a person in

[116] Explanatory Memorandum to the Imprisonment Act as at 24 May 1999, No. 103 SE, accessible at: http://www.riigikogu.ee

custody has obtained a *Voicenet* calling card through the mediation of the prison, it constitutes an item allowed in the prison.

The approval of the choice of goods on sale in a prison shop is within the competence of the director of the prison. In doing this, the director must observe the principles of exercising state power and – pursuant to § 1^1 (1) of the Imprisonment Act – the Administrative Procedure Act. If a person in custody applies for the possibility to purchase a *Voicenet* calling card (or that of another company), the dismissal of such an application requires the existence of a legal basis. Neither § 96(2) of the Imprisonment Act nor § 58(3)9) of the internal rules of prisons, referred to by the Pärnu Prison in its response, establish a legal basis for the dismissal of applications of the kind.

(5) In the matter of the application the Chancellor of Justice made the following proposals to the Pärnu Prison:

1. to allow persons in custody make phone calls at the expense of replier;
2. to allow persons in custody pay for phone calls in addition to AS Elion Ettevõtted calling cards also with those of other companies (including Voicenet calling cards) and facilitate persons in custody to purchase these through the mediation of the Pärnu Prison, if there are no other reasons for refusal than those set out in the response of the Pärnu Prison.

The Pärnu Prison did not agree with the opinion of the Chancellor of Justice and did not consider it necessary to comply with his proposals. The Pärnu Prison is of the opinion that § 96(2) of the Imprisonment act is sufficiently clear and does not allow to justify the right of persons in custody to make phone calls at the expense of replier.

The Chancellor of Justice did not consider it expedient to commence a follow-up proceeding in the matter of the application because pursuant to the amendments to Regulation No 55 of the Ministry of Justice, entitled "Placement plan", which entered into force on 1 July 2005, persons in custody shall no longer be placed in the Pärnu Prison and at the time when the Chancellor of Justice expressed his opinion the applicant was no longer in that prison.

2.4. Use of handcuffs when escorting prisoners inside prison

Case No 7-1/050545

(1) The Chancellor of Justice received an application from a prisoner who complained that he was being taken out of accommodation wards exclusively in handcuffs.

(2) The imprisoned person was serving a life sentence in the Murru Prison. It appeared from the copy of a letter of the Murru Prison, appended to the application, that pursuant to § 204 of the internal rules of the prison the prisoners serving a life sentence are taken outside accommodation wards in handcuffs. The letter pointed out that the handcuffs were used pursuant to § 70(1) of the Imprisonment Act, which establishes that handcuffs may also be used upon escorting of a prisoner if there is an actual risk of the prisoner's escape. As the prisoner who had addressed the Chancellor of Justice is escorted in the territory of the prison not far from the transport entrance and the administration can not stop the traffic during the time of escorting the prisoners out, the prison has reason to believe that without handcuffs it would be easier for the prisoner to escape.

The Chancellor of Justice requested the information necessary for the resolution of the matter of the application from the Murru Prison. According to the response § 204 of the internal rules of the Murru Prison had been established on the basis of the fact that the ward of the prisoners serving a life sentence is in the vicinity of transport entrance and the traffic can not be stopped for the time of

escort of the prisoners. Once again, the Murru Prison referred to § 70(1) of the Imprisonment Act as the basis for the use of handcuffs. The handcuffs were used on the prisoners serving life sentences only during escort, thus, the handcuffs were taken off as soon as the destination was reached.

Furthermore, the Murru Prison pointed out in its response that in the vicinity of transport entrance the handcuffs were used on prisoners serving a fixed-term sentence if there was a need for that, and the need is assessed in each case individually. When deciding on the use of handcuffs the length of sentence and other circumstances are taken into account. It was impossible in the Murru Prison to use other measures than handcuffs to minimise the possibilities of escape in the vicinity of transport entrance.

(3) In the matter of the application it was necessary to assess the compatibility of § 204 of the internal rules of the Murru Prison to § 70(1) of the Imprisonment Act.

(4) The use of handcuffs stipulated in § 204 of the internal rules infringes upon the fundamental rights of a prisoner: the use of handcuffs restricts the physical freedom of a person, as the possibilities to move are impeded and the person is forced to move in a fixed position.

Provisions delegating authority to impose means of restraint, including handcuffs, are established in § 96(1) and in the second sentence of § 70(1) of the Imprisonment Act: pursuant to § 69(4) of the Imprisonment Act, means of restraint shall be imposed by the director of a prison and, in case of urgency, by a higher prison officer currently present.

The right to use handcuffs on a prisoner is arises only when the director of a prison (or in case of urgency, a higher prison officer currently present) has ascertained the circumstances that meet the abstract elements necessary to constitute a basis for the use of the measures. In case of absence of the circumstances meeting the requirements of the referred abstract norms the use of handcuffs is unlawful. Pursuant to the response of the Murru Prison it is the second sentence of § 70(1) of the Imprisonment Act that serves as a legal basis of § 204 of the internal rules, and pursuant to the former it is permitted to handcuff a prisoner if there is actual danger of the prisoner's escape.

Danger has to be understood as a situation where the occurrence of an event with undesirable consequences is probable if appropriate counter-measures are not taken. The use of handcuffs when escorting a prisoner may be justified if there are circumstances indicating that the escape of the prisoner to be escorted is probable if the prison does not take measures to prevent the escape. A doubt not substantiated with concrete circumstances can not be a reason for the use of handcuffs.

The existence of actual danger of a prisoner's escape may be caused by a fact independent of a prisoner, such as the security risk created by the transport entrance in the present matter of the application. Nevertheless, when ascertaining the existence of actual danger of a prisoner's escape it is necessary, in addition to circumstances independent of a prisoner, to check also the circumstances related to the prisoner to be escorted, first of all there must be a reason to believe that the prisoner is willing to escape in the first place. Also, it has to be ascertained whether the physical condition of the prisoner would allow him to attempt escape, even if there is a will.

As § 70(1) of the Imprisonment Act does not establish an obligation to use handcuffs if there is actual danger of the prisoner's escape ("Means of restraint *may* also be used when escorting of a prisoner, […]), the director of a prison has the right of discretion when making a pertinent decision. There is a choice between imposition and non-imposition of means of restraint, and between the means of restraint.

Pursuant to § 1^1(1) of the Imprisonment Act the provisions of the Administrative Procedure Act apply to administrative proceedings prescribed in this Act and to administrative proceedings prescribed on the basis of this Act. Pursuant to § 4(2) of the Act, the right of discretion shall be exercised in

accordance with the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests.

The Administrative Law Chamber of the Supreme Court has found that "[…] exercise of discretion in cases when discretion is provided for under the law, is not only a right but also an obligation of the administration."[117] If the exercise of discretion is waived in an individual case, this amounts to abuse of discretion. The Administrative Law Chamber of the Supreme Court is of the opinion that such a case amounts to "[…] a situation where an administrative agency competent to exercise discretion does not consider all possibilities and does not take into account all possibilities that it can rely on when taking a decision."[118]

On the basis of the aforesaid the use of handcuffs when escorting prisoners is lawful when the actual danger that the concrete prisoner may escape has been ascertained. When pertinent circumstances have been ascertained, discretion must be exercised when deciding on the use of handcuffs, which means, inter alia, taking into account all circumstances and checking and considering if there are other possibilities to prevent a possible attempt of escape.

When the prisoners serving fixed-term sentences were escorted in the vicinity of the transport entrance of the Murru Prison, the internal rules did not prescribe the mandatory use of handcuffs. The necessity to use handcuffs was assessed separately in each case. In relation to prisoners serving life sentences the Murru Prison did not consider it necessary to assess the need for the use of handcuffs in each individual case and it was presumed that there was always an actual risk of escape when prisoners serving life sentences were escorted in the vicinity of the transport entrance. The only fact related to a prisoner that was ascertained when using handcuffs on prisoners serving life sentences was that the prisoner to be escorted was serving a life sentence, and other circumstances characterising the prisoner were not taken into account.

The Chancellor of Justice was of the opinion that when ascertaining the actual danger of a prisoner's escape it was necessary, in addition to the sentence imposed, to take into account other circumstances characterising the prisoner (e.g. the prior conduct in prison of the imprisoned person to be escorted and his physical disabilities). The mere fact that a prisoner is serving a life sentence can not give rise to the conclusion that there is an actual danger of his or her escape for the purposes of § 70(1) of the Imprisonment Act and serve as a basis for the use of handcuffs when escorting the prisoner.

Pursuant to § 204 of the internal rules, handcuffs were used when escorting prisoners serving life sentences without checking whether there existed an actual danger of the escape of the prisoner while being escorted. Neither was discretion exercised in the use of handcuffs on those prisoners serving life sentences concerning whose escort it would have been possible to ascertain the danger of escape. Thus, the Chancellor of Justice was of the opinion that § 204 of the internal rules was not in conformity with § 70(1) of the Imprisonment Act.

Nevertheless, the ascertainment of the existence of an actual danger of escape in each case and prior consideration of whether or not to use handcuffs would prove inexpedient. If in regard to a particular prisoner a fact is ascertained, which brings about lasting actual danger of his or her escape while being escorted[119], the director of a prison may issue a concrete discretionary directive to use handcuffs when escorting this person during a certain period of time. Such an order may not be issued for an unspecified term. Proceeding from the principle of investigation and § 69(3) of the Imprisonment Act, pursuant to which the application of additional security measures shall be terminated if the circumstances for their imposition cease to exist, the Chancellor of Justice found that when issuing a relevant order the director of a prison has to set a time limit upon the expiry of

[117] Supreme Court Administrative Law Chamber judgment of 11 Nov 2002, No. 3-3-1-49-02.

[118] Supreme Court Administrative Law Chamber judgment of 6 Nov 2002, No. 3-3-1-62-02.

[119] E.g. a recent attempt to escape.

which the necessity of imposing security measures shall be reviewed.

(5) In the matter of the application the Chancellor Of Justice made the following proposals to the Murru Prison:

1. to bring § 204 of the Murru Prison internal rules into conformity with the second sentence of § 70(1) of the Imprisonment Act;

2. to check in regard to which prisoners serving life sentences there is an actual risk of their escape while escorting them outside accommodation wards and to consider whether it is necessary to handcuff them;

3. to finish using handcuffs on to those prisoners serving life sentences in regard to whom no actual danger of their escape during being escorted outside accommodation wards is ascertained.

The Murru Prison agreed with the proposal of the Chancellor of Justice and § 204 of the internal rules was declared invalid to the extent that it was not in conformity with § 70(1) of the Imprisonment Act. The prison also ceased to use handcuffs on the majority of prisoners serving life sentences when escorting them outside the accommodation wards.

2.5. Placing prisoners in escort vehicle in excess of the maximum authorised number

Case No 7-1/50074

(1) The Chancellor of Justice received an application from an imprisoned person who complained about the activities of prison officers when escorting prisoners from Tartu jail to the Murru Prison.

(2) Allegedly, the prisoner had to stand all the way because there were not enough seats for the prisoners in the escort vehicle.

The letter of the Tartu Prison, by which his complaint had been examined, was appended to the prisoner's application. It is said in the letter that during the escort from Tartu jail to the Murru Prison the prisoner had had a possibility to sit but for some reason he had not used the possibility.

The Chancellor of Justice addressed the Tartu Prison with a request for information necessary for the resolution of the application.

It appeared from the response of the prison that the escort had been effected by an escort vehicle having 12 seats for the prisoners, 3 seats for the members of escort guard and the driver's seat. Inside the car the prisoners are separated from the side-windows, the rear door of the van and the escort guard by grating. There were no separate booths for the separation of prisoners from each other.

The Tartu Prison confirmed the allegation of the prisoner that he had been standing during the escort. On the way from the Tartu jail to the Murru Prison there were 14 prisoners, the escort guards and a driver in the escort van. The Tartu Prison found that due to the lack of financial and technical possibilities it was neither possible nor expedient to escort one prisoner to the Murru Prison separately.

(3) In the matter of the application it was necessary to verify the lawfulness of placing 14 prisoners in the escort vehicle.

(4) In the course of the proceeding the Chancellor of Justice ascertained that the prisoner who had

addressed him had been standing the whole way from Tartu jail to the Murru Prison. It had taken more than two hours for the escort vehicle to cover the distance.

Pursuant to § 188 of Traffic Code[120] passengers may be carried in a vehicle only in the places and in the manner intended by the manufacturer. According to the response of the Tartu Prison there were 12 seats for prisoners in the escort vehicle, while in the matter of the application 14 imprisoned persons were escorted in the vehicle.

The Chancellor of Justice was of the opinion that the main reason why the prisoner had to stand was the fact that more imprisoned persons were placed in the escort car than was permissible and that is why he could not sit.

Placing more persons in a vehicle than intended by the manufacturer endangers the security of the persons in the vehicle. Those who can not stay in the designated places during transportation are more endangered than others. Furthermore, standing in a vehicle while it is moving is physically burdensome.

The imprisoned persons do not voluntarily take an escort vehicle, they are placed there under compulsion. The liability for observing the Traffic Code and guaranteeing the traffic safety while escorting prisoners lies with the prison officers. Prison officers are not allowed, without a sufficient reason, place a prisoner in a situation which is physically burdensome.

In its response the Tartu Prison pointed out that due to the lack of financial and technical possibilities it was neither possible nor expedient to escort one prisoner to the Murru Prison separately.

§ 188 of the Traffic Code also applies to escort of prisoners and there is no legal ground for exceptions. Disregard of a provision of the Traffic Code, the purpose of which is to ensure the safety of passengers of vehicles, due to financial and technical reasons and placing a prisoner in a physically burdensome situation are non-permissible acts.

(5) The Chancellor of Justice was of the opinion that in the matter of the application the prisoner's rights had been violated when more prisoners were placed in the escort vehicle than allowed, resulting in the fact that the prisoner (applicant) had to stand the whole way from the Tartu jail to the Murru Prison. Therefore, the Chancellor of Justice made a proposal to the Murru Prison director to draw the attention of the officers of the escort guard to the obligation to observe § 188(1) of the Traffic Code when escorting prisoners.

During the verification visit in March 2006 the Tartu Prison director assured that the proposal of the Chancellor of Justice was being observed and that there have been no more violations of § 188(1) of the Traffic Code while escorting prisoners.

2.6. Verification visit to the Pärnu Prison

Case No 7-2/051273

(1) On 03.11.2005 the Chancellor of Justice made a routine verification visit to the Pärnu Prison on his own initiative.

The Pärnu Prison is a governmental authority within the area of government of the Ministry of Justice, executing imprisonment of adult male prisoners. Until 1 July 2005 the prison also executed

[120] Government of the Republic Regulation No. 48 of 2 Feb 2001.

custody pending trial. At the time of inspection there were 100 imprisoned persons in the Pärnu Prison.

(2) The Chancellor of Justice inspected whether the fundamental rights and freedoms of prisoners serving sentences were guaranteed in the Pärnu Prison.

(3.1.) Problems related to the shortage of officers

It is important for the achievement of the objectives of application of imprisonment that sufficient number of persons with special training are employed in a prison.

It appeared during the inspection that there were a large number of vacancies in the Pärnu Prison. The people working in the prison believe that the shortage of prison officers can be attributed to low salaries and insufficient social guarantees. Due to insufficient staff it is difficult for the prison to achieve the objectives of application of imprisonment, and the general state of security of the prison is also compromised.

(3.2.) Problems related to observance of the requirements of the Administrative Procedure Act

It appeared during the inspection that the director of the prison and other officers rather often fail to observe the requirements of the Administrative Procedure Act when making administrative decisions concerning prisoners. The following examples of violations of the Administrative Procedure Act could be brought: insufficient factual and legal basis in issuing administrative acts, discretionary administrative acts do not reflect the use of discretion, disregard of the principle of investigation manifest in the dismissal of the objections and considerations of the prisoners.

A concrete example is the problem of imposition of additional security measures. § 69(2) of the Imprisonment Act establishes that it is permitted to apply the following as additional security measures: restriction of a prisoner's freedom of movement and communication inside the prison, prohibition for a prisoner to wear personal clothing, prohibition for a prisoner to engage in sports, commission of a prisoner in an isolated locked cell and use of means of restraint.

The analysis of directives revealed that the decisions on the imposition of additional security measures are not sufficiently reasoned and the simultaneous imposition of several security measures remains unclear. Namely, frequently the security measures enumerated in clauses 1-4 of § 69(2) of the Imprisonment Act are imposed simultaneously, for example commission of a prisoner in an isolated locked cell includes restriction of the prisoner's freedom of movement and communication. In most cases the directives did not set out the time limits of imposing the additional security measures.

Because of the deficient administrative acts the imprisoned persons can not understand why and for how long the additional security measures are imposed in regard to them. That is why the prisoners address the prison, the Minister of Justice, as well as the Chancellor of Justice requesting additional explanations.

(3.3.) Problems related to the clothing of prisoners

In applying imprisonment the minimum well-being and human dignity must be guaranteed to the imprisoned persons. Situations where a prisoner lacks the essential clothing while in prison are impermissible.

Pursuant to § 46(1) of the Imprisonment Act prisoners shall wear prison clothing. There is no such prison uniform, neither is it allowed to send clothes to prisoners by postal parcels. During the long sentences prisoners wear out the clothes they have with them, and there is no possibility to replace the clothes. In most cases, due to the shortage of financial means, the prisoners can not afford to

purchase clothes through the mediation of a prison shop.

The lack or improper state of the clothes result in a situation where a person feels undignified, and this needs to be avoided in closed institutions.

(3.4.) Problems related to the work of prisoners

§ 37(1) of the Imprisonment Act requires that the prisoners should work. The objective of the prisoners' work could be defined as the maintenance of possibilities to earn income and fulfil financial obligations. Also, this enables the prisoners to spend their time in a useful manner instead of simply spending time doing nothing. An alternative to working while in prison is studying.

It appeared during the verification visit that the employment rate of the imprisoned persons was low, as only ten prisoners out of one hundred were working. There were also problems with the prisoners' possibility to acquire education. It became evident that the acquisition of education was only possible outside the prison, which substantially restricts the prisoners' access to education. Pursuant to § 34(3) of the Imprisonment Act a prison administration shall ensure that general premises, classrooms and workshops necessary for the acquisition of general education, vocational education and for carrying out vocational training exist, as well as the possibility to receive practical training in the areas of specialisation taught in the prison.

It is important for prisoners to be occupied, in order to avoid morally devastating routine and to guarantee their re-socialisation.

(3.5.) Problems with identity documents

It appeared during the inspection that the imprisoned persons had problems with receiving personal identity documents, because in order to receive the documents they had to appear either in the Citizenship and Migration Board or a bank in person. Pursuant to § 11^2(6) of the Identity Documents Act a document shall be issued to the holder of the document in person. A document of a person under 15 years of age or a person with restricted active legal capacity shall be issued personally to the legal representative of the holder of the document. The prison could not – due to the shortage of officers – take persons either to the Citizenship and Migration Board or to a bank.

On 1 April 2006 the Identity Documents Act was amended and subsection 6^2 was added to § 11^2, pursuant to which documents of a person serving a sentence in a prison may be issued to a prison officer authorised by the director of the prison. Thus, the problem has been solved through the amendment of legislation.

(3.6.) In the applications addressed to the Chancellor of Justice prisoners have repeatedly asked questions concerning the proceedings of applications for release on parole before prescribed time.

§ 76(1) of the Imprisonment Act establishes that directors of prisons may submit proposals for the release of prisoners on parole before the prescribed time pursuant to the provisions of the Penal Code. § 15 of the "Procedure for examining prisoners' applications for release on parole before prescribed time", approved by Regulation No. 56 of the Minister of Justice of 29 November 2000, establishes that if an application is dismissed, a director of a prison shall set a term upon the expiry of which the prisoner may re-apply for release on parole before prescribed time. The term may not be longer than one year. On the basis of the described circumstances prisoners have asked whether a director of a prison is obliged to justify the setting of a new term for the submission of an application. When the referred proposal is not made, in the decisions of prisons not to satisfy an application and to set a new term, references have been made to criminal and disciplinary punishments already expired, as material characterising the prisoner.

The Chancellor of Justice is of the opinion that in processing of applications for release on parole before prescribed time a prison must justify the setting of a new term. Furthermore, in a directive by which an application is dismissed it is not allowed to refer to punishments which have already expired. This is due to the fact that the Supreme Court has found that the refusal to grant benefits may not be justified by a reference to punishments that have already expired. It is prohibited to characterise a person through a reference to an expired punishment, because this is not in conformity with the principle established in the Penal Register Act, which stipulates that data concerning punishments in the penal register have legal effect until the deletion of the data. If a refusal is justified by an impermissible motive, in this case by a reference to an expired punishment, this may result in the unlawfulness of the administrative act.[121]

(4) The Chancellor of Justice is of the opinion that the overall state of protection of fundamental rights and freedoms in the Pärnu Prison is satisfactory. The Chancellor of Justice informed the Pärnu Prison director and the Minister of Justice of the observations made during the verification visit.

[121] Supreme Court Administrative Law Chamber judgment of 22 June 1999, No. 3-3-1-27-99, § 4.

IV AREA OF GOVERNMENT OF THE MINISTRY OF DEFENCE

The area of government of the Ministry of Defence includes the organisation of national defence and, in this regard, the making of proposals for the planning of national defence policy, the implementation of national defence, the coordination of international defence cooperation, the preparation and carrying out of mobilisation, the call-up of persons eligible to be drafted for compulsory military service, the organisation of the registration and training of the Defence Forces reserves, the financing and supply of the Defence Forces and the National Defence League, the development of the defence industry, the supervision of the activities of the Defence Forces and the National Defence League and the preparation of corresponding draft legislation.

In 2005, among the Acts regulating the area of government of the Ministry of Defence, the Defence Forces Service Act has been amended five times and the Disciplinary Measures in Defence Forces Act once. The most important amendment was the formation of the Defence Resources Agency. Since 1 August 2005 there is a single Defence Resources Agency instead of the former national defence departments, and this brought about changes in the call-up of persons eligible to be drafted for compulsory military service and alternative service and in the organisation of the registration of persons liable to service.

The amendments to the Disciplinary Measures in Defence Forces Act made adjustments to the system of disciplinary punishments imposable on members of the Defence Forces. Disciplinary detention was remodelled so that now this is a preventive measure to be imposed for the prevention of committing of a disciplinary offence or in the cases where a member of the Defence Forces is unable to control his or her behaviour and may endanger his or her own health, life or property, or the health, life or property of other persons. The duration of this preventive measure shall not be longer than forty-eight hours. Confinement to quarters as a disciplinary punishment was repealed, because it disproportionately restricted the fundamental right of inviolability of private life. Reduction of salary by up to 50 per cent for up to six months was provided for as a new disciplinary punishment. Previously, disciplinary arrest had not been imposed on female members of the Defence Forces, but in 2004, in his letter to the Minister of Defence, the Chancellor of Justice pointed out the fact that such discrimination between male and female members of the Defence Forces was not in conformity with the principle of equal treatment. Pursuant to the amended wording of the Disciplinary Measures in Defence Forces Act, disciplinary arrest as a disciplinary punishment is imposed both on male and female members of the Defence Forces. This type of punishment is not imposed on pregnant members of the Defence Forces.

In his annual reports the Chancellor of Justice has repeatedly pointed out that an Act establishing the organisation of the Defence Forces and national defence organisations, the adoption of which is prescribed by Art 126 para 2 of the Constitution, has still not been passed. Unfortunately, the same observation has to be re-iterated in this report.

It is positive that in 2005, alongside the guaranteeing of the internal development of the Defence Forces, the role of the Ministry of Defence has increased in strengthening international defence cooperation, primarily in creating conditions for the participation of the members of Estonian Defence Forces in peace-keeping operations of the UN, NATO and European Union and in NATO training exercises. In 2005 Estonia participated in peace-keeping operations in Kosovo, Bosnia and Herzegovina, Afghanistan and Iraq.

In 2005 the Chancellor of Justice addressed no proposals, recommendations or memorandums to the Ministry of Defence or the authorities within the area of government of the ministry. With the aim of reviewing the guarantee of fundamental rights and freedoms the Chancellor of Justice conducted proceedings of only one application related to the activities of the Ministry of Defence, but did not ascertain violations of the person's rights or the principle of good governance. Neither

did the public nor the press raise any significant problems in relation to the activities of the Ministry of Defence or within its area of government in 2005. Pursuant to public opinion polls, 3/4 of the respondents consider the Defence Forces reliable.

On the basis of a proposal of the State Audit Office, which pointed out some shortcomings in the activities of the National Defence League (disappearance of property, disarranged reporting), the Minister of Defence formed a ministerial committee on 3 March 2005 for the inspection of the keeping of accounts in the National Defence League. In its comprehensive report the committee made concrete proposals to the General Staff of the National Defence League for the guaranteeing of timely keeping of accounts in compliance with the laws.

On 29 November 2005 and 30 November 2005 the Chancellor of Justice, on his own initiative, made verification visits to the Kuperjanov Single Infantry Battalion and to the Võru Battle School of the Defence Forces. In the summary report of his verification visit he Chancellor of Justice recognised that the organisation of training of Defence Forces conscripts and students, as well as the living conditions of conscripts, students and other members of the defence forces, and the documents drawn up in the referred institutions of the Defence Forces were mostly in conformity with the requirements of law. During the verification visits no significant violations of fundamental rights of the members of the Defence Forces or officials in the service of the Defence Forces were detected. Nevertheless, the Chancellor of Justice found that the training and living conditions in these institutions of the Defence Forces require modernisation. In neither of the institutions, the training fields, barracks and leisure time facilities fully meet the modern requirements.

The Chancellor of Justice was of the opinion that pursuant to the practice of good governance it would be necessary, in the directives imposing disciplinary punishments, to set out reference to the possibility of contestation; this had not been the practice either in the Kuperjanov Single Infantry Battalion or in the Võru Battle School of the Defence Forces. The Chancellor of Justice also drew the attention of the command staff of the Võru Battle School of the Defence Forces to the need to explain to a member or an official of the Defence Forces, from whom explanations are required, in relation to what circumstances the person is asked to give explanations. In their letters addressed to the Chancellor of Justice the commanders of both the Kuperjanov Single Infantry Battalion and the Võru Battle School of the Defence Forces assured that the referred deficiencies had been rectified.

During the verification visits, members and officials of the Deference Forces, when speaking confidentially to the Chancellor Justice, pointed out several problems related to social guarantees, wage conditions and other service-related issues, the solution of which depends on the Ministry of Defence and the General Staff of the Defence Forces. This is why the Chancellor of Justice forwarded the raised issues to the Minister of Defence and the Commander of the Defence Forces for their opinion. The Chancellor of Justice also asked from the referred persons information about the possibilities of resolving the development problems of the Kuperjanov Single Infantry Battalion and the Võru Battle School of the Defence Forces, which would contribute to creating better conditions of service. The resolution of the referred problems continues in 2006.

V AREA OF GOVERNMENT OF THE MINISTRY OF ENVIRONMENT

The area of government of the Ministry of the Environment includes the management of national environmental and nature protection, the performance of tasks relating to land and databases containing spatial data, the management of the use, protection, recycling and registration of natural resources, the radiation protection, the environmental supervision, the management of meteorological observation, nature and marine research, geological, cartographic and geodetic operations, the maintenance of the land cadastre and water cadastre, and the preparation of corresponding draft legislation.

Articles 5 and 53 of the Constitution establish the principle of economical use of natural wealth and resources and the duty of every person to preserve the human and natural environment.

For the fulfilment of the tasks assigned to the Ministry of the Environment there are six state agencies, five governmental agencies and seven profit-making state agencies and companies in the area of administration of the ministry. On the level of counties it is the environmental authorities that implement the national environmental, nature protection, forest and fisheries policies, programmes and action plans.

The mission of the Ministry of the Environment is to create the preconditions for Estonia's development that would guarantee the preservation of our natural biodiversity and clean environment and ensure that natural resources are used economically. According to the vision of the Ministry, an integrated system of environmental protection covering the entire country should be developed so as to ensure the preservation of our clean environment and sustainable use of natural resources.[122]

During the reporting period of 2005, the Chancellor of Justice received 52 applications concerning the area of government of the Ministry of the Environment. The applications pertained to all aspects of environment: air, water, forest, land. There were also applications concerning the regulation of environmental impact assessment. Most of the cases amounted to abstract constitutional review. The issues concerning which the ombudsman conducted proceedings were primarily related to the failure to respond to applications addressed to state authorities.

In Part I of this annual report some problems related to the protection of ambient air are dealt with more thoroughly. In 2005 the Chancellor of Justice received only three applications pertaining to the protection of ambient air, whereas the press covered several other incidents in addition. That is why the Chancellor of Justice considered it necessary to draw attention to the effectiveness of the ambient air monitoring system and to taking preventive measures for the protection of ambient air.

A large proportion of the applications were concerned with placing natural objects under protection. First of all, persons were dissatisfied with the fact that natural objects could be placed under protection without the consent of their owners or users. Bearing in mind that 10% of Estonian territory has been designated as protected area, the number of affected persons is comparatively high. In such cases the Chancellor of Justice has explained to applicants the constitutional aspects of environmental protection and has argued that if the restrictions are legal the consent of interested persons is not required. What is important is that the procedural rules prescribed in the Nature Conversation Act are followed when placing natural objects under protection.

[122] Accessible at http://www.envir.ee/53328

VI AREA OF GOVERNMENT OF THE MINISTRY OF CULTURE

1. General outline

The area of government of the Ministry of Culture includes the management of work in the fields of national culture, physical fitness, sports, and heritage conservation, the promotion of the arts, participation in the planning of state media activities, and the preparation of corresponding draft legislation.

The applications related to the area of government of the Ministry of Culture, submitted to the Chancellor of Justice in 2005 contained requests to review the constitutionality of the provisions of the Copyright Act, the Creative Persons and Artistic Associations Act and the Sport Act. In the matters of the applications the Chancellor of Justice did not ascertain conflicts with the Constitution.

Cooperation between the Chancellor of Justice and the Ministry of Culture was good in 2005. Due to this, on several occasions unconstitutional norms were amended already during the preparation of bills of Acts and Regulations. Furthermore, in 2005 the Chancellor of Justice has been more active in establishing contacts with the third sector engaged in the copyright area. Cooperation with the Estonian Authors' Society has been good.

The Chancellor of Justice also received applications for the review of legality of the activities of institutions within the area of government of the Ministry of Culture. For example, the Chancellor of Justice examined whether the private security agents of the National Library of Estonia had a legal basis to search the items a reader has with him or her in the reading area. The private security agents can not be authorised by the rules for users of the National Library to search the possessions that the visitors of the National Library have with them in the reading area, unless there is a clear provision in an Act delegating such authority.

The Chancellor of Justice addressed a memorandum concerning the referred matter to the National Library Council and requested that it should bring the searching by private security agents of the possessions that persons take along with them to the reading area into conformity with Art 19 and Art 11 of the Constitution in their conjunction. In its response the National Library Council informed the Chancellor of Justice that they were planning to make a proposal to amend the National Library of Estonia Act so that it would contain a clear norm delegating the authority to restrict the general personality right established in Art 19 para 1 of the Constitution. By now the Riigikogu has passed the National Library of Estonia Act Amendment Act, which specifies the duties of the readers.

2. Private security agents in the National Library

Case No 6-1/050700

(1) An applicant asked the Chancellor of Justice whether private security agents of the National Library of Estonia had a legal basis to search the possessions that persons had with them in the library.

(2) A private security agent of the National Library of Estonia (hereinafter "the library") stopped the applicant when the applicant was leaving the reading area and searched the applicant's possessions. The applicant found that the search of the possessions the applicant was carrying violated the applicant's fundamental rights. According to the security agent the search was conducted on the basis of clause 7(3)3) of the rules for users of the National Library.

In the course of the proceeding the Chancellor of Justice submitted a request for information to the

Director General of the National Library. In the response the Director General explained that the security service to the library is provided by Falck security company under a security service contract for manned guarding. The contract stipulates that in addition to other legislation the service shall be provided on the basis of the rules for users of the National Library.

(3) The main issue was whether a private security agent of the library had a legal basis to search the possessions the applicant had in the reading area.

(4) Pursuant to Art 19 para 1 of the Constitution everyone has the right to free self-realisation, giving rise to the general personality right. Pursuant to para 2 of the same Article 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.

The general personality right protects the integrity of person, i.e. the narrower personal sphere and the basic conditions for the preservation of the sphere. The general personality right protects the status as a legal position. As such, the general personality right is the most elementary expression and the first guarantee of human dignity.[123]

By searching the items person is carrying along the person's private sphere is being interfered with and thus the general personality right established in Art 19 para 1 of the Constitution is also being restricted.

An infringement of the general personality right is justified if it meets the requirements of the restricting clause in Art 19 para 2. Art 19 para 2 of the Constitution amounts to a simple reservation by law, allowing for the restriction of the general personality right only on the basis of law.[124] It is required that interferences with the right should comply with all the formal and substantive constitutional requirements.[125]

Art 11 of the Constitution allows to restrict rights and freedoms only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Pursuant to the general scheme of review of the restriction of fundamental rights, applied by the Supreme Court, any restriction of fundamental rights must be provided by an Act passed by the Riigikogu and worded sufficiently clearly (formal constitutionality), the restriction must have a legitimate aim, it must be appropriate and necessary for the achievement of the aim and the severity of the restriction must be in proportion with the importance of the aim to be achieved (substantive constitutionality).[126]

Thus, it is next necessary to ascertain the legal basis for the search of the possessions that the visitors take along to the reading area of the library.

The rights of private security agents arise from the Security Act, more specifically from § 32 of the Security Act. Pursuant to § 32(1)2) of the Security Act a security agent has the right to apprehend any person at the guarded object if that person is suspected of having committed an offence. Pursuant to clause 3 of the same subsection a security agent has the right to apprehend any person who enters or has entered a guarded object, stays there without appropriate permission or without other legal grounds, endangers the guarded object or other persons at the guarded object, or hinders the security guard from performing his or her duties. The second sentence of the referred clause contains an important requirement that an apprehended person shall be handed over to the police promptly.

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123 M. Ernits. Kommentaarid §-le 19 – Justiitsministeerium. Vabariigi Põhiseadus. Kommenteeritud väljaanne. [Comments on Art 19. – Ministry of Justice. Commented edition of the Estonian Constitution] Tallinn 2002, comment 3.1.

124 *Ibid*, comment 3.2 to Art 19.

125 *Ibid*, comment 4.2 to Art 19.

126 See e.g. Chamber of Supreme Court Constitutional Review judgment of 6 March 2002, No. 3-4-1-1-02, § 15.

Pursuant to § 32(1)4) of the Security Act, when apprehending a person, a security agent has the right to carry out a security check of the person and the objects held by him or her solely in order to verify that the apprehended person is not in possession of objects or substances with which he or she could endanger himself or herself or others. It is important in regard to all the referred grounds that they regulate the relationships between private persons. This is the sphere of private law, whereas the National Library is a legal person governed by public law and acting on the basis of law.

According to the Director General of the National Library the aim of searching persons entering and exiting the reading area is to guarantee the preservation of the property (printed matter) necessary for the performance of the functions of the library. Yet, neither the Security Act nor any other Act give rise to the right of security agents to search the possessions a person has with him/her with the aim of ascertaining illegal possession of items (printed matter). There is no Act giving this right to the National Library, either.

§ 4 of the Administrative Cooperation Act establishes that the Act regulating the grant of authority to perform administrative duties which require authority to exercise executive power prescribes the content of the authority of the executive power and the administrative duties, the agency or body which exercises state supervision over the performance of administrative duties and the further organisation of the performance of administrative duties if a contract under public law is terminated unilaterally or if any other reason exists which prevents a legal or natural person from continuing further performance of the administrative duties. Apprehending persons entering and exiting the reading area of the National library and searching their personal possessions amounts to performance of administrative duties requiring the authority to exercise state power.

Even when presuming that a security agent has the right, on the basis of § 32(1) clause 29 of the Security Act, to apprehend any person if that person is suspected of having committed an offence, then the agent has an obligation to hand the person over to the police promptly. Further procedures may be carried out only by police officers.

Presently, a security agent of AS Falck searches the possessions of the visitors of the library on the basis of § 7(3) of the rules for users of the National Library. In fact, § 7(3) of the rules for users gives the security agents the right to search the possessions a person has with him/her.

The competence of the National Library Council is established in § 10 of the National Library of Estonia Act. Pursuant to subsection 3 of the referred section the Council shall approve the Statutes and the rules for users of the National Library and amend these. None of the Acts, including the National Library of Estonia Act, give the Council the right to restrict the general personality right of the visitors of the National Library by searching the possessions they have taken along to the reading area. Neither does the National Library of Estonia Act contain a provision delegating authority, which would allow the Council to delegate the search of possessions persons have with them in the reading area to a legal person governed by private law – to AS Falck.

Thus, in the matter under discussion, the restriction of the general personality right, which is established in Art 19 para 1 of the Constitution, has not been provided for by an Act passed by the Riigikogu and the restriction is in conflict with the requirement of formal constitutionality, arising from Art 11 of the Constitution. The security agents of the library had no legal ground to search the possessions people had with them in the reading area. If there is no clearly worded provision delegating authority to do so, the rules for users of the National Library may not authorise security agents to search the possessions the visitors of the library take along to the reading area.

(5) The Chancellor of Justice addressed a memorandum to the National Library Council, suggesting that it should consider different possibilities for bringing the search of possessions persons have along in the reading area by the security agents into conformity with Art 19 and Art 11 of the Constitution in their conjunction.

In its response the National Library Council informed the Chancellor of Justice that they were planning to make a proposal to amend the National Library of Estonia Act so that it would contain a clear provision delegating authority for the restriction of the general personality right of the visitors of the library, established in Art 19 para 1 of the Constitution.

The situation improved with the adoption of the National Library of Estonia Act and the Riigikogu Rules of Procedure Act Amendment Act on 16 February 2006. § 61(2) clause 2 of the amended National Library of Estonia Act stipulates the following: "In order to ensure the preservation of tangible assets and security, the rules for the users may provide for the obligation of visitors to present the possessions they have with them upon entering and exiting the reading area for checking." Nevertheless, even this provision does not empower the National Library to authorise the security agents to search the visitors' possessions.

VII AREA OF GOVERNMENT OF THE MINISTRY OF ECONOMIC AFFAIRS AND COMMUNICATIONS

1. General outline

The area of government of the Ministry of Economic Affairs and Communications includes the drafting and implementation of the state's economic policy and economic development plans in the following fields: industry, trade, energy, housing, building, transport (incl. transport infrastructure, carriage, transit, logistics and public transport), traffic management (incl. traffic on railways, highways, streets, waterways and airways), increasing road safety and reducing environmental hazardousness of vehicles; informatics, telecommunications, postal service and tourism; co-ordinating the development of state information systems; research and development and innovation, metrology, standardisation, certification, accreditation, licensing, registers, industrial property protection, competition surveillance, consumer protection, export promotion and trade safeguards; measures relating to regional business development and investment, administration of minimum stocks of liquid fuel, and drafting the respective legislative bills.

In the applications received by the Chancellor of Justice, people complained about the activities of the Ministry and boards and inspectorates in its area of government, activities of local governments in connection with the implementation of the laws in the Ministry's area of government, and the exercise of supervision. The second main group were applications with requests to verify the conformity of various pieces of legislation with the Constitution and the laws. Applications were mainly concerned with areas such as traffic organization issues, transport law, benefits on public transport, problems of ownership of apartments and issues of apartment associations, energy law, economic administration, trade administration, competition law, company law, and industrial property.

Similarly to the previous years, many applications had to be rejected due to the lack of competence of the Chancellor of Justice – in that case, applications were forwarded to supervisory agencies with relevant special competence or were returned if it was possible for the persons to use other more effective remedies for their protection. The Chancellor of Justice in his supervisory activities proceeds from the principle of non-duplication, according to which applications are not accepted if judicial proceedings are pending in the same matter or if the person can submit an administrative contestation or use other legal remedies. It was also necessary to reject applications which in essence sought legal assistance with interpretation of laws and regulations from the Chancellor of Justice. Unfortunately, the Chancellor of Justice cannot help all people who need his assistance but has to concentrate on the exercise of functions entrusted to him by the Constitution and the laws.

Nonetheless, it should be noted that even applications that were rejected or forwarded helped the Chancellor of Justice to develop awareness of various problems which he could later resolve in own-initiative proceedings. Generalisations reached on the basis of applications can be used to ascertain discrepancies in the legislation relating to the particular field or in the ascertainment of problems in the area of government of the particular ministry. This helps the Chancellor of Justice to develop a more general picture of the problems in the particular fields, and helps to see the expectations of society towards the state authorities and creates preconditions for further steps by the Chancellor of Justice. These steps could include constitutional review proceedings on the Chancellor's own initiative, submitting of recommendations or memorandums to ministers, or making reports to the Riigikogu on topical issues.

In the majority of cases that were accepted for proceedings, no violations on the part of the state or public officials were ascertained, and in those cases an explanatory response was sent to the applicants. Summaries of the main cases where violations were found or substantial opinions were submitted are presented below.

1.1. Planning and building law

The Chancellor of Justice verified the activities of the Saue Rural Municipality Government with regard to its refusal to divide a registered immovable in the common ownership of persons. The Chancellor of Justice assessed whether the refusal to divide the immovable into physical shares was proportional and in conformity with the purpose established in the building regulation, and analysed in supervisory proceedings the legal meaning of the provisions of the building regulation. The Chancellor of Justice stressed the need to take account of the real life situations in administrative procedure and not limit oneself only to the examination of norms; nothing changes for the local government or other inhabitants of the municipality if an existing built-up plot is divided into legal physical shares. As a result of the Chancellor's proceedings, the Saue rural municipality council decided to allow the division of an existing plot in common ownership into physical shares.

Another important proceeding dealt with the protection of areas of environmental and cultural value in Tallinn. The Chancellor of Justice sent a memorandum to the Tallinn city council, in which he pointed out the inconsistency of building regulations approved by the council for Tallinn, Nõmme and Pelgulinna districts with the Planning Act. The establishment of the conditions of protection of areas of environmental and cultural value with building regulations does not guarantee compliance with the necessary procedural rules in the adoption of planning decisions, or supervision by the county governor, involvement of the public and right of judicial appeal. The Tallinn city council agreed with the observations of the Chancellor of Justice.

As a rule, the Chancellor of Justice cannot verify the legality of planning and building activities. In the areas of planning and building, the Chancellor of Justice verifies the functioning of public authority, first and foremost whether the local government bodies operate in compliance with laws and whether administrative proceedings were carried out pursuant to the requirements of law. In exercising supervision, the Chancellor of Justice cannot limit himself to the examination of norms and requests for compliance with them, but it is also very important to take into account the real life in order to ensure that the implementation of laws is based on all the essential facts and that it does not violate disproportionately anyone's rights or contradict the purpose of the law. Therefore, the Chancellor of Justice cannot always demand that his opinions should be taken into account immediately. Sometimes the best result can be achieved through negotiations, of course if the relevant parties make efforts to reach a legal and reasonable solution and subsequently also implement it promptly.

1.2. Delegating of a function under public law to a person established under private law

On the basis of several applications, the Chancellor of Justice verified which measures related to parking supervision the Tallinn city government was allowed to delegate to legal persons under private law and whether the requirements of the law were violated in the organisation of parking supervision. The Chancellor of Justice ascertained that the city had delegated with an administrative agreement to a person under private law the making of registry enquiries about personal data, the transfer of the data, delivery of decisions on the imposition of fines for delay and the processing of administrative contestations submitted by persons. Such an extensive privatisation of public authority is illegal. The Chancellor of Justice drew the attention of the Tallinn city government to the fact that in drawing up the new public procurement conditions the past mistakes have to be avoided and an administrative agreement concluded for the transfer of public functions to persons under private law should not be incompatible with the requirements of the Traffic Act, the Taxation Act and the Administrative Cooperation Act.

In his 2004 report, the Chancellor of Justice dealt with the violations of the Tallinn city government in delegating the parking supervision related functions to AS Falck Eesti which is a company under private law.

Proceedings conducted by the Chancellor of Justice allow him to see on a more general level the problems of supervision related to the delegation of a public function to a person under private law. When entering into an administrative agreement with a person under private law the public authority should in any case guarantee the performance of the function for which it remains responsible. In reality it entails a risk that there would be lack of control over the performance of the administrative agreement and the sanctions provided in the agreement in the case of failure to perform the duties are not sufficiently effective or that there is no political will to implement the sanctions. It is very difficult for the Chancellor of Justice to verify such cases. A violation can only be ascertained in the case of exceeding the limits of the delegating norm or in administrative proceedings, but it is not possible to verify the performance of an administrative agreement as this would require a comprehensive overview of the facts and the assessment of the efficiency of the activities of a person in private law who exercises public functions, which, however, exceeds the competence of the Chancellor of Justice.

1.3. Housing and guaranteeing of vital services to the population

The Chancellor of Justice has repeatedly drawn the attention of the Ministry of Economic Affairs and Communications to the duties of the state in housing management. As a result of reforms carried out in Estonia, the majority of the housing is now in private ownership. The housing available to the state and local governments is not sufficient for the provision of social housing to persons in need, let alone the provision of apartments for rent at affordable prices, for which there is an acute need due to the exponential rise in real estate prices. Finding of housing for tenants who are forced to leave the apartments that were returned to the previous legal owners has become a serious social problem. The current law does not give the right to such tenants to request the provision of housing by the state, and places them on equal footing with other persons in need who request housing from local government.

According to § 6(1) of the Local Government Organisation Act, it is the duty of local governments to provide social assistance and social welfare services as well as housing and public utilities in their respective rural municipalities or cities, if the performance of these functions has not been given to someone else by law. According to § 14(1) of the Social Welfare Act, local governments are required to provide the opportunity to lease social housing for persons or families who are unable or incapable of securing housing for themselves or their families.

Based on the constitutional principle of a state based on social justice, in the final stage the state is required to guarantee the opportunity to use a dwelling for all persons in need, including persons who were deprived of their apartment in the course of the ownership reform. It is the function of the Ministry of Economic Affairs and Communications to propose solutions how to guarantee a dwelling that meets the minimum requirements to all the persons who need it. This presumes a sufficient overview of the housing stock available to less secured people and the turnover of the stock (the establishment of the relevant register following the example of Germany could be considered). In view of the scarcity of municipal housing and the supply of apartments in private ownership, the existing housing stock might not be appropriate to cover the relevant needs. The Ministry of Economic Affairs and Communications is competent to assess the situation in housing, considering the possibilities of local governments, and to prepare a national housing programme to overcome shortcomings.

The competence of the Ministry of Economic Affairs and Communications in respect to public water supply and sewerage system was explored in detail in the 2004 report of the Chancellor of Justice. In the meaning of the Consumer Protection Act, the public water supply and sewerage system constitute a universal service, i.e. a service provided in the public interest and used by the overwhelming majority of the population of the state or a certain region. Similar universal services

are, for example, gas, electricity, heating, waste handling or communications services. As a rule, water and sewerage service is provided by a private water company in which the local government has a participation and which is in a dominant position in the particular service area. In the meaning of the Competition Act, it constitutes an undertaking controlling an essential facility, as water and sewer lines form a network alongside which it would not be economically feasible to establish a parallel competing network.

Amendments made to the Public Water Supply and Sewerage Act in 2005 deal first of all with the issues within the competence of the Ministry of the Environment and they are not sufficient to ensure the protection of the rights of consumers in relations with water companies that enjoy a dominant position on the market. Until now, the Ministry of Economic Affairs and Communications has failed to provide a satisfactory answer to the recommendation of the Chancellor of Justice to revise the Public Water Supply and Sewerage Act in terms of competition law and consumer protection. The activities of a dominant undertaking providing a vital service should not be based on earning the profit, while the analysis of the Competition Board demonstrates that currently water companies misuse their monopolistic position.[127] The current situation is characterised by the fact that Tallinn Water is a publicly listed company.

Pricing of universal services is an issue of competition law (regulation concerning dominant undertakings or monopolies), and one of the most important economic interests of consumers – the price of the service – depends on it. Electricity and natural gas are sold at a price approved by the Energy Market Inspectorate. Regulation of the heating price is within the competence of the inspectorate or local government: who sets the price depends on the size of the company. The only regulator of the prices of water supply and waste-water disposal and waste transport is the local government. The Ministry of Economic Affairs and Communications is competent to analyse the independence and functioning of regulators of universal services and to prepare solutions for improving the current regulation.

[127] Competition Board Yearbook. Accessible at: http://www.konkurentsiamet.ee/dokumendid/aastaraamat_2004.pdf.

VIII AREA OF GOVERNMENT OF THE MINISTRY OF AGRICULTURE

The area of government of the Ministry of Agriculture includes the planning and implementation of rural development policy, agricultural policy, the part of the fisheries policy concerning fishing industry and the agricultural products trade policy, the organisation of ensuring food safety and conformity, the coordination of activities relating to animal health and protection and plant health and protection, the organisation of agricultural research and development and agricultural education, and the preparation of corresponding bills of legislation.

The majority of applications concerning issues within the area of government of the Ministry of Agriculture sought explanations of legislation or legal counselling from the Chancellor of Justice. For example, applicants sought explanation about the compensation of employment shares that were not compensated during the agricultural reform, or pointed out shortcomings in the organisation of competitions, setting up of committees or staff selection in the system of the Ministry of Agriculture. The Chancellor of Justice could not accept such applications for proceedings and forwarded them for response to the Ministry of Agriculture.

During the reporting period, while conducting supervisory proceedings in respect to the Estonian Agricultural Registers and Information Board (ARIB) the Chancellor of Justice found a violation of the protection of personal data. Without the existence of a legal basis, the ARIB requested personal identification codes of the applicant's members in the course of processing of an application for market development support.

It is important that the state's activities in the processing of personal data do not restrict personal life to an unjustifiable extent. The state may not request more personal data than is necessary in the particular case. If the legislator finds that the collection of certain personal data is necessary, a legal basis for this should be established in a law or in a regulation. As agricultural, fisheries, rural life development and food industry support can be applied for pursuant to the procedure and conditions established in respect to four different fields (based on the Common Agricultural Policy Implementation Act, the Estonian rural life development plan 2004-2006, the Estonian national development plan 2004-2006, and the Rural Life and Agricultural Market Organisation Act), the Ministry of Agriculture should definitely take better account of the rules of personal data protection when developing the relevant policies and drafting bills of legislation in the future. It should be analysed which data from the applicants for support is needed, and if necessary the legal bases for the collection of the data should be specified in laws and regulations, while bearing in mind that the collection of data should not disproportionately restrict the right to privacy.

IX AREA OF GOVERNMENT OF THE MINISTRY OF FINANCE

The area of government of the Ministry of Finance includes coordination and implementation of the planning of the financial and resource management policies of the Government and the budgetary policies of the state, planning and implementation of taxation and customs policies, economic analyses and forecasts, proceedings concerning applications for permission to grant state aid and exercise of supervision over the legality and use of state aid, public procurement activities, official statistics, coordination of the implementation of the internal control system of the Government and the organisation of internal audit, state accounting, administration of the financial assets and liabilities of the state, foreign aid and loans granted to the state, and preparation of corresponding bills of legislation. The area of government of the Ministry of Finance includes the Tax and Customs Board, the Public Procurement Office and the Statistical Office.

In respect to the above areas, the largest number of applications to the Chancellor of Justice were concerned with the issues of state and local taxes and budgets.

In 2005, applicants often turned to the Chancellor of Justice in the course of pre-trial procedure to receive an assessment of the legality of activities of the tax authority and the compliance with the duty to explain. The Chancellor of Justice had to reject most of such applications, while explaining to the applicants that the principle of supervision by the Chancellor of Justice is not to duplicate the existing supervisory mechanisms but to influence them to become more effective. In several cases, while examining the application, it was found in the data of the register of court cases that the applicant had turned to the court in the same issue and had submitted a complaint to the court about the unlawful activity of a tax authority or the court was adjudicating the particular tax dispute. Thus, while court proceedings were pending such cases, in parallel the applicants wished to have the opinion of the Chancellor of Justice. However, in such instances the law rules out the possibility of the Chancellor of Justice to initiate proceedings in respect to the application.

Legal problems of data protection arose in connection with the filling out of the declaration to the Tax and Customs Board concerning trade union admission and membership fees paid by natural persons.

The Chancellor of Justice received frequent applications with requests to verify the constitutionality of laws or regulations establishing state and local taxes, fees and other payments, or providing for public financial obligations, which is directly related to the Chancellor's function of constitutional review and the protection of fundamental rights and freedoms and principles of good governance. For example, the Chancellor of Justice received a request from an applicant who asked to verify whether the insurer's right arising from the Insurance Activities Act to process personal data without the consent of the person was in conformity with the Constitution. In respect to the state's salary system, the Chancellor of Justice had to assess whether the Government through the Minister of Finance violated the right of trade unions to be involved in the preparation of employment conditions concerning workers and public servants (i.e. problems related to social dialogue) when the Minister was drawing up salary conditions for public servants for 2005. With regard to issues of local government budget procedures, the Chancellor of Justice had to express an opinion about the conformity of a local government regulation with the Rural Municipality and City Budget Act.

In several instances the Chancellor of Justice received a request to verify compliance of a local government land tax regulation with the Constitution and the Land Tax Act in granting tax benefits to persons on the basis of their residence that is entered in the Population Register. Does the local government council have the right to establish different land tax rates for rural municipality or city inhabitants who are entered in the population register of the particular local government as compared to other land owners? To resolve this problem, the Chancellor of Justice addressed the Riigikogu finance committee with a question of possible multiple interpretations of § 11 of the Land

Tax Act on 6 June 2005. The finance committee found that the delegating norm in § 11 of the Land Tax Act that regulates the bases for the granting of tax benefits by local governments did not need any specification, but the committee decided to make a proposal to the Ministry of Finance to draw up a circular to local government units in order to guarantee the right of persons listed in § 11(2) and (2^1) of the Land Tax Act to equal treatment in the application of exemptions from land tax and to ensure the uniform interpretation of the Act.

The Chancellor of Justice also had to express a view with regard to the question whether the provision of the Value Added Tax Act concerning the taxation of turnover of cultural services (if the organiser of a performance or concert is the state, municipal or private performing arts institution or national opera) was in conformity with the requirements of fiscal neutrality and the constitutional principle of equal treatment. On 19 October 2005, the Chancellor of Justice sent a memorandum to the Riigikogu finance committee to draw their attention to the issue of compatibility of § 15(2) clause 6 of the Value Added Tax Act with the Estonian Constitution and the EU law and the violation of the requirement of fiscal neutrality and the principle of equal treatment in taxation, and recommended to bring the legislative base into conformity with superior law.

X AREA OF GOVERNMENT OF THE MINISTRY OF INTERNAL AFFAIRS

1. General outline

The Ministry of Internal Affairs performs several functions essential for the state: guarantee of the internal security of the state and the protection of public order, the guarding and protection of the state border, the crisis management, the management of issues relating to citizenship and immigration, and churches and congregations and issues related to data protection and vital statistics. That is why it is not surprising that the Chancellor of Justice attends the issues relating to the area of government of the Ministry of Internal Affairs.

In 2005, the Chancellor of Justice found problems of legislation as well as implementation within the area of government of the Ministry of Internal Affairs. There were some minor problems related to errors made by officials in interpretation and application of norms, and also some complex issues of legal policies emerged which required the intervention of the legislator in order to guarantee the required level of protection of fundamental rights.

Unfortunately, there are spheres within the area of government of the Ministry of Internal Affairs the shortcomings of which have repeatedly been highlighted by the Chancellor of Justice, and yet, until now, the Ministry has not been able to solve the problems. The persistency of the problems raises the issue of weak administrative capacity of the Ministry. The biggest problems are the deficiency of the legal basis for the police activities and the overpopulation of jails. Already in his 2004 annual report the Chancellor of Justice pointed out that many of the mistakes in the activities of the police could be attributed to the poor quality of legislation serving as a basis for the activities: "The Police Act […] is outdated, vague and too general in order to meet the requirements arising from the Constitution". Although the Minister of Internal Affairs is well aware of the problems, it is regrettable that there has been no progress in the sphere so far.

The dispute over the situation in jails has been dragging for years. Since 2004 the Chancellor of Justice has been drawing the attention of the Minister of Internal Affairs and the Minister of Justice to gross violations in the jails of the East Police Prefecture, but the situation has not changed significantly. Estonian problems have reached international level – the European Court of Human Rights has decried the conditions in the Jõgeva jail.[128] The inability of the Ministry of Internal Affairs to solve these problems is highly regrettable and impermissible.

1.1. Review of constitutionality of legislation of general application

During the reporting period several persons addressed the Chancellor of Justice with requests to check whether administrative authorities had acted legally, whereas in the course of the Chancellor of Justice's proceedings it appeared that the problems were rooted in the Acts, not in their application. In such cases the Chancellor of Justice had to assess whether the existing legal regulation allowed for the protection of fundamental rights in conformity with the requirements of the Constitution. These were the cases where the control of legality of the actions of an authority (so called ombudsman's control) developed into the constitutional review proceedings. The possibility to conjoin such different proceedings and outputs is a great advantage of the Estonian model of the institution of the Chancellor of Justice in comparison to respective institutions of other countries.

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[128] See ECHR judgment of 8 Nov 2005 No. 64812/01 *Alver v. Republic of Estonia*. In this context it is important to make a reference to the report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) concerning Estonia, published in 2005, which deals with the problems in prisons and jails in detail. See the report to the Estonian Government on the visit of 23-30 Sept 2003. Strasbourg, 14 Apr 2004. Accessible at: http://www.cpt.coe.int/documents/est/2005-06-inf-est.pdf.

One of such examples within the area of government of the Ministry of Internal Affairs was the case of disclosure of lists of former officers of the KGB [the former State Security Committee], in which the applicants addressed the Chancellor of Justice complaining about the activities of the Security Police. In order to respond to these applications it was necessary to find an answer to a very difficult question of whether the disclosure of former KGB officers was, in principle, constitutional or not. Very many different considerations had to be taken into account, beginning with Estonia's history and ending up with the age of the affected persons.

Two examples of cases within the area of government of the Ministry of Internal Affairs, which started as review of legality of activities of administrative authorities and turned into the review of constitutionality of legislation, were related to issues of vital statistics. In both cases it appeared that there were some formal obstacles to the performance of certain acts relating to vital statistics, which could be eliminated only by amending the legislation of general application regulating the sphere. In one of the cases the applicant requested the Chancellor of Justice verify whether a vital statistics office had acted lawfully when refusing to issue a certificate concerning the absence of circumstances hindering marriage, because the applicant wished to marry a person of the same sex in a foreign country. When reviewing the activities of the vital statistics office it was inevitable that several questions emerged concerning the validity of marriages between persons of the same sex entered into in a foreign state and the compatibility of the relevant regulation with the principle of legal clarity. In another case an imprisoned person was unable to marry because he did not have an identity document. In this case the problem was that the legal acts regulating marital status and acts regulating imprisonment in their conjunction interfered with fundamental rights without a basis.

In the cases referred to in this report the Chancellor of Justice had to make recommendations to the Ministry of Internal Affairs for the initiation of amendment of legislation of general application, because the current law proved insufficient in view of constitutional requirements. The area of government of the Ministry of Internal Affairs includes many duties interfering with fundamental rights, and in such cases the legislation delegating authority for relevant activities must be very well considered and sufficiently precise and clear. Fortunately, in the cases referred to the problems were not of fundamental character, only the legal bases for the activities of the executive needed some amendments. Nevertheless, it has to be stressed that in the case of activities resulting in interference with fundamental rights the solutions need particularly thorough argumentation and the existing regulations have to be unambiguous. This way it is possible to guarantee that the rights of individuals are restricted to the minimum possible extent and further disputes over the content of norms could be avoided.

1.2. Guarantee of fundamental rights and freedoms and the practice of good governance

In the majority of the applications pertaining to the Ministry of Internal Affairs the problems did not consist of deficient legislation but of mistakes in interpreting or applying norms or even of acting without a legal basis.

The areas where mistakes had occurred included the issues of citizenship and migration, regional planning, establishment of place names, granting access to public information (activities of the Data Protection Inspectorate) and issues relating to the service of county governors.

On the basis of the cases resolved in 2005, it can be argued that now and again perfunctory and careless attitude of officials in solving persons' problems becomes apparent. Against this background it is important to point out that in his activities the Chancellor of Justice is paying more and more attention to the observance of the principles of good governance. Below, two cases will be described in more detail, in which the Chancellor of Justice came to the conclusion that despite of the fact that from the legal point of view everything was correct and officials had not violated any norms

in the formal sense, nevertheless, they had failed to act in a manner that is appropriate for the representatives of the state powers. Although the practice of good governance is not an unambiguous set of rules, it should serve as a guide of conduct in communication with people. There is no doubt that the practice of good governance embraces speedy and efficient procedures, the duty of the state power to explain its activities and, if necessary, refer a person to an appropriate administrative authority, general openness of public authority and the role of public authority as the one who balances conflicting interests. Observance of these and other principles of good governance helps to create a situation where the state exists for the people, not vice versa.

1.3. Issues relating to citizenship and migration

A considerable proportion of the problems which appeared in the area of government of the Ministry of Internal Affairs are related to issues of citizenship and migration. This sphere has also been analysed in the reports of international human rights organisations and several proposals have been made for the solution of the problems.

The right to effective procedure and effective guarantee of the right of appeal when regulating the legal status of foreigners was under the scrutiny of the Chancellor of Justice. From among the issues pointed out in the report of the activities of the Chancellor of Justice in 2003 – 2004 the problem of the term of recourse to an administrative court, arising from the Aliens Act, against a decision on the issue, refusal to issue, the extension or refusal to extend or revocation of a residence permit or work permit or a decision on the refusal to review an application has still not been resolved. Namely, the Chancellor of Justice addressed the Riigikogu Constitutional Committee with the question of constitutionality of § 9(5) of the Aliens Act. Pursuant to the referred provision a complaint against a decision on the issue, refusal to issue, the extension or refusal to extend or revocation of a residence permit could be filed with an administrative court only within ten days after the date of notification of the decision.[129] The Chancellor of Justice was of the opinion that this ten-day term was too short to guarantee an effective exercise of the ht of appeal to individuals, and this amounts to the violation of the right of recourse to the courts, established in Art 15 para 1 of the Constitution.

Applications submitted to the Chancellor of Justice during the reporting period predominantly pertained to application for residence permits. The problem of the time-limits of proceedings upon the acceptance of an application for a residence permit and making a decision concerning the application was repeatedly raised.

When regulating the migration issues and adjudicating relevant applications the requirements arising from the European Union law also have to be taken into account. The transposition of several directives relating to the legal status of aliens and their family members has been lagging, which is very unfortunate. This means that for the failure to transpose the directives the European Commission or another member state may bring an action against Estonia in the European Court of Justice. However, there is another important aspect – namely, a directive which has not been transposed into national law on time may give rise to the rights and obligations of individuals, and relevant administrative authorities have to take these into account. This creates a situation where an administrative authority will have to set aside a national Act and proceed from the directive, which was not transposed on time. This will create legal uncertainty both for persons and administrative authorities. The correct transposition of directives, on the other hand, promotes the guarantee of persons' rights and freedoms through the fact that the rights of persons and the duties of administrative authorities are unambiguously prescribed by national law.

[129] Presently, § 13^6(1) of the Aliens Act establishes that a complaint may be filed against a decision on the issue, refusal to issue, the extension or refusal to extend or revocation of a residence permit or work permit or a decision on the refusal to review an application with an administrative court or such decision may be contested within ten days after the date of notification of the decision. A decision on the contestation may be appealed in an administrative court within the same term.

Among the directives regulating the rights of asylum seekers the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (transposition date 6 February 2005) and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (transposition date 31 December 2002; binding on Estonia since 1 May 2004) were transposed by the Estonian state later than prescribed. To regulate the asylum proceedings and the legal status of asylum seekers the Riigikogu passed, on 12 December 2005, the Guarantee of International Protection to Aliens Act. By this Act the referred directives relating to temporary protection and standard for the reception of asylum seekers were transposed to national law. The referred Act also takes into account Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, the minimum requirements for the procedure of granting and revoking the status of a refugee, and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The Act is scheduled to enter into force on 1 July 2006.

In addition to legislation relating to asylum seekers also the transposition of directives on the issues of long-term residents and the right to family reunification has been delayed. The date of transposition of Council Directive 2003/109/EC of 25 November 2003 regulating the status of third-country nationals who are long-term residents was 23 January 2006. The date of transposition of Council Directive 2003/86/EC of 22 September 2003 regulating the right to family reunification was 3 October 2005. To regulate the issues of the referred directives the Government of the Republic initiated a bill amending the Aliens Act and other Acts. The Amendment Act was passed by the Riigikogu on 19 April 2006 and it entered into force on 1 June 2006.

The questions of citizenship and migration have been dealt with in the reports of the Council of Europe Advisory Committee of the Framework Convention for the Protection of National Minorities and the European Commission against Racism and Intolerance (ECRI). The Council of Europe Advisory Committee of the Framework Convention for the Protection of National Minorities visited Estonia in December 2004. The Committee adopted an opinion on 24 February 2005 and it was published on 22 July 2005.[130] The ECRI adopted the third report concerning Estonia on 24 June 2005 and it was published on 21 February 2006.[131]

Both reports point out the great number of stateless persons in Estonia. The reports praise Estonia for having amended the Citizenship Act and making application for citizenship more accessible, at the same time pointing out that the number of stateless persons in Estonia continues to be very high. The Council of Europe Commissioner for Human Rights Alvaro Gil-Robles drew our attention to the same fact in his report published in 2004, where he made concrete proposals for improving the applying for citizenship.[132] The ECRI recommends that for making application for citizenship more accessible Estonia should provide free of charge and high-quality language lessons to stateless people who wish to acquire Estonian citizenship; members of the national school examination board should be required to be present whenever non-Estonian primary school students take the Estonian language exam in order to enable them all to be exempt from the language portion of the citizenship exam; to analyse whether the provision excluding the citizenship to retired military personnel and their spouses is justified and to examine the relevant applications on a case-by-case basis. Furthermore, the ECRI pointed out the problem of stateless minors and recommended the organization of awareness

[130] Council of Europe Advisory Committee of the Framework Convention for the Protection of National Minorities. The second opinion on Estonia, adopted on 24 Feb 2005, No. ACFC/INF/OP/II(2005)001. Accessible at: http://www.coe.int

[131] European Commission against Racism and Intolerance. Third report on Estonia. CRI(2006)1. Accessible at: http://www.coe.int

[132] Report by Mr Alvaro Gil-Robles, Commissioner for human rights, on the human rights situation in Estonia. Strasbourg, 12 Feb 2004, CommDH(2004)5, pp 9-15. Accessible at: http://www.coe.int; see also the summary on pp 125-126 of the Chancellor of Justice's 2004 annual report.

campaigns throughout the country in order to inform parents about the possibilities of acquiring citizenship for their children by way of simplified procedure. The ECRI also stressed the need to ease the language requirements for older people.

The ECRI also recommends that implementation of the Language Act be closely monitored, to pay more attention to the problems of national minorities and to amend the Cultural Autonomy for National Minorities Act; to prosecute hate crimes more actively; to adopt a comprehensive anti-discrimination law; to have in place asylum proceedings observing international human rights standards (to allow for the right of appeal; the right to be heard, to grant free legal aid, to solve the boarder procedural problems and observe procedural rules when detaining asylum seekers); to help people who have been living in Estonia for a long time to have their situation legalized, taking into consideration the individual circumstances of the person involved; to ensure sufficient preparation of teachers in view of reforming the Russian-language teaching; resolve the issues of integration and employment of Russian-speaking inhabitants; to develop a plan for integrating the Roma community in society, and to establish a system of ethnic data collection.

In its report the Advisory Committee of the Framework Convention for the Protection of National Minorities also touched upon stateless persons, application of the Language Act, adoption of legislation on equal treatment, media issues, support to cultural initiative of ethnic minorities and their participation in decision-making.

The referred reports highlight several important problems which should be born in mind by the legislator, when legislating, as well as by the executive authorities, when organizing their activities. From among the shortcomings pointed out in the reports the Chancellor of Justice scrutinizes the asylum proceedings, the procedure for the issue of residence permits, the expulsion proceedings and equal treatment.

2. Citizenship and migration

2.1. Principles of visa procedures

Case No. 7-1/050597

(1) An applicant turned to the Chancellor of Justice with a request to verify the legality of visa procedures.

(2) The applicant is a citizen of the Republic of Estonia married to a citizen of Nigeria. They have a son, who is also a citizen of the Republic of Estonia. Both the applicant and the spouse live in Finland and are studying at a polytechnic there. The applicant's spouse has a residence permit in Finland valid for a year and its validity is extended each year. The family wanted to travel to Estonia for the Easter of 2005 to visit the applicant's parents. The applicant's parents made a visa invitation for a short-term visa, and the applicant's spouse submitted the visa application with all the required documents to the Embassy of the Republic of Estonia in Helsinki. The applicant's spouse was refused a visa.

The applicant asked the Chancellor of Justice to verify the grounds of refusing the visa to the spouse.

The Chancellor of Justice addressed the Minister of Foreign Affairs requiring information to clarify the circumstances of the above incident.

According to the explanations of the Minister of Foreign Affairs, the Embassy of the Republic of Estonia in Helsinki accepted the visa application and forwarded it to a division at the Ministry of Internal Affairs for approval. An agency within the area of government of the Ministry of Internal

Affairs refused to approve the visa, and thus the Consular Officer at the Embassy of the Republic of Estonia in Helsinki could not issue a visa to the applicant.

On the basis of the above information, the Chancellor of Justice made an inquiry to the Minister of Internal Affairs to explain the circumstances and reasons for refusing to approve the visa application.

In response to the Chancellor of Justice's inquiry the Minister of Internal Affairs reported that the visa application was not approved by an agency within the area of government of the Ministry of Internal Affairs.

(3) In order to resolve the case, it was necessary to find an answer to the question whether the decision on issuing the visa was in accordance with the procedures established in legal acts.

(4) Section 10^{9} of the Aliens Act establishes the conditions for issue of visas, and § 10^{10} the grounds for refusal to issue a visa. Likewise, the Aliens Act provides for the procedure for reviewing a visa application.

According to § 10^{10}(1) clause 7 of the Aliens Act, a visa shall not be issued to a foreigner in whose case a relevant designated agency within the area of government of the Ministry of Internal Affairs has not approved the issuing of a visa.

Section 10^{12}(1) of the Aliens Act establishes that issuing of a visa or refusal to issue a visa shall be decided by a consular officer. According to subsection 2, a consular officer is required to obtain approval for the issue of a visa from an agency within the area of government of the Ministry of Internal Affairs, which is designated by the Minister of Internal Affairs pursuant to the procedure established by the Government. Subsection 3 establishes that a consular officer shall decide to issue a visa or refuse to issue a visa on the basis of information submitted in the visa application and the documents appended to the visa application and other circumstances known about the person.

The Chancellor of Justice stated that according to the principles of international law every country is entitled to decide the foreigners' entry into the country, their stay there and their expulsion from the country. In general, an alien lacks the subjective right to enter the country and stay there temporarily. Persons who have arrived in Estonia on the basis of a visa or right of visa-free travel, as a rule, lack close personal ties to Estonia, and thus their legal protection and visa regulation process are not comparable to persons who have been issued a resident permit by the state.[133]

Thus the state has a wide margin of discretion in deciding the entry of a foreigner into the country. In a country based on the rule of law the public authority cannot act arbitrarily in any domain, and must always observe the constitution, and first and foremost fundamental rights. These also set limits to a traditionally broad margin of discretion of the state to make decisions about foreigners' entry into the country. Therefore, deciding the issuing of a visa is not an arbitrary decision by the country, but personal fundamental rights and constitutional principles also have to be observed in visa procedures, above all the principle of legality established by the 1st sentence of Art 3 para 1 of the Constitution, the right to procedure and regulation deriving from Art 14, the fundamental right to family provided by Art 27, and the prohibition of discrimination in Art 12.[134]

The regulation of visa procedure is established by the Aliens Act. The visa procedure was regulated by a law due to the principle of legality, according to which more essential visa issues (types of visa,

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[133] See the explanatory memorandum to the Bill of Amendment of the Aliens Act and other Acts proceeding from this, as at 16 Feb 2004, No. 263 SE, accessible at: http://www.riigikogu.ee.

[134] Cf decision of the UK House of Lords on 9 Dec 2004 in the case No. 55, Regina v. Immigration Officer at Prague Airport, ex parte *European Roma Rights Centre and others. Accessible at: http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma-1.htm*; UN General Assembly Resolution of 27 Feb 2003 No. 57/195, A/RES/57/195.

giving and refusing a visa, extending the time of stay and refusing it, declaring a visa invalid, and regulation of visa invitations) must be established on the level of a law.[135]

The principle of legality is one of the general principles established by the Constitution, which requires that the administrative activity should take place within the legal framework established by the parliament. The requirement deriving from the 1st sentence of Art 3 para 1 of the Constitution stipulates that the state authority shall be exercised solely pursuant to the Constitution, and the executive power may be exercised if there is a mandate provided by law for this.[136] Proceeding from the referred principle the law must specify with sufficient clarity the scope and the manner of the exercise of the decision making powers delegated to a competent body, keeping in mind the legal aim of the applied measure in order to protect an individual from arbitrary interference.[137] The Supreme Court has decided that „The procedure for the restriction of rights and freedoms, determined by law and made public, allows for the freedom of discretion and ensures the possibility to avoid abuses of power. The absence of a detailed legislative regulation and its non-publicity, however, deprives persons of the right to informational self-determination, to choose their behaviour and to defend themselves."[138]

Based on the above considerations, the enactment of the visa regulation by law is justified, thus replacing the former regulation of the Government of the Republic and establishing on the level of a law the basis and procedure that the implementer of the Act is required to observe when issuing visas.

In essence, appointing a competent agency for issuing of visas and mandatory central authorities for the approval procedure is an organisational matter on the level of state authority. The referred obligation also derives from the provisions of the Schengen Convention and common consular guidelines, which require that the central authorities of the contracting states consult one another.

Refusal of an agency within the area of government of the Ministry of Internal Affairs to grant an approval is listed as one of the imperative grounds for the refusal to issue a visa in the Aliens Act. At the same time the Act does not provide for the purpose or limits of control by the agency within the area of government of the Ministry of Internal Affairs. Pursuant to § 10^{12}(2) of the Aliens Act the approval is performed according to the procedure established by the Government of the Republic. The Act, however, does not provide for the conditions to be considered by the agency within the area of government of the Ministry of Internal Affairs in granting or refusing its approval. Taking into account the above described constitutional principles, the referred provision cannot be treated as a discretionary power of the agencies within the area of government of the Ministry of Internal Affairs to refuse the approval of the submitted visa applications.

The Government of the Republic Regulation No. 74 of 11 April 2005 provides for the procedure and terms of approval in deciding the issuing of visas on the basis of § 10^{12}(2) and § 10§(1) clause 3 of the Aliens Act. According to § 1(1) of the Regulation, a consular official shall request the approval of visa applications subject to such approval by an official appointed by the head of the relevant designated agency in the area of government of the Ministry of Internal Affairs. According to § 2(1) of the Regulation, the agency within the area of government of the Ministry of Internal Affairs shall verify the data submitted with the visa application for approval in accordance with its competence. According to § 1 of the Minister of Internal Affairs Regulation No. 32 of 2 February 2005 „Designating of agencies within the area of government of the Ministry of Internal Affairs" the competent bodies for the approval of issuing of visas shall be the Security Police Board, the Central

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[135] The explanatory memorandum to the Bill of Amendment of the Aliens Act and other Acts proceeding from this, as at 16 Feb 2004, No. 263 SE. Accessible at: http://www.riigikogu.ee.

[136] Supreme Court en banc judgement of 22 Dec 2000, No. 3-4-1-10-00, p. 28.

[137] ECHR judgement of 27 June 1984 in the case No. 8691/79 *Malone v. United Kingdom* p. 68.

[138] Supreme Court Constitutional Review Chamber judgement of 12 Jan 1994, No. III-4/1-1/94.

Criminal Police, the Citizenship and Migration Board, and the Border Guard Administration. The aim of the approval by the agencies within the area of government of the Ministry of Internal Affairs in the process of issuing visas could be to ensure better internal security, for the respective agencies may have information to judge the alien's background and his or her potential danger to national security. As referred to above, the Aliens Act does not provide for the conditions to be considered in giving or refusing the approval. At the same time, it would be justified to specify the purpose of the approval in the Regulation of the Government of the Republic based on the competence of the particular agency. Based on the foregoing, it can be concluded that the refusal to grant an approval should be based on the information about the particular visa applicant available to the relevant agency due to its competence.

The explanation by the Minister of Internal Affairs concerning the refusal to grant an approval for issuing a visa to the applicant's spouse does not provide reasons of the refusal or data that would indicate the threat to national security by the spouse. The reasons provided are related to the grounds of refusal to grant a visa on the basis of discretionary power, the assessment of which is not within the competence of the agency in the area of government of the Ministry of Internal Affairs. Thus, the agency in the area of government of the Ministry of Internal Affairs has exceeded its competence and has assumed the role of a consular officer. According to § 10^{12} of the Aliens Act, the assessment of the given facts is within the competence of the consular official who has to decide the issuing or refusal to grant a visa by assessing all the relevant facts in aggregate, as not all the circumstances may be known to the approving agency (considering the data filed in the visa application as well as documents attached to the visa application, and other information retrieved from different institutions during the procedure).

The approving institution must not act unlawfully, i.e. exceeding its jurisdiction, in granting the approval.[139] Thereby it must be underlined that the refusal of an agency within the area of government of the Ministry of Internal Affairs to grant an approval of a visa application is an imperative basis for refusal to issue a visa. Thus if the agency within the area of government of the Ministry of Internal Affairs exceeds its competence in refusing to approve the granting of a visa it will create a possibility for an arbitrary treatment of the person and will lead to the unlawfulness of the final decision.

In processing a visa application by a spouse of a citizen of Estonia the fundamental right to family enshrined in Art 14 and Art 27 of the Constitution must also be taken into account. Traditionally the right to family reunion has arisen in connection with the expulsion of aliens, but the fundamental right to the protection of family life should also be taken into account in visa procedure. The scope of protection of the fundamental right to family life involves different aspects of relations between family members, first and foremost, the right to live together and to meet one another's emotional and social needs.[140] Although in the present case the family involved lived abroad, they submitted the visa application for visiting parents and friends in Estonia during holidays, which is important for the maintenance and development of family ties as well as learning to know Estonia. Visiting one's homeland and parents with the family is definitely of essential emotional significance. Therefore there must be substantial reasons to refuse giving a visa to a spouse of a citizen of Estonia, and the state must avoid producing unjustified inconvenience to persons. The Chancellor of Justice also drew the Minister's attention to the fact that the visa applicant was the spouse of a citizen of Estonia and, thus, legal guarantees established for spouses of citizens of the European Union shall extend to the spouse while staying in another EU member state; the Aliens Act also provides for an opportunity for the spouse of a citizen of Estonia to apply for a residence permit in Estonia.

The Chancellor of Justice also pointed out that the above regulation of the Aliens Act is problematic

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[139] Legality of the approving agency's activities is stressed, e.g., in the Supreme Court Administrative Law Chamber judgement of 10 June 2003, No. 3-3-1-38-03, p. 21–23.

[140] U. Lõhmus. Kommentaarid §-le 26. – Justiitsministeerium. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. [Comments to Art 26. Constitution of the Republic of Estonia. Commented edition.] Tallinn, 2002, comment 6 to Art 26.

in terms of the principle of legality stipulated in the 1st sentence of Art 3 para 1 of the Constitution, in conjunction with Art 14. According to the Act, one of the imperative grounds excluding the issuing of a visa is the refusal to grant the approval of the visa application by an agency in the area of government of the Ministry of Internal Affairs, while the Act also fails to provide for the conditions that the particular agency should consider in granting or refusing the approval. This, however, creates an opportunity for arbitrary treatment.

(5) Based on the above, the Chancellor of Justice found that in refusing to grant the approval of the visa application the agency in the area of government of the Ministry of Internal Affairs acted contrary to the legislation regulating the visa procedure, and asked the Minister of Internal Affairs to ensure compliance with the given principles when approving visa applications in the future.

In his reply, the Minister of Internal Affairs reported that he had informed the agencies in the area of government of the Ministry of Internal Affairs involved in the visa approval process of their rights and competence. In order to ensure the observance of the principles highlighted by the Chancellor of Justice, it shall be specified in respect to each consulting agency which particular databases and which data within the national electronic system of approving visas (which is currently under development) they will be allowed to request in the visa consultation process. By specifying databases and sets of data, it is possible to avoid the activity of agencies beyond the rules of visa procedure and approval. The Minister also noted that after the launch of the electronic system for the approval of visa applications, the relevant Government regulation would be revised and made more explicit, and specific activities and competencies of the agencies in the area of government of the Ministry of Internal Affairs in the visa approval process would be specified in order to avoid the occurrence of similar cases in the future.

The Chancellor of Justice expressed his support to the bill of amendment of the Aliens Act initiated by the Government of the Republic, which the Government approved at its sitting on 15 September 2005. The Riigikogu adopted the Act on the amendment to the Aliens Act on 23 November 2005 and it entered into force on 1 January 2006. The Act amended the competence of consular officers and the agencies within the area of government of the Ministry of Internal Affairs in the process of approval of visa applications and deciding the issuing of visas. Thus, in certain cases a visa application must be approved by an agency within the area of government of the Ministry of Internal Affairs, but in case the respective agency refuses to approve the granting of a visa, a consular officer will have the right of discretion in issuing the visa, taking into consideration the grounds of the agency's refusal for approval. Such a solution will contribute to making a well-considered decision taking into account all the circumstances in relation to a visa application.

3. Data protection and issues related to vital statistics

3.1. Right of an imprisoned alien to enter into marriage

Case No. 9-4/1078

(1) The applicant filed a complaint to the Chancellor of Justice about having no possibility to enter into marriage with an alien serving a sentence in the Harku Prison as the latter lacked a valid identity document.

(2) The Chancellor of Justice started proceedings on the basis of the complaint and asked information from the Harku Prison and the Minister of Internal Affairs. It became evident from the response of the Harku Prison that the prisoner was a person with undetermined citizenship whose residence permit had expired. As the prisoner lacked a required identity document, she could not submit an application to enter into marriage. In his response the Minister of Internal Affairs found that

according to the Family Law Act the lack of a document was not an obstacle to entering into marriage; however, it is necessary to identify the person and for this a document, established in the Identity Documents Act must represented. No exceptions have been made even in the case of prisoners. Thus, an imprisoned person is also required to present an identity document to enter into marriage, otherwise the conclusion of the marriage is impossible.

(3) To resolve the application an answer had to be found to the question whether the lack of an identity document is a justified as an obstacle to enter into marriage.

(4) According to Art 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. According to Art 27 para 1 of the Constitution the family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state. The scope of protection of this provision includes everything associated with the family from its creation to the most diverse aspects of family life.[141] Though the Constitution does not directly establish the right to marry and create a family, the corresponding subjective right, however, can be derived from interpretation of Art 27 of the Constitution.

Art 27 para 1 of the Constitution has been worded as the right without a reservation subject to imposition by law. This, however, does not allow for a conclusion that it is a fundamental right that cannot be restricted at all. There cannot be absolute fundamental rights in society that may not be restricted. An opposite conclusion would imply that the exercise of such a right might hamper the exercise of another right. In the competition between fundamental rights a need arises to restrict fundamental rights not subject to imposition of a reservation by law. By not explicitly providing for a possibility of restricting one or another fundamental right in the relevant provisions, the Constitution has afforded an even broader guarantee for some fundamental rights than for fundamental rights subject to imposition of a qualified reservation by law. But even such a comprehensive guarantee cannot imply unrestricted liberty. Each right is restricted by something. There must be a very substantial reason to restrict a fundamental right that has been provided without a reservation subject to imposition by law, and in such cases the reason must be contained in the Constitution. The restriction must be justified by some other fundamental right or a constitutional principle, for example by the goal stipulated in the preamble to the Constitution, which states that the Estonian state shall protect internal and external peace. Thus the right to live together with one's family arising from Art 27 para 1of the Constitution can also be restricted.[142]

According to Art 9 para 1 of the Constitution, the rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia. In accordance with this provision people cannot be differentiated on the basis of citizenship, thus aliens staying in Estonia as well as stateless persons are entitled to marry.

A country has the right to establish reasonable rules to regulate marriage (e.g. age and form for entering into marriage). But in case the rules deprive persons of the right to marry, the enactment of such rules is not allowed. Section 2 of the Family Law Act provides for the prerequisites to enter into marriage, and § 4 and § 41 for the obstacles to the conclusion of marriage. In the referred provisions, the existence of a valid personal identity document is mentioned neither as a prerequisite nor an obstacle for somebody to enter into marriage.

Clause 7 of the Regulation No. 159 of the Government of the Republic of 19 October 1997 on „The

[141] Supreme Court Administrative Law Chamber judgment of 18 May 2000, No. 3-3-1-11-00.

[142] *Ibid*.

procedure for compiling, changing, correcting, restoring and abolishing vital records, and issuing a vital statistics certificate" (hereinafter the vital records procedure) provides that in order to make an entry into the vital record a person must produce a document to prove the fact to be entered into the vital record and the identity of the applicant. According to clause 8 of the Regulation, for the identification of the person the applicant shall present a document established in § 2(2) clauses 1-8 of the Identity Documents Act, or a document issued by a foreign country. Thus, the referred provision determines which documents can be used to identify one's person when applying for a vital record to be compiled.

According to § 4(1) of the Identity Documents Act an Estonian citizen or a foreigner may identify himself or herself with valid documents not specified in the Identity Documents Act, if the user's name, photograph, signature and date of birth or personal identification code of the holder have been entered into the document. According to § 4(2) of the Identity Documents Act, documents issued by the Republic of Estonia must be established by law or legislation issued on the basis thereof. In the case of prisoners, such documents include the departure certificate or release certificate. According to § 84(1) of the Regulation No. 72 of the Minister of Justice of 30 November 2000 on "The internal prison rules", the departure certificate is issued to an imprisoned person for the time of an outing, and it serves as the person's identity document during the period of outing. According to § 84(1) of the Regulation No. 11 of the Minister of Justice of 25 January 2001 on "The procedure for the release of prisoners", a release certificate is issued to persons upon release from prison. At the same time the legislation does not provide for any documents to be given to persons for the time of their imprisonment. According to § 19(1) clause 1 of the Identity Documents Act, identity cards shall be issued to Estonian citizens, and according to clause 2, to aliens permanently staying (residing) in Estonia if they have a valid residence permit, and if it has been proved that the foreigner lacks a foreign travel document and if it is not possible for him or her to obtain it. Thus, a foreigner permanently staying (residing) in Estonia shall be issued an identity document only if he or she has been granted a residence permit in Estonia.

Section 18^1 of the Aliens Act establishes that an alien who is a prisoner in an Estonian prison need not have the legal basis to stay in Estonia provided for in subsection 5^1 (1) of this Act (incl. a residence permit). Thus in the case of an imprisoned foreigner we have a situation where, in accordance with the Aliens Act, he or she need not have a residence permit, and therefore it is also not possible to issue an identity document to the person. The lack of an identity document, in turn, makes it impossible for the prisoner to enter into marriage.

Art 11 of the Constitution gives rise to the requirement that the restrictions of the rights and freedoms must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. The restrictions must not damage the interests or rights protected by the law more than is justifiable by the legitimate aim of the norm. The applied measures must be proportionate to the desired aim. Not only the implementer of the law but also the legislator must take into account the principle of proportionality.[143]

In the public interest, the state may restrict an individual's scope of liberties, including the right to enter into marriage, as long as it cannot be avoided. In the case of prisoners, the state already has restricted their certain rights in the public interest (e.g. freedom of movement, right to vote). The legislator, however, has not restricted the right of prisoners to enter into marriage during the period of imprisonment, and thus prisoners should also be able to enjoy their fundamental right to marry and create a family. There must be some other legal value of the same weight to justify the restriction of a fundamental right. In the present case no other legal value of the same weight has been identified to justify the infringement of the imprisoned alien's right to create a family.

[143] Supreme Court Constitutional Review Chamber judgment of 28 Apr 2000, No. 3-4-1-6-00.

The combined effect of § 18(1) of the Aliens Act, § 19(1) clause 2 of the Identity Documents Act and clause 8 of the vital records procedure results in a situation where an imprisoned foreigner cannot enter into marriage because of the lack of an identity document during the imprisonment, and thus the person's fundamental right under Art 27 para 1 of the Constitution to enter into marriage has been infringed.

(5) The Chancellor of Justice made a proposal to the Minister of Internal Affairs to introduce necessary amendments to legal acts to guarantee the right to marry for an imprisoned foreigner. As the matters related to issuing of identity documents are in the area of government of the Ministry of Internal Affairs, the Ministry reported that in co-operation with the Ministry of Justice a bill for the amendment of the Identity Documents Act and the Imprisonment Act would be prepared, taking into account the problems raised and views expressed by the Chancellor of Justice. The respective bill was adopted by the Riigikogu on 15 February 2006 and came into force on 1 April 2006.

3.2. Certificate of the absence of circumstances hindering marriage

Case No. 9-4/1012

(1) The Chancellor of Justice received a complaint from a person who was not given a certificate of the absence of circumstances hindering marriage because the applicant wanted to marry a person of the same sex abroad.

(2) The applicant turned to the Tallinn Vital Statistics Office to obtain a certificate to confirm his unmarried status. The Tallinn Vital Statistics Office enquired about who the applicant was planning to marry and where. Learning that the applicant wanted to get married in Sweden to a person of the same sex, the Office refused to issue the certificate.

The applicant turned to the Chancellor of Justice and explained that he wanted a certificate to confirm his unmarried status, not a permit to get married.

The Chancellor of Justice turned to the Tallinn Vital Statistics Office with two information requests. The Office in its response gave the following explanations. Vital statistics offices issue certificates for Estonian residents to certify that there are no circumstances in respect to the person that would be a hindrance to his or her marriage abroad, noting thereby whom the person intends to marry. The applicant had wanted a certificate for the purposes of marriage. Regulation No. 46 of the Minister of Internal Affairs of 7 July 2004, based on Art. 112^2(1) of the Family Law Act, provides for different forms of certificates and applications, including a certificate on marital or family status and a certificate of the absence of circumstances hindering marriage, and the forms for these certificates. The Vital Statistics Office could have issued to the applicant a certificate to confirm that he was not married, which bears a note that it is not meant for presentation in the case of marrying, but the applicant did not apply for or need such a certificate. The Tallinn Vital Statistics Office justified its refusal by the fact that the contraction of marriage abroad should also be based on the International Private Law Act, which stipulates in § 56 that the prerequisites to enter into marriage shall be specified according to laws of the country of residence of the prospective spouse. The vital statistics office proceeds from the Estonian Family Law Act in the ascertainment of the prerequisites for entering into marriage. Section 1(1) of the Act excludes the possibility for the applicant to enter into marriage with the desired person, as they are both of the same sex.

The Chancellor of Justice also addressed the Ministries of Justice, Internal Affairs and Foreign Affairs with requests for information and asked them to explain whether they considered it justified that the forms „Application for issuing a certificate on marital status and certificate of the absence of circumstances hindering marriage", „Certificate on marital status" and „Certificate of the absence

of circumstances hindering marriage“ (Appendix 7, 8 and 9 to the Regulation of the Minister of Internal Affairs „Establishment of the forms of certificates to be issued by and application forms to be submitted to vital statistics offices“) had been approved in a manner that makes it impossible for persons to get a certificate to certify the person's unmarried status in order to marry abroad without verifying the person's right to marry the desired person according to Estonian law. The Chancellor of Justice also asked to clarify whether Estonia recognises same-sex marriages in the case of Estonian residents, taking into account the provisions of § 60(3) of the International Private Law Act and § 33(1) of the Family Law Act, and the view of Ministries about the compatibility with the principle of legal clarity.

According to the response by the Ministry of Internal Affairs, by issuing the certificate Estonia assumes an obligation to recognise the marriage being entered into abroad. Therefore, as much as possible, a vital statistics office verifies the conformity of the prerequisites for the contraction of marriage with the law of the country of residence of the prospective spouse. At the same time, the prerequisites for entering into marriage by a foreigner in Estonia are not verified. The Ministry of Internal Affairs is of the opinion that on the basis of § 1 of the Family Law Act Estonia only recognises marriage between a man and a woman.

According to the reply of the Ministry of Foreign Affairs, pursuant to the principles of good governance a person should be able to apply for certificates about himself or herself on the basis of information recorded in registers of public agencies. The Minister agreed that a vital statistics office, in issuing a certificate of the absence of circumstances hindering marriage in Estonia, cannot substantively verify the prerequisites because of the lack of reliable data to confirm that neither of the prospective spouses is already married. Based on the Consular Act, a consular officer working at a foreign representation can issue a certificate to an Estonian citizen to certify the facts known to the officer, including a certificate on the absence of circumstances hindering marriage, without its form having been established by the Regulation of the Minister of Internal Affairs. The number of certificates issued to marry abroad is not restricted and the vital statistics office in Estonia does not get any feedback whether the marriage was actually concluded. According to the Minister of Foreign Affairs, the practice of recognition of same-sex marriages in Estonia varies. Mostly it is not recognised, as it is in contradiction of our Family Law Act, but, for example, when a Notary Public is making a notarial act they tend to take account of this fact in order to protect the rights of all parties to the contract.

According to the Ministry of Justice, it is not always justified to call a registered partnership between persons of the same sex in several countries as marriage, as the countries themselves do not consider it as marriage. According to the information available to the Ministry, same-sex marriage today is possible only in the Netherlands and Belgium. The rest of the countries that allow the registration of same-sex partnerships distinguish between marriage and same-sex partnership. As a rule, registered same-sex partnerships are mutually recognised between countries that themselves have the equivalent legal institution; whereas countries that allow the registration of same-sex partnerships do not recognise the same-sex marriage of other countries. The Ministry of Justice holds that registered same-sex partnerships constitute a legal relationship *sui generis*. The prerequisites and legal consequences of a registered partnership vary in different countries – they may constitute a relationship considered close to marriage, or they may be of the character of a civil law partnership or other contractual relationship. In the context of Estonian law the essence and concept of marriage is expressed in § 1(1) of the Family Law Act – it is concluded between a man and a woman. A registered same-sex partnership is not seen as marriage, and therefore the provisions on the validity of marriage cannot be applied to it either. The Ministry of Justice is of the opinion that consequently Estonia cannot recognise same-sex marriages, but this does not hamper the recognition of property rights and obligations arising from a registered partnership, similarly to contractual rights and obligations. For that, it has to be ascertained in each individual case what the substance of the relevant legal institution in the foreign country is, and what corresponds to it in the Estonian legal order. The certificate issued by a vital statistics office should explain the legal situation in Estonia, i.e. give an

explanation that it is impossible to register a same-sex partnership and that there is no such legal institution in Estonian law.
(3) The main issue was whether the Tallinn Vital Statistics Office had violated the individual's rights by refusing to issue the certificate of the absence of circumstances hindering marriage. In addition, questions on the validity, in Estonia, of same-sex marriages concluded abroad arose, and on the conformity of its regulation to the principle of legal clarity.

(4.1) In the original case on which the Chancellor's proceedings are based a person turned to the Vital Statistics Office and applied for a certificate on his unmarried status to marry a person of the same sex in another country. The Vital Statistics Office verified, on the basis of facts known to it, the existence of the prerequisites for the contraction of marriage and refused to issue the certificate. Estonian law does not allow the conclusion of same-sex marriages. The Chancellor of Justice considered the issue whether in this and similar cases we are dealing with marriage at all.

The Family Law Act provides for the institution of marriage, and the formal and material prerequisites for the conclusion of a marriage. The concept of marriage contained in rules on the conflict of laws in the International Private Law Act is broader. According to § 55(2), marriage contracted in a foreign state is deemed to be valid in Estonia if it is contracted pursuant to the procedure for contraction of marriage provided by the law of the state where the marriage is contracted and the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses. Thus the concept of marriage under the conflict of laws rule also extends to marriages that have not been concluded formally, in a vital statistics office or otherwise by an official or person recognised by the state (e.g. minister of religion) – marriages without a specific form are valid in some US states. According to Estonian law, a polygamy marriage is also valid if the marriage has been concluded between people one of whom was already married and it was legal according to the law of the state of residence of the persons. Thus the concept of marriage under the conflict of laws rule is broader than in substantive law. Next it should be ascertained if it also applies to people of the same sex.

In many European countries people of the same sex can today register their cohabitation. This is a family law institution which entails private and public law effects for persons. As the Minister of Justice pointed out the majority of countries have differentiated marriage from the registered cohabitation between people of the same sex – this may mean differences in the manner of conclusion of the partnership, its prerequisites and legal consequences. These countries do not consider registered partnerships as marriage, and use another term for it. Differentiation from marriage is also indicated by a possibility in some countries to choose between the marriage and registered cohabitation for people of different sex, both of which entail different rights and duties. The Estonian legal order cannot recognise such registered partnerships as marriages if the country of conclusion of the relationship itself does not treat them as marriages. The rules on the conflict of laws on marriage cannot be applied to such registered partnerships either.

Neither the International Private Law Act nor the substantive law of Estonia knows other registered family law types of cohabitation besides marriage. As the same-sex registered partnership is not marriage, and the regulation on marriage is not applicable to it, other rules on the conflict of laws have to be examined. In finding them, the decisive factor is which legal effects the institution of registered partnership entails in the law of the country of registration. In terms of private law, the relationship will bring about proprietary obligations between the persons, and thus the relevant rules on conflict of laws can be applied, on the basis of which the effects of a registered partnership can be considered valid. The impact of another country's public law will not transfer into the legal order of Estonia.

At the same time, when registering their partnership in another country people have expressed their wish to conclude a personal relationship not an economic one. The European Court of Human Rights has dealt with the issue of family life under Art 8 of the European Convention for the Protection of

Human Rights and Fundamental Freedoms, and found that a stable cohabitation may be considered as family life. At the same time, State parties may treat other forms of cohabitation differently from marriage.[144] Art 12 of the Convention protects the conclusion of marriage. The European Court of Human Rights has emphasised that the scope of protection of the provision includes classical marriage between a man and a woman[145]. The protection is limited to national laws, the person must have the possibility to get married according to the laws applied in the respective country.

Thus Estonian law must not make it possible for people of the same sex to conclude a marriage; likewise there is no direct obligation to guarantee them other forms of registration of partnership by the state. As is known, other European countries recognise registered partnerships if their own law knows such an institution; however, even if the state's legal order knows the registered partnership, a same-sex marriage concluded in another country is often not recognised. Similarly to the conclusion of marriage, the registration of a partnership is a private law act. In private law the principle of private autonomy applies. Although Estonian law does not know the respective family law institution, Estonia can recognise other private law effects caused by registered partnership, proceeding from the essence of the institution in another country, and pursuant to the applicable rules on the conflict of the laws.

(4.2) The principle of legal clarity derives from Art 10 and Art 13 para 2 of the Constitution. Section 33(1) of the Family Law Act provides for the annulment of a marriage by court: a court shall annul a marriage only if the provisions of § 3 and 4 of this Act have been violated upon contraction of the marriage, if an ostensible marriage was contracted or if consent for marriage was obtained against the will of a prospective spouse by fraud or duress. The contraction of marriage between a man and a woman is provided for in § 1(1), and a violation of this provision is not a basis for the annulment of a marriage. In the above discussion the Chancellor of Justice came to the conclusion that a registered same-sex partnership is not a marriage. In such a case there can also be no question about the validity of marriage. As the Estonian legal order does not know or recognise a registered same-sex partnership as a family law institution, there cannot arise a question about the conformity of the regulation of the validity of marriage or the ascertainment of the invalidity of marriage with the principle of legal clarity.

According to available information, in addition to registered same-sex partnership, same-sex marriage can be concluded only in Belgium and the Netherlands. According to § 60(3) of the International Private Law Act, nullity of a marriage shall be governed by the law as specified in § 56 of this Act. According to § 56(1) of the Act, the prerequisites of and hindrances to the contraction of a marriage and the consequences arising from it shall be governed by the law of the state of residence of the prospective spouses. Section 33(1) of the Family Law Act provides for the annulment of a marriage by court: a court shall annul a marriage only if the provisions of § 3 and 4 of this Act have been violated upon contraction of the marriage, if an ostensible marriage was contracted or if consent for marriage was obtained against the will of a prospective spouse by fraud or duress. Section 3 of the Family Law Act stipulates the age of marrying; § 4 prohibits the contraction of marriage between people of whom at least one is already married, persons who are related to a certain degree, or persons whose active legal capacity is restricted. These provisions do not contain a prohibition of contraction of marriage between persons of the same sex. Hence, on the basis of these provisions it is impossible to file a request to the court for the annulment of a same-sex marriage. According to § 60(3) of the International Private Law Act, such a marriage seems to be invalid. Thus, in the current form the regulation does not comply with the principle of legal clarity.

The Minister of Justice expressed a view that, in Estonian law, § 1(1) of the Family Law Act expresses the essence of marriage – a marriage is concluded between a man and a woman. That is, we are

[144] ECHR judgment of 26 Jan 1998 No. 37784/97, *Saucedo Gomez v. Spain*.

[145] ECHR judgment of 17 Nov 1986 No. 9532/81, *Rees v. the United Kingdom*.

dealing with marriage only if it has been concluded between a man and a woman. Thus same-sex marriage seems to be invalid. This conclusion does not derive directly from any provision, but it is reached by way of interpretation. However, even in the case of such interpretation, the regulation does not meet the principle of legal clarity.

At the time of the proceedings of the case there was already a new bill of the Family Law Act.[146] According to the bill, the legal consequences of the infringement of prerequisites to the conclusion of marriage can be divided in two: it may bring about the invalidity or nullity of marriage. According to § 15(1) of the bill, a marriage is null and void when the married partners are of the same sex. This will eliminate the current ambiguity with regard to the validity of a same-sex marriage. According to § 228 of the bill the new law would enter into effect on 1 July 2006. As in this case, according to available information, nonconformity of the provisions with the principle of legal clarity does not cause problems in practice, the Chancellor of Justice considered it sufficient that the nonconformity would be removed by the new Family Law Act.

(4.3) When a person wants to marry abroad, he or she turns to a vital statistics office applying for a certificate. The vital statistics office verifies the prerequisites of the person to enter into marriage with the desired person according to Estonian law, and will refuse to issue the certificate if such a marriage cannot be concluded on the basis of Estonian law. The same is true if prospective spouses are people of the same sex.

There are two more widely spread theories in the world concerning the prerequisites of the conclusion of marriage: the doctrine of a common conjugal home and the doctrine of dual residence. According to the doctrine of the common conjugal home, the law of the country where the spouses intend to settle after marrying is applied as the prerequisite for marriage. According to the doctrine of dual residence, the aggregate of the law of the countries of residence of both spouses is applied as the prerequisite for marriage, i.e. it must be possible to marry according to the law of both countries of residence.[147]

In the countries that apply the doctrine of the common conjugal home, the other country need not require any certificate. It may require only a confirmation of the fact that the person is single. Where the doctrine of dual residence applies, the other country needs information on material prerequisites of the person's state of residence to conclude a marriage. In the case of Estonia a confirmation of the unmarried status of the person is also needed, because the law of Estonia as the state of residence of one of the prospective spouses must be applied to the contraction of marriage, and polygamy is prohibited in Estonia.

Section 55(1) of the International Private Law Act provides that Estonian law shall be applied to the procedure of conclusion of marriage in Estonia. Estonian law cannot determine which law shall be applied to the conclusion of marriage abroad, even if the prospective spouse is a citizen or resident of Estonia. Section 55(2) of the International Private Law Act regulates the recognition of a marriage concluded abroad – A marriage contracted in a foreign state is deemed to be valid in Estonia if it is contracted pursuant to the procedure for the contraction of marriage provided by the law of the state where the marriage is contracted and the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses.

Regulation No. 46 of 7 July 2004 of the Minister of Internal Affairs on the „Establishment of the forms of certificates to be issued by and applications to be submitted to vital statistics offices" established the forms of certificates and applications. The forms of „An application for the issuing of a certificate on marital status and certificate of the absence of circumstances hindering marriage"

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[146] Bill of the Family Law Act, drafted by the Ministry of Justice, forwarded for approval to other institutions, as at 28 June 2005, No 3-3-01/7766, accessible at: http://eoigus.just.ee.

[147] I. Nurmela et al. Rahvusvaheline eraõigus. [International private law] Juura 2003, p. 125.

(Appendix 7), „Certificate on marital status“ (Appendix 9) and „Certificate of the absence of circumstances hindering marriage“ (Appendix 10) have been approved in a way that a person cannot get a certificate to certify his or her unmarried status to enter into a marriage abroad, without verification of the person's right to marry the desired person under Estonian law.

When a person wants a certificate on his or her unmarried status from a vital statistics office in order to marry abroad, the agency in Estonia shall verify the right of two people to marry each other according to Estonian law. At the same time the vital statistics office knows nothing about the other person (non-resident of Estonia) except the name, citizenship and date of birth.[148]

Generally people marry abroad because the prospective spouse is a citizen or a resident of another state. A vital statistics office lacks data on the citizen or a resident of another state, therefore the vital statistics office when issuing the certificate cannot, for example, verify whether the other person is already married or not. Estonian law, more specifically § 4(1) of the Family Law Act, establishes that marriage cannot be concluded between persons one of whom is already married. It is also possible that according to the data in the Estonian vital statistics office the person is single, whereas the person may have married abroad and the relevant information is not available to the Estonian vital statistics office. Thus the certificate issued by the vital statistics office need not reflect in reality whether people can marry each other under Estonian law.

Many countries issue a similar certificate to confirm the unmarried status of a person, i.e. the so-called capacity to marry. The certificate may only contain an assurance that the person is single, as well as information on material prerequisites for the conclusion of the marriage. The latter is required by many countries. The certificate that confirms not only the fact that the person is single, but also provides other information on the competence to marry, may be compiled in two ways: 1) as far as possible, material prerequisites for two people to marry each other under Estonian law are verified, 2) it is certified that the person is single and the prerequisites for the conclusion of marriage under the law of the respective country are explained.

If the doctrine of dual residence is applied in the other country and the submitted certificate contains prerequisites for the conclusion of marriage, and it is evident that the conclusion of marriage is impossible under Estonian law if one of the prospective spouses is already married. In its present form, the certificate does not provide information to the other country that in issuing the certificate in Estonia the marital status of the other person was not taken into account, and it might seem that there are no obstacles under Estonian law. Consequently the other country can conclude the marriage. The Estonian legal order does not recognise such a marriage – pursuant to § 55(2) of the International Private Law Act a marriage concluded abroad is considered to be valid in Estonia if the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses (the doctrine of dual residence). In the case of a resident of Estonia, Estonian law has to be applied, which does not allow to enter into a marriage if one of the prospective spouses is married already. Thus the contraction of the marriage did not meet the law in the country of residence of one of the spouses and it is invalid under Estonian law. If the other country has also made the validity of the marriage dependent on the compatibility with the material prerequisites of the conclusion of a marriage in the countries of residence of the persons, the marriage is also invalid under the law of the other country, although it seemed at the time of the conclusion of the marriage that there were no obstacles. It seems to the persons themselves that their marriage is valid under the law of both countries – one country has issued the corresponding certificate and the other country has allowed them to marry each other, while the fact is that it may be invalid under the law of both countries.

According to the Ministry of Internal Affairs, by issuing the certificate Estonia would in essence

[148] These data are submitted by the applicant pursuant to § 9(2) of the Government Regulation No. 192 of 17 May 2004; the form has been established by Appendix 7 to the Minister of Internal Affairs Regulation No. 46 of 7 July 2004. The same is provided for in § 43 of the bill of the new Family Law Act.

commit itself to recognize the marriage between the applicant and the person referred to by the applicant. The currently applicable form does not provide a maximum guarantee that citizens of Estonia would enter into marriages abroad which would be recognised under Estonian law.

With the new Family Law Act, the bill of which has been prepared by the Ministry of Justice, it is also intended to enact the Marital or Family Status Act, which should enter into force on 1 July 2006. Based on § 43 of the bill of the Marital or Family Status Act a certificate, which in essence is similar to the current certificate on the capacity to marry, would be applied – when issuing the certificate the vital statistics office will verify the existence of the prerequisites for the conclusion of the marriage, on the basis of the information available about the applicant, and the other person's name, date of birth and citizenship. As pointed out above, the certificate issued in such a manner will not provide a maximum guarantee that the marriages that are concluded will be valid under Estonian law. According to § 12(1) of the bill of the Marital or Family Status Act the forms of applications submitted to and the certificates issued by the vital statistics offices shall be provided for in a regulation of the Minister of Internal Affairs

Under Art 13 para 2 of the Constitution, everybody is protected by law against the arbitrary action of the state authority. This gives rise to the principle of legal certainty. Prior to entering into a legal relationship, people must know the consequences of their steps. Legal certainty requires that the applicable rules should be clear and precise in order to be useful to people.[149] Marriage, which is valid in one legal system and not in the other, makes the consequences of a legal relationship unpredictable for the people involved – both for the spouses and other people. This is contrary to the principle of legal certainty. The aim of issuing certificates on the capacity to marry is to ensure that no marriages are concluded that would be invalid under the law of one country and valid under the law of the other. Thus the Vital Statistics Office did not infringe the applicant's rights when refusing to issue the certificate, as Estonia does not recognise the resulting legal relationship, and it is the state's obligation to avoid the emergence of such legal relationships.

When people wish to enter into marriage in a country where the doctrine of dual residence applies, it is essential for the other country to know the material prerequisites for the conclusion of the marriage under Estonian law in order to avoid the invalidity of the marriage. Therefore the certificate on unmarried status to be issued to prospective spouses ought to contain information on material prerequisites for the conclusion of the marriage in the Estonian legal order. Thereby it is irrelevant that an Estonian vital statistics office verifies the right to marry a particular person – in any case, Estonia has only limited information about that person, and the person's conformity to the given prerequisites can already be verified by the vital statistics office abroad.

In the countries with the doctrine of a common conjugal home the situation is different. In that case the country that contracts the marriage does not proceed from the law applicable in the country of residence of the persons, but from the law of the country where the persons intend to reside after entering into marriage. If the person submits only the certificate certifying his or her single status, as well as a list of material prerequisites required for the contraction of marriage under Estonian law, the other country need not take into consideration the obstacles resulting from the Estonian law and will register the prospective marriage under the law of the country of residence of the prospective spouses. Such marriage, however, would be invalid under Estonian law, if it did not comply with the material prerequisites required in the country of residence of one spouse, which in the present case is Estonia. At least in some cases Estonia can avoid the conclusion of such marriages by verifying, as far as possible, the right of the particular persons to marry each other, in addition to certifying the person's single status and listing the prerequisites to marry, and in the case of obstacles the certificate would not be issued, which has also been the practice so far. Thus, at least in the case of Europeans their name usually reveals the person's sex; the date of birth allows to verify if the other person has

[149] R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse.[Constitutionalism and the protection of fundamental rights and freedoms] Juura 2004, pp. 290–291.

attained the age of marriage under Estonian law.

(5) The Chancellor of Justice expressed the view that the Tallinn Vital Statistics Office did not infringe the rights of the person by not issuing the certificate for the conclusion of marriage with a person of the same sex abroad. Although Estonia cannot completely guarantee that Estonian residents or citizens do not enter into a marriage abroad that would be invalid under Estonian law, the state, however, is obliged to make all efforts to avoid the creation of legal relationships which are valid in one country and invalid in the other. Based on the above considerations, the Chancellor of Justice addressed the Minister of Internal Affairs in a memorandum with a proposal to supplement the certificate on the absence of circumstances hindering marriage with a list enumerating the material prerequisites for a marriage to be concluded under Estonian law.

XI AREA OF GOVERNMENT OF THE MINISTRY OF SOCIAL AFFAIRS

1. General outline

The area of government of the Ministry of Social Affairs includes the drafting and implementation of plans to resolve state social issues, the management of public health protection and medical care, employment, the labour market and working environment, social security, social insurance and social welfare, promotion of the equality of men and women and coordination of activities in this field, and the preparation of corresponding draft legislation. The area of government of the Ministry of Social Affairs includes the State Agency of Medicines, the Social Insurance Board, the Labour Market Board, the Health Care Board, the Health Protection Inspectorate and the Labour Inspectorate.
As can be seen from the above, the area of government of the Ministry is very wide and diverse. The Ministry itself divides its area of government into three main fields: labour, social and health field. The Chancellor of Justice also observes this division in describing the area of government of the Ministry of Social Affairs and in dealing with the cases concerning it.

1.1. Field of work

The field of work of the Ministry of Social Affairs covers employment and labour market issues, occupational environment, as well as shaping of legal regulation for individual and collective labour relations. The field of work is aimed at the guarantee of the rights and liberties provided for in Art 29 of the Constitution, i.e. the right to freely choose one's field of activity, profession and place of work, the right to state assistance in finding work, to national control of working conditions, to join trade unions, and to introduce collective measures for the achievement of labour related rights and liberties.

In 2005 the priority area in the field of work of the Ministry of Social Affairs was to contribute to enhancing the rate of employment by regulating the system of labour market services and employment subsidies. The Ministry drafted a new Labour Market Services and Employment Subsidies Act, which entered into force in January 2006 and replaced the previous acts on social protection of the unemployed and on labour market services. The main idea of the new Act is to be more person-centred and flexible in the provision of labour market services. The individual approach should facilitate searching for work and ensure that persons will find work that is suitable for them and where they would be able to work for a longer period of time. Considering that the new regulation only entered into force on 1 January 2006 it is obvious that it will be possible to speak of its real outcomes and possible shortcomings only in a year or two. However, it is highly appreciated that the Ministry deals with such a relevant issue and helps to increase the rate of employment.

In 2005 the keyword in this field of work that also attracted public attention was not so much the adjustment of the system of labour market services and employment subsidies, but everything connected with collective labour law, in particular everything associated with collective agreements, social dialogue and settling of collective labour disputes. Also this year the Chancellor of Justice also received many applications related to this matter.

An applicant who had a small company asked the Chancellor of Justice to verify the constitutionality of some of the provisions of the Collective Agreements Act that allowed to extend, without any prerequisites, a collective agreement on wages and working and rest time conditions concluded between an association or union of employers and an association or union of employees and a federation of employers and a federation of employees also to persons who were not parties to the relevant agreement. The Chancellor of Justice found that the regulation of extending collective agreements was not in conformity with the Constitution because it disproportionately infringed

the employers' right to the freedom of enterprise. The Minister of Social Affairs agreed with the Chancellor's view, but the Government has not yet initiated relevant amendments to the Act.
Another very extensive range of problems related to collective labour relations is connected with the right to strike. The legal regulation of the right to strike that is based on the 1993 Collective Labour Dispute Resolution Act does not satisfy either employees or employers. In the media, social partners have expressed their dissatisfaction with the regulation to strike,[150] they have also asked the Chancellor of Justice to verify the conformity of several provisions regulating the right to strike with the Constitution and international law.

Hence, the Estonian Central Federation of Employers turned to the Chancellor of Justice already in 2004, with a request to verify whether regulation of support strikes that allowed to organise three-day support strikes at a three-day advance notice was in conformity with the Constitution. The Chancellor of Justice in his response to the Estonian Central Federation of Employers stated that the regulation of support strikes allowing to organise three-day support strikes at a three-day advance notice disproportionately violated the freedom of enterprise, for the aim of organising support strikes could be achieved with practically the same efficiency and with less damage to the freedom of enterprise if the period of advance notice of support strikes was longer. The Chancellor of Justice also informed the Minister of Social Affairs about his view, and the Minister promised to take relevant measures to bring the regulation of support strikes into conformity with the Constitution. The Minister also drafted a relevant bill, but unfortunately the Government has not yet submitted it to the Riigikogu.

There are also problems with the right to strike for persons employed in the public sector and in local government and persons who provide vital services. The Collective Labour Dispute Resolution Act, for example, prohibits strikes altogether in the public sector and in local governments. This is questionable both in terms of the principle of proportionality, as well as in the light of the views of the International Labour Organisation (ILO). The Ministry of Social Affairs has prepared a relevant bill, but due to differences of opinion among different ministries the bill has not yet been submitted to the Riigikogu.

In the Chancellor of Justice's opinion the problems in the regulations of collective agreements and the right to strike should be eliminated immediately, and the Ministry of Social Affairs should carry out a broader review of the whole system of regulation of collective labour relations, because there are problems not only with extended collective agreements and the right to strike but also with other aspects of collective labour law. For instance, the issues of social dialogue are not regulated more specifically and there is also no respective established practice. Due to this, trade unions are often not involved in the shaping of regulations concerning the rights and interests of employees. For example, in 2005 the Ministry of Finance ignored the obligation to hold a social dialogue and did not involve representatives of trade unions in the drafting of regulations on the remuneration of civil servants.

Regulation of employment contracts, which was completely neglected in 2005, also needs a comprehensive review. The current Employment Contracts Act was drafted in the pre-Constitution period and expresses the principles and values pertaining to that time, and is based on the needs of economic relationships that existed in the late 1980s and early 1990s. Since 1992, however, economic relationships and social values and ideas have radically changed, a new Constitution has been adopted, and on 1 May 2004 Estonia joined the European Union. These changes have brought about particular problems in the Employment Contracts Act and have created a more general need to revise systematically the whole regulation of labour relationships in order to meet the needs of social partners.

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[150] Raudvere, R. Vaesed riigiametnikud tahavad streikida, [Poor public servants wish to strike] Maaleht newspaper 10 March 2005; Küsitlus: Kas toetusstreigid kahjustavad ettevõtlus-vabadust? [Survey: Do support strikes damage the freedom of enterprise?] Eesti Päevaleht 14 Jan 2005.

One particular problem in respect to which the Chancellor of Justice made a report to the Riigikogu concerned the protection of older employees against dismissal. The Chancellor of Justice found that the regulation, which allowed to dismiss persons aged 65 or older only on the basis of the age criterion, was not in conformity with the Constitution as it placed older people into an unjustifiably disadvantaged situation in comparison to younger people. The Riigikogu agreed with the Chancellor of Justice's view and declared the relevant provisions of the Employment Contracts Act invalid.

Despite this positive example, the Employment Contracts Act contains, as was mentioned above, unreasonably many provisions that do not meet the needs of the social partners and are sometimes also questionable from the point of view of constitutionality. For illustration, the extremely strict provisions concerning the employment record book could be mentioned. The Employment Contracts Act should be completely revised in the near future and brought into conformity with the Constitution and the needs of social partners. Representatives of employers and employees have also referred to the need to amend the Employment Contracts Act.

1.2. Social affairs

In the social welfare sphere, too, there are issues that need to be reformed. The current system of granting aid to the poor and the regulation of granting subsistence benefits require urgent review. In recent years the Chancellor of Justice has repeatedly drawn the attention of the Ministry of Social Affairs and politicians to the fact that the current system of granting aid to the poor is not in conformity with Art 28 para 2 and Art 10 of the Constitution in their conjunction, because the system does not always guarantee subsistence in conformity with human dignity or the satisfaction of the primary needs to the most deprived persons.[151]

Different Ministers of Social Affairs have admitted the existence of several problems in the system of granting subsistence benefits: problems related to taking account of housing expenses, confusion created by the concept of family in § 22 of the Social Welfare Act as well as the disputable methodology of calculating the poverty line. Nevertheless, despite repeated promises, none of the Ministers has started preparations for amending the problematic norms regulating these issues. The Chancellor of Justice is of the opinion that the system of granting aid to the most deprived needs to be changed urgently, because the situation which does not guarantee human dignity can not be tolerated.

While the rules on poverty aid still require attention, the new and amended regulations of rehabilitation services and caregiver's allowances entered into force early in 2005. Both reforms were thorough, yet both have their shortcomings.

The reform of the rehabilitation services meant that most of the legislation on rehabilitation services was transferred from the Regulations of the Minister of Social Affairs into the Social Welfare Act, which in turn was substantially amended. The Chancellor of Justice points out the following problems relating to the reform. In the course of the reform of rehabilitation services, with the aim of improving the quality of the services, the educational requirements of the persons providing these services were made stricter. The requirement in itself is welcome, but the principle of legal certainty requires that the people working in the rehabilitation sphere at the time of enactment of the new regulation be given a transition time for adjusting themselves to the new requirements. This was not made possible. Those persons who no longer met the new requirements were forced to leave. The Chancellor of Justice addressed a memorandum to the Minister of Social Affairs, drawing attention to the fact that such an abrupt change in the educational requirements was not constitutional. The Minister admitted the existence of the problem and by now the Social Welfare Act has been amended to the effect that the persons who were employed in the rehabilitation team on 1 January 2005

[151] The Constitutional Review Chamber of the Supreme Court has held that a subsistence in conformity with human dignity is guaranteed to a person if the person can satisfy his or her primary needs. (Constitutional Review Chamber judgment of 21 Feb 2004 No. 3-4-1-7-03.)

and who no longer complied with the educational requirements enacted as of the same date, were allowed a reasonable period for adjusting themselves to the new educational requirements.

In 2005 the reform of caretaker's allowances was launched. Previously, it was the state who through the Social Insurance Board paid caregiver's allowance to a caregiver or guardian of a person not less than 18 years of age with a severe or profound disability, but since 1 April 2005 the payment of caregiver's allowances to caregivers and guardians of persons not less than 18 years of age is within the competence of local governments. The aim of the reform was to resolve the problems of granting and paying of caregiver's allowances, caused by the fact that rural and city municipalities had appointed caregivers too heedlessly. Namely, in order to be granted a caregiver's allowance, a rural municipality or city government had to appoint a caregiver to a person not less than 18 years of age with a severe or profound disability, after which the caregiver was entitled to receive the caregiver's allowance through the Social Security Board. As it was the Social Insurance Board and not a local government who distributed the funds, the rural or city governments appointed caregivers without giving much thought to what kind of assistance a person with a disability actually needed. Thus, the caregiver's allowance became a source of income for certain persons and no longer served the aim of guaranteeing assistance to the disabled persons.

After the reform a local government shall pay the allowances out of its own budget. Presumably, this will force a local government to base the decisions on establishing guardianships and appointing caregivers on the disabled persons' actual need for care. At the same time this solution has already created new problems: several local governments have started to create new grounds for refusing to appoint a caregiver and have restricted the existing caregivers' right to receive the caregiver's allowance, although the law does not give the local governments such competence. The Chancellor of Justice is of the opinion that the problems relating to the new system of caregiver's allowances may be attributed to the fact that the provision delegating authority is too laconic and that the local governments have not been given sufficient clarifications. The Chancellor of Justice has drawn the attention of the Minister of Social Affairs and of local government associations to the shortcomings in the system of caregiver's allowances.

Some problems can also be found in the legal regulation and practice of the payment of parental benefits. From among the substantive law issues the problem of reduction of the sum of parental benefit is worth mentioning: namely, if a person has received income subject to social tax, even if he or she has a small child, then beginning with certain amount of income the parental benefit can not be paid to the person in full. § 3(7) of the Parental Benefit Act establishes that if the recipient of benefit receives income subject to social tax (except the business income of a sole proprietor), which is higher than the benefit rate during the calendar month of payment of the benefit, the amount of the benefit shall be equal to the sum of the benefit and received income and the quotient of number 1.2 from which the received income is deducted. The second sentence of the same subsection stipulates that the benefit shall not be paid if income received during the calendar month of payment of the benefit exceeds five times the benefit rate.

A problem arises when the period of payment of the benefit to a person ends e.g. in the middle of a calendar month. Namely, pursuant to § 3(7) of the Parental Benefit Act, a person should not receive income subject to social tax in a certain amount, because then he or she would have to refund some of the parental benefit already received. The Chancellor of Justice can not consider such a regulation to be proportional, because the reduction of the amount of parental benefit, if the parent receives income subject to social tax within the calendar month of payment of the benefit after the expiry of the period of payment of the parental benefit, does not serve the aim of reducing the parental benefit payable to those who, during the period of payment of the parental benefit, receive income subject to social tax. The courts are of the same opinion. The Riigikogu has not yet made a pertinent amendment to the law, but it has become known to the Chancellor of Justice that the Social Insurance Board has decided that no refund of the parental benefit shall be required from those persons in regard to whom the right to receive the parental benefit expires in the middle of a calendar month.

The Chancellor of Justice is of the opinion that in the payment of parental benefits and some types of pensions the Social Insurance Board has violated the principles of good governance and administrative procedure. The Chancellor of Justice found that the Social Insurance Board had not sufficiently observed the principle of investigation and the duty to assist, as the Board had failed to draw a person's attention to the need to submit additional documents for the recalculation of the amount of a pension. In some cases the proceedings conducted by the Social Insurance Board have been unreasonably slow, administrative acts have not contained a reference to possibilities of contestation, or the rules of serving administrative acts to persons have been violated. The Chancellor of Justice has brought the referred shortcomings to the attention of the Social Insurance Board and has requested that it should be more careful in observing the practice of good governance and the provisions of the Administrative Procedure Act.

Applications relating to pensions, in regard to which the Chancellor of Justice conducted proceedings, predominantly concerned procedural issues, although there was one substantive law problem relating to pensions. The wording of § 43(1) of the State Pension Insurance Act, in force from 1 January 2002 until 6 January 2005, stipulated that an early-retirement pension (a pension to which a person is entitled up to three years before attaining the pensionable age, if other requirements for the receipt of a pension are fulfilled) shall not be paid to persons who are employed. The Chancellor of Justice argued that the referred provision disproportionately violated the constitutional rights, including the right to employment, of the persons who retire early. The Supreme Court, too, found that § 43(1) of the State Pension Insurance Act, in force from 1 January 2002 until 6 January 2005, was disproportionate and declared it invalid.[152]

In summary it can be said that problems within the social sphere relate to the enacted legislation on the rehabilitation service, the caregiver's allowance and the parental benefit, as well as to the failure to reform the system of poverty aid. On the positive side it has to be underlined that the Ministry has been trying to draft a new and more effective Child Protection Act.

1.3. Health protection

Similarly with other spheres there was also a lot of activity within the health sphere. Several conferences, information days and round-table discussions took place. What is particularly welcome is the progress in preparing a document serving as a foundation of the health policy, which in turn should become the basis for setting long-term objectives in the health sphere.

In 2005 the Chancellor of Justice, too, actively dealt with the right to the protection of health, which is within the sphere protected by Art 28 (1) of the Constitution. He reviewed the constitutionality of health legislation and scrutinised whether the situation which arises as a result of implementing the health legislation actually guarantees the right to the protection of health. Furthermore, the Chancellor of Justice has been more active in establishing contacts with the third sector engaged in health care. Cooperation and dialogue between the Ministry of Social Affairs and other relevant agencies has also been established.

The majority of applications related to the review of constitutionality of health legislation. As health services are organised on the basis of the Health Services Organisation Act and the Health Insurance Act, the constitutionality of the provisions of these Acts was contested several times.

The regulation of the new Medicinal Products Act was often contested; the Act establishes stricter rules concerning handling of medicinal products and regulates in more detail the medicinal products market. Thus, it is clear why the active actors of the medicinal products market pay more attention

[152] Supreme Court Constitutional Review Chamber judgment of 21 June 2005, No. 3-4-1-9-05.

to the new regulation. For example, a representative of manufacturers of medicinal products had recourse to the Chancellor of Justice, requesting the latter to examine whether the Government of the Republic had violated the authority-delegating provision of the Medicinal Products Act when issuing Regulation No. 36 of 21 February 2005, entitled "Threshold values for mark-ups in wholesale and retail trade of medicinal products and the procedure for their implementation". The applicant was of the opinion that when implementing the threshold values for mark-ups the weighted average mark-up in wholesale remains below the minimum established in § 15(3) of the Medicinal Products Act. The Minister of Social Affairs did not agree with the applicants and explained that the Ministry of Social Affairs analyses the weighted average mark-up on the basis of the consolidated turnover report submitted to the Ministry by a person holding wholesale licences by 1 March each year, and that the Ministry can make the first analysis of the weighted average mark-up only after 1 March 2006, after the holders of wholesale licences have submitted the consolidated reports. Thus, at the time of responding to the application there was no possibility to review whether the weighted average mark-up in wholesale and retail sale, applicable under the Government of the Republic Regulation No. 36 of 21 February 2005, entitled "Threshold values for mark-ups in wholesale and retail trade of medicinal products and the procedure for their implementation", was compatible with § 13(3) 4) and 5) of the Medicinal Products Act. On the basis of the aforesaid the Chancellor of Justice held that at the material time it was impossible to ascertain a violation of the authority-delegating provision, which did not mean that the problem could not arise after the first analysis is made.

The Chancellor of Justice received an application concerning the Medicinal Products Act from the association of health care providers, requesting the Chancellor of Justice review the constitutionality of § 42(4) of the Medicinal Products Act, pursuant to which the restrictions on having holdings in or being a member of a legal person in private law holding an activity licence for a general pharmacy apply to all other handlers of medicinal products except wholesalers. According to the Minister of Social Affairs it is reasonable to allow exceptions in regard to wholesalers of medicinal products that have holdings in general pharmacies. As the wholesalers own a significant proportion of pharmacies (85% according to estimates), the disintegration of already established relationships might prove to be an excess restriction of the freedom of enterprise. The Chancellor of Justice drew the attention of the Minster to the recommendations of the Pharmaceutical Group of the European Union, the Competition Board and the State Audit Office to extend the restriction also to the wholesalers of medicinal products. The Minister agreed that additional measures for the protection of the patients' rights also in the medicinal products sector should be taken in the nearest future. The Chancellor of Justice hopes that the Minister of Social Affairs will start resolving the issue of disproportionate discrimination already in 2006.

The applications in regard to which the ombudsman's proceedings were conducted related primarily to the institutions within the area of administration of the Ministry of Social Affairs. The main problem was insufficient communication between an institution and a person – unfortunately, the activities of administrative agencies are not targeted at people, it often happens that people are not given sufficient information about their rights or procedures or they are being informed but only seemingly and superficially. The practice of responding to people in a formal style, quoting legislation, when resolving cases in the health sphere, can not be approved. A person must be able to have a full understanding of his or her rights and the reasons why a concrete proceeding had the particular outcome.

The Chancellor of Justice examined the accessibility of emergency medical care in Põlva County. An applicant argued that during certain periods the Põlva County is serviced by only two ambulance crews instead of three and that very often there is only one health care professional among the ambulance crew, which endangers the protection and preservation of persons' health. As a result of the Chancellor of Justice's proceedings the Health Care Board decided to put an end to making exceptions in providing the emergency medical service in Põlva County by the end of 2005, and the Minister of Social Affairs promised to establish stricter requirements on staffing the ambulance crews. As a result of operative activities of relevant agencies the accessibility of emergency medical

care services in Põlva County is guaranteed on a higher level. The establishment of stricter rules on staffing ambulance crews is aimed at improving the quality of emergency medical care service.

It is very welcome that the providers of health care services have started to pay much more attention to the need to guarantee the protection of persons' rights. On 27 October 2004 the Chancellor of Justice made an on-site inspection of the Põlva Family Health Centre and forwarded to the doctors of the centre the inspection report with his proposals. In 2005 the Chancellor of Justice conducted a follow-up proceeding with the aim of examining whether and how the family doctors had taken measures for the protection of persons' rights. As a result of the follow-up proceeding it appeared that all the doctors practicing in the Põlva Family Health Centre had, on the basis of the Chancellor of Justice's proposals, taken measures enabling people to exercise their right to the protection of health more effectively. The activities of providers of health care services in introducing human-centred practices constitute a significant improvement of the protection of persons' fundamental rights and freedoms.

In the proceedings undertaken by the Chancellor of Justice in 2005 on his own initiative the focus was on the legal bases for guaranteeing access to health care services and on the actual accessibility of the services. For example, the Chancellor of Justice commenced a proceeding for examining the possibilities of guaranteeing access to health care services also to persons not covered by health insurance; furthermore, the actual accessibility of health care services in the peripheral areas was examined. The unprompted proceedings of 2005 were primarily aimed at resolving large-scale problems and that is why the process of amending the health care system according to the Chancellor of Justice's proposals will continue after the end of 2005.

The Chancellor of Justice made a proposal to the Riigikogu to bring the second sentence of § 6(1) and § 14(1) of the Health Insurance Act into conformity with the Constitution. The Health Insurance Act makes the commencement of health insurance cover dependent on the submission of certain data to the health insurance fund, whereas the submission does not depend on the person, and the Act requires that an employer, who has paid social tax as required but has failed to submit the data, compensate all the medical treatment expenses of the person concerned. The referred provisions disproportionately restrict the right of an employee to the protection of health and the employer's freedom of enterprise and the right of ownership. The Riigikogu unanimously approved the Chancellor of Justice's proposal of 25 October 2005 and started to partially implement it by introducing an amendment to the Health Insurance Act, pursuant to which an additional waiting period shall no longer be applied to persons in regard to whom the documents necessary for the commencement of insurance cover are submitted to the health insurance fund later than the specified due date. A work group of the representatives of the Ministry of Social Affairs, the Ministry of Finance, the Health Insurance Fund and the Tax and Customs Board has been set up for developing a system of interbase cross-usage of tax and health insurance registers. After the elaboration of the system it will be possible to fully enact the proposals of the Chancellor of Justice.

2. Health protection

2.1. Accessibility of out-patient medical care for people living in outlying areas

Case No 7-2/050630

(1) The Chancellor of Justice commenced, on his own initiative, a proceeding for examining the constitutionality of accessibility of out-patient health care services in outlying areas.

(2) The organisation of and the requirements for the provision of health services, and the procedure for the management, financing and supervision of health care is provided for by the Health Services

Organisation Act. According to the Act the out-patient health services include general medical care (§ 7(1)), emergency medical care (§ 16(1)), specialised medical care (§ 20(1)) and nursing (§ 24(1)).

Pursuant to § 7(1) of the Act a family physician providing general medical care is a specialist who has acquired the corresponding speciality and who practises on the basis of a practice list of the family physician. Pursuant to § 8(4), it is the Minister of Social Affairs who shall approve the maximum number of practice lists by counties, as well as the maximum number of persons on practice lists, and the bases of and procedure for the compilation, amendment and comparison of practice lists. On 29 November 2001 the Minister of Social Affairs issued Regulation No. 114 entitled "Maximum number of practice lists of family physicians", which establishes that the maximum number of practice lists of family physicians in Estonia shall be 840 and, with the aim of guaranteeing equal accessibility of the service, establishes the maximum number of practice lists by counties.

Pursuant to § 16(1) of the Health Services Organisation Act, the emergency medical care means out-patient health services for the initial diagnosis and treatment of life-threatening diseases, injuries and intoxication and, if necessary, for the transportation of the person requiring care to a hospital. The number of ambulance crews is to be established by the Minister of Social Affairs. On 19 December 2001, by Regulation No. 135, the Minister of Social Affairs approved the number of ambulance crews financed from the state budget. Pursuant to § 2(1) of the Regulation there shall be 85 ambulance crews financed from the state budget and selected by way of public competition organised by the Health Care Board. According to the data of the Ministry of Social Affairs one ambulance crew services 15 000 people and makes the average of six calls within twenty four hours.[153]

According to § 20(1) of the Health Services Organisation Act, the specialised medical care means out-patient or in-patient health services which are provided by specialists or dentists and health care professionals working together with them. By Regulation No., 84 of 22 June 2004 the Minister of Social Affairs has approved "Requirements of accessibility of health care services" and pursuant to § 6 of the Regulation the specialised medical care on the regional level in the fields of general surgery, internal medicine, paediatrics, obstetrical care and gynaecology shall be provided within the reach of up to 70 kilometres or 60-minute drive.

Pursuant to § 24(1) of the Health Services Organisation Act, the nursing means out-patient or in-patient health services which are provided by nurses and midwives together with family physicians, specialists or dentists, or independently. No general requirements of accessibility of nursing have been established.

On 5 May 2005 the Chancellor of Justice commenced an unprompted proceeding for the review of the activities of state agencies in guaranteeing the constitutional rights and freedoms of persons and asked for the opinion of the Minister of Social Affairs on the constitutionality of the general situation.

(3) The main issue was whether at present a person could enjoy the right to the protection of health on equal footing with others and irrespective of where he or she lives.

(4) Irrespective of the existence of legislation guaranteeing the accessibility of out-patient medical care the results of a survey conducted by the Health Insurance Fund in 2004 show that only 52% of the population consider that the accessibility of medical care is good or rather good.[154] One of the reasons for dissatisfaction could be the fact that the providers of medical care have progressively been converging into centres (specialised medical care even into regional centres only), which means additional expenses in terms of time and money for those who live far from the centres.

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[153] Accessible at: http://www.sm.ee/est/pages/index.html (as at 26 Apr 2005).

[154] Accessible at: http://veeb.haigekassa.ee/files/est_haigekassa_uuringud/ARUANNE_L.pdf (as at 26 Apr 2005).

It is highly probable that for financial and physical reasons many people living far from the centres lack both the already required and preventive out-patient treatment. This makes the right to the protection of health, guaranteed by Art 28 (1) of the Constitution, questionable. The situation where out-patient treatment is in the financial or physical sense inaccessible for persons living in outlying regions is also not compatible with the principle of territorial and social equal treatment, arising from Art 12 of the Constitution.

One of the most considerable problems for a person with a small income is the covering of travel expenses for visiting a doctor far away. The Health Insurance Act, in the wording in force until 31 December 2004, provided for travel expenses benefit as one of the health insurance benefits in cash payable to an insured person (§ 25(4)3) of the Act). The procedure of payment of the referred benefit was regulated by §§ 27(4), 64, 66 and 90(5) of the Act. According to the explanatory memorandum of the Health Insurance Act the compensation for travel expenses was provided for with the aim of avoiding the decline of the accessibility of health care services due to the increase of travel expenses. §§ 3, 4, 6, 7 and 9 of the Health Insurance Act and Health Insurance Fund Act Amendment Act, passed by the Riigikogu on 16 December 2004, repealed the referred provisions providing for travel expenses benefit and, thus, abolished the possibility for insured persons to request compensation for expenses made for travelling to the place where medical care service was provided. The lack of compensation for travel expenses may result in the increase of medical treatment expenses because the persons who are worst off will have limited access to medical care and the diseases to be treated in the end will be more advanced.

In addition to the restrictions on the accessibility of out-patient treatment due to the lack of financial means, there is also the problem of accessibility for people who due to their diseases are not able to independently visit a doctor practicing far away. The state has established no system for providing transport services to sick persons. The emergency medical care service is provided only for the initial diagnosis of life-threatening diseases, injuries and intoxication, and treatment, if necessary. Persons wishing to go to a regular medical examination or scheduled surgical operation are not covered by the emergency medical care service.

In summary it can be stated that the guarantee of the right to the protection of health, arising from Art 28 of the Constitution, is problematic. Neither is the situation where out-patient treatment is in the material or physical sense inaccessible for persons living in outlying regions compatible with the principle of equal treatment, arising from Art 12 of the Constitution, requiring equal treatment irrespective of, inter alia, the place of residence and social status of a person.

(5) In his response the Minister of Social Affairs recognised the severity of the problem and stated that in the nearest future the possibilities would be searched for promoting the accessibility of specialised care in the outlying areas through organising consultations of doctors outside the centres, through consultations via Internet or by other means enabling to guarantee the fundamental right to the protection of health to all persons on equal footing. According to the Minister the Ministry of Social Affairs, the Health Insurance Fund, the local governments and the Society of Estonian Family Physicians are cooperating to find solutions to improve the accessibility of medical care and the Ministry of Social Affairs is in the process of drafting a development plan of out-patient general medical care and emergency medical care, in order to improve the accessibility of medical care in the light of the proposals of the Chancellor of Justice.

2.2. Territorial restrictions on health insurance

Case No 6-8/050324

(1) The Chancellor of Justice verified on his own initiative the constitutionality of territorial restrictions on health insurance benefits established in the Health Insurance Act.

(2) § 5(1), 25(5), 27(1) and (2), and 36(3) of the Health Insurance Act read as follows:

"§ 5. Insured person

(1) For the purposes of this Act, an insured person is a permanent resident of Estonia or a person living in Estonia on the basis of a temporary residence permit, for whom a payer of social tax is required to pay social tax or who pays social tax for himself or herself pursuant to the procedure, in the amounts and within the terms provided for in the Social Tax Act (…), or a person considered equal to such persons on the basis of this Act or on the basis of a contract specified in subsection 22 (1) of this Act. […]

§ 25. Definition and types of health insurance benefit

[…]

(5) An insured person does not have the right of recourse against the health insurance fund in respect of the money or other assets spent on the services, medicinal products or medical devices classified as health insurance benefits in kind. […]

§ 27. Territorial effect of health insurance benefits

(1) Except in the cases provided for in subsection (2) of this section and subsection 36 (3) of this Act, insured persons have the right to receive health insurance benefits in kind only in Estonia.

(2) An insured person may receive health service benefits in a foreign state on the basis of a written contract entered into beforehand between the insured person or his or her legal representative and the health insurance fund, unless otherwise provided by an international agreement. […]

§ 36. Entry into contract for financing medical treatment

[…]

(3) The health insurance fund has the right to enter into a contract for financing medical treatment with health care providers located in foreign states. The reference prices and limits provided for in the list of health services apply to a contract for financing medical treatment which is entered into with a health care provider located in a foreign state if the health insurance fund undertakes to assume the obligation to pay for the provision of a health service entered in the list of health services."

On 19 May 2005 the Chancellor of Justice commenced a proceeding for the review of compatibility of § 5(1), 27(1) and 25(5) of the Health Insurance Act with the Constitution and asked the Minister of Social Affairs to give explanations about the restrictions arising from these provisions in their conjunction.

(3) The main issue was whether national law may restrict the right of European Union citizens and residents, who are covered by the health insurance system of the country of their origin, to receive health care services necessary for the preservation of their health and other health insurance benefits

during their stay in another member state on the same conditions as the insured persons in their country of residence.

(4) For the purposes of § 5(1) of the Health Insurance Act an insured person is a permanent resident of Estonia or a person living in Estonia on the basis of a temporary residence permit, for whom a payer of social tax is required to pay social tax or who pays social tax for himself or herself, or a person considered equal to such persons on the basis of law or on the basis of a contract (pregnant women from the twelfth week of pregnancy; persons under 19 years of age; persons who receive a state pension granted in Estonia; persons with up to five years left until attaining pensionable age who are maintained by their spouses who are insured persons; students of up to 21 years of age acquiring basic education, students of up to 24 years of age acquiring general secondary education or secondary vocational education on the basis of basic education, pupils and students acquiring secondary vocational education on the basis of secondary education in educational institutions of Estonia or similar educational institutions of foreign states founded and operating on the basis of legislation; students who are permanent Estonian residents; and employees and persons, pupils and students who acts as sole proprietors).

The health insurance, created as a result of payment of social tax, is a mandatory insurance because if the requirement to pay social tax is fulfilled the insured person has a subjective right to receive medical treatment benefits. This principle is affirmed in a general form in § 5 of the Social Tax Act, which defines an insurable person in regard to whom the requirement to pay social tax exists. The range of persons to whom health insurance is applicable is further specified by § of the Health Insurance Act, establishing that in addition to the obligation to pay social tax the health insurance cover shall depend on whether a person is a permanent resident of Estonia.

The referred restriction is manifest in other provisions of the Health Insurance Act, too. For example, pursuant to § 27(1) of the Act, insured persons have the right to receive health insurance benefits (compensation for medical treatment, benefit for medicinal products and benefit for medical devices) in kind only in Estonia. Proceeding from the Act the insured persons are entitled to request the compensation for health care services in the form of health insurance benefits in kind mainly in Estonia, and on certain conditions also for health care services provided in a foreign state. At the same time an insured person is entitled to request other health insurance benefits – benefits for medicinal products and medical devices – only in Estonia. It follows from § 25(5) of the Act that an insured person does not have the right of recourse against the health insurance fund in respect of the money or other assets spent on the services, medicinal products or medical devices classified as health insurance benefits in kind.

Art 28 para 1 of the Constitution provides for the right to the protection of health as one of the fundamental social rights. This provision gives rise to everyone's right to receive assistance for the protection of health on certain conditions. The legislator has a wide margin of appreciation upon substantiating social rights, including the right to the protection of health. When establishing a health insurance system the legislator is competent to decide to whom and to what extent to guarantee the rights, whereas it is important to underline that the legislator can not have unlimited discretion in formulating fundamental social rights, which in turn means that the legislator must not, when shaping fundamental rights, leave the core of relevant fundamental rights out of the scope of protection.[155] The legislator has established the system of compensation for health care services and related health care costs by enacting the Social Tax Act and the Health Insurance Act. The objective of the health insurance system is to guarantee to the persons in regard to whom there exists the requirement to pay social tax the right to receive health insurance benefits from the health insurance fund. Thus, the right to receive health insurance benefits falls within the area of protection of Art 28 para 1 of the Constitution, because the actual possibility to use the health insurance benefits afforded through

[155] Supreme Court Administrative Law Chamber judgment of 27 Nov 2003, No. 3-3-1-65-03.

health insurance constitutes a direct guarantee for the protection of a person's health. The supervision of the guarantee of the fundamental right to the protection of health requires checking whether the law unjustifiably restricts the fundamental right. If, bearing in mind the constitutional norms, unjustifiably strict conditions for the protection of health are established by Acts, this amounts to a violation of the fundamental right.[156] When the Health Insurance Act, establishing the subjective right to the protection of health, unconstitutionally restricts the fundamental right of a person in regard to whom social tax is to be paid, this amounts to a violation of the right to the protection of health.

It proceeds from the Social Tax Act and the Health Insurance Act that the main condition for the commencement of health insurance cover, organised in the form of mandatory insurance, is the fulfilment of the obligation to pay social tax. The Social Tax Act defines that an insurable person is a person for whom it is required to pay social tax or for whom the social tax is paid, whereas the Health Insurance Act establishes a restricting condition that only a person residing in Estonia can be an insured person. Also, the Health Insurance Act confines the place of application for health insurance benefits – benefits for medicinal products and medical devices – to Estonia only and excludes the right of persons to request the refund of the money or other assets spent on health insurance benefits classified as health insurance benefits in kind. The referred provisions do not allow to take into account the fact that the person himself has paid social tax or for him or her the social tax has been paid, yet the provisions completely exclude the possibility of persons residing outside Estonia to receive health insurance benefits on equal footing with the persons who have paid social tax or for whom the social tax has been paid, and who reside in Estonia.

Due to harmonisation of the social security schemes in the European Union[157] every citizen and permanent resident of the European Union who is covered by the health insurance system of his or her country of origin has the right, while staying in another member state, to receive the health care services necessary for the preservation of health and other health insurance benefits on the same conditions as the insured persons in the country of his or her residence. The services provided in the country of residence shall be paid by the member state where the social tax is deducted from the person's income and where, consequently, the person has a health insurance cover. Similar principles of implementing health insurance schemes in the states not members of the European Union have been enacted on the basis of social security agreements entered into between Estonia and the third states.[158]

Against this background it is not clear why the legislator has established territorial restrictions on the exercise of the rights deriving from health insurance cover, making the commencement of insurance cover conditional upon residence in Estonia and permitting to apply for the refund of health insurance benefits in kind, especially for the medicinal products and medical devices benefits, only in Estonia. The reason behind the restriction established in § 25(5) of the Health Insurance Act that an insured person does not have the right of recourse against the health insurance fund in respect of the money or other assets spent on the services, medicinal products or medical devices classified as health insurance benefits in kind, is not clear, either. Even the explanatory memorandum to the bill of the Act gives no clarification as to the legislator's aim in establishing these restrictions.[159] The referred restrictions are in conflict with the principles of harmonisation of European social security schemes and do not take into account the fact that the fulfilment of the condition to pay social tax creates a subjective right to receive health insurance benefits irrespective of where a person is residing or staying.

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156 B. Aaviksoo/T.Annus. Sotsiaalhoolekanne kui põhiõigus. – Juridica eriväljaanne 2002 [Social welfare as a fundamental right. – special issue of Juridica 2002], pp 16-17.

157 Regulation (EEC) No. 1408/71 on the application of social security schemes to employed and to members of their families moving within the Community.

158 E.g. Social security agreement between the Government of the Republic of Estonia and the Ukraine, RT II 1997, 34, 112.

159 Explanatory memorandum to the Health Insurance Act as at 10 May 2006, No. 914 SE, accessible at: http://www.riigikogu.ee.

(5) The Minister of Social Affairs, in the response to the Chancellor of Justice's request for information, admitted that although the legislation regulating the social insurance schemes in the European Union is directly applicable, it would be necessary, in the interest of legal clarity, to specify and update the provisions of the Health Insurance Act in regard to medical care provided in European Union member states. The Minister of Social Affairs recognised the need to specify the Health Insurance Act. As the process of amending the Act has started, the Chancellor of Justice terminated the proceeding of the matter.

XII AREA OF GOVERNMENT OF THE MINISTRY OF FOREIGN AFFAIRS

The area of government of the Ministry of Foreign Affairs includes the making of proposals for planning the foreign policy of the state, resolution of issues relating to international agreements and foreign trade, securing that the positions of Estonia in the Permanent Representatives' Committee of the Council of the European Union and in court proceedings in the European Court of Justice and in the Court of First Instance are being defended, management of the relations of the Republic of Estonia with foreign states and international organisations, management of internal protocol and protocol abroad in the event of national holidays being celebrated, foreign visits of national importance being conducted and eminent guests being received, protection of the interests of the Estonian state and Estonian citizens abroad, administration of the provision of international development assistance and humanitarian aid, promotion of Estonia, and preparation of corresponding draft legislation.

The structure of the Ministry of Foreign Affairs includes diplomatic missions, consular posts and special missions of the Republic of Estonia.

Among the Acts regulating the activities of the Ministry of Foreign Affairs, in regard to which the Chancellor of Justice exercised preventive control, the Government of the Republic Act and the Chancellor of Justice Act Amendment Act are worth highlighting. The competence of the Ministry of Foreign Affairs in defending Estonia's positions in the European Union Council Permanent Representatives' Committee and before the European Court of Justice and the Court of First Instance were supplemented and specified.

Another important Act passed by the Riigikogu was the Constitutional Review Court Procedure Act and the Riigikogu Rules of Procedure Act Amendment Act, establishing a procedure for the implementation of Art 2 of the Constitution of the Republic of Estonia Amendment Act and for the interpretation of the Constitution in conjunction with the European Union law.

The Chancellor of Justice and his senior adviser Mihkel Allik were involved, as experts, in the work group for the constitutional analysis of the Treaty Establishing a Constitution for Europe, set up by the Constitutional Committee of the Riigikogu with the aim of answering the question of whether the Constitution of the Republic of Estonia and the Constitution of the Republic of Estonia Amendment Act allow the Riigikogu to ratify the Treaty Establishing a Constitution for Europe without prior amendment of the Constitution. The answer to that question given by the work group was the affirmative.[160] Nevertheless, the Chancellor of Justice is of the opinion that a situation where the written provision and the actual content of the Constitution have grown apart, is regrettable. Presently, the interpreting of the European law and the Constitution in their conjunction does not provide unambiguous and clear solutions to everything. From the aspect of applicability of the Constitution and proceeding form the principle of legal clarity the best solution would be to amend the Constitution by adding the changes arising from the Accession Treaty and transposition of the European Union law. These changes have to be screened on the basis of analysis of the problems, which have already emerged in the application of European law, and the reforms deriving from the Treaty Establishing a Constitution for Europe.

Several applicants addressed the Chancellor of Justice for the review of issues related to the conclusion of the border agreement between the Republic of Estonia and the Russian Federation and the compatibility of the agreement to the first sentence of Art 122 para 1 of the Constitution, pursuant to which the land boundary of Estonia is determined by the Tartu Peace Treaty of 2 February 1920 and by other international boundary agreements. The Chancellor of Justice was of the opinion that in addition to the Tartu Peace Treaty the boundary can also be determined by other international boundary agreements, which may change the border determined by the Tartu

[160] Summary of the conclusions of the work group is accessible at: http://www.riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf.

Peace Treaty. An interpretation to the effect that prior to ratifying a boundary agreement changing the border determined by the Tartu Peace Treaty it would be necessary to amend the Constitution would restrict the scope of Art 122 para 2 to the point of total elimination thereof. The Chancellor of Justice considers it important that the boundary agreements, already entered into, pertain to only some topics embraced by the Tartu Peace Treaty, and do not affect the validity of the Tartu Peace Treaty, which is an important pillar of Estonian statehood together with the Russia's resolution to recognise the sovereignty of Estonia through the ages. The Riigikogu ratified the boundary agreements between the Republic of Estonia and the Russian Federation on 20 June 2005. In the preamble of the Act ratifying the agreements a reference was made to the legal succession of the Republic of Estonia, which was proclaimed on 24 February 1918, as it is established in the Constitution, in the resolution of the Supreme Council of Estonian Republic of 20 August 1991 entitled "On Estonia's sovereignty" and in the declaration of the Riigikogu of 7 October 1992 entitled "On the restoration of constitutional authority of the state". The Chancellor of Justice is of the opinion that the added preamble does not constitute a reservation to the concluded agreement.

The Chancellor of Justice had several proceedings to verify the provision of consular services in the foreign missions of the Republic of Estonia. The Ministry of Foreign Affairs must act in conformity with the requirements of the Consular Act and the Vienna Convention on Consular Relations. It is of utmost importance that citizens are always clearly and sufficiently informed of their rights and obligations. Especially in a situation where a person or those closest to him or her have problems with the authorities of a foreign state.

The Consulate General of the Republic of Estonia in St. Petersburg failed to forward to the Citizenship and Migration Board an application for the issue of a residence permit and an alien's passport, because allegedly the consulate could not identify the person. During the Chancellor of Justice's proceeding it appeared that the person could have been easily identified, yet instead of fulfilling its obligation under § 44(1) of the Consular Act the foreign mission chose to perform a function of the Citizenship and Migration Board and evaluate the substantive law bases for the submission and satisfaction of the application.

It is worth recalling that also in 2003 the Chancellor of Justice's proceeding of an application had lead to the finding that the Republic of Estonia Consulate General in Washington had violated the Consular Act when refusing to issue a passport to a person. Subsequently, the Minister of Foreign Affairs promised to prepare a precise code of practice to consular officials for similar cases. As the problem which emerged in 2005 is of similar kind it would probably be necessary to strengthen the supervision of the observance of the Consular Acts by foreign representations.

The Chancellor of Justice received an application from a person who wished to marry a person of the same sex in a foreign state, to whom the Tallinn Vital Statistics office refused to issue a certificate concerning the absence of circumstances hindering marriage. In the course of the proceeding the issues of legal clarity and applicability of several provisions of international private law emerged, and the Chancellor of Justice filed a request for information to the Minister of Foreign Affairs.[161]

The Chancellor of Justice reviewed the regulation in § 10^{10}(1)7) of the Aliens Act, which prohibits a consular official of the Ministry of Foreign Affairs from issuing a visa to an alien if an agency within the area of government of the Ministry of Internal Affairs refuses to grant approval for issue of the visa to the alien. The Chancellor of Justice was of the opinion that although the state has a wide discretion in granting and refusing to grant visas, this may not amount to unlimited discretion, especially in a situation where the refusal to grant a visa prevents a person from exercising his or her fundamental rights and the person is the spouse of an Estonian citizen. Furthermore, it is out of the question that an agency within the area of government of the Ministry of Internal Affairs could have the competence of a consular official (Ministry of Foreign Affairs).[162]

[161] See part 2, X 3.2. Certificate concerning the absence of circumstances hindering marriage.

[162] See part 2, X 2.1. Principles of visa procedure.

The Chancellor of Justice was repeatedly addressed in relation to the payment of foreign service allowances. The Chancellor of Justice argued that the reduction of foreign service allowances of spouses working in the same foreign mission by a Regulation of the Government of the Republic was not legal. The Chancellor of Justice also found that the amounts allocated to cover the subsistence expenses of diplomats' children must not depend on the amount of foreign service allowances. These problems were solved by the new Foreign Service Act, passed by the Riigikogu on 10 May 2006. The Acts will enter into force on 1 January 2007.

On quite a few occasions the Chancellor of Justice was addressed with a request for clarification of the interpretation of certain provisions of international agreements. Explanation of interpretations of legislation is not within the competence of the Chancellor of Justice; in the referred cases the applicants were recommended to have recourse either to the Ministry of Foreign Affairs or some other competent administrative authority.

XIII STATE CHANCELLERY

The main functions of the State Chancellery include the provision of support services to the Government of the Republic and the Prime Minister, coordination of the public service, coordination of document management and archiving, publishing of the *Riigi Teataja*, management of issues relating to insignia and decorations. Also, the State Chancellery must review draft legislation of the Government of the Republic for conformity with the Constitution and the laws, and coordinate the forming of the positions of Estonia in European Union affairs.

Pursuant to Art 141 para 2 of the Constitution the Chancellor of Justice may participate in sessions of the Riigikogu and of the Government of the Republic with the right to speak. This preventive control allows the changing of unconstitutional legislation before it enters into force. Bearing in mind the principle of separation of powers and the limited resources of the Chancellor of Justice's Office, the preventive control is only a supplementary possibility to guarantee the constitutionality of Acts and Regulations. The Chancellor of Justice exercises selective preventive control, primarily in regard to the bills that restrict the fundamental rights of persons. It has to be underlined that the main duty and responsibility to review the constitutionality of the Regulations issued and drafts initiated by the Government of the Republic lies with the law specialists of the ministries and primarily of the State Chancellery. So far the Chancellor of Justice's cooperation with the State Chancellery has been effective and in most of the cases the emergence of unconstitutional norms can be prevented already before the matter is discussed at a session of the Government of the Republic.

The Chancellor of Justice received several applications relating to the provisions of the Archives Act. The Chancellor of Justice analysed the provisions which regulate access to personal data included in the records. It appeared that the provisions regulating the protection and processing of personal data in the archives are contradictory and ambiguous. The drafting of pertinent Acts is organised by the State Chancellery, who promised that the new concept of the Archives Act will be drafted taking into consideration the proposals of the Chancellor of Justice, adding to the Act provisions relating to access to personal data.

In 2003–2005 the Chancellor of Justice repeatedly drew the attention of the Riigikogu and the Government of the Republic to the necessity to provide a statutory regulation of nominating Estonia's candidates for the European Union positions, and of the European Union decision-making on the national executive level. So far this sphere was either not regulated at all and was, thus, shaped by the practice of agencies, or was regulated by the Regulations of the Government of the Republic based on disputable legal bases. The European Union Affairs Committee and the Constitutional Committee of the Riigikogu shared the position of the Chancellor of Justice and the Riigikogu has decided to amend the Government of the Republic Act by adding relevant provisions.

XIV BRINGING DISCIPLINARY PROCEEDINGS AGAINST JUDGES

Section 91(2)2) of the Courts Act gives the Chancellor of Justice the right to commence disciplinary proceedings against all judges, if elements of a disciplinary offence become evident. Pursuant to § 94(1) of the Courts Act it is the Disciplinary Chamber of the Supreme Court that shall be competent to hear matters of disciplinary offences of judges and impose disciplinary punishments on judges.

Regrettably, it has to be said that the shortcomings of the regulation of disciplinary proceedings of the Courts Act, pointed out by the Chancellor of Justice in his 2004 annual report, have not been eliminated. As the Act does not regulate the situation where several officials simultaneously commence disciplinary proceedings against one and the same judge, and the norms governing disciplinary proceedings are very declarative and fragmented, the daily work of the Chancellor of Justice is substantially more complicated.

As the simultaneous double supervision is neither justified nor necessary, the Chancellor of Justice and the Chief Justice of the Supreme Court cooperate, to inform each other of the receipt of pertinent applications. Also, the Chancellor of Justice and the Chief Justice of the Supreme Court have agreed that explanations of the judge under supervision shall be asked through the chairman of the relevant court. This system guarantees that the chairmen of courts are informed of the possible commencement of disciplinary proceedings and, if necessary, can share the information with others planning to commence proceedings.

During the course of his activities the Chancellor of Justice has developed certain criteria on the basis of which to address the problems set out in applications and consider the necessity of commencing disciplinary proceedings.

Section 87(2) of the Courts Act defines a disciplinary offence as a wrongful act of a judge which consists of failure to perform or inappropriate performance of official duties, and also as an indecent act of a judge. When giving meaning to this declaratory norm the Chancellor of Justice has, on the basis of analogy, observed what the Supreme Court has established with regard to disciplinary proceedings of notaries as independent officials. As the courts are independent in their activities (second sentence of Art 146 of the Constitution), just like notaries, the opinion and criteria developed by the Supreme Court are also appropriate with regard to judges. Thus, the Supreme Court has pointed out that the requirement that a notary as an official shall be independent, restricts the extent of supervision over his or her activities. The Court stressed that an independent official like a notary must resolve all legal issues diligently and professionally and pursuant to his or her personal understanding. Even if the opinion of the independent official proves wrong in the course of court proceedings, the interference of a conductor of disciplinary proceedings is not permissible if the opinion of the official was based on reasonable discretion reached as a result of diligent work. The Court pointed out that "[o]nly when a notary has violated a clear and unambiguous provision of law when applying the law, this amounts to a wrongful failure to perform or inappropriate performance of official duties, which may bring about disciplinary proceedings."[163] "[A] notary's mistake upon interpreting substantive law [can] be punishable by way of disciplinary proceedings only if the notary's intentional or gross error in the application of provisions of law is ascertained (for example if a notary applies an invalid norm, if the interpretation of a norm derogates from the obviously established judicial practice, etc.)."[164]

Furthermore, the Chancellor of Justice has adopted a position that the commencement of a disciplinary proceeding by the Chancellor of Justice can be considered primarily in a situation where the violation committed by a judge is an obvious and gross one and the elimination or compensation

[163] Supreme Court Administrative Law Chamber judgment of 26 Sep 2000, No. 3-3-1-35-00, § 1.

[164] Supreme Court Administrative Law Chamber judgment of 7 Dec 2004, No. 3-3-1-70-04, § 13.

of the consequences of the violation by way of ordinary appeal either is or may prove impossible. The Chancellor of Justice is of the opinion that in the cases of possible unlawful activities of a judge the correction of the possible errors through the judicial system itself should be considered preferable. This could be done either by way of appeal as well as through disciplinary proceedings within the judicial system.

During the reporting period the Chancellor of Justice received 18 applications requesting the commencement of disciplinary proceedings against judges. Unlike in 2004, when the Chancellor of Justice considered it necessary to commence disciplinary proceedings against a judge in one case, in 2005 none of the applications lead to the commencement of disciplinary proceedings. On the basis of his proceedings and the evidence collected the Chancellor of Justice considered it necessary to address to the Tallinn City Court two recommendations, in which he drew the attention to problems related to organization of work. One of the recommendations concerned giving notice to a person held in custody of the postponement of the pronouncement of judgment and the other serving of the summons.

XV PROPOSAL TO BRING CRIMINAL CHARGES

Impeachment proceedings are the duty of the Chancellor of Justice, arising from the Constitution. The Chancellor of Justice makes proposals to the Riigikogu that criminal charges be brought against the President of the Republic, a member of the Government of the Republic, a member of the Riigikogu, the Auditor General and a member of the Supreme Court.

On 14 December 2005 the Riigikogu passed the Government of the Republic Act and the Chancellor of Justice Act Amendment Act, which entered into force on 8 January 2006. By this Act, impeachment proceedings against members of the European Parliament elected from Estonia were placed within the competence of the Chancellor of Justice. The Chancellor of Justice shall make a proposal to the President of the European Parliament that a member of the Parliament, elected from Estonia, be deprived of the immunity provided for by the Protocol on the Privileges and Immunities of the European Communities.

Within the impeachment proceedings the Chancellor of Justice reviews the legality of pre-trial procedure and the observance of procedural rules. The Chancellor of Justice does not verify the content of the charges or evaluate the evidence collected. The Chancellor of Justice's control is intensive and impartial. The aim of the control is to avoid the bringing of fabricated or political charges against persons holding high positions in constitutional institutions. The Chancellor of Justice does not conduct the impeachment proceedings on his own initiative. The outcome of the Chancellor of Justice's supervision is making a proposal to the Riigikogu or the President of the European Parliament. If the Chancellor of Justice ascertains that pre-trial proceedings have been conducted violating the effective law, he will return the application to the State Prosecutor's Office.

The Chancellor of Justice has had four impeachment proceedings, two of these in 2005.

On 21 February 2005 the Chancellor of Justice made a proposal to the Riigikogu to deprive Margus Hanson, a member of the Riigikogu, of the immunity of the member of parliament. The State Prosecutor's Office suspected Mr Hanson, the Minister of Defence at that time, of negligent permission of unlawful access to information classified as a state secret and of losing of a medium which contained a state secret, i.e. of a commission of an act punishable under § 242 of the Penal Code. Before making the proposal to the Riigikogu the Chancellor of Justice reviewed the legality of the summary of pre-trial proceedings and of the conducted criminal proceedings. In the course of the review the Chancellor of Justice scrutinised the criminal file. The Chancellor of Justice did not ascertain any violations of the provisions of the Code of Criminal Procedure during the criminal proceedings by the Security Police or the Prosecutor's Office; all rights provided by law had been guaranteed to the participants in the proceeding.

On 21 August 2005 the Chancellor of Justice made a proposal to the Riigikogu to waive the immunity of Jaanus Tamkivi. The Prosecutor's Office suspected that Jaanus Tamkivi, who had worked as the mayor of Kuressaare before becoming a member of the Riigikogu, had committed a misuse of official position (§ 289 of the Penal Code) in relation to assumption of proprietary obligation to the city and violation of the Public Procurement Act. On 31 May 2005 the Saare County Court had rendered a judgment, acquitting mayor Jaanus Tamkivi of the criminal offence with which he had been charged. Subsequently, on 2 June 2005, Jaanus Tamkivi became an alternate member of the Riigikogu. On 29 July 2005 the Chief Public Prosecutor submitted an application to the Chancellor of Justice requesting the conduct of an impeachment proceeding in regard to Jaanus Tamkivi, as the Prosecutor's Office had submitted an appeal against the acquittal.

During the Chancellor of Justice's review an important legal issue emerged – the Code of Criminal Procedure does not regulate the special procedure of continuing a criminal proceeding against a member of the Riigikogu in a situation where the statement of charges has already been prepared and

a judicial proceeding against a member of the Riigikogu has already commenced. Thus, in the given case, the law did not provide for the impeachment proceedings. Applying the principle of analogy and interpreting purposively the legal institution of immunity of a member of the parliament, established in Art 76 of the Constitution, the Chancellor of Justice came to the conclusion that the continuation of judicial proceeding against Jaanus Tamkivi was not possible before the Riigikogu had given its consent. The Chancellor of Justice was of the opinion that the aim of the immunity of a member of the Riigikogu was to protect the members of the parliament (especially the representatives of the opposition) and their free mandate in the parliament against the possible attempts of a government, based on the parliamentary coalition (the executive), to eliminate them from the political debate by dishonest means. In the concrete case the Chancellor of Justice did not ascertain any violations of the Code of Criminal Procedure. The above described proceeding showed that there was a need to amend the Code of Criminal Procedure so that it would exhaustively regulate all cases when the deprivation of a member of the Riigikogu of his or her immunity would prove necessary.

During the reporting period another question emerged, namely whether the immunity should also extend to certain procedures performed in misdemeanour proceedings, such as apprehension and search of persons. Under § 377 of the Code of Criminal Procedure, as a general rule, a person enjoying immunity may be detained as a suspect, preventive measures may be applied with regard to him or her and searches, seizure of property, inspections and physical examinations may be conducted with regard to him or her, only after the impeachment proceeding. The Code of Misdemeanour Procedure does not require the conduct of an impeachment proceeding and in the formal sense the protection of immunity does not extend to misdemeanour proceedings.

A strange situation has developed in practice, where an infringement of a greater legal asset (commission of a criminal offence) brings about the protection of immunity for the alleged offender and, thus, also a more favourable situation than the infringement of a lessor legal asset (commission of a misdemeanour). Yet, there is another aspect, namely if the police has apprehended a member of the Riigikogu in the act, only misdemeanour proceedings against him or her can be conducted, irrespective of the nature and necessary elements of the act. Yet, if there is a suspicion that the person has committed a criminal offence, the police will probably have to drop pertinent charges, otherwise it would appear that the police has violated the immunity.

The Chancellor of Justice is of the opinion that when interpreting the current law in conformity with the Constitution the apprehension of persons enjoying immunity is justified only in the cases of prevention of danger and for self-defence. Also, such apprehension must have a preventive nature – when the danger has passed, the persons must be released promptly. These issues are, no doubt, related to the problem that the whole legal basis of law enforcement in Estonia is dated.

XVI EQUALITY AND THE PRINCIPLE OF EQUAL TREATMENT

Division 4 of Chapter 4 of the Chancellor of Justice Act stipulates the activities of the Chancellor of Justice in application of principles of equality and equal treatment.

Pursuant to § 35[16] of the Chancellor of Justice Act the Chancellor of Justice shall perform the following duties for application of the principles of equality and equal treatment: 1) analyse the effect of the implementation of legislation on the situation of the members of society; 2) inform the Riigikogu, Government of the Republic, governmental agencies, local government agencies and bodies, other interested persons and the public of application of the principles of equality and equal treatment; 3) make proposals for amendment of legislation to the Riigikogu, Government of the Republic, governmental agencies, local government agencies, local government bodies and employers; 4) promote, in the interests of adherence to the principles of equality and equal treatment, the development of national and international cooperation between individuals, legal persons and agencies; 5) promote, in cooperation with other persons, the principles of equality and equal treatment.

The following will be a brief overview of the sufficiency of the legal framework concerning equal treatment and of the proceedings and activities of the Chancellor of Justice related to the issues of equal treatment.

1. Legal framework of equal treatment

Art 12 para 1 of the Constitution stipulates that everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. This general right to equality constitutes a right to protection against unequal treatment. For the application of this principle also in the relationships between persons governed by private law and for guaranteeing the protection of a person in e.g. labour relationships, in consuming services or acquiring education, the legislator must provide for an additional legal regulation.

In 2004 the Riigikogu passed the Gender Equality Act, aimed at ensuring equal treatment arising from the Constitution of the Republic of Estonia and promoting gender equality of men and women as a fundamental human right and for the public good in all areas of social life. The Act also provides for the establishment of the institution of Gender Equality Commissioner; in October 2005 this responsible position was assumed by Margit Sarv, who used to work as an adviser to the Chancellor of Justice.

In 2004 also the Employment Contracts Act was amended – the rights of employees and obligations of employers arising from the violations of the prohibition of unequal treatment were added to the Act.

Thus, it can be stated today that the Estonia has created an efficient legislative framework for the prevention of unequal treatment in labour relationships on the grounds of sex. Nevertheless, it is unfortunate that in all other spheres the principle of equal treatment, guaranteed by Art 12 of the Constitution, has not been further substantiated by Acts. It is regrettable that up to now there is a lack of a uniform Act on equal treatment, providing, in addition to discrimination of the basis of gender, also for protection against unequal treatment outside labour relationships. As a result the rights of persons may go without appropriate protection. The importance of existence of such uniform Act has also been pointed out by the European Commission against Racism and Intolerance[165] and the

[165] European Commission against Racism and Intolerance. Third report concerning Estonia. CRI(2006)1. Accessible at http://www.ecri.coe.int, p 42.

Advisory Committee on the Framework Convention for the Protection of National Minorities.[166]

When developing the framework for equal treatment the relevant European Union legislation and case-law have to be taken into account. European law regulates the gender equality issues in detail; also Council Directive 2000/43/EC has been adopted, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation. For Estonia the deadline for the transposition of the referred directives into national law was the accession to the European Union. Thus, the requirements arising from the referred directives must be established in national law; yet, presently, several of the provisions of the directives go unimplemented or have insufficiently been provided for (e.g. burden of proof, obligation to consider the special needs of disabled persons at workplace, wider implementation of the obligations arising from the directive against discrimination on the grounds of race and ethnic origin). Furthermore, it has to be born in mind that the directives only provide for minimum requirements and a member state can enact more favourable provisions for the protection of persons' rights. Thus, on the European level, one can observe a tendency to unify the extent of protection provided for in regard to different discrimination proceedings, thus going much further than the mere requirements arising from the European law.

2. Chancellor of Justice's activities in application of the principles of equality and equal treatment

Within the area of competence of the Chancellor of Justice the issues related to the application of the principle of equal treatment may arise in the course of constitutional review and within the ombudsman's conciliation procedure.

As already stated above, Art 12 para 1 of the Constitution establishes, in addition to the prohibition to discriminate on the grounds enumerated in the article, also the general right to equality, the scope of protection of which embraces all spheres of life. A violation of the general principle of equal treatment is frequently one of the supplementary arguments in persons' applications. The following are some examples of the proceedings in 2005, which directly relate to the application of the principle of equal treatment.

In 2004 – 2005 the Chancellor of Justice's Office prepared an extensive analysis of the right of children with special needs to education, containing both an analysis of legislation and inspection visits to schools. As a result of the analysis the Chancellor of Justice addressed a memorandum to the Ministry of Education and Research and the Cultural Affairs Committee of the Riigikogu.

In 2005 the Chancellor of Justice addressed the Riigikogu with a report, requesting that the Riigikogu analyse the provisions of the Employment Contracts Act, which give an employer the right to release an employee from work without a reason if the employee has attained sixty-five years of age. Pursuant to the Employment Contracts Act an employer has the right to terminate the employment contract entered into for an unspecified or fixed term prior to expiry of the term of the contract if the employee has attained sixty-five years of age and he or she has the right to receive a full old-age pension.

In a proceeding commenced on his own initiative the Chancellor of Justice examined the observance of the principle of equal treatment of men and women in the Tallinn Technical Secondary School. The Chancellor of Justice drew the attention of the Tallinn Technical Secondary School to the fact that as a result of the usual practice of the school, pursuant to which, on the basis of tests and

[166] Advisory Committee on the Framework Convention for the Protection of National Minorities. Second opinion on Estonia, adopted on 24 Feb 2005, No. ACF/INF/OP/II(2005)001, §§ 15, 39; accessible at http://www.coe.int.

interviews, pupils are enrolled in three classes for the tenth year of studies (a separate class for girls and two classes for boys) the representatives of one sex may be discarded from entering the school. Furthermore, the Chancellor of Justice pointed out to the director of the school that it was not correct from the point of view of equal treatment and equality that in the school only boys were given a possibility to study electrical engineering and national defence.

Since 2004 the Chancellor of Justice has the competence to resolve discrimination disputes between persons governed by private law. Everybody has the right of recourse to the Chancellor of Justice for the conduct of conciliation procedure, if he or she finds that a natural person or a person governed by private law has discriminated against him or her on the basis of sex, race, ethnic origin, colour, language, origin, religion or religious opinion, political or other opinion, property or social status, age, disability, sexual orientation or other attributes specified by law. Conciliation procedure is voluntary and confidential. Conciliation proceedings are closed if proceedings are terminated, the parties fail to reach an agreement, or the Chancellor of Justice approves the agreement. The Chancellor of Justice's proposal to resolve the dispute and enter into an agreement presents his substantiated opinion formed by him in the course of the proceedings based on obtained evidence and established facts.

In 2005 the Chancellor of Justice received three applications for the conduct of a conciliation procedure. In regard to one application the procedure could not be commenced, because the alleged discriminatory treatment had not yet taken place. Another application related to treatment on the basis of trade union membership. This procedure had to be terminated, because in the session organised by the Chancellor of Justice for the ascertainment of the facts of the dispute the respondent announced the wish that the conciliation procedure be discontinued. The third application concerned discrimination on the basis of ethnic origin in rendering services. The conciliation procedure commenced on the basis of this application also had to be terminated, because the respondents did not wish to participate. Also, in 2005 the Chancellor of Justice consulted a person whose complaint pertained to discrimination in labour relationships on the basis of language (nationality). As the person did not want his name to be disclosed during the proceedings, it was not possible to commence the procedure, because an anonymous conciliation procedure can not be conducted.

Cooperation of the Office of the Chancellor of Justice with non-profit associations has been an important priority. Non-profit associations frequently submit applications to the Chancellor of Justice on behalf of persons. The advisers to the Chancellor of Justice have participated in seminars and information events organised by the third sector in order to explain the competence of the Chancellor of Justice and the issues of equal treatment. A representative of the Chancellor of Justice participated in the work of the team initiating the information campaign called "In favour of differences. Against discrimination".

Since 2004 the Chancellor of Justice participates in the European Network of Specialised Equality Bodies project, launched within the European Union action programme to combat discrimination. The main purpose of the project is to improve the exchange of information between equality bodies, to support cooperation between member states and relevant EU institutions and to harmonise the interpretation and implementation practices of EU law in member states.

Since Estonia's accession to the European Union on 1 May 2004 a representative of the Chancellor of Justice participates in the activities of the European Commission's Advisory Committee on Equal Opportunities for Men and Women. The Chancellor of Justice's representative in the Committee is the head of the First Department Eve Liblik, who was elected to act as vice-president of the Committee as of 2005.

XVII STATISTICS OF THE PROCEEDINGS

1. General profile of the statistics of proceedings

1.1. Statistics of proceedings by breakdown of applications

In 2005, the Chancellor of Justice received 2043 applications. 1666 proceedings of cases were initiated on the basis of referrals to the Chancellor of Justice. The decline in the number of applications as compared to 2004 can be explained by the raising of awareness of the Chancellor's competencies among the public. The sudden increase in the number of applications in 2004 was due to informing of the public about the new functions of the Chancellor of Justice in the protection of fundamental rights and freedoms since 1 January 2004.

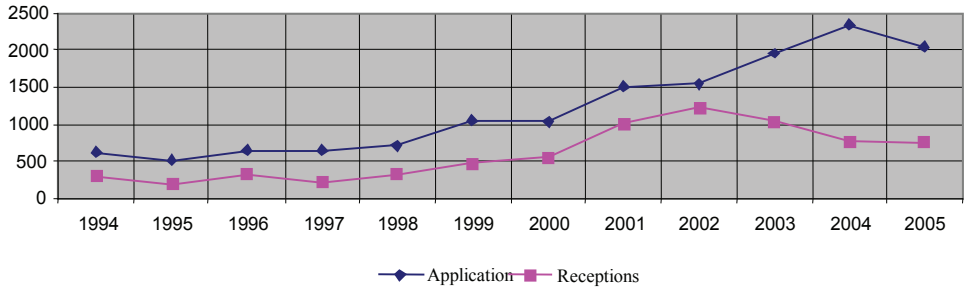


Figure 1. Fluctuation in the number of applications and reception of persons in 1994-2005.

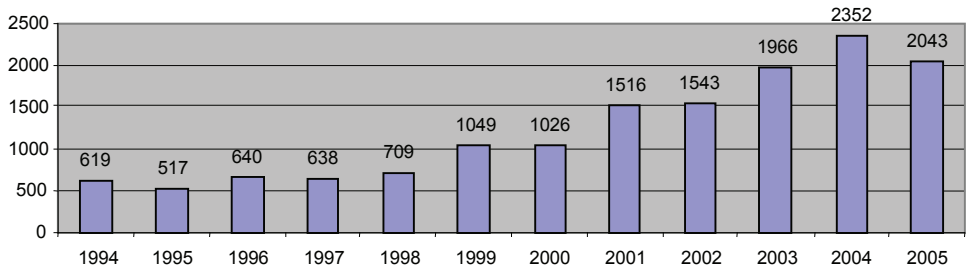


Figure 2. Number of applications in 1994-2005.

1.2. Statistics on the basis of proceedings of cases

In the previous years, the statistics of proceedings were based on the applications of persons. In the 2005 report, the statistics are for the first time based on proceedings of cases. A proceeding of a case involves performing of acts and the creation of documents for resolving an issue under the proceedings within one of the main functions. Applications of persons in one and the same issue are joined into one proceeding of a case. During the reporting period there were 1666 proceedings of cases.

The Chancellor of Justice initiates proceedings of a case either on the basis of an application or on his own initiative. During the reporting period there were 57 own-initiative proceedings, i.e. 3.4% of the total number of proceedings. In the case of the remaining proceedings, in 668 cases there were substantive proceedings on the merits of the matter (41.5%), and in 941 cases (58.5%) proceedings were not initiated for various reasons (see point 4).

1.2.1. Distribution of proceedings of cases by substance

By substance, the proceedings of cases can be divided as follows:

- proceedings to verify whether a legislative act was in conformity with the Constitution and the laws (247 proceedings, i.e. 14.8% of the total number of proceedings);
- proceedings to verify the legality of the activities of the state, local government, other persons in public law, or private persons, bodies or agencies who exercise public functions (372 proceedings, i.e. 22.3% of the total number of proceedings);
- proceedings to express an opinion within the constitutional review proceedings regarding a legal act (11 proceedings, i.e. 0.7% of the total number of proceedings);
- proceedings to answer inquiries, written questions or applications by members of the Riigikogu (13 proceedings, i.e. 0.8% of the total number of proceedings);
- proceedings to initiate disciplinary proceedings against judges (18 proceedings, i.e. 1.1% of the total number of proceedings);
- conciliation proceedings concerning discrimination disputes between private individuals (3 proceedings, i.e. 0.2% of the total number of proceedings);
- impeachment proceedings concerning the deprivation of immunity of members of the Riigikogu (2 proceedings, i.e. 0.1% of the total number of proceedings);
- other activities deriving from the law (39 proceedings, i.e. 2.7% of the total number of proceedings);
- refusal to initiate proceedings (941 proceedings, i.e. 58% of the total number of proceedings).

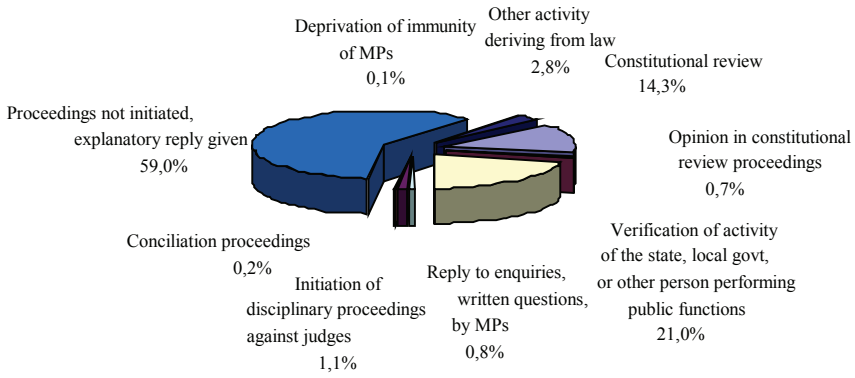


Figure 3. Distribution of proceedings of cases by substance.

1.2.2. Proceedings of cases by regional distribution

Most proceedings were initiated on the basis of applications received from Harju County (819 cases). A large number of proceedings were also with regard to applications from Tartu County (215 cases), Ida-Viru County (111 cases) and Pärnu County (84 cases). The larger number of proceedings by regional distribution is first and foremost connected with larger cities. The smallest number of proceedings were with regard to cases from Hiiu County (6 cases). 21 proceedings of cases were based on applications received from abroad and 123 proceedings on the basis of applications received by e-mail.

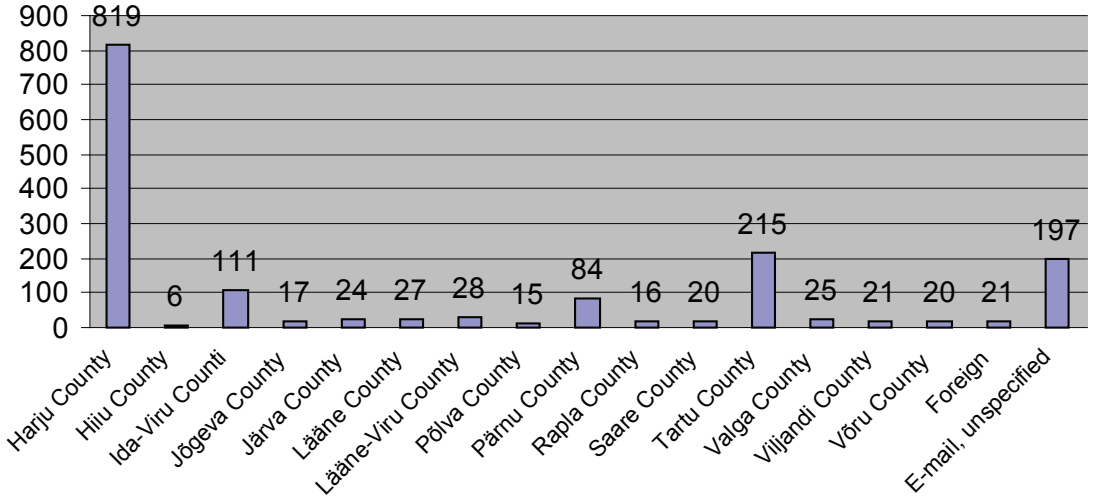


Figure 4. Proceedings of cases by regional distribution.

1.2.3. Proceedings of cases by areas of responsibility

The character of issues and problems relating to the cases proceeded by the Chancellor of Justice by distribution to various fields can be seen in the following table (Table 1). This provides the distribution of proceedings by areas of government among government agencies and other institutions according to their competence regarding the resolving of the problem or depending against whom the complaint was made.

Table 1. Distribution of proceedings of cases by areas of responsibility.

Agency, body, person	Proceedings of cases
Government of the Republic	**11**
Area of government of the Ministry of Education and Research	**41**
Ministry of Education and Research	40
Language Inspectorate	1
Area of government of the Ministry of Justice	**397**
Ministry of Justice	77
Prosecutor's Office	15
Prisons	305
Area of government of the Ministry of Defence	**7**
Ministry of Defence	6
Estonian Defence Forces	1
Area of government of the Ministry of the Environment	**52**
Ministry of the Environment	40

Environmental Inspectorate	2
Land Board	10
Area of government of the Ministry of Culture	**8**
Ministry of Culture	6
Heritage Protection Board	2
Area of government of the Ministry of Economic Affairs and Communications	**55**
Ministry of Economic Affairs and Communications	34
Estonian National Vehicle Registration Centre	5
Roads Administration	6
Consumer Protection Board	8
Technical Supervision Inspectorate	1
Waterways Administration	1
Area of government of the Ministry of Agriculture	**11**
Ministry of Agriculture	10
Agricultural Registers and Information Board	1
Area of government of the Ministry of Finance	**34**
Ministry of Finance	23
Tax and Customs Board	10
Public Procurement Board	1
Area of government of the Ministry of Internal Affairs	**131**
Ministry of Internal Affairs	24
Data Protection Inspectorate	2
Security Police Board	1
Citizenship and Migration Board	38
Border Guard Board	2
Police Board	61
Rescue Board	3
Area of government of the Ministry of Social Affairs	**134**
Ministry of Social Affairs	94
State Agency of Medicines	2
Social Insurance Board	32
Health Protection Inspectorate	3
Health Care Board	1
Labour Market Board	2
Ministry of Foreign Affairs	**6**
Other:	**739**
Bar Association	5

Estonian Health Insurance Fund	6
Estonian Television	1
Financial Supervision Authority	5
Local government council or government	241
Courts	129
Bailiffs	11
County Governments	32
Non-profit associations	16
Chamber of Notaries	2
Trustees in bankruptcy	5
State Chancellery	2
State Audit Office	1
Foundations	3
University of Tartu	1
Companies	31
Other establishments, organisations	288
TOTAL:	**1666**

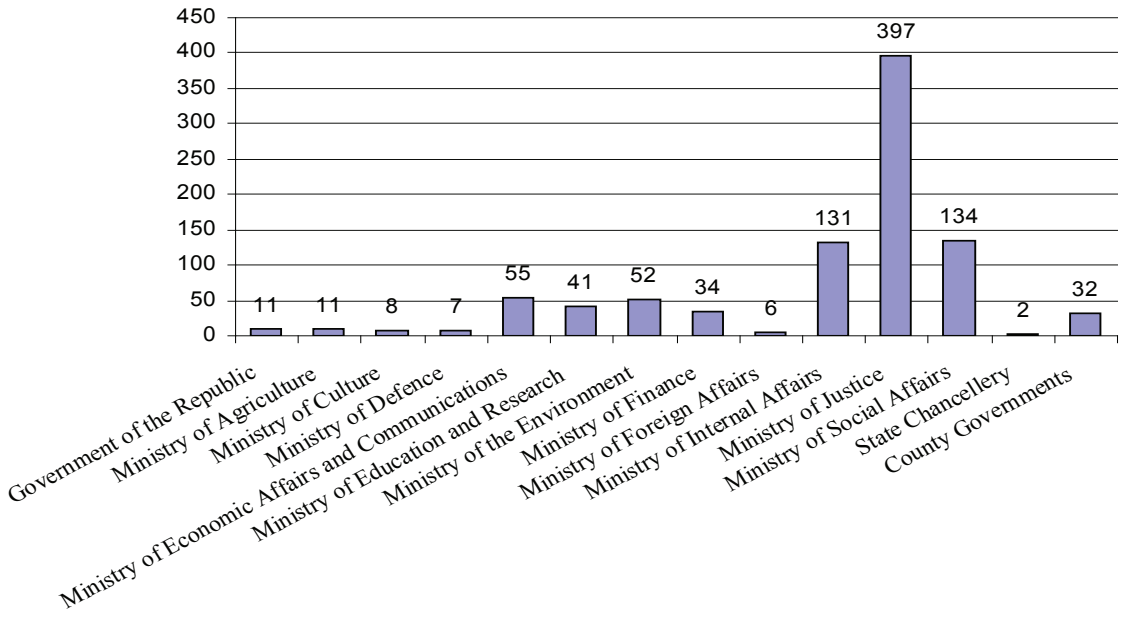


Figure 5. Proceedings of cases by distribution of government agencies.

1.2.4. Distribution of proceedings of cases by areas of law

Based on applications received by the Chancellor of Justice, most proceedings of cases were initiated in connection with criminal enforcement procedure and prison law. There were also many cases relating to social welfare and social insurance law, and issues of ownership reform. The distribution of proceedings of cases by areas of law is demonstrated by the following table (Table 2).

Table 2. Proceedings of cases by areas of law.

Area of law	Number of proceedings
Data protection, databases and public information law	27
Public service	36
Planning and building law	42
Energy law	7
Political parties law	3
Financial law (incl. tax and customs law, state budget, state assets)	24
Administrative law	31
Education and research law	53
Environmental law	36
Citizenship, migration and language law	48
Local government organisation law	57
Pre-trial criminal procedure	38
Judicial procedure law	150
Criminal enforcement procedure and prison law	312
Child and youth protection law	9
Traffic organisation and transport law, roads and waterways law	46
Animal welfare, hunting and fishing law	10
Economic administration, trade administration and competition law	13
Substantive penal law	12
Medical and health care law	56
Non-profit associations and foundations law	11
Heritage protection law	2
Ownership law, incl. intellectual property rights law	42
Ownership reform law	106
Family law	10
Police and law enforcement law	13
Constitutional amendment	1
Fundamental rights	32
Law of succession	6

International law	12
State budget and state assets law	6
National defence law	3
State organisation law	32
Broadcasting law	2
Social welfare and social insurance law	123
Consumer protection law	14
Telecommunications and postal services law	4
Enforcement procedure law	22
Labour law	56
Electoral and public referendum law	19
Domestic validity of international treaties	1
Misdemeanour proceedings	19
Legal assistance and notaries public law	24
Company, bankruptcy and credit institutions law	19
Other private law	37
Other public law	20
Other areas of law	20

1.2.5. Language of proceedings of cases

Proceedings of cases were mostly conducted on the basis of applications in Estonian. Applications in Russian made up approximately one fifth of the total number of applications.

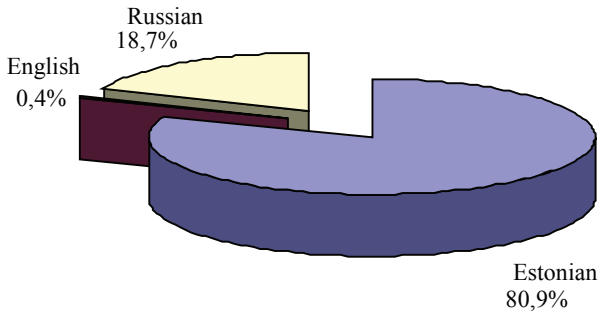


Figure 6. Language of applications on which proceedings of cases were based.

1.2.6. Outcome of proceedings of cases

The principles of the freedom of form and feasibility are observed in dealing with applications received by the Chancellor of Justice, taking necessary steps to ensure efficient and impartial investigation of the matter. As a result of his supervisory proceedings, the Chancellor of Justice reached the following outcomes.

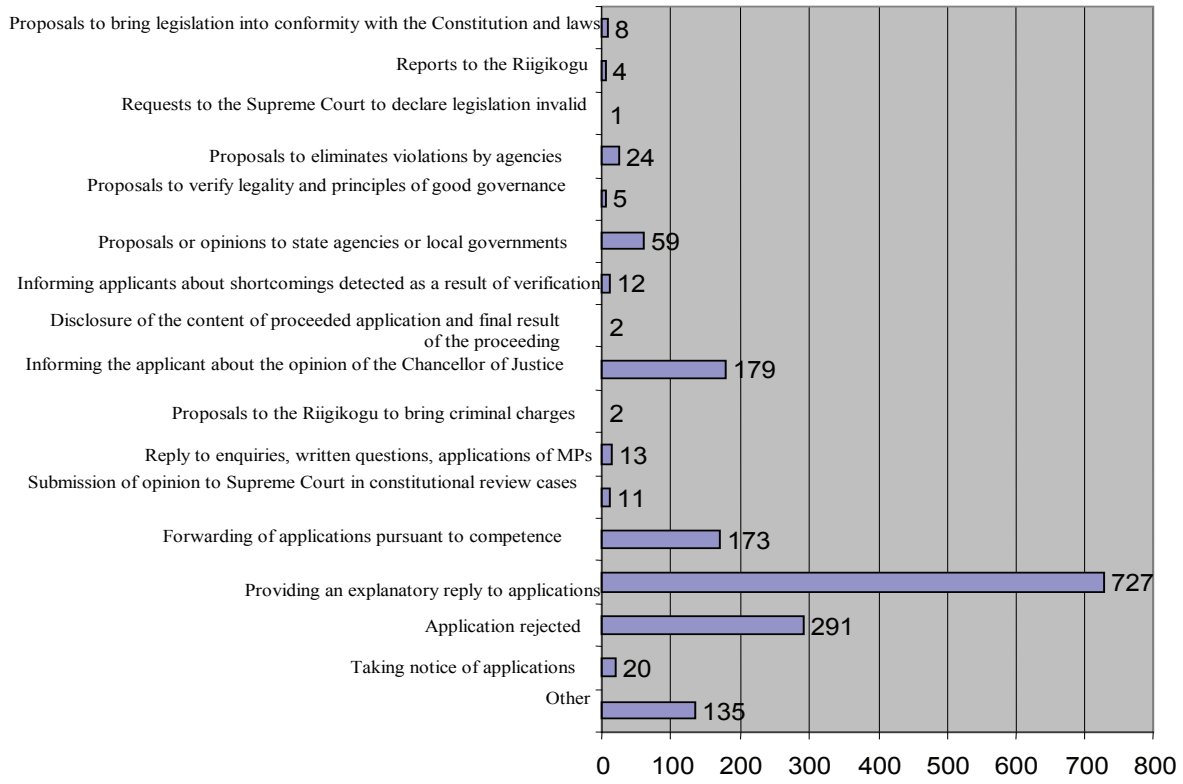


Figure 7. Outcomes of proceedings of cases.

2. Verification of the conformity of legislation with the Constitution and the laws

247 proceedings of cases were initiated to verify the conformity of legislation with the Constitution and the laws, 228 of them were based on applications received from persons and 19 on the Chancellor's own initiative. The following issues were verified in constitutional review proceedings:

- conformity of legislation with laws (173 proceedings, 160 of them based on applications from persons, and 13 on own initiative);
- conformity of Government regulations with the Constitution and laws (4 proceedings, 3 of them based on applications from persons, and one on own initiative);
- conformity of regulations of Ministers with the Constitution and laws (19 proceedings, 18 of them based on applications from persons, and one on own initiative);
- conformity of local government council and rural municipality or city government regulations with the Constitution and laws (45 proceedings, 42 of them based on applications from persons, and 3 on own initiative);
- legality of a legal act of a legal person in public law (one proceeding on the basis of application);
- legality of other legislation (5 proceedings, 4 of them based on applications from persons, and one on own initiative).

In the course of preliminary review of bills of legislation, opinions were expressed upon review of the materials of sittings of the Government of the Republic. An opinion was expressed in respect to 122 items on the agenda, and observations were made on 61 occasions.

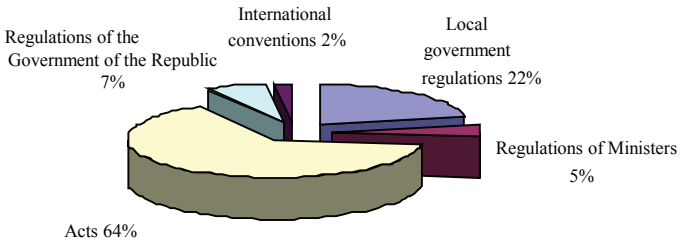


Figure 8. Distribution of proceedings initiated on the basis of applications for the review of legislation.

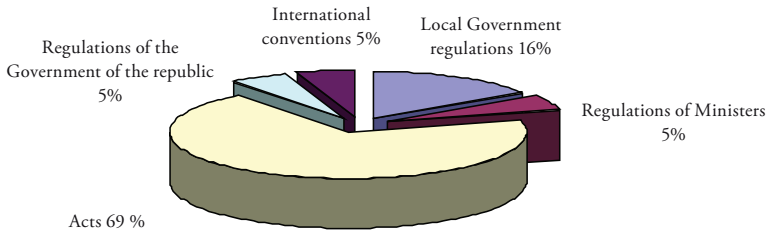


Figure 9. Distribution of proceedings initiated by the Chancellor of Justice for the review of legislation.

3. Verification of the legality of activities of agencies that perform public functions

For the verification of conformity of the legality of activities of the state, local government, other legal persons in public law or private persons, bodies or establishments performing public functions, 372 proceedings of cases were initiated, 334 of them were based on applications from persons and 38 on own initiative. In two of the cases, supervision was initiated with regard to a judicial body concerning the activities not related to the administration of justice. The Chancellor of Justice expressed criticism with the aim to eliminate violations or improve administrative practice in 88 instances.

Among ministries, most proceedings of cases were initiated on the basis of applications against the activities of the Ministry of Social Affairs and the Ministry of Justice. Among executive agencies in the areas of government of ministries, most complaints were made against prisons and police authorities, and among county governors against the Harju and Ida-Viru County Governor. With regard to local government units, the Chancellor of Justice received most complaints against the Tallinn City Government, there were also several complaints against the Kohtla-Järve City Government and the Tartu City Government.

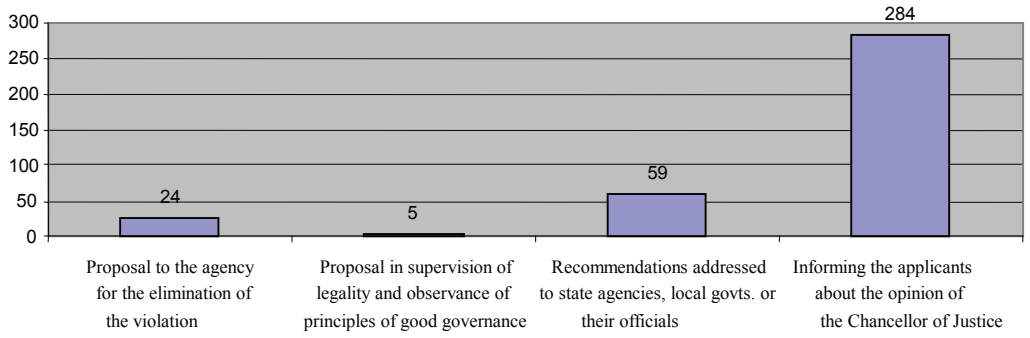


Figure 10. Outcome of proceedings for the verification of the activities of state agencies

4. Proceedings of cases without examination on the merits

The Chancellor of Justice rejected 941 cases (58% of the total number of proceedings of cases) for the following reasons:

- lack of competence (417 proceedings, incl. 45 regarding the issue of legal assistance, i.e. 25% of the total number of proceedings of cases);
- an application was not in conformity with the requirements provided for in the Chancellor of Justice Act (29 proceedings, incl. three anonymous or illegible applications, i.e. 1.7% of the total number of proceedings of cases);
- an application was manifestly unfounded (47 proceedings, i.e. 2.8% of the total number of proceedings of cases);
- an application had been submitted more than one year after the person learned about the violation (10 proceedings, i.e. 0.6% of the total number of proceedings);
- the person had an opportunity to file an administrative contestation or use other legal remedies (405 proceedings, i.e. 24.3% of the total number of proceedings);
- there were contestation proceedings or other non-compulsory pre-trial proceedings pending in the matter (15 proceedings, i.e. 0.9% of the total number of proceedings);
- there were judicial proceedings or compulsory pre-trial proceedings pending in the matter (18 proceedings, i.e. 1.1% of the total number of proceedings).

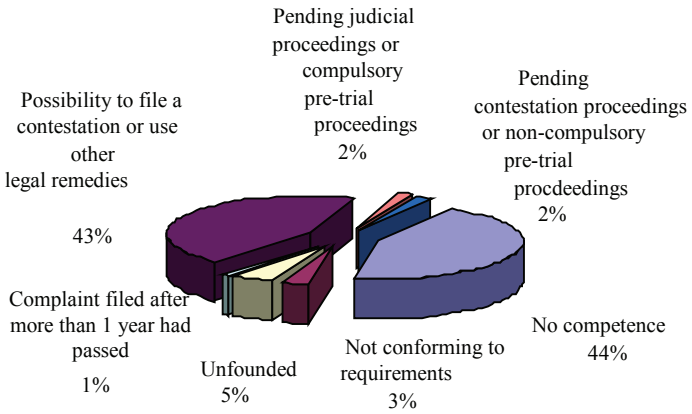


Figure 11. Reasons for decision not to initiate proceedings.

In the case of applications that were rejected, an explanation of laws and other legislation and of the competence of the Chancellor of Justice was provided to the applicant in the following form:

- an explanatory answer was given in 748 proceedings of cases;
- the application was forwarded for review to other agencies in 173 proceedings of cases;
- the complaints of persons were taken notice of by the Office of the Chancellor of Justice in 20 proceedings of cases.

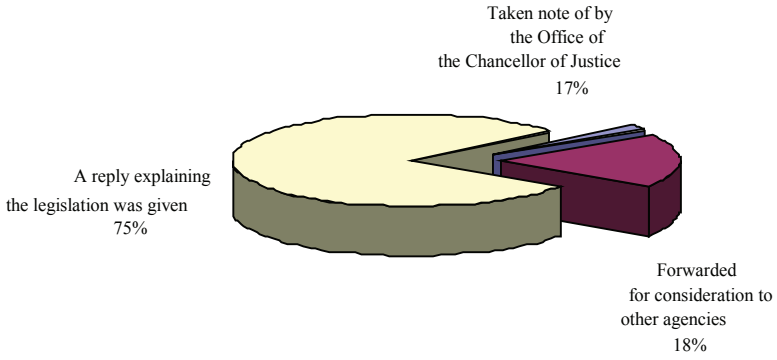


Figure 12. Replies to applicants in the case of proceedings without examination of the matter on the merits

5. Reception of persons

In 2005, 751 persons came to the reception to the Office of the Chancellor of Justice and to receptions of the Chancellor's advisers organised in counties (see also Figure 1). Besides the Office of the Chancellor of Justice, reception of persons was also organised in county offices in Tartu, Jõhvi, Narva, Pärnu and Sillamäe. In addition, advisers to the Chancellor of Justice also received persons during their official visits, about which persons were informed in advance via the mass media.

Most issues raised during the receptions were concerned with the areas of administrative law (incl. mostly ownership reform issues, but also issues of residence permits and citizenship), constitutional law and civil law (issues concerning companies and civil procedure). Mostly, citizens who came to the receptions wished to have explanations of legislation and legal advice. There were issues that were subsequently accepted for proceedings, as well as issues that were beyond the competence of the Chancellor of Justice for various reasons (e.g. disputes between persons in private law that can not be resolved by way of conciliation proceedings). If during the reception a need to draw up a written application arose, then assistance with this was provided by the advisor who was holding the reception.

6. Conclusion

The number of applications received by the Chancellor of Justice during the reporting year did not increase as compared to the previous year, and was on the same level as in 2003.

There were still a large number of complaints from prisoners against prison authorities (305 proceedings of cases). Many complaints were also submitted with regard to which it was not possible to initiate proceedings under the Chancellor of Justice Act (941 proceedings of cases).

Most issues brought to the attention of the Chancellor of Justice were concerned with social welfare and social law, as well as criminal enforcement procedure and prison law. There were continuously many complaints about the ownership reform issues, as well as issues of medical and health care law and education law.

The number of persons who come to the reception of the Chancellor of Justice has been stable in the recent years (753 persons in 2004, 751 persons in 2005).

PART 3.

ACTIVITIES OF THE OFFICE OF THE CHANCELLOR OF JUSTICE

I ORGANISATION

The Office of the Chancellor of Justice is an agency serving the Chancellor of Justice as a constitutional institution. The head of the Office is the Chancellor of Justice. The expenses of the Office are covered from the state budget.

The activities of the Chancellor of Justice and his Office are based on the mission, vision and fundamental values of the Chancellor of Justice, which arise from the functions entrusted to the Chancellor by law.

1. Structure and composition

In terms of structure, the Office comprises the Chancellor of Justice, two Deputy Chancellor of Justice-Advisers, the Director of the Office, and four departments – the general department and three departments for the performance of the core functions whose competence is divided on the basis of areas of government of the ministries..

The Chancellor of Justice heads the Office in accordance with the procedure and the bases provided for in the Constitution and the laws and the Statutes of the Office.

The function of the Deputy Chancellor of Justice-Adviser is to provide all-round advice to the Chancellor of Justice and to replace the Chancellor in his absence.

The duty of the Director of the Office is to manage the development work of the Office and to provide advice to the Chancellor of Justice and his staff on strategic, tactical and managerial issues. The Director is responsible for the development of the mission, vision and development plan of the Office and its subsequent implementation. In addition, the Director exercises supervision over compliance with the guidelines and procedures applicable in the Office and is in charge of drafting the annual budget and carrying out public procurement procedures.

The area of activity of the First Department includes all matters that fall within the competence 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 that fall within the competence 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 that fall within the competence 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.

The General Department deals with the organisational work of the Office of the Chancellor of Justice, the reception of individuals, drafting of the budget, monitoring and analysis of the prudent use of the budgetary resources, organisation of accounting, communication with other institutions and the public, personnel issues and training, managerial and secretarial issues of the Office. It also ensures the necessary organisational, economic and technical conditions for the functioning of the Office.

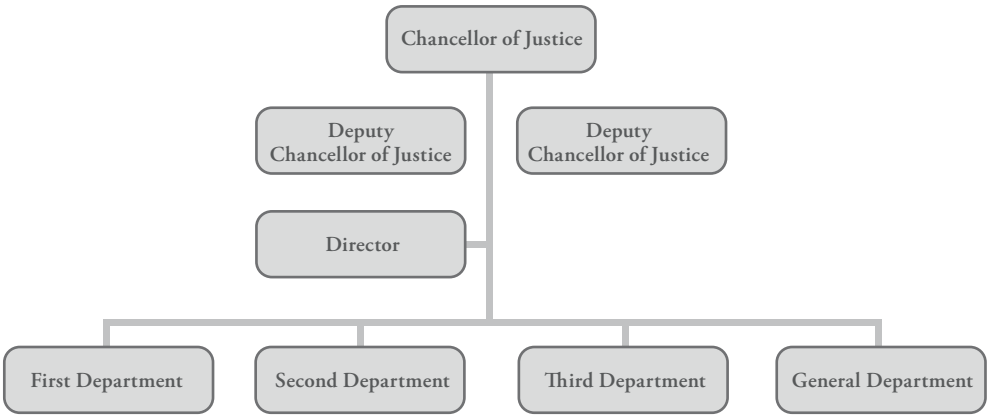
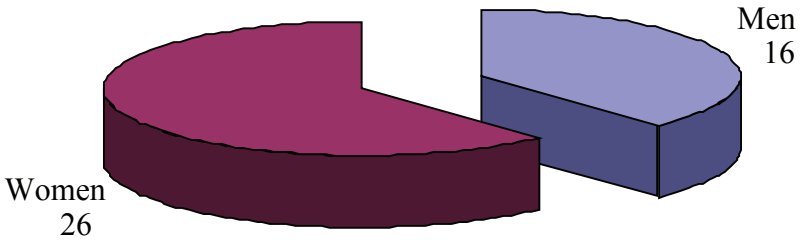


Figure 13. Structure of the Office of the Chancellor of Justice.

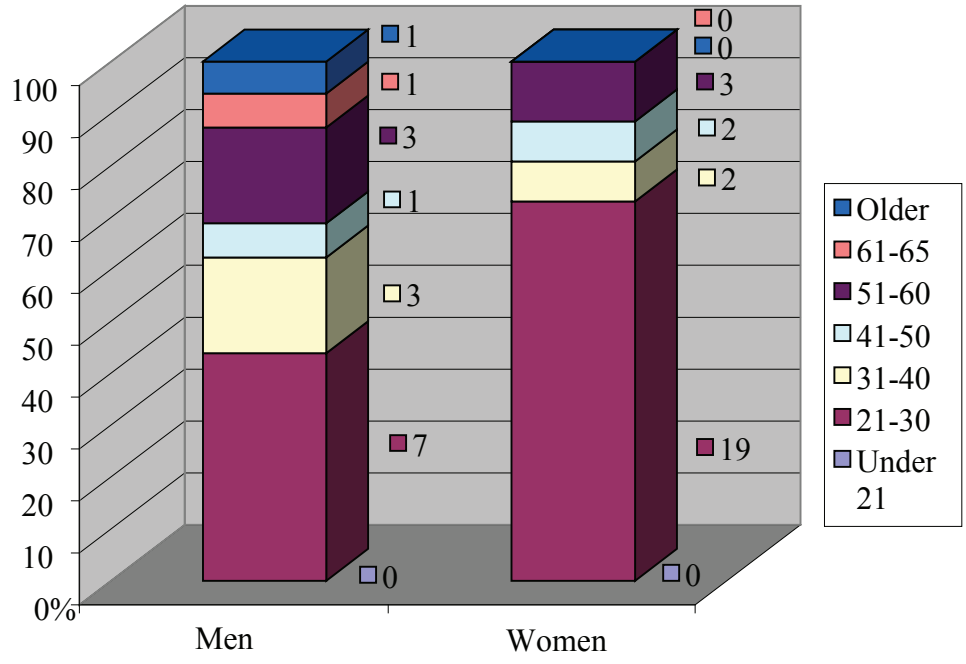
On 31 December 2005, there were 48 staff positions in the Office of the Chancellor of Justice, 42 of which were covered. There were 26 women and 16 men working in the Office. Among the covered staff positions, 30 were higher officials and 12 were senior officials. The main functions were performed by 29 and supporting functions by 13 officials.

Figure 14. Distribution of the staff by gender on 31.12.2005



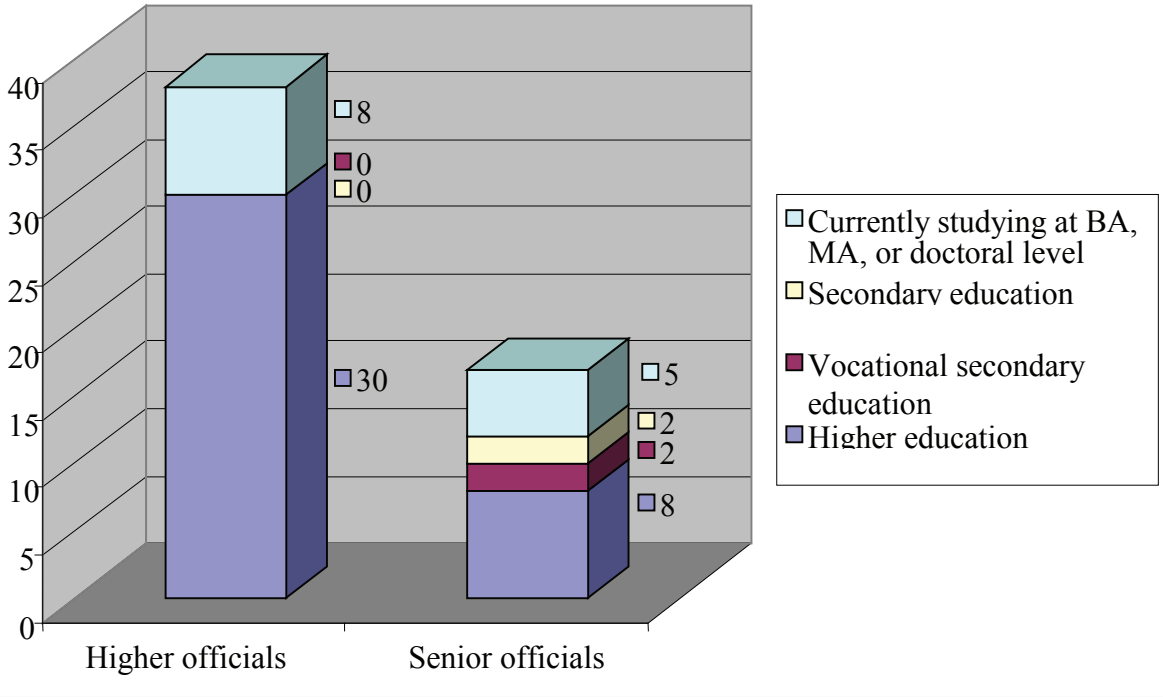
Most of the staff at the Office of the Chancellor of Justice were in the age group 21-30 years. The youngest member of the staff was 21 and the oldest 76. The average age of the staff was 34 years.

Figure 15. Distribution of the staff of the Office by age, on 31.12.2005



Among the staff of the Office, 38 persons have higher education, two have vocational secondary education and two have secondary education. In 2005, 13 persons continued their studies either at Bachelor's, Master's or Doctoral level. Six members of the staff have a Master's degree and four have a Doctoral degree.

Figure 16. Education of the staff by groups of officials, on 31.12.2005



2. Budget

The operating expenses of the Office of the Chancellor of Justice are covered from the state budget, in accordance with the State Budget Act. From the state budget of 2005, the Office of the Chancellor of Justice was allocated 17.45 million EEK for operating expenses. The Office also received 0.26 million EEK from foreign aid, 0.015 million from targeted financing, 0.15 million for the repayment of student loans of the staff in accordance with the Education Act, and the carryover of the unused funds from 2004 was 0.13 million EEK. The total budget of the Office in 2005 was 18.02 million EEK.

The information in the budget implementation report is based on the principle of cash accounting

Table 3. Budget implementation report

		31.12.2005	**31.12.2005**
		Budget	**Discharge**
EXPENDITURE			
Total operating expenditure		***17 454 232***	***17 399 393***
50	Labour costs	12 190 000	12 189 999
500	Salaries	8 923 100	8 923 122
505	Fringe benefits	143 400	143 393
506	Taxes and social insurance payments	3 123 500	3 123 484
Maintenance costs		***5 264 232***	***5 209 394***
5500	Administrative costs	1 067 600	1 054 755
5503	Business trips	300 000	299 945
5504	Training costs	280 000	275 493
5511	Maintenance costs of immovables, buildings and premises	2 137 632	2 137 314
5513	Maintenance costs of vehicles	357 000	356 501
5514	Information and communication technology costs	892 000	855 899
5515	Inventory costs	196 000	195 926
5522	Medical costs	34 000	33 561
Targeted allocations for current expenses		***15 000***	***9 055***
4500	Memberships fees of international organisations	15 000	9 055
Use of the 2004 budget during the reporting year		134 624	134 624
5500	Administrative costs	97 200	97 171
5514	Information and communication technology costs	37 400	37 453
Foreign aid and co-financing of foreign aid		***262 278***	***1 204 678***
55	Foreign aid PHARE programme		942 400*
55	Foreign aid to cover operating expenses of the programme of the German Foundation for International Legal Cooperation	262 278	262 278

Repayment of student loans		*151 641*	*144 558*
505	Repayment of the principal sum of the loan	86 652	82 568
506	Income and social tax on fringe benefits	64 989	61 990
Total expenditure		**18 017 775**	**18 892 308**

* The expenditure was planned in the 2004 budget.

The largest item of expenditure for the Office was labour costs, which accounted for approximately 68% of the operating expenses during the reporting year.

Since 1 January 2004, he Chancellor of Justice leases premises from the State Real Estate Company for a period of fifty years at the address 8 Kohtu Street. For the reception of persons, rooms are also leased from the Tartu Court of Appeal. In Narva and Jõhvi, reception premises are used four times a month. With the agreement of the Narva City Government and Ida-Viru County Government, rooms are used for free. The lease payment with the VAT was over 2.1 million EEK in 2001 and accounted for approximately 41% of the maintenance expenses of the Office.

Expenditure on information and communication technology in 2005 was 0.89 million EEK, including 37 453 EEK of carryover from 2004. The largest items of expenditure were connected with the lease contract of computer hardware and software and IT maintenance and development work.

In 2005, 299 945 EEK were used for business trips in Estonia and abroad. 175 493 EEK were used for training expenses. The annual training need and business trips abroad are determined in the training and foreign communication plans, which are approved by the beginning of the financial year.

262 278 EEK were received as foreign aid from the German Foundation for International Legal Cooperation (*Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V.*) for organising a scientific conference on data protection "Hunger for information v. thirst for privacy" (*Infonälg vs. privaatsusjanu*) and for participation in administrative law training in Tallinn and prison law training and document management training visit in Germany.

The 2005 budget of the Office reflected the costs of 0.94 million EEK of the partner organisation within the Phare Twinning Light Programme "Strengthening of the administrative capacity of the Chancellor of Justice and of the Office of Chancellor of Justice" (EE03/IB/TWP/JHA/03) that took place from January until May 2004. The Ministry of Finance paid the programme related costs to the partner organisation in the 2005 budgetary year.

In connection with the membership of the International Ombudsman Institute, the Office paid a membership fee of 9055 EEK.

3. Development activities

3.1. Personnel development

Personnel development of the staff of the Office is based on annual development interviews, training priorities, training plan and other staff-related documents in the Office. The main fields of training in 2005 were: motivation of workers, law, IT, occupational health and safety, personnel work, public relations, public sector accounting, organisation of public procurement, managerial assistance and secretarial work, Russian and German language. 275 493 EEK from the state budget were used

for the training of the staff. In addition, support was received from the German Foundation for International Legal Cooperation.

In law training, close cooperation with the Estonian Law Centre Foundation (within the training programme for judges) and with the Estonian Lawyers' Association continued.

With support from the German Foundation for International Legal Cooperation, study visits to Germany were organised on the issues of prison law and document management, and a training course on administrative law was held in Tallinn.[167] Altogether nine persons from the Office and the Ministry of Justice participated in the training visits. Officials from the Riigikogu and from various ministries were invited to attend the training course on administrative law.

In 2005, 37 officials of the Office attended training courses on 262 occasions, including 26 higher officials on 179 occasions and 11 senior officials on 83 occasions. The most frequent participation was at law, language, computer, management and personnel work training courses, as well as managerial and secretarial, archiving, accounting and public relations training. An equal number of open and specially ordered training courses were used; the volume of in-house training was smaller. All training courses were organised for the purpose of work-related self-improvement. Several officials of the Office themselves participated in training courses and seminars as trainers.

3.2. Updating of the information systems of the Office

In 2005, work continued for the development of the document management system and digital archiving, and for the creation of a modern IT environment.

At the beginning of 2005, a new document management system was launched in cooperation with the Ministry of Justice. This is based on the program *SharePoint* used in the Ministry of Justice, to which interfaces were added to take account of the specific nature and needs of the Office. The creation of the document management system enabled the Office to transfer to electronic operations and archiving. Development work continued also for the creation of the statistical and reporting system on the basis of data entered in the document management system.

At the end of 2005, the Office organised public procurement for leasing 55 new PCs with software for the following three years. The procurement contract was awarded to ML Arvutid AS.

At the end of 2005, the new homepage of the Chancellor of Justice at http://www.oiguskantsler.ee in Estonian, Russian and English was completed. The principles of simplicity and overall clarity were observed in structuring the homepage, and the new symbols of the Office were used in its design.[168] Via the homepage, it is possible to submit electronic complaints or requests for information to the Chancellor of Justice.

[167] Assistance from the German Foundation for International Legal Cooperation was 262 278 kroons in 2005. See section 2. Budget.

[168] The Statutes of the Office of the Chancellor of Justice is in force from 14 June 2005.

II PUBLIC RELATIONS

1. Relations with other institutions

In 2005, the Chancellor of Justice's Office continued to develop cooperation with other constitutional institutions, primarily with the Riigikogu, the Government of the Republic and the Ministries. Also, cooperation with local governments, several other partners, various organisations and target groups and with the representatives of the third sector continued. The Chancellor of Justice can succeed in his work first and foremost if his opinions and suggestions are implemented, and, working hand in hand with the institutions under supervision, opinions are shared. In addition to his basic work the Chancellor of Justice contributes to enhancing the constitutionality of society through participation in work groups, round tables and programmes engaged in shaping the legislation and legal order.

1.1. Cooperation with the Riigikogu Committees and ministerial work groups

In 2005 the Chancellor of Justice and his advisers had frequent meetings with several Committees of the Riigikogu, primarily with his main cooperation partners – the Constitutional, Legal affairs and Social Affairs Committees. During these meetings the problems of legislating were discussed and the opinions of the Chancellor of Justice concerning draft Acts were explained. One of the most important examples of cooperation was the participation of the Chancellor of Justice and his senior adviser Mihkel Allik in the work group, set up by the Constitutional Committee of the Riigikogu, for the constitutional analysis of the Treaty Establishing a Constitution for Europe.

In 2005 the representatives of the Chancellor of Justice senior adviser Jüri Liventaal and secretary general of the Office of the Chancellor of Justice Alo Heinsalu participated in the activities of the National Electoral Committee as its members.

The Chancellor of Justice Allar Jõks and his representatives, heads of departments Indrek-Ivar Määrits and Nele Parrest, as well as his advisers Tiina Ilus and Helen Kranich participated in 2005 in the work of the Council for Administration of Courts that administers the first and second instance courts in cooperation with the Ministry of Justice.

In addition, in 2005 representatives of the Chancellor of Justice were involved in several work groups of ministries. Thus, the Deputy Chancellor of Justice-Adviser Madis Ernits participated, in the capacity of a permanent expert, in the joint work group of the Ministry of Justice and the Ministry of Internal Affairs for drafting the Maintenance of Law and Order Act. Adviser to the Chancellor of Justice Tiina Ilus participated in the work group drafting the Personal Data Protection Act, set up by the Ministry of Justice. The representatives of the Chancellor of Justice and the Ministry of Justice have had regular meetings for discussing the issues of prison law. Adviser to the Chancellor of Justice Mari Amos participated in the work group of the Ministry of Social Affairs, preparing the national strategy for the prevention of HIV and AIDS for 2006 – 2009.

1.2. Cooperation with local governments, other organisations and the third sector

Each year, in cooperation with local governments, the Chancellor of Justice organises meetings and information days for explaining his functions, discussing legal issues and training the officials of local governments. On 2 November 2005 the Chancellor of Justice and his advisers organised an information day in the Pärnu County Government for the officials of local governments. The idea was initiated by the local governments' association of the Pärnu County. In his report the Chancellor of Justice gave an overview of his supervision over local governments, the relations and problems

between the Chancellor of Justice and local governments. The advisers addressed several issues topical for the officials of local governments, such as the amendments to the Local Government Organisation Act which entered into force on 12 May 2005, rules of legislative drafting and requirements to city Statutes. Also, the issues related to the grant and payment of caregiver's allowance and lawfulness of discretionary decisions were discussed. The advisers to the Chancellor of Justice dealt with the issues of transfer of public duties by contracts in public law.

One of the Chancellor of Justice's priorities in 2005 was the right to the protection of health. In 2005 the adviser to the Chancellor of Justice Mari Amos held regular meetings with the members of the Patients Representative Association of Estonia. At these meetings the issues of access to medical care, psychiatric care and health care administration were considered.

An important course of action of the Chancellor of Justice has been the protection of the rights of the child and cooperation with the organisations fostering the rights of the child. The head of the First Department of the Office of the Chancellor of Justice Eve Liblik is a member of the Council of the Estonian Union for Child Welfare. In 2005 the primary focus of cooperation was the guarantee of the rights of children with special needs. It was on the initiative of the Union for Child Welfare that the Chancellor of Justice supervised the guarantee of the rights of the child in Orissaare Boarding-School. During the inspection the compatibility of teaching aids with the special needs of a child and several other problems were scrutinised. As a rule, children themselves do not have recourse to the Chancellor of Justice for the protection of their rights, and this makes the Union for Child Welfare an invaluable partner for the Chancellor of Justice, pointing out the problems in legislation as well as concrete cases in practice, where the interference of the Chancellor of Justice on his own initiative is necessary.

In 2005 the discussion, initiated by the Chancellor of Justice, on school environment, school violence and violence against children had wide resonance in the society and constant media coverage. The disapproval and watchfulness of the members of society towards acts of violence as well as the courage and skills to protect one's rights have increased, which is exemplified, among other things, by the fact that the police has been receiving more and more notices of the abuse of women and children and the number of proceedings concerning family and school violence has grown.

In November 2004, in the Children's Parliament in the Riigikogu, within the framework of the youth forum of the Association of Student Self-Governments, a debate was launched on whether the corporal punishment of children should explicitly be prohibited; this induced an exchange of opinion in the society and the media. Although physical violence against other persons is punishable and impermissible under Estonia's legislation, the Chancellor of Justice has had to conclude, on the basis of the exchange and some research, that most of the parents are not ready to give up physical punishment of children. In cooperation with child welfare organisations the Chancellor of Justice has been monitoring the reform of the child welfare law. The Ministry of Social Affairs is drafting a new Child Protection Act with the intention of enacting a more specific prohibition on the corporal punishment of the child, instead of the declarative provisions of the presently valid Act, and the discussion of the topic in the society is going on.

The Chancellor of Justice has had regular meetings with students and teachers in schools. On 27 April 2005 the Chancellor of Justice visited the Kannuka School of Sillamäe. The Chancellor of Justice gave an overview of his functions and discussed legal issues with the students and teachers. On 2 September 2005 the Chancellor of Justice made a speech at the Kuninga Street Basic School of Pärnu, at the opening ceremony of the gym for the schools in the centre of Pärnu.

In 2005 the Chancellor of Justice continued to cooperate with the Faculty of Law and Institute of Law of Tartu University. Also, the Chancellor of Justice had a meeting with the public administration students of Tallinn Technical University, explained his activities and the possibilities for in-service training in his Office. In 2005 five students underwent their practical training in the Office of the Chancellor of Justice, four of them in fundamental branches of law and one in a subsidiary branch.

Deputy Chancellor of Justice-Adviser Madis Ernits participated as a member in the work of the supervisory board of the Estonian Law Centre Foundation, established jointly by the Ministry of Justice, the Supreme Court and the Tartu University, and the basic spheres of activity of which are provision of in-service law training for lawyers and promotion of exchange of information and cooperation within the legal profession.

In 2005 the cooperation between the Office of the Chancellor of Justice and the National Library of Estonia continued, with the aim of raising the quality of the performance of the legal duties of the Chancellor of Justice and enhancing the accessibility of law information.

1.3. Addresses at conferences

An important part of The Chancellor of Justice's relations with other institutions and the public consists in the participation in the preparation and organisation of conferences and seminars. Presentation of reports or making speeches and participation in workshops and discussions is considered of great importance.

On 17 January 2005 the Chancellor of Justice participated in the health forum of the Public Understanding Foundation and made a report on "Health as a prerequisite of dignified life". In the report the Chancellor of Justice dealt with the fundamental right to the protection of health, the scope and problems of accessibility thereof. The Chancellor of Justice touched on the use of restraint measures on patients in health care institutions providing psychiatric care, because he considers the protection of the rights of the patients requiring psychiatric care an important sphere of his work. Furthermore, the Chancellor of Justice referred to one of the shortcomings of health care, namely the low awareness of patients of their rights and the lack of integrated legislation on the rights of the patient.

On 25 May the Chancellor of Justice attended a conference of the Estonian Public Service Academy, entitled "Bakers of the pie. Relations between politicians and officials in the Republic of Estonia." In his report entitled "Who is baking the pie?" the Chancellor of Justice analysed the duties and responsibility of officials, the politicising, relations between political and professional officials, the motives and constitutional limits of politician's resolutions. The Chancellor of Justice stressed that the efficient and citizen-centred functioning of the state is not barely an issue of political choice or expediency, it is a constitutional requirement, setting legal boundaries on political decision-making.

On 16 September 2005 the Chancellor of Justice participated in a conference, jointly organised by the e-Governance Academy and the National Electoral Committee, entitled "E-voting: possibilities and challenges". The Chancellor of Justice presented a report "Fair elections", devoted to legal bases of elections, relations between lawful and fair elections and the relationship of legal issues and good practice in electoral principles; the condemnable methods in election campaigns; relations between the fairness of elections and the quality and credibility of power; the possibility of fair elections in a situation where provisions of law can not regulate everything, yet the political culture is shallow.

On 3 November 2005 the Chancellor of Justice attended an international scientific conference "Ratification of the Constitutional Treaty for Europe: effects on national constitutions", organised by the Estonian Lawyer's Union and the European Community law section of the Union. The Chancellor of Justice addressed the conference with a report entitled "The effects of the Constitutional Treaty For Europe on the Estonian legal order", analysing the Treaty Establishing a Constitution for Europe against the background of Estonian organic law and drawing the first conclusions concerning future developments on the basis of the practice of application of Estonian Constitution in conjunction with the European law. The Chancellor of Justice considered it advisable, in the long perspective, to

draft and introduce to the Constitution concrete amendments arising from the European Union law. The Chancellor of Justice considered it important to establish, in the first place, the bases and scope of delegating the competences to the European Union; to extend the rights that had been reserved to Estonian citizens to other European Union citizens; to regulate the partial transfer of the legislating role of the Riigikogu to the government in European Union issues, establishing supervision and responsibility; to give the Riigikogu the competence, arising from the Constitutional Treaty, to exercise preventive control of European legislation of general application; to specify the issues related to the right of issue of the Bank of Estonia and to the introduction of the euro; to supplement the competence of the Chancellor of Justice and the Supreme Court to exercise the review of compatibility of national law with that of the European Union; to specify the clause protecting the fundamental principles of the Constitution and to work out a procedure for the transposition of new Establishing Treaties of the European Union into Estonian legal order.

On 7 December the Chancellor of Justice participated in an international conference "New Masculinity Tallinn 2005 -- broadening the mindscape on masculinity", organized by the Ministry of Social Affairs, where he made a speech on masculinity, on the role of a man and a father in the modern equality-oriented society.

2. Media relations

2.1. Objectives and general principles of public relations

In 2005, the Chancellor of Justice continued the policy of open and transparent, citizen-friendly and clear relations with the media and the public. The main objective of the open and simple, yet quality-assuring relations has been to better inform the people of the constitutional requirements and values in Estonian society, of the fundamental rights and freedoms of persons, of the activities of the Chancellor of Justice and the possibilities of recourse to the Chancellor of Justice for the protection of their rights.

The Chancellor of Justice has a duty, arising from the Chancellor of Justice Act, to make his requirements known through the press, with the aim of making his work more efficient and achieve the observance of his proposals.

The main objectives of disclosure of information are the following:
- to inform about the constitutional rights and freedoms;
- to inform about the possibilities available for the protection of rights;
- to rise the awareness of the activities of the Chancellor of Justice;
- to enhance to authority and credibility of the Chancellor of Justice;
- to achieve better compliance with the opinions of the Chancellor of Justice through going public;
- to increase the quality of legislation and legal order;
- to enhance the sense of social security, mutual trust between the state and its citizens, and justice;
- to safeguard democracy.

Besides the principle of openness in relations with the media, in 2005 much more emphasis was laid on professionalism, on the precision and legal quality of the Chancellor of Justice's message. In the context of media relations and choice of media channels, the Chancellor of Justice set out to achieve a conscious balance between the need for constant dissemination, vigour and efficiency of information, on the one hand, and, public relations appropriate to a respectable and dignified constitutional institution, on the other. Thus, openness and dignity are the foundations of the Chancellor of Justice's media relations.
The public relations plan for 2005, based on the communication strategy of the Office of the Chancellor of Justice, stressed the more conscious information of target groups, more purposeful

choice of channels, the cooperation with county and local publications and the Russian-language media; and also the analysis of media coverage with the aim of identifying the topics and target-groups in regard to which the activities of the Chancellor of Justice require further explanations. The public relations plan provided also for the compilation and ordering of a new Internet home-page of the Chancellor of Justice.

2.2. The effects of public relations

As a result of the strategy and tactics of the Chancellor of Justice's public relations the good relations of the Chancellor of Justice with other institutions, the public and the media have deepened.

Among many other things, the efficiency of the Chancellor of Justice's open public relations and media activities involving target groups and media channels on a well-considered bases is also demonstrated by the following indicators, based on the results of surveys:

The authority of the Chancellor of Justice in the eyes of the institutions under supervision is high. On the basis of the statistics of the Office of the Chancellor of Justice it can be argued that more than 90% of the proposals made by the Chancellor of Justice are implemented by the public powers without any dispute. In 2005 it was only once that the Chancellor of Justice had to have recourse to the Supreme Court for having his proposal observed.

When evaluating the public relations of the Chancellor of Justice his good reputation and credibility are important. When Allar Jõks assumed the office in 2001 the credibility of the Chancellor of Justice was 47%, the percentage has constantly been growing during his term of office. In 2003 67% of the respondents trusted the Chancellor of Justice, by the end of 2004, according to the results of a survey conducted by market research company Turu-uuringute AS, the credibility of the Chancellor of Justice was already 76%. In 2005 the credibility of the Chancellor of Justice has even reached 78%.

According to a survey among journalists, conducted by Turu-uuringute AS, the journalists found that the public relations of the Chancellor of Justice in 2005 were worth the second place among public authorities; the journalist also single out the openness of the Chancellor of Justice in giving information.

Nevertheless, the awareness of Estonian population about the competence and functions of the Chancellor of Justice and about his role among other supervisory and law enforcement institutions is far form sufficient. The duties of the Chancellor of Justice as an ombudsman need further clarification, as well as the new functions imposed on the Chancellor of Justice since 1 January 2004: review of the observance of fundamental rights and freedoms and the sound administrative practice in local governments and in the activities of legal persons governed by public law and private law persons performing public functions. Also, the public is not well informed about the function of the Chancellor of Justice to conduct conciliation procedures in the cases of discrimination.

Compared to 2004, as a result of constant dissemination of information, the number of applications not falling within the direct competence of the Chancellor of Justice has somewhat decreased. Yet, in 2005, too, 57% of the applications received where such in regard to which the Chancellor of Justice could not commence proceedings. In the majority of cases the matter was either not in the competence of the Chancellor of Justice or legal aid was requested or applications did not meet the formal requirements or were manifestly ill-founded, the applicant had a possibility of recourse to some other authority or a proceeding of the matter was already pending either in some other authority or in a court.

The ongoing need to raise the awareness of the public has to be born in mind when planning further activities in the sphere of public relations.

3. Internal communication

In the internal communication in the Office of the Chancellor of Justice the systematic and organized dissemination of inside information continued in 2005.

The core of the internal information of the Office consists in a weekly information bulletin *Nädalainfo* (Weekly Information) distributed by e-mail. *Nädalainfo* contains necessary information for the officials of the Office about the materials that would be disclosed and published in the media within the week, and information about the published materials and matters concerning the work and representation duties of the Chancellor of Justice and the Office's management; the responses, opinions and proposals sent out by the Chancellor of Justice, as well as the pending cases, working meetings, business trips and training courses, personnel information and current organisational matters.

III INTERNATIONAL RELATIONS

2005 was a year of significantly active promotion of cooperation with the ombudsmen and Chancellors of Justice of other countries. The colleagues from Belgium, Lithuania, Latvia, Sweden and Denmark visited the Chancellor of Justice and on the invitation of other ombudsmen and Chancellors of Justice the Chancellor of Justice of Estonia participated in cooperation meetings in Finland, Denmark, the Netherlands, Lithuania, Russia, Azerbaijan and Armenia.

The cooperation with the German Foundation for International Legal Cooperation and other international organisations continued, as well as participation in the European Union cooperation program *Equinet*.

1. Relations with international organisations

1.1. European Ombudsman

Good cooperation continued with the European Ombudsman, whose duty is to handle complaints of maladministration in the institutions and bodies of the European Community. Such institutions are, for example, the European Commission, the Council of the European Union and the European Parliament. The European Environment Agency and the European Agency for Safety and Health at Work are among the bodies the activities of which the European ombudsman is entitled to investigate. Only the Court of Justice and the Court of First Instance acting in their judicial role do not fall within his jurisdiction.

In addition to the aforementioned functions, the European Ombudsman has made a significant contribution to the promotion of cooperation between the ombudsmen of the European Union member states. A network of liaison officers of member states' ombudsmen has been established, and an internal web has been set up. The Chancellor of Justice has – through his liaison officers – actively participated in the work of the network and has contributed to "European Ombudsmen Newsletter", published by the European Ombudsman. In 2005, the articles entitled "Constitutional right to the protection of health" and "Data processing – who decides?", written by the Chancellor of Justice, were published in the newsletter.

From 10 to 14 September 2005 the Chancellor of Justice participated in the Hague seminar of ombudsmen of the European Union member states, dedicated to the 10th anniversary of the European Ombudsman's institution. At the seminar the role of the institution of the European Ombudsman in the European Union law was discussed. Four groups of topics were dealt with, namely the ombudsman and the Constitution of the European Union, the environment, discrimination and free movement.

1.2. European Commission's Advisory Committee on Equal Opportunities for Men and Women

In 2005 the work of the Chancellor of Justice as a full member of the European Commission's Advisory Committee on Equal Opportunities for Men and Women continued. The Chancellor of Justice's representative in the Committee is the head of the First Department Eve Liblik, who was elected to act as vice-president of the Committee as of 2005. Regular sessions of the Committee took place in May and October in Brussels.

1.3. International Ombudsman Institute

International Ombudsman Institute (hereinafter "I.O.I.") was founded in 1978 as a worldwide non-profit organisation of ombudsmen. The purposes of the I.O.I. are to promote the institution of ombudsman throughout the world, to support educational programmes for and exchange of information and experience between ombudsmen, and to support research and study in the institution of ombudsman. The I.O.I. conjoins the ombudsman institutions of numerous countries, encompassing all continents. The Estonian Chancellor of Justice has been a full member of the I.O.I. since 2001.

1.4. German Foundation for International Legal Cooperation

The Chancellor of Justice has been cooperating with the German Foundation for International Legal Cooperation (IRZ) since 2003. With the IRZ support the Chancellor of Justice's conferences, training seminars and study trips have been organised and expert analyses of legal issues have been carried out.

In 2005, in cooperation with IRZ, a scientific conference of the Chancellor of Justice entitled "Hunger for information vs. thirst for privacy" took place.

As a follow-up of prison law training programme a study visit to Berlin took place from 22 to 26 May 2005 with the participation of four officials of the Office of the Chancellor of Justice and two officials of the Ministry of Justice. During the study trip the participants were familiarised with the work of the German custodial institutions and other relevant institutions.

From 16 to 19 October 2005 a study trip to Kiel, devoted to document management, took place, with the participation of four officials of the Office. The participants were informed of the document management systems of the Ombudsman of Social Issues, the Petition Committee, the Data Protection Bureau, the Prosecutor's Office, the Ministry of Justice and of the Administrative Court of Schleswig-Holstein.

On 23 and 24 November 2005 a training seminar on the general part of administrative law took place, involving officials from the Riigikogu and different ministries. The topics of the seminar were challenge proceedings and the effects of European Union law on administrative procedure. The lecturers of the training seminar were Matthias and Karen Keller, judges of the Aachen Administrative Court.

1.5. Council of the Baltic Sea States

The Council of the Baltic Sea States was founded in March 1992 and its members are the following: Denmark, Germany, Finland, Sweden, Norway, Estonia, Latvia, Lithuania, Poland, Russia and Iceland. The aim of the Council of the Baltic Sea States in to strengthen and tighten the mutual cooperation between the states on the shores of the Baltic Sea.

The ombudsmen of the Baltic Sea States have primarily co-operated for the guarantee of non-military security. Cooperation seminars of the ombudsmen of the Baltic sea States have been organised. The latest of these took place in 2004 in Warsaw and in 2003 in Tallinn. On 26 April 2005 the representatives of the work group of democratic institutions of the Council of the Baltic Sea States (WGDI) visited the Chancellor of Justice with the aim of preparing their annual report on the development of democracy in the states members to the Council.

1.6. SIGMA

On 14 June 2005 the Chancellor of Justice welcomed the experts of SIGMA, set up as a joint effort of the European Commission and the OECD. Besides the Chancellor of Justice the experts also met the representatives of other constitutional institutions, governmental authorities and main interest groups. The objective of their visit was to prepare a report on how Estonia's administrative capacity in the filed of legislative drafting meets the good principles of legislative drafting; also, the structure of Estonia's legal system, the administrative capacity of institutions and implementation of improved legislative drafting policies were assessed. Reports like this have also been prepared in regard to all the so-called old member states of the European Union. Reports are available at the OECD homepage http://www.oecd.org/regreform/backgroundreports.

2. Cooperation of the Chancellor of Justice with the Chancellors of Justice and ombudsmen and with other high public servants of foreign countries

In 2005 good cooperation relations with the ombudsmen and Chancellors of Justice of other countries continued and new contacts with other high public servants were developed.

In April the delegation of the Legal Committee of the Irish Parliament visited the Chancellor of Justice, with the aim of familiarising themselves with the functions and activities of the Chancellor of Justice and learning about his cooperation with the Legal Affairs Committee of the Riigikogu.

Good cooperation with the Latvian and Lithuanian ombudsmen strengthened. In April the Chancellor of Justice participated in the conference "The role of ombudsman in guaranteeing sound administrative practice", held in Vilnius on the occasion of the 10th anniversary of the institution of ombudsman in Lithuania. The Chancellor of Justice addressed the conference with a presentation entitled "Chancellor of Justice as an ombudsman and a warden of constitutionality".

It has become a good tradition that once year the Estonian Chancellor of Justice, director of Latvia's State Bureau on Human Rights and the Lithuanian ombudsman and their officials have a meeting. The meeting of 2005 was hosted by the Estonian Chancellor of Justice. The two-day seminar in June gave an overview of the competencies of the ombudsman's institutions and of the most important activities of the ombudsmen in 2004 – 2005, and presentations were made on "Access to information on the activities of ombudsman", and "The role of ombudsman in protecting the right to a fair and public trial within a reasonable time". During the visit the colleagues also met with the chairman of the Riigikogu Legal Affairs Committee Mr Väino Linde.

In October the officials of the Lithuanian Ombudsman's Bureau were on a three-day study trip at the office of the Chancellor of Justice. They familiarised themselves with the document management system and operations procedure of the Office with the aim of getting information and ideas for the preparation of new document management system of the Lithuanian Bureau.

Lithuanian ombudsman Mrs Albina Radzevičiūtė visited the Chancellor of Justice from 2 to 4 November 2005, wishing to learn about the supervision of prisons and the organisation of the Chancellor of Justice's inspection visits. The Lithuanian ombudsman was taken to a visit to the Murru Prison, which is one of the biggest camp-type maximum-security prison applying imprisonment on mail prisoners in Estonia, with approximately 1600 inmates. The Lithuanian ombudsman also participated in the Chancellor of Justice's inspection visit to the Pärnu Prison. The Pärnu prison is a cell-type maximum-security prison, the two accommodation wards of which accommodate 114 prisoners. Ombudsman Albina Radzevičiūtė is one of the five ombudsmen of Lithuania, she hears petitions pertaining to the activities of the officials of state authorities and institutions and to the cases of misuse of official position.

In 2005 good cooperation with the ombudsmen and Chancellor of Justice of the Nordic Countries continued, too:

The Chancellor of Justice participated in the 9th round-table of European ombudsmen, held in Copenhagen from 30 Marc to 3 April 2005, on the occasion of the 50th anniversary of the establishment of the ombudsman's institution of the Danish parliament. The round-table was organised jointly by the Human Rights Commissioner of the Council of Europe and the Danish parliamentary ombudsman. The Chancellor of Justice addressed the round table with reports and speeches on three topics, namely the development of the role of ombudsman in the future Europe, imposition of additional security measures for restraining difficult prisoners, and the protection of right to privacy in information society or, in other words, informational self-determination in an information society – just an illusion? Furthermore, the Chancellor of Justice moderated the discussions on the legal regulation and practical problems concerning the restraining of difficult prisoners. The Danish Crown prince Frederic participated in the opening ceremony of the round-table. Among the participants were the following: Danish parliamentary ombudsman Hans Gammeltoft-Hansen, the Council of Europe Human Rights Commissioner Alvaro Gil-Robles, the European Ombudsman professor Nikoforos Diamandourus, the Human Rights Commissioner of the Russian Federation Vladimir Lukin, Norwegian parliamentary ombudsman Arne Fliflet, Portuguese ombudsman Henrique Nascimento, Austrian ombudsman Peter Kostelka, and many others.

On 8 and 9 December 2005 the Danish parliamentary ombudsman Hans Gammeltoft-Hansen, the head of the division Morten Engberg and senior legal adviser Jens Olsen paid a return visit to the Chancellor of Justice. At a joint seminar the functions of the ombudsmen of the two countries were analysed, as well as the legal basis for dealing with the issues of health and social welfare, main problems were discussed and interesting examples given. The Danish ombudsman also met with the chairman of the Riigikogu Constitutional Committee Urmas Reinsalu.

In early June, on the invitation of the Finnish ombudsman and the Finnish Chancellor of Justice, the Chancellor of Justice took part in the second conference of the ombudsmen of the Nordic Countries and the Baltic States, held in Helsinki. The conference concentrated on the rights of prisoners, the sound administrative practice and social rights. The Chancellor of Justice presented a report on the rights of imprisoned persons. The tradition of the conferences of ombudsmen of the Nordic Countries and the Baltic Sea region was started by the Estonian Chancellor of Justice. The first conference was held in 2003 in Tallinn.

On 15 and 16 June 2005 the advisers to the Chancellor of Justice Mari Amos and Andres Aru were on a study trip to the Office of the Finnish Ombudsman. During the visit they learned about the activities of the ombudsman in protection of psychiatric patients and participated in the on-site inspection in Hämmenlinna psychiatric hospital

The Chief Parliamentary Ombudsman of Sweden, Mats Melin, and parliamentary ombudsmen Kerstin André and Nils-Olof Berggren visited the Chancellor of Justice from 14 – 15 November 2005. During their visit a joint seminar on the environmental law and social welfare was held. At the seminar the functions of the ombudsmen of the two countries were analysed, as well as the legal basis for dealing with the referred issues, main problems were discussed and interesting examples given. The Swedish ombudsman also paid a visit to the Riigikogu and met with the chairman of the Riigikogu Constitutional Committee Urmas Reinsalu.

In 2005 the cooperation with the Belgian ombudsman continued and contacts were established with the institutions of ombudsman of Chechnya, Azerbaijan and Armenia.

From 9 to 11 February 2005 the Chancellor of Justice was on a three-day trip to Russia, where he shared his experience with the aim of developing of the institution of ombudsman in Chechnya. The objective of the seminar in Sanct-Petersburg, organised with the support of the Council of

Europe, was to enhance the professional qualification of the officials of the Chechnya's ombudsman's institution. The Chancellor of Justice made a two-hour speech on the working methods of the Estonian Chancellor of Justice and his experience in the protection of fundamental rights of persons, and he responded to questions. The topic of the report was "How to make the government respect human rights". At the seminar the Chancellor of Justice had a meeting with the Human Rights Commissioner of the Russian Federation professor Vladimir Lukin. In addition to foreign experts – the Human Rights Commissioner of the Council of Europe Alvaro Gil-Robles and the Estonian Chancellor of Justice Allar Jõks – the invitees and reporters of the seminar included the ombudsmen of different regions of Russia, including the Human Rights Commissioner of the Tatar Republic of the Russian Federation, the human rights specialists of Russia, social and political scientists.

From 4 to 8 May 2005 the Chancellor of Justice was in Baku, on the invitation of the ombudsman of Azerbaijan, where he visited the institution of the ombudsman and attended a conference on legal assistance, entitled "Stable functioning of law clinics in Azerbaijan". The purpose of the conference of the Azerbaijan ombudsman was to share experience in granting state legal aid to last privileged population and to give advice about drawing up the development plan of law clinics. At the conference presentations were made by the representatives of the Ukraine, Russia, Moldova, Byelorussia and other countries, workshops were held and discussions conducted on the issues of development of legal assistance system and activities of law clinics. The Chancellor of Justice addressed the conference with a report " State legal assistance to last privileged persons – Estonian experience".

On 28 June 2005 the Belgian federal ombudsman Dr Herman Wuyts visited the Chancellor of Justice. At the seminar organised during the visit Mr Wuyts shared his experience in the field of supervision over financial rights with the advisers to the Chancellor of Justice.

From 14 to 19 October the Chancellor of Justice attended a cooperation seminar of Estonian and Armenian ombudsmen in Yerevan, where he presented a report on the institution of the Chancellor of Justice of Estonia.

3. Conference "Hunger for information vs. thirst for privacy"

On 13 May 2005, in cooperation with the German Foundation for International Legal Cooperation, an international data protection conference "Hunger for information vs. thirst for privacy" took place. This conference was a continuation of the Chancellor of Justice's tradition of organising scientific conferences. The objective of the conferences is to draw attention to important problems within Estonian legal order.

The objective of the referred international conference was to draw the attention of the wider public and specialists alike to the issues of the right to information and data protection, to raise problems and lighten up professional debate with the aim of arranging the legal environment.

The conference concentrated on such topics as the constitutional bases for the protection of personal data, European data protection law, and the problems of data protection in Estonia's public and private sectors. The salutatory speech of the conference was made by the director of the German Foundation for International Legal Cooperation Matthias Weckerling, reports were presented by Dr Marion Albers of Hamburg University, data protection expert Lukas Gundermann, data protection commissioner of Berlin Prof Dr Hansjürgen Garstka and data protection commissioner of Schleswig-Holstein Dr Thilo Weihert. Estonian reporters included a judge of the Tallinn Circuit Court Ivo Pilving, justice of the Supreme Court Prof Eerik Kergandberg and advisers to the Chancellor of Justice Tiina Ilus and Ave Henberg.

The members of the Riigikogu, justices of the Supreme Court, representatives of the courts and

several state authorities and inspectorates engaged in data processing, legal scholars and other persons concerned were invited to participate at the conference.

4. International cooperation programme Equinet

In December, the Office joined the European Network of Specialised Equality Bodies project *Equinet* (also known as EuroNEB), launched within the European Union action program to combat discrimination. The project will continue until November 2006, with the participation of 25 organisations from 20 EU member states. The main purpose of the network is to improve the exchange of information between equality bodies, to support cooperation between member states and pertinent EU institutions and to harmonise the interpretation and implementation practices of EU law in member states. The *Equinet* functions in the format of annual meetings, work groups, trainings and electronic system for the exchange of information. All in all, four work groups covering the following spheres will be set up: promotion of exchange of information, strategic implementation, dynamic interpretation, and policy formation. The representatives of the Chancellor of Justice in *Equinet* are the head of the general division-adviser Kertti Pilvik and advisers Kristiina Albi and Kärt Muller.

From 22 to 24 March 2005 Kristiina Albi and Kertti Pilvik attended the annual meeting of Equinet-programme in Leuven, and participated in the work groups on exchange of information and strategic implementation. As a result of the activities of the work groups several analysis concerning equality were prepared in 2005, as well as a home-page of the organisations participating in the *Equinet* programme.

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RECEPTION TIMES

The Chancellor of Justice or the Chancellor of Justice Deputy-Adviser receives persons on Wednesdays at 9.00-11.00.

The Adviser to the Chancellor of Justice receives persons on Tuesdays at 9.00-11.00 and 14.00-17.00, and Wednesdays at 14.00-17.00.

RECEPTION OF PERSONS IN REGIONS

The Adviser to the Chancellor of Justice receives persons at the following places:

Pärnu County Government
Akadeemia 2, 80088 Pärnu
Every other month on the third Thursday of the month at 10.00-17.00.

Tartu Courts House
Kalevi 1, 50050 Tartu
Every other month on the third Thursday of the month at 10.00-17.00.

Narva City Government
Peetri Square 5-316, 20308 Narva
Every month on the first Monday at 10.00–13.00

Ida-Viru County Government
Keskväljaku 1, 41594 Jõhvi
Every month on the first Monday at 14.00–17.00

Registration to the reception by telephone +372 693 8404.